

INDIGENOUS PEOPLES' ACCESS TO JUSTICE, INCLUDING TRUTH AND RECONCILIATION PROCESSES

INSTITUTE FOR THE STUDY OF HUMAN RIGHTS
COLUMBIA UNIVERSITY

Wilton Littlechild and Elsa Stamatopoulou (Eds.)

INDIGENOUS PEOPLES' ACCESS TO JUSTICE,
INCLUDING TRUTH AND RECONCILIATION PROCESSES

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JUSTICE, INCLUDING TRUTH AND
RECONCILIATION PROCESSES**

Institute for the Study of Human Rights

Columbia University

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28 February 2014
Wilton Littlechild
Elsa Stamatopoulou

FOREWORD

Access of Indigenous Peoples to justice has been a fundamental demand around the world, especially after the adoption of the United Nations Declaration on the Rights of Indigenous Peoples. It is essential for the promotion and protection of all other human rights and is firmly rooted in the Declaration, as well as in international human rights treaties.

However, access to justice is riddled with barriers for Indigenous Peoples, who continue to face discrimination and inequalities in this context. For example, they are more likely to be the victims of crime, to be charged with offences and to come into contact with police. The available data also show that Indigenous Peoples are over-represented in prisons.

Following a request from the United Nations Human Rights Council, the Expert Mechanism on the Rights of Indigenous Peoples prepared a study on this topic in 2013 and is conducting a complementary study in 2014 with a focus on restorative justice and indigenous juridical systems, particularly as they relate to achieving peace and reconciliation, including an examination of access to justice related to indigenous women, children and youth and persons with disabilities.

From 27 February to 1 March 2013, Columbia University's Institute for the Study of Human Rights hosted an international expert seminar on Indigenous Peoples' Access to Justice, including Truth and Reconciliation Processes. The Institute is a committed member of the Academic Friends of the Expert Mechanism. The conference was organized in partnership between the Office of the High Commissioner for Human Rights (OHCHR), the International Center for Transitional Justice and the Institute, and was the largest indigenous-related global conference at Columbia. It bore witness to the special role academia can play in partnering on Indigenous Peoples' rights.

This volume is meant as a companion to the Study of the Expert Mechanism on access to justice (UN document A/HRC/24/50).

Co-edited by the Chairperson of the Expert Mechanism on the Rights of Indigenous Peoples, International Chief Wilton Littlechild, and the Director of the Indigenous Peoples' Rights Program at Columbia's Institute for the Study of Human Rights, Elsa Stamatopoulou, the book contains contributions from around the world, from participants at the conference as well as other advocates, academics and practitioners. Its contents constitute a rich example of how, together with partners, the Expert Mechanism can play a key role in generating and disseminating knowledge to help address some of the most pressing human rights challenges faced by Indigenous Peoples.

Access to justice is inextricably linked to other human rights challenges that Indigenous Peoples around the world are facing, including poverty, lack of access to health and education and lack of recognition of their lands, territories and resources. Tackling this issue requires a multitude of approaches, including socioeconomic, cultural, historic, political and legal, to reinforce the human rights approach. The book is an effort to capture rich experiences, analyses, struggles and visions from these different perspectives.

This book is dedicated to the human rights advocates around the world who continue to strive for human rights and justice for Indigenous Peoples.



Navi Pillay
High Commissioner for Human Rights
United Nations



Elazar Barkan
Director, Institute for the Study of Human Rights
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INTRODUCTION

Access to justice is a demand that increasingly underlies the major debates of our time, whether in the area of economic, political and social development, peace, human rights or culture. The issue is a bridge between the past, the present and the future as it refers to the entrenched marginalization of and systemic discrimination against members or groups of society. Access to justice is the stepping stone to address or remedy injustice. No area of human endeavor has given more meaning and normative content to the concept of access to justice than the human rights area, including the United Nations Declaration on the Rights of Indigenous Peoples. The solid international human rights framework developed in the past seventy years and the ways it is being given depth through the interpretation of international human rights bodies is providing access to justice with the normative contours and specificity needed for practical implementation. Thus, access to justice is at once a substantive and a procedural right. Major elements such as the rule of law, the right to truth and other fundamental normative frameworks have added new weight to access to justice.

It is within this rich human rights context that the effort to breathe new life to the struggle of Indigenous Peoples' access to justice should be viewed. The mobilization around access to justice is shedding light on the concrete steps that can be followed for Indigenous Peoples' access to justice to materialize.

The articles contributed to this book are written by Indigenous Peoples, researchers, policy-makers, practitioners and academics, capturing a variety of international and national perspectives, based both on theory and on the analysis of specific cases and examples.

Most of the articles have been contributed by participants to the International Expert Seminar on Indigenous Peoples' Access to Justice, including Truth and Reconciliation Processes held from February 27th to March 1st, 2013 at Columbia University in New York, co-hosted by the Institute for the Study of Human Rights

and the Office of the High Commissioner for Human Rights and the International Center for Transitional Justice, and held to inform the UN Expert Mechanism on the Rights of Indigenous Peoples' Study on Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples. In addition, the co-editors found it useful to invite some authors who were not present at the Seminar to make their contributions. Thus, this volume captures a variety of subjects that fall under the broad topic of "Indigenous Peoples' Access to Justice."

The articles have been arranged in five sections designed to facilitate study by the reader, although overlap of main categories is inevitable.

Part I refers to the normative framework for Indigenous Peoples' access to justice, especially the human rights framework, including the United Nations Declaration on the Rights of Indigenous Peoples. This part situates the right to self-determination and other human rights in terms of their inter-relationship to Indigenous Peoples' access to justice.

Part II contains articles exploring the contributions of Indigenous customary systems for access to justice and their interface with non-indigenous justice systems, in Aotearoa/New Zealand, Malaysia and the United States of America. The importance of revitalization of cultural norms and practices, and recognition of these systems is underscored.

Part III discusses various country-specific experiences with truth, justice and reconciliation processes, including challenges and achievements of such processes. Experiences in Canada and Guatemala are specifically discussed, in addition to a global overview of cases. The importance of redressing historical injustices and their contemporary impacts facing Indigenous Peoples is explored in detail throughout this section.

Part IV contains regional and country experiences of Indigenous Peoples' access to justice. A broad overview of the regions of Africa and Asia is presented, the latter with specific focus on Indigenous women. Country-specific cases refer to Aotearoa/New Zealand, Australia and Guatemala.

Part V contains articles with a focus on initiatives aimed at overall access to justice. This section explores both inclusiveness of all

Indigenous persons in accessing justice, including those with disabilities and less well-known paths for improving access to justice.

Together, these articles provide a rich and diverse examination of the necessary steps needed to improve access to justice for Indigenous Peoples, within Indigenous juridical systems as well as within State systems, along with other broader responses.

The co-editors hope that this book will encourage a growing number of networks of Indigenous Peoples, researchers, policy-makers and practitioners, organizations and institutions, to delve further into access to justice issues and to strengthen concrete steps in that direction.

PART I
NORMATIVE FRAMEWORKS

INDIGENOUS PEOPLES' RIGHT TO SELF-DETERMINATION AND OTHER RIGHTS RELATED TO ACCESS TO JUSTICE: THE NORMATIVE FRAMEWORK

Dalee Sambo Dorough

Definitions of Access to Justice:

“The right of individuals and groups to obtain a quick, effective and fair response to protect their rights, prevent or solve disputes and control the abuse of power, through a transparent and efficient process, in which mechanisms are available, affordable and accountable”¹ OR

“Opening up the formal systems and structures of the law to disadvantaged groups in society. This includes removing legal and financial barriers, but also social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.”²

When speaking of Indigenous Peoples and access to justice, it is important to understand the historical contextual framework for the litany of injustices perpetrated against Indigenous Peoples in order to determine if we can in fact ever “reconcile” the dramatically different worldviews of Indigenous Peoples and others, and in particular nation-States. In my view, the cultural clashes experienced by most, if not all, Indigenous Peoples across the globe have crystallized or hardened to the point that full reconciliation may not ever be possible. We are all acutely aware of this history, which has been forcefully, persuasively analysed from a legal perspective by Indigenous scholars such as Robert Williams in his volume *The*

1 Justice Charles Kajimanga, Enhancing Access to Justice Through Alternative Dispute Resolution Mechanisms – The Zambian Experience, presented at the Annual Regional Conference Held at Southern Sun, Mayfair Nairobi Kenya. (Nairobi: Annual Regional Conference on Enhancing Access to Justice, 2013) p. 2).

2 Global Alliance Against Traffic in Women. 1st Group Session on Rule of Law, Justice and Security Talking Points (New York: GAATW, 2013) p. 4.

*American Indian in Western Legal Thought*³ and his more recent volume entitled *Savage Anxieties*.⁴

For now, one or two examples are worth recalling in order to illustrate my point. Indigenous Peoples are no strangers to the age old ploy of denying status in order to deny rights. This was a matter of concern to Bartolome de las Casas and others in the early debates triggered by the so-called “discovery” of lands already inhabited by Indigenous Peoples. Such a ploy is effectively illustrated in the *Edwards v Canada* case (or referred to as the Persons case) in 1930 wherein women were being denied the status as “persons” in order to be denied eligibility to be appointed to the Senate.⁵ Indigenous Peoples experienced the same ploy in relation to the right to self-determination throughout the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) negotiations with the attempt by States to deny us status as peoples in order to deny this primordial right.

Specifically related to the topic of access to justice, in 1927 the Indian Act (originally adopted in 1876 in Canada) was explicitly amended to make it illegal for First Nations to raise money or retain a lawyer to advance land claims, thereby blocking effective political or court action. This is but one example of the overt and nefarious means to block “access to justice” instituted by a government specifically against Indigenous Peoples. Blatant discrimination is at the heart of such actions and ultimately it is the truth about such discriminatory acts that must be told, especially to the younger generations in order for us to effect change in the long run.

I have been asked to provide an overview of the normative framework needed to begin to right the wrongs concerning access to justice, including truth and reconciliation. The normative framework necessary has been established by the Declaration—the most comprehensive international human rights instrument specifically concerning Indigenous Peoples. And, in this regard, the Declaration articles must be read as a

3 Robert Williams, *The American Indian in Western Legal Thought: the Discourses of Conquest*, (New York: Oxford University Press, 1991).

4 Robert Williams, *Savage Anxieties: The Invention of Western Civilization*, (New York: Palgrave Macmillan, 2012).

5 *Edwards v. Canada (Attorney General)*, [1930] A.C 124, 1929 UKPC, Appeal No. 121.

whole and in context. Like all other human rights, these minimum standards are inter-related, inter-dependent, indivisible, and inter-connected.

I would like to emphasize the right of self-determination and a number of articles relevant to the collective rights of Indigenous Peoples, then conclude with a few comments on developments in Alaska, as a hopeful example of improving access to justice through Indigenous self-determination and “partnership” or cooperation with others.

The right to self-determination

For Indigenous Peoples, the starting point for access to justice at every level is directly related to, dependent upon, and connected to the right to self-determination. Internally, Indigenous Nations, communities, and Peoples have relied upon their respective values, customs, practices, and institutions to ensure justice for their members. Like social contract theory, survival of Indigenous Nations, Peoples and communities required “an implicit agreement among the members of a society to cooperate.”⁶ There were not only basic rules and protocol within Indigenous societies but also responsibilities, freedoms, status, and “rights” afforded to each member, sometimes in the form of tasks, privileges, and office. And, this collective expression and the dynamics of internal self-determination offered many forms of tangible and intangible security of person and cultural identity.⁷ Individual security, identity, dignity, and self-worth are intimately tied to the collective dimension of an Indigenous Peoples’ right to self-determination. When Indigenous Peoples’ right to self-determination is denied, the repercussions are felt by its individual members and overall Indigenous communities are destroyed or become vulnerable to destruction.⁸

6 Oxford Dictionary, definition for “Social Contract” (New York: Oxford University Press, 2012).

7 Dalee Sambo, “Sustainable Security: An Inuit Perspective,” in J. Kakonen, ed., *Politics and Sustainable Growth in the Arctic*, (Hants, England: Dartmouth Publishing Company, 1993), pp. 51–62.

8 Davis Inlet: Innu Community in Crisis, 1992 at <http://www.cbc.ca/archives/categories/society/poverty/davis-inlet-innu-community-in-crisis/a-heart-wrenching-cry-for-help.html> documentary wherein two medical doctors stationed at the small, inadequate health clinic made the linkage between denial of right to self-determination and “huffing”, alcohol abuse, and shocking suicide statistics

It is by no means an academic phenomenon or exercise that has compelled international legal scholars and publicists to affirm that the right of self-determination is regarded as a pre-requisite to the exercise and enjoyment of all other human rights. For Indigenous Peoples around the world, it has taken on various forms. Indeed, when nation-State members of the United Nations (the UN) were searching for “certainty” in relation to self-determination, in 1994, then Chairperson for Aboriginal and Torres Strait Islander Commission stated:

“Self-determination for the member states of the UN has taken many forms. The same will happen, I believe, in the evolution of self-determination for indigenous peoples. There is not a single future to which we must conform, there are multiple futures. And multiple futures within the same environment....”⁹

Therefore, the ongoing or future exercise of this collective right must be defined by the “self” in self-determination. And, the intellectual and political space needed to define the contours of the exercise of this right must be afforded and guaranteed to the Indigenous Peoples concerned. And, how each tribe, nation or Peoples choose to represent themselves and their interests outside of their communities, including at the international level, and with all others external to their communities, should not be stifled in any way, shape or form. The false dichotomy of internal and external self-determination cannot and should not be tolerated. This includes the efforts of Indigenous Peoples to gain access to justice collectively when collective rights have been violated or denied. Processes, mechanisms, and means will undoubtedly have to be flexible enough or specifically adjusted to accommodate Indigenous political developments and political enterprises where they have not yet taken place and further enhancements will have to be made where they have already occurred. For example, in those regions and territories where Indigenous Peoples are not even recognized on the basis of their status as Indigenous Peoples, ways and means for respecting and recognizing their distinct

amongst the Innu of Davis Inlet.

9 United Nations Working Group on Indigenous Populations, Statement by the Aboriginal and Torres Strait Islander Commission, UNWGIP, 12th Sess., (1994).

legal and political status and human rights must be identified. In other regions, such as Nunavut in the Canadian Arctic, where the Inuit have been recognized and their rights to self-government as well as lands, territories, and resources have been affirmed, surprisingly because of government led abrogation of constitutionally protected rights, there remains a need for adjustment to ensure genuine access to justice in relation to the full realization of the Inuit right to self-determination.

Genocide and access to justice

Directly related to the realized or potential for destruction of Indigenous communities and the collective dimension of their rights is the matter of genocide and cultural genocide. The 1948 Genocide Convention is significant due to its explicit reference to the right of *groups* to physical existence.¹⁰ As is known, the definition or origin of genocide can be traced to Raphael Lemkin, a jurist recognized as coining the term.¹¹ Lemkin defined genocide as “the criminal intent to destroy or to cripple permanently a human group. The acts are directed against groups, as such, and individuals are selected for destruction only because they belong to these groups.”

Moral outrage expressed by individuals and governments is critical to the identification, punishment and more importantly, the prevention of such acts. However, when genocide occurs against Indigenous Peoples, many States behave as though it never happened. And, no fair inquiry is allowed. This distorts any rights discourse, leaving Indigenous individuals and/or communities without any opportunity to try or charge governments as perpetrators of the crime of genocide. There is no opportunity to even pose the question of who committed such a crime let alone discuss damages or other measures of recourse.

Indigenous Peoples must take the view that no comparison should take place and that each case of genocide should be understood within their own historical, political, cultural and social context. Without pressing such claims and identifying the historical facts, as well as

10 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, GA Resolution 260 (3).

11 G. J Andreopoulos, Genocide: Conceptual and Historical Dimensions, (Philadelphia: University of Pennsylvania Press, 1994) p. 1.

assessing the blame and responsibility, no solutions will ever be found. Presently, States have the upper hand by controlling the definition of genocide and the interpretation of the provisions of the Genocide Convention. Such cushioning by the UN and the international community only results in measures to further safeguard States: genocide did not take place, there is no entitlement, no legal recourse, no responsibility and therefore, no human rights responsibilities. This is an example of an area where serious, substantive adjustments need to be made.

During the 2002 session of the UN Commission on Human Rights Working Group on the Draft Declaration on the Rights of Indigenous Peoples, article 7 concerning “cultural genocide” or “ethnocide” was under consideration and few Indigenous representatives were prepared to deal with State efforts to eliminate any reference to these important provisions and to significantly alter its elements. Despite the final outcome, articles 7 and 8 of the Declaration concerning security, genocide, and essentially cultural genocide remain of particular importance to Indigenous Peoples in the context of access to justice, including truth and reconciliation. The specific provision that “States shall provide effective mechanisms for prevention of, and redress for” a range of actions damaging to the cultural integrity of Indigenous Peoples must be underscored.

Another area that has caused extraordinary destruction of Indigenous communities by virtue of denying the collective dimension of their rights are the matters related to lands, territories, and resources, which ultimately has the probability of leading to cultural genocide. In this way, the basic survival of Indigenous Peoples becomes a matter of access to justice. Though many are of the view that such actions are history and that the long list of atrocious, genocidal acts no longer occur, the truth is they are ongoing and I firmly believe, they are intensifying through aggressive extractive industry,¹² hydroelectric projects,¹³ land dispossession in the name of world heritage sites,

12 Proposed uranium mining in Greenland.

13 Lucy Jordan, Belo Monte Dam, *The Rio Times*, 7 May 2013, <http://riotimesonline.com/brazil-news/front-page/brazil-indians-occupy-belo-monte-dam-site/#>.

national and trans-frontier parks, and conservation areas¹⁴ and adverse impacts of climate change, to name but a few.

Increasingly, Indigenous Peoples across the globe are under extraordinary pressure from all quarters. Often, there is not even baseline recognition of Indigenous land and territorial rights, thereby paving the way for Indigenous communities to be bulldozed by State and industry development schemes. In other instances, minimum recognition is afforded but trampled. Further, where Indigenous land and territorial rights have been affirmed, the systems of justice are systematically stacked against Indigenous Peoples. In the face of such forces, how will Indigenous communities gain any access to justice in order to safeguard against cultural destruction and cultural genocide?

In this regard, article 10 enunciates a prohibition against forcibly removing Indigenous Peoples from their lands or territories and that no relocation shall take place without their free, prior and informed consent and after agreement on just and fair compensation, and where possible, an option of return. The wording of article 10 essentially creates a pathway to justice or access to justice. Access is the procedural dimension, and justice is to receive fair and just remedy for the violation of rights. The lands, territories, and resource provisions reflected in articles 25, 26, 27, 28, and 29 are also important to underscore for Indigenous Peoples and their quest for fair, meaningful, and effective hearing of their claims in order to receive fair and just remedy for the violations of these crucial collective human rights.

The days of measures such as the Indian Claims Commission in the United States should effectively be over. The land rights provisions of the Declaration and in particular, articles 27 and 28 place an onus upon States to keep themselves in check with regard to Indigenous land rights as well as to substantively address the legal recognition and protection of Indigenous Peoples' rights to their homelands, including specific measures for access to justice where they have been deprived of such collective rights. Any and all such processes for recognition of land rights or "redress"—or essentially to obtain justice

14 See general discussion about this dynamic on the continent of Africa at: <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/south-africa/transfrontier-parks-south-africa>.

with regard to the violation of these collective rights—must involve Indigenous Peoples directly, as included in the explicit language of these articles as well as expressed within articles 18 and 19 of the Declaration. Intimately tied to lands, territories and resources are the Declaration provisions related to harvesting rights and in particular, article 20 and the fact that Indigenous Peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Additional provisions of the Declaration also give rise to redress, reparations, or access to justice in very specific contexts. For example, articles 11 and 12 concerns restitution of cultural property and repatriation of human remains respectively. Other examples include the right to redress in relation to development activities and to mitigate adverse environmental impacts as referenced in article 32 of the Declaration. Furthermore, the right to observance, recognition, and enforcement of Treaties, agreements and other constructive arrangements is another crucial pathway needed for Indigenous Peoples to effectively access justice in a collective fashion. Article 40 of the Declaration is unequivocal in its statement that the Declaration is the normative framework for access to justice for Indigenous Peoples:

“Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, *as well as to effective remedies for all infringements of their individual and collective rights*. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.” (emphasis added)

Finally, the right of Indigenous Peoples to financial and technical support from States (article 39) must be recognized and respected in order for genuine access to justice, including truth and reconciliation, in favor of the most disadvantaged peoples across the globe. Again, the procedural and substantive aspect of access to justice must be applied in relation to the rights enunciated within the Declaration and violated.

In regard to reparations, redress, and remedies, it is important to highlight the recently concluded International Law Association

Expert Commentary on the Declaration¹⁵ as it makes a number of comprehensive and crucial linkages that assist in understanding the concept of access to justice and what Indigenous Peoples would regard as the content of justice. For example, the Committee made the distinction between Western notions of redress and reparations attaching to individuals in contrast to the collective dimension of Indigenous Peoples' human rights. The Committee also highlighted the fact that "compensation" should not be merely regarded as monetary—remedies, within the Indigenous context (and affirmed by the Declaration), should include material as well as non-material elements. The report states "*non-material reparations* have a special significance, on account of the fact that, in many instances, human rights breaches lead not only their members to feel physical and psychological pain at the individual level, but also to destroy the spiritual identity and even the socio-political construction of the collectivity—producing harmful consequences that usually perpetuate at the intergenerational level—since the inherent order of the universe surrounding them is affected."¹⁶

More significantly, the ILA Committee reports confirm that, among other Indigenous human rights, reparations, redress, and remedies are in fact "crystallized in the realm of customary international law." The ILA Committee is right to recognize that the whole of the Declaration cannot be considered as falling within the scope of general principles of international law. However, it is highly significant that the Declaration provisions that seek to provide a pathway to justice by making explicit reference to redress fall under what is regarded as "corresponding to established principles of general international law, therefore implying the existence of equivalent and parallel international obligations to which States are *bound* to comply with."¹⁷

15 See International Law Association, Committee on the Rights of Indigenous Peoples Report, The Hague Conference (2010 pp. 39–43, <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>

16 International Law Association, Committee on Rights of Indigenous Peoples Report, Hague Conference (2010) p. 40.

17 See International Law Association, Committee on Rights of Indigenous Peoples Report, Sofia Conference (2012) pp. 43–52, <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>

Status of Indigenous Peoples

Now that I have turned the Declaration into the Indigenous Peoples' Access to Justice Declaration, I want to briefly comment on the legal personality of Indigenous Peoples. I hesitate to do so because it would not be prudent to open the door to this question for those that are unfriendly toward us and our desires, aspirations, and more importantly, our fundamental human rights. However, I want to make only two points.

First of all, the Declaration has affirmed that we are “peoples” despite the efforts of some States to deny this fact and those who went even further in their attempts to deny the equal application of the right of self-determination to us or more accurately to those States who tried to place a wedge between us and all other peoples through racially discriminatory and intellectually dishonest means.¹⁸

18 The following examples demonstrate how Canada and the U.S. misleadingly sought to deny Indigenous Peoples the right to self-determination at the ILO – and therefore also undermine access to justice as “peoples”. See International Labour Office, Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Report IV (2A), ILO, 76th Sess., (1989), position of government of Canada:

“... self-determination under international law can imply the *absolute* right to determine political, economic and social [and] cultural programmes and structures without *any involvement whatsoever* from States. Consequently, any use of the term “peoples” would be unacceptable without a qualifying clause which would indicate clearly that the right of self-determination is not implied or conferred by its use.” [emphasis in original]

And the position of the government of the United States:

“Adoption of the term “peoples” could be used to argue for an interpretation of international law to include an *absolute* right of indigenous groups not only to self-determination in the political sense of separation from the State but also to absolute independence in determining economic, social and cultural programmes and structures, which would also be unacceptable to many States.

“ILO Convention 169, article 1(3), which provides: “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.” Though this provision alone does not affirm that Indigenous Peoples are “peoples” in international law, the use of the term in the context of a Convention correctly acknowledges the status and rights of Indigenous peoples as “peoples.”

Further, see International Labour Organization, *Report of the Committee on Convention No. 107*, International Labour Conference, Provisional Record, 76th Session, Geneva, 1989, No. 25, para. 42:

To be clear, preambular paragraph 2 and article 2 of the Declaration expressly affirm that Indigenous Peoples are free and equal to all other peoples. Furthermore, ILO Convention 169 expressly uses the term Indigenous “peoples.” The UN has now resolved the issue that Indigenous Peoples are “peoples.” Therefore, ILO Convention 169 must now be read together with the UN Declaration, as confirmed by the ILO and others. Through these specific provisions (and all other provisions of the Declaration), the group or collective human rights of Indigenous Peoples are affirmed and as such, our legal personality as peoples is affirmed. We are rights’ holders as groups and we are also holders of responsibilities (or duties) as such. The sources of our legal personality, possessing rights and duties (or responsibilities) and increasingly, our capacity to bring claims concerning such rights have been recognized by the UN human rights regime and regional inter-governmental human rights regimes such as the OAS and African Union. In addition, nation-States have recognized the legal personality of Indigenous Peoples as peoples through their constitutions, national legislation, agreements, Treaties, policy, and other instruments.

Recognizing the important linkage between “peoples” and the right to self-determination within international human rights law, increasingly scholars and State government representatives have moved away from a purely State-centered conception of the term “peoples.” In this regard, Indigenous Peoples have affirmed and repeatedly asserted that we are the “self” or the subjects, as peoples,

The Chairman considered that the text was distancing itself to a certain extent from a subject which was outside the competence of the ILO. In his opinion, no position for or against self-determination was or could be expressed in the Convention, nor could any restrictions be expressed in the context of international law. [emphasis added]

See further, UN-Indigenous Peoples’ Partnership (UNIPP), "For democratic governance, human rights and equality", Multi-Donor Trust Fund, Terms of Reference ILO, OHCHR, UNDP, Framework Document, (Geneva: UNIPP, 2010) p. 4:

With the adoption of the UN Declaration, the international normative framework regulating the protection of the rights of indigenous peoples has been firmly strengthened. The ILO Convention No. 169 on the rights of indigenous and tribal peoples, adopted by the ILO in 1989, is fully compatible with the UN Declaration on the Rights of Indigenous Peoples and *the two instruments are mutually reinforcing*. The two instruments provide the solid framework for promoting indigenous peoples’ rights and addressing the existing implementation gaps at all levels. [emphasis added]

who are free to determine our political status and pursue our economic, social and cultural development. Clearly, we are diverse and are all at varying stages of capacity and readiness to engage in local, regional, national, and international political and legal enterprises to increase and improve access to justice. Just as the Navajo Nation and others at the UN have argued for recognition of their status as Nations and as Indigenous governments, in the North, I have argued that the Inuit not only have a right to status as direct participants in entities such as the Arctic Council, but moreover, a responsibility in the context of good governance. In this way, our legal personality as peoples, Nations, communities, and tribes should not hinder our actions to reverse the historical injustices and to begin creating and re-defining the ways to achieve real justice, truth and reconciliation.

With the adoption of the Declaration, as the normative framework for the protection and promotion of our fundamental human rights, the international community and even treaty bodies have taken note of these crucial human rights norms. The treaty bodies have begun to interpret their respective instruments against the backdrop of the Declaration, taking into consideration the distinct cultural context of Indigenous Peoples when faced with issues and communications that directly impact us. Let us hope that these interpretations begin to take on an even stronger hold within the various regional treaty bodies as well, including the Inter-American system, the African Union, the European Court, and others. I find this to be an extraordinary, positive development, not to mention the number of mechanisms and UN activities concerning Indigenous Peoples now, in contrast to thirty years ago.

Future Adjustments

My second point is that future adjustment in these various regimes is needed to fully accommodate our distinct cultural context and our human rights. This may take the form of a Convention on the Rights of Indigenous Peoples but I won't hold my breath for that political enterprise to be realized. However, as a legally binding instrument accompanied by a robust treaty body, we would have a new and different pathway or access to justice at the international level. If such

a development is realized in my lifetime, I would predict that such a treaty body would be overwhelmed for decades solely on the basis of the injustices that I've seen in my lifetime. Unfortunately, in my assessment, the few nation-State ratifications of ILO Convention 169 reflects a lack of political will and unfounded fear about the genuine respect for and recognition of Indigenous human rights and real "partnership" with Indigenous Peoples, which the Declaration represents.

In the meantime, adjustments that might be explored are options such as a voluntary "optional protocol" to the Declaration that would allow States and Indigenous Peoples to come to the table to resolve Indigenous demands for justice. We may be able to generate real political will through a number of States that may be willing to challenge other UN members at the forthcoming World Conference on Indigenous Peoples in 2014 to initiate a serious, comprehensive program to genuinely and fully implement the provisions of the Declaration both domestically and internationally.

At the same time, I take the long view, and I do believe that there are important, substantive measures taking hold but only in limited quarters. I don't know how we can replicate them elsewhere, for example, in the Russian Federation. Sustained international pressure, awareness, and dialogue are but a few measures that those of us working at the international level can undertake. However, we must all challenge ourselves on this point. Regarding the extraordinary developments achieved to date, we should not forget the text of the ILO Convention 169 and its potential force within those States, which have ratified the Convention and been founded on the lands and territories of Indigenous Peoples. More must be done to invigorate the ILO recourse mechanism essential to this legally binding instrument not to mention a vital campaign to increase ratifications.

Alaska Natives and access to justice

I want to conclude with a few more words about Alaska that relate to problems with access to justice and also articles 13(2) and 34 of the Declaration. As one might imagine there are huge problems facing Alaska Native people and their access to justice, both procedurally

and substantively. The statistics are in all likelihood the same as those in Australia, New Zealand, Guatemala, Canada, and elsewhere in regard to incarceration rates, etc. In 1979, I worked as a paralegal with the Alaska Judicial Council on a Racial Disparity in Sentencing Study, which confirmed that though we made up only 15% of the total State population, Alaska Native women made up 43% of the prison inmate population and Alaska Native men made up 52%. Despite the list of substantive recommendations made 34 years ago, the system has not changed. However, on February 13, 2013, Alaska Supreme Court Justice, Dana Fabe, offered some hope in her State of the Judiciary report to the State Legislature. Her statement included recommendations concerning the important role of tribal courts throughout rural Alaska, sentencing in villages, circle sentencing, which engages the whole community, and other good reforms.

Justice Fabe invoked the words of Judge Nora Guinn of Bethel, a Yup'ik woman who in 1968 became our State's first Alaska Native judge, took a similar approach to rural justice. She said:

“Over the years I tried to include people—involve people—in all of my court activities....I started what we call an advisory sentencing court....I'd have them sit and after the people came up and pled guilty....we would send them out and we'd sit and talk about it. And I'd say now what would you advise?...I stress this person is from your village. He's your relative. He's your friend. If you aren't going to help him, nobody else is going to really try to help him because we don't know how to help him.”¹⁹

Further, Justice Fabe stated:

“Tribal courts bring not only local knowledge, cultural sensitivity, and expertise to the table, but also valuable resources, experience, and a high level of local trust. They exist in at least half the villages of our state and stand ready, willing, and able to take part in local justice delivery. Just as the three branches of state government must work together closely to ensure effective delivery of justice throughout

19 Chief Justice Dana Fabe, *The State of the Judiciary: A message by Chief Justice Dana Fabe to the First Session of the Twenty-Eight Alaska Legislature February 13 2013* (2013) p. 9.

the state court system, state and tribal courts must work together closely to ensure a system of rural justice delivery that responds to the needs of every village in a manner that is timely, effective, and fair.”²⁰

There are approximately 90 tribal courts in Alaska and a growing number of Tribal court judges, practitioners, and advocates. Curiously, it is through the Tribal courts that we are seeing the most significant expressions of Indigenous self-determination in Alaska, from the Bristol Bay Native Association Tribal Court Enhancement Program to the Sitka Tribe of Alaska to community of Bethel and their Child Welfare Code. Certainly, problems remain and the State of Alaska remains hostile to these developments. However, the desire of Justice Fabe to create real reform offers some hope to the difficult issue of the need for fairness and equality in our access to justice in the North and elsewhere.

Indian Law and Order Commission

“Every woman you’ve met today has been raped. All of us. I know they won’t believe that in the lower 48, and the State will deny it, but it’s true. We all know each other and we live here. We know what’s happened. Please tell Congress and President Obama before it’s too late.”²¹

More recently, the bipartisan Indian Law and Order Commission²² issued a scathing review and critique of the persistent forms of discriminatory treatment of Alaska Native Tribal governments in

²⁰ *Ibid* at p. 13.

²¹ Tribal citizen (name withheld), Statement at Indian Law and Order Commission Site Visit to Galena, AK, (18 October 2012).

²² Indian Law and Order Commission is an independent national advisory commission created in July 2010 when the Tribal Law and Order Act P.L. 111-211 (29 July 2010) was passed and extended in 2013 by the Violence Against Women Act Reauthorization, P.L. 113-4 (22 January 2013). President Obama and majority and minority members of Congress appointed the nine Commissioners, all of whom have served as volunteers. See: Indian Law & Order Commission, [A Roadmap for Making Native America Safer: Report to the President & Congress of the United States](#), (Indian Law & Order Commission, 2013).

their efforts to provide access to justice for their respective members. According to the Commission members the “problems in Alaska are so severe and the number of Alaska Native communities affected so large, that continuing to exempt the State from national policy change is wrong...The public safety issues in Alaska—the law and policy at the root of those problems—beg to be addressed...Given that domestic violence and sexual assault may be a more severe public safety problem in Alaska Native communities than in any other Tribal communities in the United States, this provision adds insult to injury. In the view of the Commission, it is unconscionable.”²³

The Commission went on to conclude that “[t]he strongly centralized law enforcement and justice systems of the State of Alaska are of critical concern to the Indian Law and Order Commission. They do not serve local and Native communities adequately, if at all. The Commission believes that devolving authority to Alaska Native communities is essential for addressing local crime. Their governments are best positioned to effectively arrest, prosecute, and punish, and they should have the authority to do so—or to work out voluntary agreements with each other, and with local governments and the State on mutually beneficial terms.”²⁴

Ultimately, what the Commission has identified is a matter of the full and effective exercise of the right to self-determination by Indigenous Peoples of Alaska through their Tribal governments. To date, the persistent denial of the right to self-determination ensures that “State government authority is privileged over all other possibilities: the State has asserted exclusive criminal jurisdiction over all lands once controlled by Tribes”²⁵ and has effectively curtailed one of the most visible, dynamic forms of the collective right to self-determination and self-government within Indigenous communities: to safeguard their individual members and their fundamental human rights.

For Indigenous Peoples and governments, there should be no question about the linkage between the exercise of our right to

23 Indian Law and Order Commission, *A Roadmap for Making Native America Safer: Chapter 2 Reforming Justice for Alaska Natives: The Time is Now*, (2012) p. 55.

24 *Ibid* at p. 55.

25 *Ibid* at p. 45.

self-determination and access to justice. The more we exercise our conception of human rights and the responsibilities of our members combined with our capacity to control both the internal and external affairs of our Nations, communities and Peoples, the better off we are. One of the most visible forms of self-determination of our communities is how we uphold and express our rights and responsibilities. Again, the Declaration speaks of partnership and in order to for us to be full partners, we must enjoy authentic access to justice. States must uphold their obligations, in collaboration with Indigenous Peoples. That “self” in the self-determination of Indigenous Peoples has to be fully realized in all of its forms, from internal self-government to lands, territories, and resources to international affairs. And, self-determination is really the only way to achieve a pathway or access to justice as well as potentially sincere and true reconciliation.

NORMATIVE DIRECTIONS

Alexandra Xanthaki¹

This paper maintains that Indigenous rights to access to justice relate to three big clusters of rights: a) non-discrimination; b) cultural rights; and c) self-determination. The paper argues that any attempt to view the issue of access to justice in relation only to one of these rights undermines their basis and thus, undermines them. The non-discrimination aspect ensures that Indigenous Peoples should be treated equally to non-Indigenous people in their access to justice; the Indigenous right to culture underlines the need for some deviation from the national practices in judicial matters and processes; while the principle of self-determination is the foundation for the establishment of separate judicial institutions for Indigenous Peoples that will be designed and implemented with their active participation.

Non-discrimination

It must be stressed how important and far-reaching the principle of non-discrimination can be in seeking to improve Indigenous access to justice. Non-discrimination is important for two reasons: first, for the substantial reasons that will be discussed below; second, because of its binding force in international law. The international system of human rights perceives non-discrimination as such a fundamental principle that it binds states irrespective of whether they have signed the relevant international instruments. Moeckli confirms: “At least important aspects of the right to self-determination binds all states (...). Even more fundamentally, the right to non-discrimination on the basis of race, sex and religion arguably forms part of *jus cogens* according to article 53 of the Vienna Convention on the Law of Treaties and cannot be set aside by treaty or acquiescence.”² This can be of

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2 Daniel Moeckli, Human Rights and Non-discrimination in the War on Terror. (Oxford: Oxford University Press, 2008) pp. 67–68.

substantial use to Indigenous Peoples in States that have not been very active in signing and ratifying the main human rights treaties, as the States have the obligation to ensure the implementation of such a right and principle.

Therefore, in all cases access to justice must happen on an equal basis for Indigenous Peoples and non-Indigenous populations. The principle of non-discrimination prescribes that States should not create obstacles to Indigenous access to justice. However, international law goes much further than this: States must take measures to ensure that Indigenous Peoples have access to justice on an equal basis to non-Indigenous Peoples. For example, States must ensure that judicial mechanisms are not so far away from Indigenous communities that it becomes unrealistic for the later to reach these mechanisms. It has been argued that in remote communities, access to justice is 'so inadequate that remote Indigenous Peoples cannot be said to have full civil rights'.³ Living in remote communities is an issue that particularly affects Indigenous Peoples. For example, in Australia, 27% of Indigenous People live in remote or very remote communities compared to just 2% of the non-Indigenous population.⁴ Also, States must take measures to ensure that poverty and other lack of socio-economic factors do not impact on Indigenous access to justice. For example, legal aid is a way that Indigenous Peoples among others obtain representation. Several non-governmental organizations (NGOs) have noted that legal aid is currently being cut.

Maybe most importantly, equal access to justice also means that the police and the judiciary act to support Indigenous Peoples rather than to oppose them; and are educated not to act in a prejudiced manner against Indigenous Peoples. This is an important element that hinders very often the realisation of Indigenous rights. In this respect, the

3 Submission by The End Women's Legal Service to the 2003 Australian Inquiry into Legal Aid and Access to Justice in Senate Report entitled *Inquiry into Legal Aid and Access to Justice*, (Commonwealth of Australia, 2004) p. 107, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2002-04/legalaidjustice/report/contents, last accessed on 14/01/2014.

4 Australian Government Steering Committee for the Review of Government Service Provision, Report on Government Services, (Canberra: SCRGSP, 2007) p. 2.

example of the (1978) Indian Child Welfare Act in the United States is rather telling: The Act was adopted initially out of concern for the large numbers of Indian children being separated from their families. It imposes a heightened evidentiary standard for terminating the parental rights of an Indian parent or custodian. In the 1970s, 25–35% of Indian children were growing up away from their families and 90% of those with non-Indigenous families.⁵ The Act was created in order to reduce such damning percentages. It is notable that if intent is established in such separations, they can be acts of genocide: according to the 1948 Genocide Convention, genocide includes the forcible removal of children from one group (in this case an Indigenous group) to another group (non-Indigenous families) committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group. The inclusion of the forcible removal of children from the group in the 1948 Genocide Convention was one of the most controversial paragraphs of the final version of the Convention. Such an act is more an act of cultural genocide, and indeed this is how it was viewed in the Secretariat draft,⁶ before being excluded from the provision of the Ad Hoc Committee on cultural genocide in article 2.⁷ Since several governments were opposed vigorously to the notion of “cultural genocide,” such a term was finally rejected; Greece subsequently proposed the addition of the phrase “[f]” to the list of punishable acts, noting that States who were opposed to cultural genocide did not

⁵ *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Committee on Indian Affairs*, 95th Cong., p. 539, as mentioned in Brief of Amici Curiae Association of American Indian Affairs, National Congress of American Indians, National Indian Child Welfare Association, Indian Tribes and Other Indian Organisations in support of Respondents in Supreme Court of US, *Adoptive Couple v Baby Girl, a minor under the age of fourteen years et al.*, pp. 6–7, in http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=6&ved=0CEMQFjAF&url=http%3A%2F%2Fwww.indian-affairs.org%2Fprograms%2Fdocuments%2Faaia_icwa_amicusbrief.pdf&ei=V23VUoL0KY_T7Ab1roHwCw&usq=AFQjCNGvfyh4mr98mDUH3NM00734e4hYxg, last assessed on 14/01/2014.

⁶ Convention on the Prevention and Punishment of the Crime of Genocide, Secretariat and Ad Hoc Committee Draft (May 1947) Doc. E/447, article I (3) a.

⁷ William Shabas, *Genocide in International Law: The Crime of Crimes*. (Cambridge, Cambridge University Press, 2000) p. 65.

necessarily contest “forced transfer.”⁸ Although it was argued during the drafting process that ‘no one had been able to quote any historical case of the destruction of a group through the transfer of children,’⁹ Australia’s stolen generation, among other examples, has proved this statement wrong. In addition, phrases used by States such as “to kill the Indian in the child” verify that at least in some cases, there was clear intent to destroy the group.

Although the (1978) Indian Child Welfare Act aimed at reversing such practices, the results were not always anticipated. Indeed, even though the domestic Centre for Court Innovation has explicitly noted that “the goals of this law will not be achieved without a commitment to system-wide training that reaches the front-line staff at child welfare agencies, the attorneys representing children and parents, individual judges, and tribal leadership,”¹⁰ unfortunately, this has not happened. Hence, the judiciary in seven US states has developed a doctrine to water down the power of the (1978) Indian Child Welfare Act (ICWA) by using the “Indian family doctrine” to claim that the Indian children are not Indian enough to apply the ICWA to them and, thus, justify and allow the continuation of adoption by non-Indigenous couples.

Such practices as well as policies, which limit Indigenous rights to access to justice, are not just acts of discrimination; it is argued that they constitute institutional racism. In the United Kingdom, the MacPherson Report has defined institutionalised racism as follows: “The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin.”¹¹ This definition reflects the situation that most Indigenous Peoples currently face around the world. Institutional racism often creates alienation from

8 *Ibid*, p. 175.

9 *Ibid*.

10 Justine van Straaten and Paul G Buchbinder, Paper on *The Indian Child Welfare Act Improving Compliance through State-Tribal Coordination* published by the Centre for Court Innovation (2011) in <http://www.courtinnovation.org/research/indian-child-welfare-act-improving-compliance-through-state-tribal-coordination>, last accessed on 14/01/2014, p. 12.

11 UK Home Office, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny*, Cm 4262-I, February 1999, para 6.34. The report can be accessed at <http://www.archive.official-documents.co.uk/document/cm42/4262/sli-06.htm#6.34>.

the State and fear of the State. The legacy of colonialism, the on-going marginalisation, disempowerment and on-going discrimination often result in Indigenous opposition to any intervention from the police or other public bodies to situations involving Indigenous individuals. Many Indigenous persons prefer to stay away from all State agencies and public bodies and challenge their usefulness. A recent Australian study has confirmed that Indigenous resistance and reaction to discrimination often results in the criminalisation of the Indigenous person discriminated against. And it would be inaccurate to focus only on the judiciary or only on the enforcement bodies and their attitudes. In Malaysia, although Indigenous Peoples have won land cases, the legislature refuses to acknowledge the decisions and change the laws; and/or the government does not implement the decisions of the courts. States must educate their public servants about Indigenous cultures, realities and needs. Otherwise, they clearly are failing their obligations under international law.

Often, the main argument given against additional protection designed to ensure non-discrimination against Indigenous Peoples in access to justice relates to an ill-perceived principle of equal treatment. States argue that they do not wish to implement any additional rights for Indigenous Peoples, because they wish to treat all individuals living within their territory in the same way. This however, is not in accordance with standards of international law. Article 26 of the International Covenant on Civil and Political Rights (ICCPR) requires *effective* protection against discrimination. Both General Comment 18 of the Human Rights Committee and General Recommendation 14 of the Committee on the Elimination of All Forms of Racial Discrimination (CERD) specify that that “differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate.”¹² Therefore, specific measures such as providing all State documents in the Indigenous languages so that Indigenous individuals can be sufficiently informed are paramount. Yet, it has been reported

12 UNHCHR Committee on the Elimination of All Forms of Racial Discrimination, Prevention of Racial Discrimination, including Early Warning and Urgent Procedures: working paper adopted by the Committee on the Elimination of Racial Discrimination, 48th Sess., A/48/18 (1996) chapter VIII B.

that the Orang Asli in Malaysia would file a case for their land rights but they could not really follow the proceedings as they had no translators. Hence, their right to remedy is seriously hindered by the lack of access to the judicial proceedings.

I outline below a number of points supporting positive protection of Indigenous Peoples in promoting their access to justice:

First, States have the *responsibility* to take positive measures. States do not have discretion as to the decision to take measures: they do not have the right, but the responsibility to take positive measures. Of special interest is the comment of CERD about the opinion of the United States that special measures are “allowed,” but not required. CERD’s response was:

“With regard to affirmative action, the Committee notes with concern the position taken by the State party that the provisions of the Convention permit, but do not require States parties to adopt affirmative action measures to ensure the adequate development and protection of certain racial, ethnic or national groups. The Committee emphasizes that the adoption of special measures by States parties when the circumstances so warrant, such as in the case of persistent disparities, is an obligation stemming from article 2, paragraph 2, of the Convention.”¹³

The Committee has repeatedly linked Indigenous access to justice with the non-discrimination principle: in August 2012, CERD referred to Ecuador’s attempts to take measures to ensure Indigenous access to justice. CERD has recently also referred to problems in federal States’ policies in Indigenous access to justice when commenting on Canada’s report. The Committee said that although Canada may have taken positive measures, the practices at the provincial and territorial state levels differ.

Secondly, a distinction has been drawn by CERD “between special and temporary measures for the advancement of ethnic groups on the one hand and permanent rights of Indigenous Peoples on the other

13 CERD, Concluding Observations of CERD: United States of America, 59th Sess., CERD/C/304/Add.125 (2001).

hand.”¹⁴ General Recommendation 32 (2009) consolidates the practice of CERD in distinguishing permanent rights from special measures:

“Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as...the rights of Indigenous Peoples. (...) The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures.”¹⁵

The recommendation also states that “special measures should clearly benefit groups and individuals in their enjoyment of human rights”¹⁶ as well as suggesting that States parties “should ensure that special measures are designed and implemented on the basis of prior consultations with affected communities and the active participation of such communities”¹⁷—a provision that assists communities in securing genuine benefit from the measures in terms that they understand and accept.

Cultural Rights

In addition to the principle of non-discrimination, Indigenous rights to access relates to Indigenous cultural rights. I have analysed Indigenous cultural rights elsewhere;¹⁸ here, I wish to stress that the rights of Indigenous Peoples to culture must be taken into account both when the national system of justice is reviewed and assessed and

14 CERD, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination, 70th Sess., CERD/C/NZL/CO/17, (2007) para. 15.

15 CERD, The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination, 75th Sess., CERD/C/75/Misc.7/Rev.2 (2009) para. 15.

16 *Ibid* para. 33.

17 *Ibid* para. 18.

18 Alexandra Xanthaki, *Indigenous Cultural Rights* in M Weller and J Hoffman eds., *Oxford Commentaries on International Law—The Rights of Minorities: A Commentary on the United Nations Declaration on the Rights of Indigenous Peoples*. (Oxford: Oxford University Press, 2014). (forthcoming); also see Elsa Stamatopoulou, *Monitoring Cultural Human Rights: The Claims of Culture on Human Rights and the Response of Cultural Rights* (2012) 34 Human Rights Quarterly. p.1172.

when separate Indigenous judicial systems are established. Indigenous Peoples' understanding of their rights, including access to justice, is often informed by their unique outlooks on, and practices associated with, justice. These may in some respects differ from dominant approaches to justice. It has been argued in the literature that the following Indigenous judicial customs and practices work well and have positive results in the community:

- Indigenous sentencing courts, including circle courts;
- Indigenous community-based structures and bodies;
- Indigenous community-based family violence programs;
- Indigenous night patrols and other community-initiated policing strategies;
- Indigenous mentoring programs;
- Indigenous community-based alternatives to prison;
- Correctional programs delivered by Indigenous community members and
- Cultural immersion programs within prisons.¹⁹

Notwithstanding which specific measures will be chosen in each region and each precise time, the specific characteristics of Indigenous Peoples must be taken into consideration in the design of justice systems.²⁰ It is those States with quality processes for *ongoing* engagement with Indigenous communities that have been developing effective criminal justice policies. For example, the American Bar Association's Centre on Children and Law found that "talks and/or agreements between neighbouring state and tribal governments frequently fail because there had been inattention to the history, cultural considerations, and important political or fiscal realities that form an ever-present context for tribal/state co-existence."²¹

19 See Fiona Alison and Chris Cuneen, *The role of Indigenous Justice Agreements in improving social and legal outcomes for Indigenous people*, (2010) 32 Sydney Law Review, p. 666.

20 CERD, Report of the Committee of the Elimination of Racial Discrimination: Namibia, Sess., 72–73. CERDA/63/18 (2009) para. 305.

21 Stanley Feldman and David Withey, "Resolving State-Tribal Jurisdictional Dilemmas" (1995) 79 Judicature, p. 156.

A positive example in this respect has been the Indigenous Justice Agreements (IJAs) in Australia. These agreements were put in place after the 1997 Royal Commission into Aboriginal Deaths in Custody and have been agreed between the government and Indigenous bodies in New South Wales, Queensland, Victoria and Western Australia. They constitute significant strategic frameworks, intended to address Indigenous over-representation in the criminal justice system through improved delivery of justice programs to Indigenous communities with an emphasis upon Indigenous self-determination.²² They address several important Indigenous concerns, including “social, economic, and cultural issues; justice issues; customary law; law reform; and government funding levels for programs.”²³ Measures agreed upon vary from specific targets for reducing the rate of Indigenous over-representation in the criminal justice system to specific methods of service delivery and include monitoring and evaluation. The agreements form a refreshing set of initiatives in a period that saw more punitive approaches to law being favoured and also reluctance towards any reform to the justice system or recognition of Indigenous rights in this respect. According to Alison and Cuneen, these agreements have been effective to a large degree and have improved the accountability of State bodies initiating independent monitoring and evaluation.²⁴ In addition, Indigenous communities have actively participated in the design and implementation of these agreements: “Indigenous community engagement, self-management and ownership where they have set up effective and well-coordinated community-based justice structures and/or led to the development of localised strategic planning, as well as through encouraging initiatives that embody such ideals.”²⁵

Caneen emphasises that such agreements show that “Indigenous demands are more likely to be met by a transformation in the justice system that allows the development of a hybrid system where

22 See *supra* note 18.

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

traditional legal bureaucratic forms of justice are combined with elements of informal justice and Indigenous justice.”²⁶

Indigenous Customary Laws and Systems

The right of Indigenous Peoples to maintain their customary laws and systems is a rather unexplored issue in the literature, even though it is a recognised right by the UN Declaration on the Rights of Indigenous Peoples (UN Declaration). Article 34 recognises the right of Indigenous Peoples to promote, develop and maintain their institutional structures and juridical systems. Although the text includes the limiting clause “in the cases where they exist,” it is still a major success for Indigenous Peoples. This was especially evident during the elaboration of the UN Declaration, where States were reluctant to accept the use of the phrase “Indigenous laws” and “Indigenous juridical systems.” This was partly because of the wide belief that law is at the core of the State mechanism. However, this idea—albeit true in many respects—does not fully cover the realities of today’s States.

In the interpretative statements delivered after the adoption of the Declaration, Australia objected to the position of Indigenous customary law above the national law. The Australian delegate stated:

“Customary law is not law in the sense that modern democracies use the term; it is based on culture and traditions. It should not override national laws and should not be used selectively to permit the exercise of practices by certain Indigenous communities that would be unacceptable in the rest of the community.”²⁷

This statement deviates from current standards of international law, as the “processes of promoting and protecting human rights should be conducted in conformity with the purposes and principles of the

26 Chris Caneen, *Criminology, Criminal Justice and Indigenous People: A Dysfunctional Relationship?* (2009) 20 *Current Issues Criminal Justice*. pp. 323–336 & 335.

27 UNHRC, Submission: Universal Periodic Review of Canada, 61st Sess., UN Doc. A/61/PV.107 (2007) p. 12.

Charter of the United Nations *and international law*.”²⁸ As confirmed by the International Court of Justice, “the fundamental principle of international law [is] that it prevails over domestic law.”²⁹ In this respect, making the rights recognised by the UN Declaration subject to national law would not make sense.

The definition of what exactly customary laws are is important in guiding the specific customs that will be used in justice systems. In a paper in 2013 on glossary of relevant terms, the World Intellectual Property Organization (WIPO) used Black’s Law Dictionary which defines “customary law” as law “consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.”³⁰ Customary law was also defined as “locally recognized principles, and more specific norms or rules, which are orally held and transmitted, and applied by community institutions to internally govern or guide all aspects of life.”³¹

Svensson has noted:

“Customary law is, moreover, a complex concept; it refers to ecological, political, legal as well as cultural aspects, and it is constituted by a combination of certain customs and a set of legal perceptions people in a specific culture may have. It is the customs that are law generating which are of interest, not customs as such. As a working definition, customary

28 Human rights and international solidarity, UN Commission on Human Rights Res. 2005/55, 61st session, UN Doc. E/CN.4/RES.2005/55 (2005) Preamble. [emphasis added]; See also UNHRC, Urgent Need to Improve the U.N. Standard-Setting Process and Importance of Criteria of ‘Consistent with International Law and its Progressive Development’, 62nd Sess., UN Doc. E/CN.4/2005/WG.15/CRP.3 (2005).

29 ICJ, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, (26 April 1988) I.C.J. 12, para. 57.

30 WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Glossary of Key Terms related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, 25th Sess., UN Doc. WIPO/GRTKF/IC/25/INF/7 (2013) annex, pp. 8–9.

31 *Ibid.*

law will be conceived as traditional knowledge-based rules. In my view, customary law discourse has a two-dimensional feature: first it is a matter of political strategy of actions; second it has to do with the management of traditional, locally anchored knowledge.”³²

The above definitions reveal some characteristics that customary laws may include:

- They must be more than mere customs. Rather, Indigenous customary laws are “complex systems of rules and practices which may have legal and juridical effect.”³³
- They can be oral or written; codified or not. As customary laws are closely tied to ethical, cultural and spiritual principles, their application does not necessarily follow the logic of positive law and attempts to codify or assimilate customary law into the positive law system may lead to changes in its nature and the loss of its underlying principles, nature and dynamism.
- However, they have to be viewed by the community as having binding effect, rather than simply describing actual practices.
- They may concern different aspects of community life; for example, they can relate to natural resources or inheritance, cultural and spiritual behaviour, etc.
- In addition, Indigenous customary laws are not static, in the same manner that tradition and culture are not static. They evolve and adapt to the social and economic changes.
- Finally, some will be “formally” recognized by and/or linked to the national legal systems of the country in which a community resides.

Scholars in the field of legal pluralism have written extensively about issues of justice, property rights, religion, natural resources and human rights. They have investigated the relationship between customary law and State law and debated the impact of transnational law. Indeed, discussions around Indigenous customary law have

32 Tom Svensson, *On customary law: Inquiry into an Indigenous Rights Issue*, (2003) 2 Acta Borealia. p.95.

33 *Supra* note 29, at annex, pp.8–9.

taken place before, just not within the remit of Indigenous rights and international law. For example, a lot of relevant discussion took place in Africa in the 1960s about the recognition of Indigenous customary law.³⁴ The colonial States recognized legal pluralism at the time only as a set of rules dependent on the colonial States' structures. The materials the State officials drew at the time "was mainly the interpretation of Western-educated lawyers on Indigenous law that would then be applied in practice by Western-style law courts and second, that it gave legal validity and permanence to the views of old tribal leaders and stifled progress."³⁵ Twining rightly criticises such an approach; according to him, legal pluralism is the co-existence of two or more legal orders in the same time-space context.³⁶ He continues: "It is gradually accepted that a conception of law confined to state law (...) leaves out too many significant phenomena deserving sustained juridical attention."³⁷

However, although practice worldwide has accepted sub-national juridical systems, international law has not followed. Today, there is still no explicit recognition of the right of sub-national groups to their customary laws and systems. Certainly the rights of Indigenous Peoples to their customary laws and systems seem to be more explicitly accepted than the rights of minorities. In specific, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities urges States "to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture (...) traditions and customs" but makes minorities' customs dependent on national law. ILO Convention No. 107 also makes the retention of Indigenous customs dependent on national law. Article 4.2 of ILO Convention No. 107 maintains that "due account shall be taken of the cultural and religious values and

34 Kaius Tuori, *Legal Pluralism and Modernisation: American Law professors in Ethiopia and the downfall of the reinstatements of African Customary Law* (2010) 62 *Journal of Legal Pluralism*.; also see William Twining, *The restatement of African customary law: A Comment* (1963) 3 *Journal of Modern African Law*. p.221.

35 *Ibid.*

36 William Twining, Legal Pluralism 101, (UCL and University of Miami Law School, 2010), http://www.ucl.ac.uk/laws/academics/profiles/twining/Legal_Pluralism_101_2010.pdf

37 *Ibid.*

of the forms of social control existing among these populations;” and article 7.1 maintains that “regard shall be had to their customary laws;” and article 7.2 allows Indigenous Peoples to “retain their own customs and institutions” but only where these are not incompatible with the national legal system or the objectives of integration programmes. In addition, article 8 proclaims that “to the extent consistent with the interests of the national community and the national legal system,” the methods of social control and the Indigenous customs in regard to penal matters are to be respected. In other words, although articles 7 and 8 recognise Indigenous customary laws, the language used and its qualifications act as a double sword. The requirement of compatibility of Indigenous customs and institutions with non-Indigenous ones does not stand well in today’s vision of Indigenous rights. Although the convention is now closed for ratification, it is still in force in 18 States, some with significant Indigenous populations. All provisions above are currently interpreted by the ILO bodies within the spirit of ILO Convention No. 169, the UN Declaration and general international law standards, without the limitations that were intended at the time of the drafting of the Convention. Hence, the ILO Convention No. 107 should not be quickly discarded, as it still offers protection of Indigenous cultural rights. For example, recently, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEARC) asked Iraq to provide information about measures that take Indigenous customary laws and their methods of social control into account,³⁸ while El Salvador was asked to provide more information about the effect of the Cultural Development Policy on the cultural heritage of Indigenous Peoples.³⁹

ILO Convention No. 169 is more forthcoming in its protection of Indigenous cultural rights. Article 2(1) ensures that States must take action to promote the full realization of Indigenous cultural rights “with respect for their social and cultural identity, their customs and traditions and their institutions.” The Convention asks States to take special measures to “safeguard” the cultures of Indigenous Peoples (art. 4). The

38 CEARC, 102nd ILC Sess., Direct Request (CEARC)- Indigenous and Tribal Populations Convention, 1957 (No. 107)- Iraq (2012)

39 CEARC, 101st ILC Sess., Direct Request (CEARC)- Indigenous and Tribal Populations Convention, 1957 (No. 107)- El Salvador (2011).

“social, cultural, religious and spiritual values and practices of these Peoples shall be recognised and protected” according to article 5 of the ILO Convention No. 169 and “due account shall be taken of the nature of the problems which face them both as groups and as individuals.” More specifically, the Convention requires that the “integrity of the values, practices and institutions” of Indigenous Peoples “shall be respected” (article 5b). Article 8 of the ILO Convention No. 169 requires States to give due regard to the customs or customary laws of Indigenous Peoples, when applying national laws and regulations. The ILO has explained that the criteria of article 8(1) are cumulative, in other words Indigenous customs can be restricted only when incompatible *both* with the national legislation and the international human rights standards.⁴⁰ Article 9 asks for respect of the Indigenous methods that deal with offenses and customs with respect to penal matters. The ILO monitoring mechanisms have discussed on several occasions the obligations that derive from the above provisions, especially related to customary laws and sanctions. In 2012, the CEARC asked Fiji to indicate areas where there is “an interaction between customary law and written law of the country and how the judiciary has dealt with cases of such nature, by providing copies of court decisions.”⁴¹

Indigenous communities have been disappointed that the Convention does not view Indigenous cultural rights under the framework of self-determination; this though should not detract from the effectiveness of the instrument. Indeed, the Convention has been used by several national courts on cases related to customary rights. For example, the Constitutional Court in Bolivia used the ILO Convention No. 169 provisions on cultural rights regarding sanctions imposed by an Indigenous community to its members and recognized the Indigenous sanctions, even though it said this was not an absolute right and was limited by constitutional requirements and human rights law.⁴²

40 ILO, Indigenous and Tribal Peoples Rights in Practice. A Guide to ILO Convention No. 169. (Geneva: International Labour Standards Department, 2009) p. 82.

41 CEARC, 102st ILC Sess., Direct Request (CEARC)- C169- Indigenous and Tribal Peoples Convention, 1989 (No. 169) Fiji, (2012).

42 Constitutional Court of Argentina, Constitutional Judgment 0295/2003-R, File 2002-04940-10-RAC, Judgment of 11 March, 2003.

Similarly, the Constitutional Court of Colombia also used article 8 to hold that the decisions of Indigenous communities that apply sanctions in accordance with Indigenous customary community law constitute valid decisions within their jurisdiction, unless they contravene the Constitutional guarantees for fundamental rights.⁴³ Although these decisions are great and their limitation of Indigenous laws before constitutional provisions go further than ILO Conventions No. 107 and No. 169, they were held before adoption of the UN Declaration in 2007 (2003 and 1994 respectively) and hence do not incorporate the evolution that the UN Declaration has represented in Indigenous customary laws. Article 34 of the UN Declaration embodies the right to self-determination as expressed in the Preamble and articles 3, 4 and 5 of the Declaration. Here the right to cultural autonomy is not separated from the right to self-determination as opposed, for example, to articles 1 and 27 of the ICCPR, which separate self-determination and cultural autonomy respectively. Conversely article 34 of the UN Declaration draws together self-determination and cultural autonomy.

Finally, one should not forget the important contribution of the Inter-American system of human rights protection in defending and promoting Indigenous rights. In the *Aloeboetoe* case, the Inter-American Court of Human Rights considered the marriage customs of the Saramaca people in apportioning compensation to the victims' next of kin and took into account the customary marriage practices of the Saramacan people in its decision as to who qualified as family members who would be awarded reparations.⁴⁴ The Inter-American Court also ordered reparations to reinforce the cultural traditions and customary law of the Achí Mayan Peoples when their culture was almost destroyed through human rights violations.

43 Constitutional Court of Colombia, Judgment T-254/94, Judgment of 30 May, 1994 (Rapporteur: Eduardo Cifuentes Muñoz).

44 *Aloeboetoe et al. v Suriname (Reparations)* 1993 IACHR Series C 15; 1–2 IHRR 208.

Some Challenges

Still, the maintenance of multiple legal systems within the State brings with it some challenges that have to be discussed:

1. *Conflicts with other human rights*

Many States are very reluctant to allow for Indigenous alternative judicial arrangements. They often use the argument of potential discriminatory outcomes or processes that such arrangements may have. For example, the Australian report on Customary Law states that customary law may mean control of the judicial processes by male elders who were themselves or family members were perpetrators of crimes.⁴⁵

UN bodies have also expressed their concern. The Committee on the Rights of the Child has expressed its concern for on-going discrimination against Indigenous children that touches all aspects of life, including cultural rights;⁴⁶ and customary laws and cultural practices that have a detrimental effect on Indigenous children and especially girls.⁴⁷ Similar comments have also been issued by the Committee of the Committee on the Elimination of Discrimination against Women (CEDAW), especially with respect to Indigenous cultural practices that have a negative effect on Indigenous women.⁴⁸

Article 1 of the UN Declaration confirms that the instrument is not to be examined on its own, but is part of the whole international human rights edifice. In addition, article 46.2 is a general clause recognising that the Declaration is subject to limitations “interpreted in accordance

45 Northern Territory Law Reform Committee, Report of the Committee of Enquiry, Report on Aboriginal Customary Law, (Darwin: NTLRC, 2003) p. 15.

46 Committee on the Rights of the Child, Consideration of the reports submitted by States parties under article 44 of the Convention: Concluding observations Union of Myanmar, 59th Sess., UN Doc. CRC/C/MMR/CO/3-4 (2012), para. 96.

47 CRC, Concluding observations on the consolidated second and third report of Namibia, 61st Sess., UN Doc. CRC/C/NAM/CO/3-4 (2012) para. 30 (a) & (b); also *supra* note 45.

48 For example, CEDAW, Concluding Observations of the Committee on the Elimination of Discrimination of Women, Mexico, 52nd Sess., CEDAW/C/MEX/CO/7-8 (2012) paras. 34–35; CEDAW, Concluding Observations of the Committee on the Elimination of Discrimination of Women, Paraguay, 50th Sess., CEDAW/C/PRY/CO/6 (2012) para. 32.

with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith,”⁴⁹ which are values that are common for the whole humanity. They include the principle of non-derogation of some rights, such as the right to life and prohibition of torture; and also include the core of human rights, the essence of each human right. Indigenous leaders have recognised repeatedly that no cultural practices and beliefs can violate these values and no real adjustment can be initiated to these rights. Understanding the UN Declaration as part of international law, as noted in articles 1 and 46, provides some directions about these cases.

The recognition of Indigenous laws and systems does not endanger human rights any more than the recognition of non-Indigenous or national customs. International law is open to the cultural allegiances that the individual has and views them as concentric circles around the person. All circles are protected as they all contribute to the enrichment and development of the individual. This model emphasises the commonality of values and ideas of different cultural frameworks, including Indigenous and non-Indigenous cultures. Revisibility and re-evaluation of specific expressions of cultures occur in all cultures, including the Indigenous ones, and must *prima facie* come from the group itself. Also, any assessment about a cultural practice must allow for a certain deference for the group’s “own interpretive and decision-making processes in the application of universal human rights norms, just as States are accorded such deference.”⁵⁰ Therefore, no preconceived hierarchy between the Indigenous right to custom and any other right is desirable and can be concluded by applying the UN Declaration on the Rights of Indigenous Peoples. Even when a custom violates a non-derogable right or the core of another right, a solution that would accommodate both rights must be found. However, at the very last instance, the custom that violates the core of another right

49 United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49, article 46.

50 James Anaya, International Human Rights and Indigenous Peoples. (Aspen CO: Aspen Publishers, 2009) p. 26.

cannot continue.⁵¹ This is how articles 12–14 in conjunction with articles 1 and 46.2 of the UN Declaration must be read.

2. *Hierarchy of systems*

For example, in Malaysia the traditional institutions are often undermined by the State or hybrid systems. These bodies are often established to represent Indigenous communities but gradually become the oppressor themselves as they are seen to represent the views of Indigenous Peoples even though their Indigenous composition is very limited. Therefore, Indigenous Peoples have noted that in ‘there is a need for a re-definition of the relationship between Indigenous Peoples and the State through effective negotiation processes’.⁵²

Also in Africa, the colonial State legal pluralism recognized Indigenous law only as a set of rules, while the contemporary idea of deep legal pluralism attempts to take into account Indigenous law but considers its existence independent of state structures. So, it is an often committed mistake that the interpretation of Indigenous laws and systems relies on Western-educated lawyers that would then be applied in practice by Western-style law courts. Also, the choice of who will be chosen to give his or her opinion on the Indigenous laws is usually made on the basis of convenience of the State rather than knowledge. In this issue, positive has been the new Administration of Justice Act for Greenland and a new Criminal Code for Greenland which entered into force in January 2010. District courts maintain a local presence and staff and district judges are recruited among the local population.

3. *Interpretation of Indigenous laws and systems—Capacity building*

51 Alexandra Xanthaki, *Multiculturalism and International Law: Discussing Universal Standards*, (2010) 32 Human Rights Quarterly.

52 Indigenous Governance systems in Asia, Submission by the Asia Indigenous Peoples’ Pact (AIPP) Foundation to the Study by the Expert Mechanism on the Rights of Indigenous Peoples entitled Indigenous Peoples and the Right to Participate in Decision-Making, 3d session (2010) of the Expert Mechanism on the Rights of Indigenous Peoples, Office of the High Commissioner on Human Rights, found in <http://www2.ohchr.org/english/issues/Indigenous/ExpertMechanism/3rd/docs/contributions/AIPP.doc>

The other major challenge to the Indigenous political systems is the building of the capacity of these institutions to address more effectively the more complex present-day realities and situations of Indigenous Peoples. For example, Indigenous institutions are increasingly confronted by outside entities such as corporations, international financial institutions promoting “development projects” that severely limit the rights of Indigenous communities and more often than not entail the extraction or expropriation of Indigenous lands and resources. In Malaysia, hybrid organisations such as the Village Security and Development Committees (JKKK) are seen as tools of the government to dominate and control the Indigenous Peoples or as organisations that act as ‘the ears and eyes’ of the government.⁵³

Who will decide whether the Indigenous structure, custom and right is in conflict with international human rights and on what basis?⁵⁴ Suffice to say that first, the individual whose rights are in question must be the initial point of reference; second, that the group must be allowed to exercise its own rules of interpretive and decision-making processes in the application of universal human rights norms;⁵⁵ and third, that conflicts between international human rights and Indigenous rights would put in motion the Lovelace test of proportionality, necessity, equity and balance of rights.⁵⁶

Also, there is a need for Indigenous experts to give their expertise on Indigenous laws. For example, in Palau “the courts are increasingly viewed as becoming a part of customary processes of dispute resolution, while the inclusion of chiefs in legislature and state government bodies is seen as forging a compromise between western and customary models of governance.”⁵⁷ This notion of compromise is also apparent in the Loyalty Islands Environment Charter, “which

53 *Ibid.*

54 James Anaya, Indigenous Peoples in International Law. (Oxford, Oxford University Press, 2004) 133.

55 *Supra* note 50, at p. 26.

56 Lovelace v. Ontario, 2000 (1) S.C.R 950 (SCC 37).

57 Brendan Tobin, The Role of Customary Law in Access and Benefit-sharing and Traditional Knowledge Governance: Perspectives from Andean and Pacific Island Countries. (Switzerland: WIPO & UNU, 2013) pp.1–97.

seeks to articulate customary law principles in a fashion coherent to a western legal system.”⁵⁸

Other questions that have to be addressed include more depth in the relationship between Indigenous and non-Indigenous systems of law and how they can interact with mutual respect but also efficiency; whether the Indigenous customary laws will also bind non-Indigenous Peoples that are in Indigenous areas or not; and what form of recognition the Indigenous customary laws may take.

Notwithstanding all the challenges and also the need for further reflection on customary international laws and systems, one cannot deny that important steps have been made. Certainly, the implementation of the UN Declaration on the Rights of Indigenous Peoples will push for further reflection and discussion on such matters.

58 *Ibid.*

THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES FOR ACCESS TO JUSTICE, REDRESS, RESTITUTION AND NON-RECURRENCE REGARDING VIOLATIONS OF RIGHTS AFFIRMED IN TREATIES BETWEEN INDIGENOUS NATIONS AND STATES¹

Andrea Carmen
on behalf of the
International Indian Treaty Council (IITC)

The United Nations Declaration on the Rights of Indigenous Peoples provides an essential normative framework for the development and implementation of bi-lateral mechanisms for access to justice, conflict resolution and redress of Treaty violations with the full and equal participation of both the state and Indigenous Nation Treaty partners. The Declaration also affirms core aspects reflecting the original spirit and intent of Treaties as understood by Indigenous Peoples as sacred agreements entered into by equal partners based on principles of respect, mutual responsibility and free, prior and informed consent.

In-depth analysis of the far reaching impacts and applications of this normative framework was presented in two expert submissions of the International Indian Treaty Council to the 3rd United Nations Seminar on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Peoples, 16–17 July 2012, in Geneva

1 This position paper was submitted to the United Nations Expert Mechanism on the Rights of Indigenous Peoples Study on access to justice in the promotion and protection of the rights of Indigenous Peoples by the International Indian Treaty Council, a Non-Governmental Organization with General Consultative Status with the United Nations Economic and Social Council, on February 11th, 2013 (see posting on the website of the Office of the UN High Commissioner for Human Rights, <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/AccessToJustice.aspx>). The paper was presented by Andrea Carmen on 28 February 2013 at the Expert Seminar on Access to Justice for Indigenous Peoples including Truth and Reconciliation Processes, at Columbia University, New York (27 February–1 March 2013).

Switzerland. They are listed below and links to the webpage of the UN High Commissioner for Human Rights, where they are posted, are also provided:

1. "Treaties and Original Spirit and Intent: An Historic Overview, a New Framework and Recent Advances for Conflict Resolution, Redress of Violations and Restoration of Just and Respectful Relations," by Chief Wilton Littlechild, International Chief for Treaties 6, 7 and 8 and member of the UN Expert Mechanism on the Rights of Indigenous Peoples, and Andrea Carmen, Executive Director, International Indian Treaty Council.²
2. "A Framework for Conflict Resolution, Reparations, Restitution and Redress of Treaty Violations based on the United Nations Declaration on the Rights of Indigenous Peoples and Free, Prior and Informed Consent" by the International Indian Treaty Council.³

The IITC requested that these submissions, which were directly relevant to the issues under direction in this Seminar and the EMRIP Study on to Access to Justice be considered as resource and reference texts for consideration in the development of the EMRIP Study. Both submissions highlighted specific articles of the UN Declaration on the Rights of Indigenous Peoples, which form a new rights-based framework for redress, restitution and access to justice as follows:

Article 27: States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining

2 Chief Wilton Littlechild & Andrea Carmen. Treaties and Original Spirit and Intent: An Historic Overview, A new Framework and Recent Advances for Conflict Resolution, Redress of Violations and Restoration of Just and Respectful Relations, UN Doc. HR/GENEVA/ /SEM/NGOs/2012/BP.15 (2012), <http://www.ohchr.org/Documents/Issues/IPeoples/Seminars/Treaties/BP15.pdf>

3 IITC, Treaties and Original Spirit and Intent: An Historic Overview, a New Framework and Recent Advances for Conflict Resolution, Redress of Violations and Restoration of Just and Respectful Relations, UN Doc. HR/GENEVA//SEM/NGOs/2012/BP.5 (2012), <http://www.ohchr.org/Documents/Issues/IPeoples/Seminars/Treaties/BP5.pdf>.

to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process. Indigenous peoples shall have the right to participate in this process.

Article 28: 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 40: Indigenous peoples have the right to access to and prompt decisions through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Together with article 3 (right to self-determination), article 37 (treaties, agreements and constructive arrangements), article 18 (right to participate in decision-making) and various articles affirming free, prior and informed consent, these provisions in the UN Declaration provide a principled, rights-based, but as yet unimplemented, normative framework for access to justice based on the internationally recognized minimum standards for such processes.

It is important for the EMRIP Study to include examples in which the UN Declaration has been affirmed as a guideline for the interpretation and implementation of relevant international standards to which States are legally obligated, in particular the International Convention

for the Elimination of all Forms of Racial Discrimination (ICERD). The role of the Declaration in this regard was specifically affirmed in 2008 in the recommendations of the Committee on the Elimination of Racial Discrimination ((CERD), the Treaty Monitoring Body for the ICERD) to the United States, as follows:

“While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the Declaration be used as a guide to interpret the State party’s obligations under the Convention relating to indigenous peoples.”⁴

In another historic step in advancing access to justice using the UN Declaration as the “minimum standard,” on April 20, 2012, States attending the 14th session of negotiations for the proposed American Declaration on the Rights of Indigenous Peoples in Washington, D.C. adopted by consensus article XXIII on Treaties, Agreements and other constructive arrangements. It states in paragraph 1:

“Indigenous Peoples have the right to the recognition, observance, and enforcement of the treaties, agreements and other constructive arrangements concluded with states and their successors in accordance with their true spirit and intent, in good faith, and to have the same be respected and honored by the States. States shall give due consideration to the understanding of the Indigenous Peoples in regards to treaties, agreements and other constructive arrangements. When disputes cannot be resolved between the parties in relation to such treaties, agreements and other constructive arrangements, these shall be submitted to competent bodies, including regional and international bodies, by the States or Indigenous peoples concerned.”

Other important advances have taken place to support the establishment of international mechanisms for redress and restitution, notably the new UN Special Rapporteur on the promotion of truth,

4 Committee on the Elimination of Racial Discrimination, Concluding Observations, United States of America, CERD 72nd Sess., UN Doc. CERD/C/USA/CO/6 (2008) para. 29.

justice, reparation and guarantees of non-recurrence established by the UN Human Rights Council's 18th session in September 2011. This mechanism can also make important contributions utilizing the UN Declaration on the Rights of Indigenous Peoples as a normative framework as well as the final recommendations in the EMRIP Study on Access to Justice, in particular pertaining to redress, reparations and non-recurrence regarding violations of the Treaties between Indigenous Peoples and States as they are understood and interpreted by the Indigenous Peoples.

In conclusion, the International Indian Treaty Council submitted the following recommendations:

1. That the EMRIP Study recognize, support and affirm the OAS Declaration Text Article XXIII, relevant CERD recommendations and other advances in the international arena affirming the rights in Treaties as understood and interpreted by Indigenous Peoples and advancing redress and access to justice in this regard.
2. That the EMRIP Study recommend that States and UN system implement bi-lateral, fully participatory processes for redress and restitution of rights affirmed in treaties, respecting their original spirit and intent as understood and interpreted by the Indigenous Peoples and utilizing the normative framework provided by the UN Declaration on the Rights of Peoples.
3. That the ERMIP Study recommend that the development of such effective, participatory international processes to resolve conflicts and redress violations related to Treaties and Agreements be included as focus for the 2014 World Conference on Indigenous Peoples.

Cheoque Utesia, Thank you very much.

PART II
GEOGRAPHICAL PERSPECTIVES

ACCESS TO JUSTICE IN AUSTRALIA - ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES EXPERIENCE

National Congress of Australia's First Peoples
Tammy Solonec and Katie Kiss

Introduction

The Aboriginal and Torres Strait Islander Peoples of Australia comprise the oldest living cultures in the world. Our cultures are underpinned by distinct political, cultural, social and economic institutions, and our cultures and identities form an integral part of our way of life.

Despite over two hundred years of colonial history, our ways of being, knowing and doing have survived, and differ greatly from those of the dominant population in Australia. Today, the majority of Aboriginal and Torres Strait Islander Peoples live each day between two worldviews: the Aboriginal and Torres Strait Islander worldview and the western worldview.

This has created significant challenges for Aboriginal and Torres Strait Islander Peoples and their communities, particularly in our ability to access justice, which is one of the critical issues facing our peoples, and is fundamental to our ability to access and exercise our human rights.

The ability of Aboriginal and Torres Strait Islander Peoples to access justice must be understood within a historical context. Colonisation has brought with it a justice system which includes government, legal and policy frameworks that were imposed on us without our input, consultation or consent.¹ The western justice system supports the dominant ideology, but it does not accommodate the needs or different experiences of those who are forced to comply with it,² nor does it adequately reflect the customary laws, traditions and values

1 United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49, article 19.

2 *Supra* note 1, preamble, para. 2.

of Aboriginal and Torres Strait Islander Peoples.³ In fact, in Australia the western justice system has been and continues to be used as a tool of dispossession, oppression, control, assimilation, dislocation and discrimination.

Aboriginal and Torres Strait Islander Peoples across Australia are overrepresented in all contact with the western justice system, and our engagement with the criminal justice system in particular is at critical levels. For example, we are more likely to be victims of offences.⁴ We are more likely to have contact with police. We are more likely to be charged with offences. We are more likely to be convicted of offences, and we are more likely to receive harsher sentences for offences, including receiving higher fines. On the flipside, we are less likely to receive police cautions, we are less likely to receive bail, we are less likely to receive sentences that are alternatives to incarceration, we are less likely to be granted parole once incarcerated, and we are less likely to receive access to rehabilitative and through care programs. The cycle then continues; with our people more likely to repeat offend.⁵ This is further heightened when Indigenous children in care and protection come into contact with the juvenile justice system and then in turn, the adult criminal justice system.⁶

3 *Supra* note 1, article 27.

4 Productivity Commission 2011, Overcoming Indigenous Disadvantage: Key Indicators 2011, Productivity Commission (Canberra: Council of Australian Governments, 2011), http://www.pc.gov.au/__data/assets/pdf_file/0018/111609/key-indicators-2011-report.pdf (viewed 01 March 2013).

5 Tammy Solonec, "The role other economic, social and cultural factors to Indigenous offending and solutions to overcoming the high incarceration rates of Indigenous individuals, including women and youth," Presentation made to Expert Mechanism on the Rights of Indigenous Peoples Expert Seminar on Access to Justice for Indigenous Peoples, including Truth & Reconciliation Processes (New York: Columbia University, 1 March 2013) p. 4.

6 While no nationally collated data exists within Australia, in Queensland for example, it has been found that 54 per cent of Indigenous males, and 29 per cent of Indigenous females, involved in the child protection system go on to criminally offend both as juveniles and adults. Anna Stewart, Michael Livingston & Susan Dennison Transitions and Turning Points: Examining the Links Between Child Maltreatment and Juvenile Offending, (Griffith University: Office of Crime Statistics and Research, 2005), www.ocsar.sa.gov.au/docs/other_publications/papers/AS.pdf (viewed 6 July 2013).

If the current gap in access to justice for Aboriginal and Torres Strait Islander Peoples is to be closed, innovative responses that respect cultural difference and that are based on concepts including restorative justice and justice reinvestment are necessary.

Access to justice for Aboriginal and Torres Strait Islander Peoples must be about how we are able to access and use both the Indigenous and western systems of justice to ensure the greatest possible quality of life for all Aboriginal and Torres Strait Islander Peoples.⁷ As such, access to justice for Aboriginal and Torres Strait Islander Peoples must include procedural and substantive protections across political, social, cultural, economic and environmental areas, as well as the right to impartiality, non-discrimination and access to fair and just remedies to breaches of rights.⁸

This article examines the challenges experienced by Aboriginal and Torres Strait Islander Peoples in accessing justice more broadly in Australia, and it proposes a way forward. It also considers two options that address the overrepresentation of Aboriginal and Torres Strait Islander Peoples within the criminal justice system and the high incarceration rates: justice reinvestment and the inclusion of national justice targets in the ‘Closing the Gap’ policy framework.

Aboriginal and Torres Strait Islander Peoples’ Access to Justice in Australia

Aboriginal and Torres Strait Islander People interact on a daily basis with the western justice system and it has an impact on many areas of our lives, including:

- self-determination and governance,
- equality and non-discrimination,
- recognition as First Peoples, including in the nation’s Constitution,
- access to remedies for stolen generations and stolen wages, including compensation,

⁷ *Supra* note 1, article 5.

⁸ Human Rights Council, 21st Session, Panel Discussion on Access to Justice for Indigenous Peoples (18 September 2012) Palais des Nations, Geneva.

- access to our lands, territories and resources, including land rights, native title, cultural heritage, rights to water and other resources, and compensation,
- customary law,
- protection of intellectual property and knowledge,
- access to services including housing, education, employment, social security and service delivery,
- criminal justice including victims' compensation, policing and police complaints,
- access to natural justice,
- family matters including child protection, family and domestic violence,
- wills and intestacy,
- accident and injury,
- credit and debt,
- consumer issues, and
- taxation.⁹

The 2011 National Census found that 548,370 people identified as being of Aboriginal and/or Torres Strait Islander descent. While Aboriginal and Torres Strait Islander Peoples represent only 2.5% of the Australian resident population,¹⁰ we are overrepresented in all aspects of the justice system. For example:

- Aboriginal and Torres Strait Islander adults are incarcerated at 15 times the rate of non-Indigenous adults,¹¹

9 See Fiona Allison, et al., Indigenous Legal Needs Project: NT Report, (James Cook University, Cairns 2012).

10 Australian Bureau of Statistics (ABS), 2011 Census Counts — Aboriginal and Torres Strait Islander Peoples, (Canberra: ABS 2011), (<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2075.0main+features32011> (accessed 7 February 2013)). In 2011, 35.9% of the Aboriginal and Torres Strait Islander population was aged between 0–14 years, while 3.8% were aged 65 years and over. The median age for Aboriginal and Torres Strait Islander peoples was 21 years compared with 37 years of age for non-Indigenous people.

11 Australian Bureau of Statistics, Prisoners in Australia 2012, (Canberra: ABS 2012) Cat no 4517.0, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0> (accessed 27 March 2013).

- The imprisonment rate for Aboriginal and Torres Strait Islander women has grown by 58.6% between the years 2000 to 2010, and it has grown by 35.2% for Aboriginal and Torres Strait Islander men,
- Aboriginal and Torres Strait Islander children are 24 times more likely to be in youth detention than non-Aboriginal and Torres Strait Islander young people,¹²
- Aboriginal and Torres Strait Islander Peoples are more likely than non-Aboriginal and Torres Strait Islander People to be placed in custody for trivial offences such as using offensive language, resisting arrest, breaching bail and non-payment of fines,¹³
- In 2011–12, Aboriginal and Torres Strait Islander children were subjected to child protection substantiations at a rate of 41.9 per 1000,¹⁴ nearly eight times that of non-Indigenous children, and are ten times more likely to be in out-of-home care (comprising 31% of all children in care),¹⁵ despite making up only 4.2% of the population of all children and young people,¹⁶ and are increasingly being placed with non-Aboriginal and Torres Strait Islander foster care homes,
- Aboriginal and Torres Strait and Islander Peoples who are affected by substance abuse, auditory hearing loss, cognitive and/or mental disability; as well as those who have received limited formal education, been the victim of family or domestic

12 Australian Institute of Health and Welfare, Juvenile Justice in Australian 2010–11, Juvenile Justice Series no. 10, (Canberra: AIHW 2011) Cat No JUV 10, p. 7.

13 For information about the types of crime that Aboriginal and Torres Strait Islander peoples are being incarcerated for, see: the Australian Institute of Criminology at <http://www.aic.gov.au/publications/current%20series/rpp/100-120/rpp107/09.html> (accessed 11 February 2013) and Australian Law Reform Commission, Recognition of Aboriginal Customary Laws, (Sydney: ALRC, 1986).

14 Australian Institute of Health and Welfare, Child Protection Australia 2011–12, in AIHW, Child Welfare Series no. 55, (Canberra: AIHW 2013) p. 17.

15 Australian Institute of Health and Welfare, Fact Sheet: Child protection and Aboriginal and Torres Strait Islander Children, (2011), <http://www.aifs.gov.au/cfca/pubs/factsheets/a142117/index.html> (viewed 01 March 2013).

16 Australian Bureau of Statistics (ABS), 2011 Census Counts — Aboriginal And Torres Strait Islander Peoples, (ABS 2011), <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2075.0main+features32011> (accessed 7 February 2013).

violence (including members of the Stolen Generations), and those who are poor are also overrepresented in the justice system.¹⁷

Cross-sectoral research has consistently affirmed that ‘social determinants,’ which include a person’s social and economic position in society, early life experiences, exposure to stress, educational attainment, employment status, and past exclusion from participation in society, can all influence social and emotional wellbeing and interaction with society throughout life.¹⁸ The impact of social determinants on justice outcomes for Aboriginal and Torres Strait Islander Peoples are highlighted by examples in recently published studies and reports of national inquiries. For example:

- There is a link between a failure to detect and treat oral language disorders in early childhood (i.e. relating to listening and talking skills) and an increased risk of delayed language and literacy skills, which in turn increases the risk of youth incarceration.¹⁹

17 Tammy Solonec, “The role other economic, social and cultural factors to Indigenous offending and solutions to overcoming the high incarceration rates of Indigenous individuals, including women and youth”, Presentation made to Expert Mechanism on the Rights of Indigenous Peoples Expert Seminar on Access to Justice for Indigenous Peoples, including Truth & Reconciliation Processes (New York: Columbia University, 1 March 2013) p. 5.

18 See the Report of the Royal Commission into Aboriginal Deaths in Custody, released in 1991, which investigated 99 deaths and made 339 recommendations, many of which are yet to be actioned. Royal Commission into Aboriginal Deaths in Custody, at: <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/> (viewed 01 March 2013). See also The Bringing Them Home Report on the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, released in 1995. Royal Commission into Aboriginal Deaths in Custody, at: <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/> (viewed 01 March 2013). See also United Nations Human Rights Council, Report by the Special Rapporteur on the situation of human rights fundamental freedoms of indigenous people: Situation of indigenous peoples in Australia, * UNHRC, 15th Sess., A/HRC/15/37/Add.4 (2010) on of indigenous peoples in Australia. At: <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/CountryReports.aspx> (viewed 01 March 2013).

19 Pamela Snow & Martine Powell, “Youth (in) justice: Oral language competence in early life and risk for engagement on antisocial behaviour on adolescence” (2012) 435 Trends and Issues Australian Institute of Criminology.

- A study of Aboriginal and Torres Strait Islander Peoples in Queensland prisons found that 72.8% of men and 86.1% of women had at least one mental health disorder, compared to a prevalence rate in the general community estimated at 20%.²⁰ The study concluded that the overrepresentation of Aboriginal and Torres Strait Islander people in prison, the high prevalence of mental disorder, and the frequent transitioning to and from prison, would inevitably affect Aboriginal and Torres Strait Islander communities.

Systemic Barriers to Access to Justice for Aboriginal and Torres Strait Islander Peoples—The Australian Policy Environment

Aboriginal and Torres Strait Islander overrepresentation in the justice system is the result of a complex interplay of historical and contemporary factors and social determinants. These historical factors have led to contemporary disadvantage that increases our likelihood of coming into contact with the justice system and being incarcerated.

As demonstrated in the analysis above, the drivers of access to justice are inter-related with other factors which lie outside the direct responsibility of the justice sector. Criminal justice issues are a major concern for Aboriginal and Torres Strait Islander People, and they are also a major focus of the justice response in Australia. Unfortunately, little attention is paid to civil and family law issues and the collective rights of Aboriginal and Torres Strait Islander Peoples to develop and maintain our own institutions that support access to justice, and are based on our own customs, traditions, procedures and juridical systems.

There is currently no coordinated national commitment, strategy or agreement that binds the federal and state and territory [provincial] governments to address the overrepresentation of Aboriginal and Torres Strait Islander Peoples across the spectrum of the justice system. The absence of an effective national strategy or commitment defies the fact that there is a significant gap between the level of exposure and nature of interactions of Aboriginal and Torres Strait Islander Peoples

²⁰ Edward Heffernan, et al., “Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons” (2012) 197 Medical Journal of Australia, p. 1.

with the justice system, in particular the criminal justice system as compared with non-Aboriginal and Torres Strait Islander people.

Historical and Constitutional Background

The Australian juridical system was inherited from the British at colonisation in 1788 and imposed upon Aboriginal and Torres Strait Islander Peoples. Unlike other British colonies, a treaty was not negotiated between Aboriginal and Torres Strait Islander Peoples and the colonising state. As a result, the right of Aboriginal and Torres Strait Islander Peoples to self-determination has been denied, and our sophisticated systems of customary law that existed prior to colonisation have effectively been ignored in the establishment of the Australian juridical system.²¹

The Australian Constitution, which established the Commonwealth of Australia in 1901, was drafted at a time of overt discrimination in the spirit of *terra nullius* (land owned by no one) and therefore without the input of Aboriginal and Torres Strait Islander Peoples, including women. Despite being in place for more than 100 years, the Constitution remains silent on the existence and recognition of Aboriginal and Torres Strait Islander Peoples as the First Peoples of Australia, and it contains provisions that permit and anticipate racial discrimination.²² A national debate is currently underway to address these constitutional deficiencies through a referendum. While there is currently bipartisan support from the major political parties in Australia to recognise Aboriginal and Torres Strait Islander Peoples in the Constitution, maintaining this level of support throughout the course of the referendum process will be critical.

21 Australian Law Reform Commission, Recognition of Aboriginal Customary Laws. (Sydney: ALRC, 1986), <http://www.alrc.gov.au/publications/report-31> (accessed 1 February 2013).

22 Section 51 (xxvi) of the Australian Constitution, which was the result of the historic 1967 Constitutional Referendum, enables the Parliament to make 'special laws' with regard to people of a particular race. However, the Constitution does not stipulate that these 'special laws' or policies should benefit those affected, as opposed to discriminating against them. Section 25 of the Australian Constitution currently contemplates the exclusion of voters based on race.

Australia's Federated System of Government

A particular complication of the system established by the Constitution is Australia's federated system of government.²³ While the Commonwealth has responsibility under international law for the human rights of Aboriginal and Torres Strait Islander Peoples, the areas of law that have the greatest impact on Aboriginal and Torres Strait Islander Peoples—including most criminal, child protection and family violence laws, as well as policy and legislation concerning rights to lands, territories, resources and cultural heritage protection, and economic and social rights such as health, housing and education—are laws that are primarily the responsibility of Australia's provincial governments, known as States and Territories. This means that national action on any issue requires the agreement and cooperation of nine separate governments.

Also, as there is no constitutional entrenchment of human rights, they can be taken away at the whim of successive governments. As Aboriginal lawyer and academic Megan Davis, observes:

In Australia, Indigenous interests have been accommodated in the most temporary way, by statute. What the state gives, the state can take away, as has happened with the ATSIC [Aboriginal and Torres Strait Islander Commission], the *Racial Discrimination Act* and native title.²⁴

This is demonstrated by the fact that on all three occasions that the Racial Discrimination Act 1975 (Cth) (RDA) (the federal legislation enacted by the Australian Government to embed into domestic law the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination), has been compromised, it involved Aboriginal and Torres Strait Islander issues. The most recent example is the Australian Government's Northern Territory Emergency

23 Prior to the Australian Constitution in 1901, Australia was governed by six self-governing colonies.

24 Megan Davis, "A woman's place..."(2009) 24 *Griffith Review*, p. 157.

Response (NTER) legislation, which commenced in 2007, affecting 73 remote Aboriginal communities in the Northern Territory.²⁵

In its original application, the NTER was not subject to the RDA. The NTER ended in 2012, and while the subsequent policy platform, *Stronger Futures in the Northern Territory*,²⁶ has reinstated the application of the RDA, some have argued that elements of the legislation may still be indirectly discriminatory because of the high number of Aboriginal and Torres Strait Islander people that live in the Northern Territory and due to its application through over-regulation and over-policing.²⁷

Unfortunately, relying on Parliaments to protect the rights and interests of Aboriginal and Torres Strait Islander Peoples has not provided adequate protection against racial discrimination, nor has it been effective in ensuring that the policies and laws concerning Aboriginal and Torres Strait Islander Peoples comply with both international human rights standards and domestic legal requirements.

25 Northern Territory National Emergency Response Act 2007 (Cth.).

26 Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, *Stronger Futures in the Northern Territory*, (Cth.), <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/stronger-futures-in-the-northern-territory-0> (accessed 13 August 2013). The *Stronger Futures* legislative package includes three pieces of legislation: *The Stronger Futures in the Northern Territory Act, 2012* (Cth.); *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act, 2012* (Cth.); and the *Social Security Legislation Amendment Act, 2012* (Cth.), <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/stronger-futures-in-the-northern-territory/additional-information-on-stronger-futures-legislation> (viewed on 13 August 2013).

27 Australian Human Rights Commission, *Submission to the Senate Community Affairs Legislation Committee, Stronger Futures in the Northern Territory Bill 2011 and two related Bills* (Sydney: AHRC 2012) p. 28, <https://www.humanrights.gov.au/submission-stronger-futures-northern-territory-bill-2011-2012> (viewed 13 August 2013).

Compliance with human rights standards and the United Nations Declaration on the Rights of Indigenous Peoples

The overarching international human rights instrument for Aboriginal and Torres Strait Islander Peoples is the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) as it constitutes the “minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”²⁸ The Declaration also reflects existing international human rights law including that contained within the International Covenant on Civil and Political Rights as it relates specifically to access to justice.

When the Declaration was endorsed by the Government of Australia in 2009, the Minister for Indigenous Affairs stated:

Today Australia takes another important step to make sure that the flawed policies of the past will never be re-visited... The Declaration is historic and aspirational... While it is non-binding and does not affect existing Australian law, it sets important international principles for nations to aspire to... Australia’s existing obligations under international human rights treaties are mirrored in the Declaration’s fundamental principles... The Declaration needs to be considered in its totality—each provision as part of the whole... Through the Article on self-determination, the Declaration recognises the entitlement of Indigenous peoples to have control over their destiny and to be treated respectfully.²⁹

Despite the growing jurisprudence on the Declaration, the Australian Government continues to assert that the Declaration is not legally binding on States because it does not hold the same legal status as an international covenant or treaty. Recognition and use of the Declaration across the Parliament and the bureaucracy has largely been dependent on individuals, rather than a co-ordinated policy approach or national standard.

28 *Supra* note 1, at article 43.

29 The Hon. Jenny Macklin, Minister for Families, Community Services and Indigenous Affairs, Statement regarding United Nations Declaration on the Rights of Indigenous Peoples (3 April 2009), <http://jennymacklin.fahcsia.gov.au/node/1711> (viewed 2 August 2013).

This has meant that where the participation of Aboriginal and Torres Strait Islander Peoples in the design, development, implementation and evaluation of laws and policies is encouraged in some sectors, in other sectors it is not. Consequently laws and policies that affect Aboriginal and Torres Strait Islander Peoples are not coordinated or strategically linked across sectors. In many instances policy responses are not culturally appropriate, or needs-based, and they are more often than not imposed on Aboriginal and Torres Strait Islander people and their communities as a blanket approach, rather than being implemented either in partnership with or by Aboriginal and Torres Strait Islander Peoples.

Aboriginal and Torres Strait Islander Peoples Self-determination and Governance

In order for Aboriginal and Torres Strait Islander Peoples to achieve access to justice, we must be able to exercise our right of self-determination. Fundamental to any concept of self-determination is the ability of Aboriginal and Torres Strait Islander Peoples to form and develop our own distinct institutions; determine our social, cultural, economic and political priorities; and fully participate in decisions that affect us.

Unfortunately, the right of self-determination for Aboriginal and Torres Strait Islander Peoples has long been contentious in Australia. Since colonisation, Australia has experienced waves of policy that undermine Aboriginal and Torres Strait Islander Peoples' rights to self-determination.

While Australian governments have on one hand supported institutional and community capacity building; on the other hand, they create policy or legislative arrangements that restrict the capacity of those institutions, organisations and communities. A number of examples reflect this.

With regard to Aboriginal and Torres Strait Islander autonomy and good governance within our own institutions, organisations and service providers, our national and state based peak bodies and our regional representative organisations play an important role in the

lives of Aboriginal and Torres Strait Islander Peoples. They provide a means of self-management, communication with Government, policy advice and service delivery on behalf of the communities they serve. Many of these organisations face the ongoing threat of abolition through policy reform and the withdrawal of funding support. These decisions are most often made by members of the bureaucracy in isolation of Aboriginal and Torres Strait Islander Peoples.

In 2009, a number of years after the governments' abolition of the ATSIC and in response to the *Our Future in Our Hands Report*,³⁰ the Australian Government committed \$29.2 million for the period 2010–2013, for the establishment and operation of a national representative body for Aboriginal and Torres Strait Islander Peoples, the National Congress of Australia's First Peoples (Congress).

The *Our Future in Our Hands Report* also recommended that in order to secure the future sustainability and independence of the Congress, the allocation of an Establishment Investment Fund would be necessary. Committing to the investment fund was the only recommendation from the *Our Future in Our Hands Report* that has not yet been adopted by the Australian Government. As demonstrated above, without this financial security, Congress is vulnerable to the withdrawal of government funding support, particularly in its early years when it is still establishing itself. The Establishment Investment Fund is one way in which Government can support and enable Congress and in turn support and enable effective Aboriginal and Torres Strait Islander national governance and self-determination.

A further \$15 million over three years from 2014–15 was committed to Congress in the Australian Budget 2013–14 to “enable the Congress to effectively represent Aboriginal and Torres Strait Islander peoples and to provide a vehicle for engagement and consultation on

30 Australian Human Rights Commission, "Our future in our hands" - Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples, Report of the Steering Committee for the creation of a new National Representative Body. (Sydney: AHRC 2009), http://humanrights.gov.au/social_justice/repbody/report2009/index.html (accessed 20 February 2013).

government policy and processes.”³¹ However, a federal election was held in September 2013, and the newly elected government announced in late December 2013 that it was unlikely to honour this funding commitment.³² Without this financial backing and the investment fund, the future of Congress is unclear.

As part of local government reforms in 2008, the Northern Territory Government amalgamated 60 Aboriginal Community Councils into eight ‘Super Shires’.³³ These Community Councils played a central role in communities that included advocacy and an interface with government, service delivery, and dispute resolution. Mick Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner observes that:

The impact of the reforms has significantly diminished the capacity of communities to determine and address their specific needs. While the Community Council model was not working well in every context, Community Councils themselves had provided a vehicle through which communities balanced their particular community decision-making models with the structures required by government. In contrast, the establishment of the Shires removed the capacity for discrete Aboriginal communities to prioritise their own issues. Instead the Shires model has centralised decision-making regarding service delivery across many communities.³⁴

In order for Aboriginal and Torres Strait Islander Peoples to be truly self-determining and to engage effectively with the broader societal

31 Australian Government, Budget 2013–14, Budget Paper No. 2, May 2013, http://www.budget.gov.au/2013-14/content/bp2/html/bp2_expense-10.htm (accessed 10 January 2014).

32 The Australian, Aboriginal congress told funding will go, 19 December 2013, <http://www.theaustralian.com.au/national-affairs/policy/aboriginal-congress-told-funding-will-go/story-fn9hm1pm-1226786220338#> (accessed 10 January 2014).

33 Local Government Act, 2008 (NT).

34 Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 2012, (Sydney: AHRC 2012), p. 126. Available at: <http://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 13 August 2013).

and political structures, the independence and economic sustainability of these organisations is critical. Unfortunately, many Aboriginal and Torres Strait Islander organisations are over-regulated, under-funded and under-resourced, and they face great uncertainty with regards to their future.

For example, while government funding is provided to the Aboriginal and Torres Strait Islander Legal Services (ATSILS) and the Family Violence Prevention Legal Services (FVPLS), this funding is insufficient to meet the need,³⁵ and the overrepresentation of Aboriginal and Torres Strait Islander People in prison has meant that clients facing incarceration are prioritised by ATSILS over other needs such as family or civil law issues;³⁶ and funding guidelines limit FVPLS programs to rural and remote locations, restricting service provision to urban areas.³⁷ Limited resources have also resulted in a reduced capacity for services such as those that provide preventative, early intervention and diversionary services as well as law and policy reform advice and advocacy. Despite this, the Australian Government, elected in September 2013, have confirmed that funding for Legal Policy Reform and Advocacy Funding, the program under which the ATSILS and FVPLS are funded, will be reduced by \$43.1m over a four year period.³⁸ This coupled with withdrawing funding from Congress

35 National Aboriginal and Torres Strait Islander Legal Services, Submission to the Expert Mechanism on the Rights of Indigenous Peoples: Access to Justice for Aboriginal and Torres Strait Islander peoples in Australia (2013), pp. 19–20., <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/StudyAccessToJustice/NATSILS.pdf> (accessed 8 August 2013).

36 Melanie Schwartz & Chris Cuneen "Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services" (2009) 7 *Indigenous Law Bulletin*, p. 4. <http://www.worldlii.org/au/journals/ILB/2009/4.html> (accessed 20 February 2013).

37 National Congress of Australia's First Peoples, Statement to the Expert Mechanism on the Rights of Indigenous Peoples Expert Seminar on Access to Justice for Indigenous Peoples Including Truth and Reconciliation Processes (New York: NCAFP 2013) pp. 35–36. At: <http://nationalcongress.com.au/wp-content/uploads/2013/07/20130220CongressEMRIPSubmissionAccess-to-Justice.pdf> (viewed 2 August 2013).

38 Australian Government, *Budget 2013–14*, Mid Year, Economic and Fiscal Outlook, December 2013, <http://www.budget.gov.au/2013-14/content/myefo/html/index.htm> (accessed 10 January 2014).

affects the ability of Aboriginal and Torres Strait Islander peoples to collectively advocate for policy and law reform, and to effectively promote the rights of Aboriginal and Torres Strait Islander peoples both domestically and internationally.

The ATSILS have also identified the “great need” for Aboriginal and Torres Strait Islander Peoples to be able to access highly trained interpreters, particularly where they are required to appear in Court, and have “little or no comprehension of what happens inside a court room.” This need is further exacerbated by the fact that approximately 11% of Aboriginal and Torres Strait Islander Peoples speak an Aboriginal or Torres Strait Islander language as their main language at home and this increases to 42% in many remote areas of Australia;³⁹ and that almost one in five or 19% of Aboriginal and Torres Strait Islander language speakers report that they do not speak English well.⁴⁰

With regard to land justice, each State and Territory has some form of land rights and in response to the High Court’s *Mabo* decision in 1992,⁴¹ the Australian Government with some input by Aboriginal and Torres Strait Islander Peoples enacted the *Native Title Act 1993* (Cth) (NTA). The NTA provides the federal legislative framework for recognising at common law, the effects of colonisation including dispossession, and the rights of Aboriginal and Torres Strait Islander Peoples to our lands, territories and resources.

The federal native title system provides one avenue for securing economic development opportunities through native title agreements concerning lands, territories and resources; and independent community governance through the establishment of Prescribed Bodies

39 Australian Bureau of Statistics, National Aboriginal and Torres Strait Islander Social Survey (2008) Australian Bureau of Statistics, as cited by National Aboriginal and Torres Strait Islander Legal Services, Submission to the Expert Mechanism on the Rights of Indigenous Peoples: Access to Justice for Aboriginal and Torres Strait Islander peoples in Australia (2013) p. 20, <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/StudyAccessToJustice/NATSILS.pdf> (accessed 8 August 2013).

40 Australian Bureau of Statistics, Population Characteristics, Aboriginal and Torres Strait Islander Australians (2006), as cited by National Aboriginal and Torres Strait Islander Legal Services, Submission to the Expert Mechanism on the Rights of Indigenous Peoples: Access to Justice for Aboriginal and Torres Strait Islander peoples in Australia (2013) p. 21, <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/StudyAccessToJustice/NATSILS.pdf> (accessed 8 August 2013).

41 *Mabo v Queensland* 1992 (No 2) 175 (C.L.R.), p. 1.

Corporate, set up to manage native title rights and interests. However, the adversarial nature of the native title system and the decisions of successive governments have resulted in the significant watering down of the land rights of Aboriginal and Torres Strait Islander Peoples.

Under the NTA, the burden of proof is currently on Aboriginal and Torres Strait Islander Peoples to prove a continuous connection to country; and while Indigenous and non-Indigenous interests can ‘co-exist’ in some instances, and agreement-making is possible, the rights and interests of Aboriginal and Torres Strait Islander Peoples are subordinate to non-Indigenous rights and interests. The system has also created inequality amongst Aboriginal and Torres Strait Islander Peoples whereby some acts on lands result in the extinguishment of native title, while others do not.

Without addressing issues such as adequate access to resources, the current burden of proof, the operation of the law regarding extinguishment, and the future acts regime; the native title system does not effectively promote access to justice or self-determination for Aboriginal and Torres Strait Islander Peoples.

The Way Forward

In order to facilitate access to justice across all areas that impact on the daily lives of Aboriginal and Torres Strait Islander Peoples, the historical barriers that hinder progress need to be addressed. This includes as a first step constitutional reform that recognises the unique place of Aboriginal and Torres Strait Islander Peoples as Australia’s First Peoples and which provides constitutional redress against laws that negatively affect Aboriginal and Torres Strait Islander Peoples which are racially discriminatory.

Relationships based on principles of justice, democracy, respect for human rights, non-discrimination and good faith must also be established between the State and Aboriginal and Torres Strait Islander Peoples. This is achieved by the State working with Aboriginal and Torres Strait Islander Peoples to ensure that policy and legislative structures empower, enable and facilitate access to justice as well as political, social, cultural and economic development.

The United Nations Declaration on the Rights of Indigenous Peoples

The Declaration provides the most comprehensive guide and a framework for facilitating access to justice broadly for Aboriginal and Torres Strait Islander Peoples across Australia and for Indigenous Peoples globally.

Using the Declaration as a framework and guide in the development of all policy and legislation affecting Aboriginal and Torres Strait Islander Peoples will ensure our full and effective participation in those processes; and will promote and protect our collective rights to develop and maintain our own customs, traditions, procedures and juridical systems and decision-making institutions.

Targeting justice

The current policy response designed to ‘close the gap’ in Indigenous disadvantage in Australia is the Coalition of Australian Governments (COAG)⁴² *Closing the Gap* framework.⁴³ This response was driven by Aboriginal and Torres Strait Islander peak health organisations and non-governmental health organisations focused on addressing the life expectancy gap between Aboriginal and Torres Strait Islander Peoples and the general Australian population.⁴⁴

COAG committed to closing this gap in November 2007 and in October 2008, they adopted the following six targets to support this:

42 The Council of Australian Governments (COAG) is the peak intergovernmental forum in Australia. The members of COAG are the Prime Minister, State and Territory Premiers and Chief Ministers and the President of the Australian Local Government Association.

43 Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap, The Indigenous Reform Agenda*, (Canberra: AG, 2008), <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap> (accessed 8 August 2013).

44 The Australian Bureau of Statistics estimates for 2009 show life expectancy for Indigenous Australians to be lower than the non-Indigenous population by approximately 11.5 years for males and 9.7 years for females. See Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap, the need to act*, <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap/closing-the-gap-the-need-to-act> (accessed 8 August 2013).

- close the gap in life expectancy within a generation,
- halve the gap in mortality rates for Aboriginal and Torres Strait Islander children under five years old within a decade,
- ensure all Aboriginal and Torres Strait Islander four years olds in remote communities have access to early childhood education within five years,
- halve the gap in reading, writing and numeracy achievements for Aboriginal and Torres Strait Islander children within a decade,
- halve the gap in Aboriginal and Torres Strait Islander students in year 12 attainment or equivalent attainment rates by 2020, and
- halve the gap in employment outcomes between Aboriginal and Torres Strait Islander and non- Aboriginal and Torres Strait Islander Australians within a decade.⁴⁵

This commitment is secured through the National Indigenous Reform Agreement (NIRA),⁴⁶ which commits all jurisdictions to achieving these targets. The NIRA also identifies a number of ‘Building Blocks’ to support the achievement of the targets (Early Childhood, Schooling, Health, Economic Participation, Healthy Homes, Safe Communities, and Governance and Leadership).

The Safe Communities ‘Building Block’ says that:

Indigenous people (men, women and children) need to be safe from violence, abuse and neglect. Fulfilling this need involves improving family and community safety through law and justice responses (including accessible and effective policing and an accessible justice system), victim support (including safe houses and

45 Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, Closing the Gap: Targets and building blocks (Canberra: AG, 2008), <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap/closing-the-gap-targets-and-building-blocks> (accessed 8 August 2013).

46 Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, Closing the Gap: National Indigenous Reform Agreement, <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap/closing-the-gap-national-indigenous-reform-agreement> (accessed 8 August 2013).

counselling), child protection and also preventative approaches. Addressing related factors such as alcohol and substance abuse will be critical to improving community safety, along with the improved health benefits to be obtained.⁴⁷

However, the Safe Communities ‘Building Block’ is not yet accompanied by agreed targets, funding or by explicit strategies and actions to achieve this target. It has been recommended that COAG consider the adoption of ‘justice-specific, Indigenous, closing-the-gap targets.’⁴⁸

At the time of writing, the Australian Government was in caretaker mode for a forthcoming election. The Minister for Indigenous Affairs announced that the Australian Labor Party’s election platform includes a commitment to the inclusion of a justice target in the ‘Closing the Gap’ policy framework.⁴⁹

The Steering Committee for the Review of Government Service Provision has also developed a series of ‘headline indicators,’ against which data is compiled for the Productivity Commission’s annual *Overcoming Indigenous Disadvantage* reports.⁵⁰ These include indicators in relation to family and community violence, adult imprisonment, youth detention, youth diversions and repeat offending. While this is a positive step in the right direction, these are simply indicators. A national commitment to achieving change is required.

47 Coalition of Australian Governments (COAG), National Indigenous Reform Agreement (Closing the Gap), ‘COAG Framework,’ (Canberra: COAG2012) Box 1: Building Blocks, p. 7., http://www.federalfinancialrelations.gov.au/content/npa/health_indigenous/indigenous-reform/national-agreement_sept_12.pdf (accessed 7 February 2013).

48 Standing Committee of Attorneys General, Communique, 21 & 22 July 2011 (2011) [http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communique_21-22_July_2011_FINAL.pdf/\\$file/SCAG_Communique_21-22_July_2011_FINAL.pdf](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communique_21-22_July_2011_FINAL.pdf/$file/SCAG_Communique_21-22_July_2011_FINAL.pdf) (accessed 4 June 2012).

49 Australian Labor, Media Release, Closing the Gap, Arnhem Land, (9 August 2013), http://www.alp.org.au/cm5_090813 (accessed 13 August 2013).

50 Australian Government, Productivity Commission, Overcoming Indigenous Disadvantage, <http://www.pc.gov.au/gsp/indigenous> (accessed 6 August 2013).

Justice Reinvestment

In addition to specific justice targets in the Closing the Gap policy and the Productivity Commissions indicators, justice reinvestment is being actively promoted as a model to reduce the overrepresentation of Aboriginal and Torres Strait Islander Peoples in the criminal justice system.

Developed, tried and tested in the United States of America, justice reinvestment is built on a foundation of effective participation and self-determination. There are dual objectives of justice reinvestment including easing the financial burden on society by reducing the cost of funding the justice system; and increasing social well-being by decreasing crime and improving community safety.⁵¹ This approach:

- is designed to help reverse the high levels of Indigenous incarceration and improve the lives and the well-being of communities by diverting people away from jails and from the criminal justice system to community-led development programs, and
- recognises that standardised data collection, prevention, early intervention and diversion are essential to building safe communities and reducing over-representation of Indigenous people in the criminal justice system.⁵²

Over \$2.6 billion is spent on adult imprisonment in Australia every year.⁵³ As Aboriginal and Torres Strait Islander prisoners make up about a quarter of the prison population, approximately \$650 million is spent on imprisonment of Aboriginal and Torres Strait Islander adults each year.

51 Tammy Solonec, The value of a Justice Reinvestment approach to criminal justice in Australia, Speech presented at 'Celebrating Mowanjum's Future', (Perth 10 August 2013), p. 7.

52 Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 2009, (Sydney: AHRC, 2012) pp. 15–16., <http://www.humanrights.gov.au/publications/chapter-2-introduction-social-justice-report-2009> (viewed 13 August 2013).

53 Australian Institute of Criminology, Australian Crime: Facts and Figures 2008, (Canberra: AIC, 2008) p. 110., http://www.aic.gov.au/documents/E/4/0/%7BE4031E6F-031D-415C-B544-8CE865A3CA0C%7Dfacts_and_figures_2008.pdf (viewed 14 February 2013).

Under this approach, a portion of the public funds that would have been spent on covering the costs of imprisonment are diverted to local communities that have a high concentration of offenders. The money is invested in community programs, services and activities that are aimed at addressing the underlying causes of crime in those communities.

These programs might include for example, specialist rehabilitation and prisoner through care programs, pre-release centres,⁵⁴ supervised bail programs including bail hostels and home detention schemes,⁵⁵ alcohol and drug rehabilitation centres⁵⁶ and youth services including drop-in centres. Alternative forms of dispute resolution that are provided by Aboriginal and Torres Strait Islander service providers are also critical in diverting people away from the courtroom to resolving disputes through mediation, conciliation, arbitration and transitional and restorative justice initiatives.⁵⁷

A long-term investment into justice reinvestment initiatives would pose a major policy shift for Australia away from a punitive hard on crime approach towards a diversion, rehabilitation and smart on crime approach.

Models such as this are critical to reducing the high levels of incarceration, building strong families and communities and ensuring the participation and self-determination of Aboriginal and Torres Strait Islander communities to determine their own solutions.

As identified above, a challenge for Australia in implementing a justice reinvestment approach is our federal system of government, where law and order is the jurisdiction of states and territories. If

54 See for example the Boronia Pre-Release Centre for women, <http://www.correctiveservices.wa.gov.au/prisons/prison-locations/boronia.aspx> (accessed 13 August 2013).

55 Justice Action, *Jail at Windsor*, (Sydney: JA, 2000) <http://www.justiceaction.org.au/cms/component/k2/item/307-jail-at-windsor> (accessed 13 August 2013).

56 See for example the various alcohol and drug treatment information services outlined at http://www.adin.com.au/content.asp?Document_ID=38, including the Alcohol, Education and Rehabilitation Foundation.

57 See the National Alternative Dispute Resolution Advisory Council at <http://www.nadrac.gov.au/> and in particular their report, *Indigenous Dispute Resolution and Conflict Management*, available at: <http://www.nadrac.gov.au/publications/PublicationsByDate/Pages/IndigenousDisputeResolutionandConflictManagement.aspx> (accessed 13 August 2013).

justice reinvestment is to be adopted nationally, it will require the leadership, agreement and cooperation of all states and territories and the federal Government. Alternatively, we will need to rely on state and territory governments to commit to this approach within their own jurisdictions.

On a positive note, the Australian Government is currently investigating justice reinvestment as an option for dealing with the substantial overrepresentation of Aboriginal and Torres Strait Islander Peoples in the justice system.⁵⁸

Conclusion

Access to justice for Aboriginal and Torres Strait Islander Peoples is complex and multidimensional. This article presents a number of core elements, which are necessary if we are to ‘close the gap’ in Aboriginal and Torres Strait Islander Peoples’ access to justice in Australia.

First and foremost, Aboriginal and Torres Strait Islander Peoples must be in control of our own destinies and must be supported to determine what that destiny looks like. As outlined clearly in the Declaration, Aboriginal and Torres Strait Islander Peoples must be able to exercise self-determination in order to successfully navigate our way through the western justice system that has been imposed on us, while maintaining our own cultural institutions that provide the legal and moral frameworks by which we live our daily lives.

Secondly, justice policy must be co-ordinated in order to ensure that Aboriginal and Torres Strait Islander Peoples are able to access justice in parity with the dominant resident population in Australia; and address the broad spectrum of related issues that affect Aboriginal and Torres Strait Islander Peoples’ ability to access justice.

The effect of historical barriers such as structures that promote and permit systemic racism against, and exclusion and control of Aboriginal and Torres Strait Islander Peoples cannot be underestimated in our

58 Senate Legal and Constitutional Affairs Committee, Value of a justice reinvestment approach to criminal justice in Australia, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/justice_reinvestment/index.htm (accessed 20 February 2013).

efforts to increase access to justice and must be addressed. National responses including the recognition of First Peoples in national constitutions provides a starting point for addressing some of these historical barriers and provides a point of reference for legislative and policy development into the future.

Contemporary policy responses, including a national policy framework on Aboriginal and Torres Strait Islander Peoples' access to law and justice, are also necessary mechanisms that provide guidance to governments and their bureaucracies aimed at achieving better outcomes. However, in order for them to make any significant impact, the design, development, implementation and evaluation of such mechanisms must take into account the diversity within communities and cultural considerations, requiring the full participation of those affected—Aboriginal and Torres Strait Islander Peoples and their representative organisations and institutions.

Thirdly, innovative long-term policy and legislative responses such as justice reinvestment, that put Aboriginal and Torres Strait Islander Peoples in the driver's seat of the development of community based and led solutions is the way forward. This is particularly urgent in addressing critical areas of access to justice such as incarceration.

Finally, it is important to understand the roles that each key stakeholder plays. Aboriginal and Torres Strait Islander Peoples and our organisations must take up the challenge and demand equal access to justice, and work with Governments to ensure that the proposed responses are appropriate. The Government's role is to facilitate access to justice for all Australians. As this applies to Aboriginal and Torres Strait Islander Peoples, the Declaration provides clear and extensive guidance to States in this regard.

THE ISSUES OF THE CRIMINAL JUSTICE SYSTEM AND OF RESOURCES IN AOTEOROA/NEW ZEALAND

Valmaine Toki

Within the seven regions, recognized by the United Nations, various jurisdictions have acknowledged Indigenous rights within their respective constitutions. Although not explicit, some constitutional provisions, such as those included in the Norwegian Constitution, when read together with other articles, provide tentative opportunities for the implementation of an Indigenous legal system and an Indigenous court. Some Constitutions, such as that of Ecuador, are more explicit in providing constitutional recognition of an Indigenous legal system as well as rights to nature and, the interim Constitution of Nepal, courts for Indigenous Peoples.

United Nations Declaration on the Rights of Indigenous Peoples (the Declaration)

The pivotal article within the Declaration, Article 3, articulates that;¹

Indigenous Peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 5 states that;²

Indigenous Peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

1 Article 3, United Nations Declaration on the Rights of Indigenous Peoples.

2 Article 5, United Nations Declaration on the Rights of Indigenous Peoples.

Article 5 informed by article 3 provides convincing grounds for the implementation of existing Indigenous legal systems.

Whilst some have incorporated the rights articulated in the Declaration on Rights of Indigenous Peoples, such as Congo; others, such as Chile and Bangladesh, are not so progressive. Indigenous Peoples within jurisdictions including the United States already, arguably, enjoy a level of self governance and established Tribal Courts. However, the incorporation of Indigenous rights within domestic Constitutions would support any initiative to establish an Indigenous Court.

Countries including Canada, Australia and the United States have stepped towards implementing an Indigenous Court.³ In parts of Malaysia, Native Courts have been established primarily to deal with breaches of native law and customs.⁴ These courts apply native laws and customs.⁵ In addition, African Indigenous courts, also deal exclusively with Indigenous law.⁶ In terms of their success, the anecdotal evidence is positive, however like the Rangatahi Courts (Youth Court held within a traditional forum) in New Zealand most are relatively new initiatives and reliable statistical information is absent.

Notwithstanding this provision, in New Zealand, the doctrine of parliamentary sovereignty⁷ extinguishes, replaces and limits this right. Upon the signing of the English text of the Treaty, with Maori (the Indigenous Peoples of Aotearoa/New Zealand), the English superimposed upon Maori their legal, political and social systems. Within this broader context of self-determination, this article examines two issues facing the Maori: the criminal justice system and the issues of resources.

3 For example, Koori Courts in Australia, Gladue and Cree Courts in Canada.

4 Ramy Bulan, Associate Professor Director, Centre for Malaysian Indigenous Studies, *Indigenous Peoples and the Right to Participate in Decision Making in Malaysia*. Discussion paper prepared for International Expert Seminar on Indigenous Peoples and The Right to Participate in Decision Making, Chiang Mai, Thailand, 20–22 January 2010. See also presentation given to the International Expert Seminar on Access to Justice Including Truth and Reconciliation Processes, University of Columbia, New York 27 February – 1 March 2013.

5 Bulan, *Ibid.*

6 However the Traditional Courts Bill has caused controversy. See Sipho Khumalo *Activists berate Traditional Courts Bill*, April 12, 2012 [The Mercury](#), South Africa.

7 Section 3(2) of the Supreme Court Act 2003 (NZ).

A. The criminal justice system in Aotearoa/New Zealand

Upon colonisation, the existing legal, political and social systems for Maori were subsumed into the English system. The Maori value-based systems were not encouraged, or recognized, by colonial rule. This resulted in a changing world for Maori. So, began the marginalisation and alienation of Maori.

In New Zealand, all crime is codified⁸ and thus it is not possible to be charged with a criminal offence under common law. A crime is defined as an offence for which the offender may be proceeded against by indictment.⁹ A breach of the legislation results in various forms of punishment ranging from community service to imprisonment.

With respect to criminality and offending a review by the Justice Department noted that the consequential problems of colonisation, in part, are manifested in statistics¹⁰ indicating that Maori of all age groups from 14 and older are overrepresented as offenders and more likely to be victims of violent offences than are New Zealand Europeans.¹¹

The Law Commission concurred with this finding, observing that Maori are disproportionately represented in court proceedings, with higher rates of criminal offending and incarceration than other ethnic groups when measured as a proportion of the total population.¹² A relatively recent report from the Department of Corrections also noted that Maori are overrepresented at every stage of criminal justice process.¹³ Though forming just 12.5% of the general population aged 15 and over, 42% of all criminal apprehensions involve a person identifying as Maori, as do 50% of all persons in prison. For Maori

8 See section 9 Crimes Act 1961 (NZ) Offences not to be punishable except under New Zealand Acts.

9 Section 2 NZ Crimes Act 1961 (NZ).

10 Australia Ministry of Justice, *Responses to Crime, Annual Review Ministry of Justice*, November 1999 (Canberra: AMJ, 1999).

11 *Ibid*, at p. 7.

12 Law Commission, *Report (NZLC R53) Justice: The experiences of Maori women*, Te Tikanga o te Ture : Te Matauranga o nga Wahine Maori. (Wellington: LC, 1999).

13 Strategy and Research Group Department of Corrections, *Over-representation of Maori in the criminal justice system An exploratory report policy*. (Wellington: SRGDC, 2007) p. 6.

women, the picture is even more acute: they comprise around 60% of the female prison population. There are currently 4000 Maori in prison, six times the number one might otherwise expect. Thus, there is a "...practical need to address the overrepresentation of Maori at all stages of the criminal justice system, based on the serious economic and social cost to the government, Maori communities and individuals, and society in general."¹⁴ And, considering a possible initiative the Report further notes:¹⁵

"The relatively high rates of offending by Maori and Pacific Peoples and the need for culturally appropriate responses point to the importance of both fostering diverse approaches to offending by these two groups and identifying those approaches that show most promise of reducing their over-participation in the criminal justice system as both offenders and victims" (my emphasis).

This indicates that Maori offend against the criminal code at rates higher than those for any other ethnic group in New Zealand and that there is consideration for diverse approaches to reduce the overrepresentation in the criminal justice system as both an offender and a victim. This position is similar to that of other Indigenous¹⁶ Peoples in many post-colonial countries, including Australia and Canada. Jim McLay, the Permanent Representative of New Zealand recently reported:¹⁷

"Despite many positive developments, we remain realistic about the challenges. We recognise that Maori are overrepresented in the criminal justice system, that Maori women and children experience a greater prevalence of domestic violence and that Maori face a higher number

14 *Ibid*, at p. 94 & p. 97.

15 *Ibid*, at p. 7.

16 Indigenous Peoples is a term commonly used to describe any ethnic group who inhabit the geographic region with which they have the earliest historical connection. See also Caecilie Mikkelsen (ed) *The Indigenous World 2013*. (Eks-Skolens Trykkeri IWGIA, Copenhagen, 2013).

17 Jim McLay statement to the Third Committee, 68th session of the United Nations General assembly under Item 66 Rights of Indigenous Peoples 21 October 2013 (GA/SHC/4074). Available <http://www.un.org/News/Press/docs//2013/gashc4074.doc.htm>

of health problems. **The New Zealand Government is committed to addressing these issues by improving social and economic conditions for Maori**” (my emphasis).

So what has been done?

The term tikanga (correct procedure, custom, habit) has been included within legislation however only half provide a definition of tikanga (correct procedure, custom, habit) and refer to concepts such as culture and custom. The references are more descriptive than definitive.¹⁸ This undermines consistency and intention of the legislative provision.

The preamble to the Children, Young Persons, and their Families Act 1989 (CYPF) is to:

“advance the well-being of families and the well-being of children as young persons as members of...whanau, hapu, iwi...make provisions for whanau, hapu, iwi...and the matters to be resolved where possible by their own... whanau, hapu, iwi...”

Section 13 refers to principles and that the primary role for caring and protecting the child or young person lies with the whanau (extended family), hapu (sub tribe) or iwi (tribe). Various programmes such as Family Group Conferencing¹⁹ are also provided for in the CYPF Act that acknowledge and support the participation of whanau (extended family).²⁰

Family Group Conferences

A Family Group Conference (FGC) is a meeting where a young person who has offended, their family, victims and other people meet to discuss how to assist the young person to take responsibility for their

18 See Fiona Wright, *Law, Religion and Tikanga Maori* (2007) 5 NZJPIIL at 261–299.

19 The immense contribution of Judge Mick Brown and Judge Fred McElrea to the area of Youth Offending and the Family Group Conference initiative has been invaluable. It was their pioneering approach that led to these reforms.

20 Specifically Part Two of the Act and ss 256 Procedure and 258 Functions.

actions and implement practical ways that the young person can make amends.²¹ The objective is to reach a group consensus on an outcome.

Involving the victim in the process and encouraging mediation of concerns between the victim, the offender and their families is a means to achieve reconciliation, restitution and rehabilitation.²² The FGC allows for the participation of whanau (extended family) and iwi (tribe). Furthermore, there is provision for the FGC to be held on a Marae (although this term relates to the courtyard, area in front of the whare nui, more generally this term refers to the traditional meeting house or whare nui).

The success of the FGC and adoption of the FGC by other jurisdictions is to be applauded and adds weight to the case for an Indigenous court. However, notwithstanding the inclusion of a marae setting, unlike the Rangatahi Courts there is no impetus to connect the offender with their cultural identity. Furthermore, although tikanga (correct procedure, custom, habit) may be implicit there is no explicit mention of “tikanga” (correct procedure, custom, habit) within the CYPF Act 1989.

The express recognition of Indigenous law/tikanga (correct procedure, custom, habit) Maori within the justice system varies from recognition of Maori customs and values²³ to rejecting claims based on lack of jurisdiction.²⁴ Within the criminal justice system this is further limited to incorporation into programmes by the Corrections Department.²⁵

21 See also Ministry of Justice *The Family Group Conference in Youth Justice*. Available <http://www.justice.govt.nz/publications/global-publications/y/youth-crime-action-plan-full-report/making-a-difference-how-the-youth-crime-action-plan-will-work-in-the-community/the-family-group-conference-in-youth-justice>.

22 Youth Court of New Zealand, *Family Group Conferences*, Available also at <http://www.justice.govt.nz/courts/youth/about-the-youth-court/family-group-conference#footnotes>

23 T Bennion (ed) Ngati Hokopu ki Hokowhitu v Whakatane District Council, *Maori Law Review*, July (2003), 2 – 8.

24 R v Toia CRI 2005 005 000027 Williams J HC Whangerei 9 August 2006. See also Hunt v R [2011] 2 NZLR 499 at para [82] [85] for discussion breach of tikanga, this claim was rejected by the Court.

25 For example, Te Whanau Awhina. See also domestic violence programmes at <http://www.justice.govt.nz>

Programmes

The Department of Corrections has recently evaluated two programmes.²⁶ Firstly, Te Whare Ruruhau o Meri; this programme offers a Whanau Reconciliation Support Service in recognition that many women want to return to their partners and the Service needs to support them to do so, while providing them with the best possible opportunity to be free from violence. Secondly, Tu Tama Wahine o Taranaki; this programme provides a group programme for Maori respondents.

An exciting initiative between Te Whare Whakaruru Hau (Maori Women's Refuge in Hamilton) and prisoners within the Maori Focus Units has organically developed. This initiative permits the members of the Maori Focus Units to perform work tasks, such as gardening and furniture removal, within the environs of Te Whare Whakaruruhau. Although still in its early days, and under close scrutiny and monitoring, the "relationship" between these two vehicles has anecdotally provided a "healing" process for the prisoners in the Maori Focus Units. Through this relationship, the participants within the Maori Focus Units who provide this assistance become "more aware" of the difficulties and trauma faced by the victims of domestic violence.

The Domestic Violence (Programmes) Regulations 1996²⁷ specify that Maori values and concepts are to be taken into account. Three key principles evident in these programmes are; the use of te reo (Maori language), that they are kaupapa-driven (ground rules) and, the provision of healing both the individual and the collective. This incorporation of tikanga (correct procedure, custom, habit) led to a favourable review by the Justice Department.

A recent evaluation of the Corrections Department's community-based Tikanga Maori programmes shows that offenders with a heightened awareness of their Maori heritage are more likely to choose offence-free lifestyles.²⁸ By encouraging offenders to

26 *Ibid.*

27 See Regulation 27 and also 28.

28 See Department of Corrections, Underpinning the Department's five-year Strategic Business Plan is the recognition that "to succeed overall we must succeed for Māori offenders." (2010). <http://www.corrections.govt.nz>.

increase their cultural knowledge and to reconnect with whanau (extended family), the report finds that Tikanga Māori programmes are changing lives. For Maori, the learning of pepeha (oral speech usually denoting your genealogy) and whakapapa (genealogy, lineage, descent) is about reaffirming a connection with their tribes, their ancestors, and their history.²⁹

The Ministerial Review for Tikanga Maori Programmes (“TMP”) has confirmed that TMPs:³⁰

- a) are motivational programmes incorporating principles that acknowledge Te Reo, Tikanga Maori solutions and whanau (extended family) involvement;
- b) are programmes tailored to Maori offenders to motivate them to address the underlying causes of their offending behaviour;
- c) have been operating nationally (male) offenders and locally (women) within the Public Prisons Service and the Community Probation Service;
- d) are well structured, and incorporated a range of active, passive and interactive teaching methods such as haka, waiata and korero to help increase responsivity;
- e) are consistent with Corrections legislation.

One particular initiative which provides for assistance prior to release from prison is, Whare Oranga Ake; this involves the establishment of kaupapa Maori centres to reintegrate Maori prisoners back into their communities. This initiative by Minister Sharples has attracted \$19.8 million to build and run two 16-bed Whare Oranga Ake units in Auckland and the Hawkes Bay.³¹

²⁹ *Ibid.*

³⁰ Department of Corrections, Report on Tikanga Maori Programmes. (Wellington: DC, 2010), www.ssc.govt.nz.

³¹ Department of Corrections, Whare Oranga Ake. (Wellington: DC, 2011), www.corrections.govt.nz.

It is acknowledged that initial teething problems are inevitable, however this should not stifle the enormous benefit this offers to prisoners re-integrating into society. Integration has been identified as a problem with prisoners not wanting to return to their dysfunctional families and peer groups.³²

Whilst such initiatives and reports may be applauded, these programmes are the exception rather than what is generally available for Maori. Mainstream programmes offered by providers³³ lack this content and often contribute to the disproportionate offending rates of Indigenous Peoples, particularly for women. The Human Rights Commission has also suggested that many of these programmes that are focused on individual victims and offenders, rather than on broader relationships, may be unlikely to satisfy the ambitions of those who seek the introduction or extension of programmes based on tikanga Maori.³⁴ In seeking appropriate programmes or systems, the Human Rights Commission suggests legislative backing.

A recent announcement by the Minister for Maori Affairs calls for a review of the criminal justice system stating:³⁵

‘For most Maori, justice in New Zealand is not positive; it is a system that is unfair, biased and prejudiced... the justice system, including the police, courts and corrections, systematically discriminates against Maori’ (my emphasis).

32 Department of Corrections, *Maori focus leads to positive gain* (Wellington: DC, 2010), www.corrections.govt.nz

33 Such as Preventing Violence in the Home programme. The Montgomery House violence prevention programme is a joint project between the New Zealand Department of Corrections and the New Zealand Prisoners’ Aid and Rehabilitation. The programme is an 8-week group based intervention established upon social learning and cognitive behavioural principles. Due to concerns the programme now includes a Te Whare Tapa Wha aspect that seeking to address te taha tinana (physical), te taha hinengaro (psychological), te taha wairua (spiritual), and te taha whanau (familial) needs of all residents. See The Montgomery House violence prevention programme, www.corrections.govt.nz

34 Human Rights Commission, Submission to the Justice and Electoral Select Committee on the Victims’ Rights Bill, (Wellington: HRC, 2001) p. 9., www.hrc.co.nz.

35 Neil Reid, Harawira's departure not handled well – Sharples (1 October 2011), www.stuff.co.nz/national

What is at stake for the future?

Despite these initiatives the statistics reveal that the Criminal Justice System is not working. So, should we continue to look for answers within our current paradigm? Do the answers lie with our colonisers? Or should we seek answers within our own Indigenous legal system, a realisation of the right of self-determination? If we pursue self-governing models, how would an Indigenous criminal justice system look? Such a system would be Marae based, where community would take responsibility and the offender take responsibility and provide accountability.

Justice Heath³⁶ opines that there are two options. First, that tikanga Maori, or custom, is incorporated as part of the common law and second that where both parties are Maori, tikanga Maori should be the chosen method of resolving disputes.³⁷ These two options can be accommodated by firstly overhauling the entire judicial system and parallel systems of adjudication developed, which take into account Maori custom.³⁸ Second, the existing framework could be modified enabling Maori concepts and customs to operate.³⁹ Although optimistic about the future it is unsurprising that Justice Heath favours the second option citing political acceptability as opposed to the recognition of Indigenous and original rights. In my opinion this is an opportunity lost to meaningfully address the lack for Maori of access to a fair justice system.

To support the thesis, a return to an Indigenous criminal and legal system through the realisation of self-determination, there is another element to consider that is intrinsic to the essence of Indigenous Peoples. This is realization of the inter-related the rights related to resources, including the right to own, use, develop and control their resources.⁴⁰

36 Honourable Justice Heath is a High Court Judge in New Zealand.

37 Heath, P., *One law for all – Problems in applying Maori custom law in a Unitary State* (2010–2011) Vols 13–14 *Yearbook of New Zealand Jurisprudence*. p. 197.

38 Heath, *ibid*, p. 199.

39 Heath, *ibid*, p. 199.

40 United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49, article 26.

B. The issue of resources

The rights related to resources held by Indigenous Peoples are intrinsic to Indigenous Peoples by virtue of the special relationship they have with their environment. This right not only includes control, management and use rights, consistent with articles 26 to 29, 31 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples, but also extends to ownership such as an Indigenous Right to Foreshore Seabed and an Indigenous right to water.

Foreshore Seabed

For Maori, their right to the Foreshore and Seabed is undeniable. Doctrine such as native title, aboriginal title⁴¹ and tikanga Maori support this claim. Following an application by Maori to the Waitangi Tribunal for recognition of this right, the Waitangi Tribunal⁴² stated that the Treaty of Waitangi recognised and guaranteed te tino rangatiratanga over the foreshore and seabed as at 1840 and recommended that the New Zealand Government “have a longer conversation” or “use other tools in the toolbox,” before passing legislation vesting the foreshore and seabed in the Crown.⁴³

There are many positive values of the Waitangi Tribunal, which is held up as a model for reconciliation and truth. However, the Waitangi Tribunal only provides recommendations, which are not binding on the Crown. Despite this recognition by the Waitangi Tribunal and the doctrine supporting Maori right to the foreshore and seabed, the New Zealand Government ignored their recommendations and the legislation was passed alienating Maori from their whenua (land, in this instance the foreshore and seabed).⁴⁴

41 Attorney-General v Ngati Apa [2003] 3 NZLR.

42 Waitangi Tribunal Report Wai 1071, p. 28.

43 See R Boast, *Foreshore and Seabed*, (Lexis Nexis, Wellington, 2005) p. 57

44 Foreshore Seabed Act 2004. It is acknowledged that this legislation has since been repealed and replaced by Coastal Marine Area (Takutai Moana) Act 2011, however this new piece of legislation provides for a “lesser” right for Maori upon an application.

Water

The Indigenous Peoples' Right to Water is an issue of current interest in New Zealand. The New Zealand Maori Council, in conjunction with ten co-claimant hapu (sub tribe) and iwi (tribe), filed an urgent claim, in February 2012, with the Waitangi Tribunal in response to action by the New Zealand Government to sell off 49 percent of State assets owned by State Owned Enterprise power companies (SOEs) such as Mighty River Power, Meridian Energy, and Genesis Energy. As it appeared to the Waitangi Tribunal that the imminent sale of shares in SOEs could result in 'irreversible prejudice to Maori interests if they were carried out without first protecting the Crown's ability to recognise Maori rights in water or remedy breaches of those rights,'⁴⁵ the claim was heard under urgency.

The questions posed to the Waitangi Tribunal were:

Do Maori have commercial proprietary interests in water protected by the Treaty of Waitangi?

If yes, will the sale of up to 49 percent of shares in State-owned power-generating companies affect the Crown's ability to recognise those rights and remedy their breach?

On 24 August 2012, the Waitangi Tribunal came to the view, 'after hearing the evidence and submissions of the parties, that there is a nexus between the asset to be transferred (shares in the power companies) and the Maori claim (to rights in the water used by the power companies), sufficient to require a halt if the sale would put the issue of rights recognition and remedy beyond the Crown's ability to deliver.'⁴⁶ The Waitangi Tribunal found that Maori still have residual proprietary rights in water and the Crown will breach the principles of the Treaty of Waitangi if it goes ahead with the intended share sale.

Citing the example of Lake Omapere in Northland the Waitangi Tribunal recalled the 'historical claims made by Maori for legal recognition of their proprietary rights in water noting that Maori have unique customary rights and authority asserted over their water bodies

45 Waitangi Tribunal Report 2358.

46 Waitangi Tribunal Report 2358.

in 1840 (and still assert today).⁷⁴⁷ This claim by Maori was viewed as once again a request to the ‘State to recognise and protect Maori proprietary rights in water and water bodies.’⁷⁴⁸ If a framework could not be agreed upon to recognise these rights, it was suggested by Maori that compensation be available.

Maori relied on article 2 of the Treaty of Waitangi that guaranteed them the ‘full, exclusive and undisturbed possession’ of their properties (in English) and te tino rangatiratanga (full authority) over their taonga (treasured possessions) (in te reo Maori).

The common law doctrine of native title, aboriginal title, customary title, international law, tikanga Maori, the first law of Aotearoa, New Zealand⁴⁹, case law⁵⁰ and previous Waitangi Tribunal’s recommendations⁵¹ provided further avenues of recognition for this right to water.⁵² The precedents set by the 1896 Maori Land Court decision to vest Poroti Springs in six Maori owners, and the determination by the Maori Land Court that Maori owned Lake Omapere also provided compelling grounds for an Indigenous right to water.

The Crown’s position however was that Maori have legitimate rights and interests in water, but no one owns water and therefore the best way forward is not to develop a framework for Maori proprietary

47 Waitangi Tribunal Report 2358.

48 Waitangi Tribunal Report 2358.

49 See Ani Mikaere, *The Treaty of Waitangi and Recognition of Tikanga Maori* in Michael Belgrave, Merata Kawharu and David Williams (ed) Waitangi Revisited Perspectives on the Treaty of Waitangi. (Oxford University Press, Victoria, 2005) pp. 331–332.

50 See discussion in Attorney General v Ngati Apa [2003] 3 NZLR 641, which provides that the law should recognise customary rights in accordance to Maori custom. When discussing sovereignty and absolute ownership, Tipping J notes at [204], “The Crown’s ownership is and never has been absolute in this respect. It is and always has been subject to the customary rights and usages of Maori...”

51 See the Waitangi Tribunal Te Ika Whenua Rivers Report. (Wai 212, 1998) where: “The Tribunal...made a number of recommendations to the Crown relating to the recognition of Te Ika Whenua’s residual rights in the rivers, the management and control of the rivers, the vesting of certain parts of the riverbeds in the claimants, and the compensation owed to them for the loss of title resulting from the application of the *ad medium filum aquae* rule.” See also Waitangi Tribunal The Whanganui River Report. (Wai 167, 1999).

52 Jacinta Ruru, *Introducing Why it Matters: Indigenous Peoples, the Law and Water* (2010) 20 Water Law. p. 221.

rights, but to strengthen the role and authority of Maori in resource management processes. On that basis, Crown decided to proceed with the sale in spite of the Waitangi Tribunal recommendations to the contrary. As with rights to the foreshore and seabed, the Crown chose to ignore the recommendations from the Waitangi Tribunal.

Maori appealed to the Supreme Court. A decision of the Court in February 2013 dismissed the appeal from the New Zealand Maori Council, on behalf of Maori, to block the Mighty River Power partial privatization. The full court of five Supreme Court judges was unanimous in its findings that enabled the New Zealand Government to proceed with the sale of up to 49 percent of Mighty River Power. The Court concluded “that the partial privatization of Mighty River Power will not impair to a material extent the Crown’s ability to remedy any Treaty breach in respect of Maori interests” and dismissed the appeal.

The commodification of this Indigenous right to water, a right sourced from various threads, without meaningful engagement with Maori, lies contrary to doctrines, principles and precedents. The New Zealand Government’s commodification of water as a property right, through legislation,⁵³ without recognition of any original or native title right to water, is in breach of this right. Indigenous Peoples are often side-lined when it comes to issues of information, consultation and development of water policies; the New Zealand Government utilising the principle of parliamentary sovereignty to justify the alienation of these rights through legislation.⁵⁴

The current legislation implemented by the New Zealand Government does not include a meaningful Indigenous perspective to water. Instead, we see examples of mismanagement and over allocation to intensive agricultural practices and extractive industries such as mining. This results in polluted waterways, ecosystems and livelihoods,

53 Examples of this arise in the Water and Soil Conservation Act 1967 and the Resource Management Act 1991, which allows the Crown to assert rights over water without consultation with Māori.

54 See *Attorney General v Ngati Apa*, where the New Zealand Government, despite the findings in this case, passed legislation, the Foreshore Seabed Act 2004, to vest the foreshore and seabed in the Crown, denying Maori the right of due process. This legislation has now been repealed.

causing harm. Any reference to indiginity is overridden by competing considerations.⁵⁵

Drawing together all our threads, it would seem prudent, and long overdue, that the New Zealand Government engages with Maori to secure their free, prior and informed consent to allocate these proprietary use rights meaningfully.

Conclusions

The right to self-determination is imperative as is the mandatory inclusion of Indigenous Peoples as decision makers, particularly when the substantive issue is an Indigenous right. This is the case whether the context is access to justice systems, particularly Indigenous justice systems, or access to other rights, including those related to resources. The thrust of self-determination is to enable Indigenous Peoples the human right to be in control of their destinies and to create their own political and legal organisation of their territories, which will not necessarily amount to separate statehood: however, the possibility remains.

Glossary of Terms

Hapu	Sub tribe
Iwi	Tribe, extended kinship, nation, people
Kai	Food
Kaitiaki	Guardian
Karakia	Prayer
Kaumatua	Maori elderly man or woman
Kaupapa	Ground rules

⁵⁵ Sections 6(e), 7(a) and 8 of the Resource Management Act 1991 recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga (s 6(e)); have particular regard to kaitiakitanga (s 7(a)), and take into account the principles of the Treaty of Waitangi (s 8). However, these sections are but one issue to be taken into account by the decision-makers when determining the purpose of the Act.

Kawa	Customs and protocol
Kuia	Maori elderly woman, grandmother
Mana	Power, prestige
Marae	Courtyard, area in front of the whare nui
Mihi	Maori speech of greeting
Pepeha	Oral speech usually denoting your genealogy
Rangatahi	Youth
Tangata Whenua	People of the Land, local people
Taonga	Treasure/treasured possessions
Te Reo	Maori language
Turangawaewae	Place to stand, rights of residence
Tikanga	Correct procedure, custom, habit,
Tino rangatiratanga	Full Authority
Whakapapa	Genealogy, lineage, descent
Whanau	Extended family, family group
Whare Nui	Traditional meeting house, large hui

ACCESS TO JUSTICE FOR INDIGENOUS PEOPLES IN AFRICA

Laura A. Young¹ and Korir Sing'Oei²

Introduction

In preparation for the 2014 World Conference on Indigenous Peoples, Indigenous community representatives from across Africa traveled to Nairobi for a conference in December 2012. The participants identified access to justice as a primary concern for Indigenous Peoples in Africa—whether political recognition and participation, criminal justice, or land rights, Indigenous representatives were clear that their communities struggle to access remedies for violations of their rights.³ This paper provides a broad overview of the situation for access to justice on the continent—from national legal frameworks, to judicial decisions, to regional human rights bodies, to transitional justice mechanisms. While African Indigenous Peoples' access to justice concerns are similar to those of Indigenous Peoples around the globe, some specific issues emerge in the African context, such as how to understand the very existence of Indigenous Peoples on the continent. Ultimately, the paper makes clear that access to justice for Indigenous Peoples is more a political than legal issue, and that State political will to implement positive decisions in favor of Indigenous rights is one of the primary challenges for Indigenous Peoples.

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3 See Mainyoi Pastoralist Integrated Development Organisation (MPIDO), *Proceedings Report: Africa Preparatory Meeting for the World Conference on Indigenous Peoples*. (Nairobi: Dec. 2012).

i. Do Indigenous Peoples exist in Africa?

The first challenge to access to justice for Indigenous Peoples in Africa is simple recognition of indigenoussness as a valid identifier for communities with unique histories and relationships to territories. The existence of Indigenous Peoples in Africa remains a contested notion. An unstudied, yet common, refrain is that all black Africans are Indigenous to Africa. Accordingly, the concept of Indigenoussness loses any meaning because it includes every black African. Scholars have presented a more nuanced critique identifying the risk of using the notion of Indigenoussness in the contexts of ethnically diverse and divided societies. As Felix Ndahinda, a Rwandan scholar, points out, the “[i]mplications of indigenous identification for other groups in multi-ethnic countries remains one feature of indigenous rights discourse in need of further clarification.”⁴ Indeed, in regions where tribalism remains a major threat to peace and stability, the idea of Indigenoussness can appear to feed such divisive notions.

The colonial legacy in Africa and the legacy of pan-African struggles for political independence created unique struggles for Indigenous Peoples. In recent decades, the concept of Indigenoussness has begun a transition from a term that included all black Africans in contrast to white settlers, to a term that now includes certain self-identified African communities in contrast to their (often surrounding) African neighbors. This view appears to be acquiring resonance even among states such as the Republic of Congo (Brazzaville) which recently adopted a law on Indigenous Peoples’ rights.⁵

Across the globe the definition of Indigenous Peoples has been contested in part because the relationships between Indigenous Peoples

4 FM Ndahinda, Indigenoussness in Africa—a contested legal framework for empowerment of “marginalized” communities. (The Hague: Springer, 2011), p. 211.

5 Act No. 5-2011 of 25 February 2011, On the Promotion and Protection of Indigenous Populations, available at http://www.iwgia.org/iwgia_files_news_files/0368_Congolese_Legislation_on_Indigenous_Peoples.pdf. This law defines Indigenous Peoples thus: “the term Indigenous populations mean populations who are different from the national population by their cultural identity, lifestyle and extreme vulnerability.” This definition underscores two characteristics that are being deployed elsewhere in the continent: ethno-cultural distinctiveness from dominant populations and economic vulnerability.

and dominant or mainstream groups in society vary from country to country. While the United Nations Declaration on the Rights of Indigenous Peoples⁶ deliberately avoided developing any definition of Indigenous Peoples, a working definition of common characteristics was proposed by the United Nations and is relevant to the controversies surrounding indigenes in Africa:

“Indigenous communities, Peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as Peoples, in accordance with their own cultural patterns, social institutions and legal systems.”⁷

The critical issue in relation to identifying Indigenous Peoples in Africa is the focus on territory and distinctiveness. Africa traditionally has been and remains a continent of Peoples tied to their land, with distinct ethnic communities claiming certain territories. Colonial domination tended to enhance ethnic enclaves within arbitrary borders, often naming regions for the ethnic groups that were found within them when the settlers arrived. Migration of Peoples in response to climatic change and conflict has been a constant feature of African life for centuries; many African ethnic groups adopted nomadism as a tool of survival. All of these factors make the modern notion of Indigenous rights a complicated overlay for the African context.

Despite this, many African communities have self-identified as Indigenous and have been recognized as Indigenous by the State. Traditional hunter-gatherer Batwa, residing in Uganda, Rwanda, Burundi and the Democratic Republic of the Congo are some of the most widely recognized, and most marginalized, Indigenous Peoples

6 UN GA Res. 61/295, 107th Plenary Meeting, 13 September 2007.

7 Study of the Problem of Discrimination Against Indigenous Populations, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986).

in Africa. Khoe-San, including their subgroups, reside primarily in the Northern and Western Cape regions of South Africa.⁸ Some San subgroups still rely in part on hunting and gathering, but all Indigenous groups in South Africa have had to adopt other livelihoods. Khoe-San have been recognized by multiple authorities, including the South African government, as the first inhabitants and self-identified Indigenous Peoples of South Africa.⁹ Highly multi-ethnic nations such as Nigeria and Kenya include multiple communities that self-identify as Indigenous Peoples. In Kenya for instance, where the census identifies well over 100 distinct ethno-linguistic groups,¹⁰ these include traditional hunter-gatherer communities such as Ogiek and Sengwer, multiple pastoralists groups such as Maasai, Turkana, Samburu, and Endorois, as well as fisher Peoples such as Il Chamus.¹¹ In North Africa, Imazighen are Indigenous inhabitants of the Maghreb residing in Morocco, Algeria, and Tunisia.¹² Imazighen have preserved their language, Tamazight, and have traditionally lived a semi-nomadic existence. In West Africa, Tuaregs self-identify as the Indigenous Peoples of the Sahel. These communities have clamored for more definitional clarity of Indigeneity on the continent.

In 2010, a Kenyan case before the African Commission on Human and Peoples' Rights (African Commission) responded to those concerns. In its decision in the communication on *Endorois Welfare Council v. Kenya*, the African Commission confirmed guidelines on identifying Indigenous Peoples that were laid out by its Working Group of Experts on Indigenous Populations/Communities. The four criteria for identifying African Indigenous Peoples are: the occupation

8 University of Pretoria Centre for Human Rights, South Africa: constitutional, legislative and administrative provisions concerning Indigenous Peoples. (Geneva: ILO, 2009), pp. 4–5.

9 *Id.*, pp. 2–3.

10 Ethnic affiliation for the 2009 census is reported by the Kenya National Bureau of Statistics at <http://www.knbs.or.ke/censusethnic.php>.

11 MO Makoloo, Kenya: Minorities, Indigenous Peoples and Ethnic Diversity. London: Minority Rights Group International, 2005, <http://www.minorityrights.org/download.php?id=147>.

12 M Martin, *Moroccan Constitutional Reform: Berbers Say the Battle's Just Begun*, International Business Times. July 6, 2011 <http://www.ibtimes.com/articles/175560/20110706/morocco-constitution-morocco-constitutional-reform-berber-activists.htm>.

and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; and an experience of subjugation, marginalization, dispossession, exclusion or discrimination.¹³ The African Commission further specified that Indigenous groups in Africa include hunter-gatherers, certain pastoralists, and other groups for which “survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon.”¹⁴

The African Commission’s definitional guidelines in the *Endorois* decision also highlight an important trend in the approach to Indigenosity in Africa. Faced with challenges from the State and other actors to the very notion of Indigenosity, many African Indigenous communities have instead adopted “marginalized” community as an alternative identifier. Using the proxy of marginality to address the concerns of Indigenous Peoples has proven less politically volatile for some groups, but also strips Indigenous Peoples of their recourse to international and regional standards, such as the UN Declaration on the Rights of Indigenous Peoples. In Kenya for example, the proxy of marginality has been embedded in the Constitution (2010) in which “marginalized” groups and communities (of which Indigenous Peoples are included along with multiple other categories) are given certain protections under law.¹⁵ The specific rights of Indigenous Peoples, however, are not recognized.

Accordingly, the first access-to-justice challenge for Indigenous Peoples in Africa remains the very validity of the concept of indigenosity in the African historical, political and ethnic context.

ii. African legal frameworks

Access to justice is a fundamental human right enshrined in African regional human rights instruments, specifically the African [Banjul]

13 Communication No. 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Decision on the Merits* (African Commission on Human and Peoples’ Rights 2010), para. 149.

14 *Id.*

15 See, e.g., articles 260, 56 and 100 of the Constitution of Kenya (2010).

Charter on Human and Peoples' Rights¹⁶ (ACHPR), as well as in the majority of African constitutions. For Indigenous Peoples in particular, effective access to justice has multiple pillars that should operate holistically to ensure that the most vulnerable groups in society can make use of the multiple systems they need to protect their rights. Accordingly, access to justice for Indigenous Peoples encompasses the constitution and laws, customary justice systems, formal justice mechanisms, administrative mechanisms, legal aid policy, and rights-based education and awareness.

For Indigenous Peoples, access to justice ultimately depends on the interaction of these legal structures with their collective rights: the right to recognition, the right to land and natural resources, the right to development, the right to participation, the right to non-discrimination and substantive equality, and the right to be free from violence. Although this paper cannot comprehensively address each of these topics for the entire continent, the following paragraphs use selected examples to give a broad view of access to justice for Indigenous Peoples in Africa.

ii.a. Formal legal frameworks

Across Africa, constitutional and legislative frameworks are rapidly transforming. This transformation has been largely positive, from a purely legal standpoint. Many African nations are now enjoying “third generation” constitutions having grown through first generation colonial instruments, second generation independence-era constitutions, and, in the last two decades, third generation constitutions that have emerged out of transitions from military rule or other forms of political oppression and violence. These third-generation constitutions embrace third-generation human rights,¹⁷ encompassing protections not only for civil and political rights, but also for economic and social rights, as well as environmental rights and “collective” rights in some African

16 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

17 See Karel Vasak, *Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of Law to the Universal Declaration of Human Rights*, UNESCO Courier, 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977.

countries. South Africa's Constitution is widely acclaimed for such progressive human rights protections, but other nations also have demonstrated extremely progressive provisions in their constitutional frameworks that are directly relevant to the protection of the rights of Indigenous communities. The Ethiopian Constitution's (1995) model of ethnic federalism was designed to protect cultural, linguistic and self-determination rights among others.¹⁸ The Constitution of Kenya (2010) protects first, second and third generation rights and specifies a cadre of rights applying only to marginalized communities and groups as noted above. The Constitution of Namibia (1998) provides clear protections for third generation rights.¹⁹ Most African constitutions also explicitly recognize customary law, to the extent that customary law does not conflict with constitutional human rights protections.

It is in the translation of constitutional provisions into legislation where one first sees the challenges in implementation of Africa's progressive constitutions. While many laws in African countries provide important protections that can apply to Indigenous Peoples,²⁰ legislation often fails to live up to the constitutional ideals it is intended to make operational. Breakdown in the translation of constitutional principles into applicable legislation often has a deleterious impact on Indigenous Peoples in Africa.²¹ Indigenous Peoples often lack the political power to force changes in laws, either when they are proposed or after they are promulgated. Accordingly, third generation constitutions do not always translate into effective protection of third generation rights for Indigenous Peoples on the ground.

18 Tsegaye Regassa, *Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia*, *Mizan Law Review*, 3(2), pp. 288–330.

19 Oliver Ruppel, *Third-generation human rights and the protection of the environment in Namibia*, in *Human Rights and the Rule of Law in Namibia*. Eds. Horn N / Bösl A (Windhoek: Macmillan Publishers) (2008).

20 For instance, Namibia's Traditional Authorities Act (No. 5 of 2000) provides important sovereignty for so-called "traditional" communities and their role in protection of natural environmental resources in Namibia.

21 For example, in the context of Kenya, minority representation has been denuded by an unclear legal framework despite constitutional intent to promote inclusion of marginalized communities. See e.g. Korir Sing'Oei, Yash Ghai, Jill Ghai & Waikwa Wanyoike, *Taking diversity seriously: minorities and political participation in Kenya*. (Nairobi: Katiba Institute, Jan. 2013).

ii.b. Interaction of formal and customary laws

While formal legal frameworks tend to undermine and dilute collective rights, customary systems of dispute resolution, community governance, family law, and land management are still dominant in the lives of most African communities. This is particularly the case for African Indigenous Peoples. The recognition of customary law across Africa varies widely. Even in situations in which customary law is effectively recognized by the State, in practice it often will be recognized only to the extent that it manages affairs within the community or between community members. South Africa has developed a robust legislative system for recognition of customary law, yet it has found such recognition to be challenging. In 2010, for example, the Constitutional Court rejected the Communal Land Rights Act in its entirety.²² The act had been designed to provide enhanced security of tenure to communities in South Africa by vesting ownership in the community as a whole.

Accordingly, customary law has proven to be a double edged sword for African Indigenous communities. On the one hand it provides critically important access to dispute resolution for community members who have no access to formal court systems because of distance, user-fees, and language or cultural barriers. Moreover, customary systems of negotiation and peace building have been effectively used to mitigate inter-community conflict, including cross-border conflicts, in some countries.²³ Customary justice systems also perpetuate culture in communities that are under constant pressure to assimilate. On the other hand, Indigenous communities in Africa find that their systems of customary justice are under continual attack and regularly

22 *Tongoane and others v. Minister for Agriculture and Land Affairs and others.* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010).

23 See, e.g., Chopra, Tanja, *Peace versus justice in northern Kenya: Dialectics of state and community laws*, in Ghai, Yash, and Jill Cottrell, eds. Marginalized Communities and Access to Justice. Routledge, 2010; Laura A. Young and Korir Sing'Oei, Land, livelihoods and identity: Inter-community conflicts in East Africa. (London: Minority Rights Group International, 2011); Abraham Korir Sing'Oei, Customary Law and Conflict Resolution among Kenya's Pastoralist Communities, Indigenous Affairs. (Copenhagen: IWIGIA, Jan-Feb 2010).

are misconstrued. Attacks related to gender inequity and harmful practices are frequent from state institutions and the international human rights community. Harmful practices, such as trial by ordeal or corporal punishments have been banned, but often without providing viable and culturally valid alternatives.²⁴ The treatment of Indigenous women in African customary justice systems often is analyzed with little understanding of the diversity and nuance within these systems and a lack of understanding of loci of power for women in Indigenous cultures. While the dangers of patriarchy and inequality are very real for Indigenous women (as they are for all women), the potential for African women to effectively exploit customary systems with which they are intimately familiar and which have a proven ability to adapt throughout changing contexts often has been underestimated.²⁵ African Indigenous women live by, and challenge, customary law on a daily basis, continually pushing the boundaries of custom to change and recognize their rights in a changing world.

The clash of custom and formal laws creates significant challenges for Indigenous Peoples' access to justice. Indigenous communities also find themselves forced to interact with the formal or state legal system in many instances, in relation to land and natural resources disputes with the state, disputes with corporate bodies, and criminal prosecutions, for example. While the formal justice system may in some instances recognize certain aspects of custom, as a South African scholar points out, formal or "State" justice systems have been unable so far to accommodate customary law in its difference, in its otherness.²⁶ Attempting to fit dynamic, adaptive customary law systems into a box that can be contained within the legal reasoning of the formal system has often proven impossible. This can significantly hamper Indigenous Peoples' access to justice because legal results become arbitrary and unpredictable.

24 For example, in Liberia, transitioning away from a system that made regular use of trial by ordeal has been an ongoing challenge in the post-conflict period.

25 See, e.g., Laura A. Young, Challenges at the intersection of gender and ethnicity in Kenya. (London: Minority Rights Group International, 2012).

26 Wilmeine Wicomb, The Emancipatory Potential of Customary Law for the Rights of Women to Access Land, Indigenous Affairs. (Copenhagen: IWGIA, Jan-Feb 2010).

An effort to change these paradigms is ongoing in Uganda, for example, where a non-governmental organization is challenging the traditional notions of patriarchy in Indigenous customary law and also is attempting to make customary law more accessible when it intersects with the formal courts. In the Teso region of Uganda, the non-governmental Land and Equity Movement in Uganda (LEMU) builds upon Uganda's constitutional recognition of customary land and inheritance rights to enhance protection for women's tenure rights. The group worked closely with Iteso leaders over a period of years to document customary tenure rights and land management practices in Iteso clans. The result is a booklet that is available to community members, clan leaders, and to the Ugandan judiciary which is entitled *Principles and Practices to provide for rights over customary land, procedure for sale of land and to provide for other land-related and land incidental [sic] matters in Teso*. Designed to assist customary authorities and formal courts in making determinations about land conflicts, the *Principles and Practices* highlight the detailed ways in which Iteso regulate land holding, land use, and land transfers.

The *Principles and Practices* are based on a consultative community process and integrate gender equity provisions in a way that makes sense for Iteso culture. The *Principles and Practices* contain specific provisions about the rights of Iteso widows—some of the most marginalized members of African communities—for example:

“l) All widows whether living alone or with a male partner from within the clan become heads of their families upon the death of their husbands with full rights to manage her land and the land of her children who are minors.

m) The clan of the deceased husband shall appoint a man to protect the land rights of a widow from trespassers but the land rights of the widow shall not pass onto the officer appointed to protect the widow.”

A similar process of “restatement” of customary law is ongoing in Namibia, instigated not by an NGO but by a decision of the Namibian Council of Traditional Leaders.²⁷ The restatement project has multiple

27 George Mukundi Wachira, *Applying Indigenous Peoples' Customary Law in*

goals, including preserving customary practices for future generations as well as bringing the customary laws of various Namibian communities into alignment with human rights protections as specified in the Namibian Constitution. These types of efforts to enhance the recognition and understanding of customary principles will be critical to maintaining Indigenous Peoples' identity through customary law while enhancing their access to legal remedies.

ii.c. Judicial protection of rights of minorities

Like minorities around the globe, Indigenous Peoples in Africa have sought recourse in formal courts. However, despite positive judicial decisions, many African States have stubbornly refused to be bound by the declarations of their own courts. While known for their inefficiency and corruption, courts in Africa "have become the theatre for dramatizing the plight of Indigenous rights and the sheer scale of their destitution."²⁸ The role of courts in protecting minority rights was aptly captured in the celebrated South African case of *State v Makwanyane and Machunu*, where the Court held that:

"The very reason for... vesting the power of judicial review of all legislation in the courts was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected."²⁹

An example from Kenya, where many Indigenous communities have attempted to litigate violations of their rights, demonstrates state

Order to Protect their Land Rights in Africa, Indigenous Affairs. (Copenhagen: IWGIA, Jan-Feb 2010).

28 Korir A Sing'Oei, *Indigenous People in Africa: A Quest Yet Unmet* in Hakima Abbas (ed) *Africa's Long Road to Rights: Reflections on the 20th Anniversary of the African Commission on Human and Peoples' Rights.* (2007) 36 (Fahamu - Oxford: London).

29 *State v Makwanyane and Machunu*, 1995 (3) SA 391 (CC).

failures to recognize judicial decisions on Indigenous rights. The Il Chamus (also known as the *Njemps*), are a Kenyan Indigenous People with a distinct history and language living around the shores of Lake Baringo. Before the High Court of Kenya, they argued that they were an Indigenous minority group and that a member of their community had never and could never represent them in parliament because the demarcation of the constituency boundaries in Baringo made them a perpetual minority.³⁰ Consequently, the Il Chamus contended that this demarcation violated their fundamental right to representation. The Constitutional bench³¹ declared:

“minorities of whatever time and shade are entitled to protection. And in the context of Constitution making it is to be remembered that the Constitution is being made for all, majorities and minorities alike and accordingly, the voice of all should be heard...what is called for in a society such as ours is a balance between majoritarian principle of one person one vote and the equally democratic dictates of minority accommodation in the democratic process...”

The Constitutional bench further held that:

- The Il Chamus are a unique cohesive homogenous and a cultural distinct minority being. “A group numerically inferior to the rest of the population of a state, and in a non-dominant position whose members—being nationals of the state—poses 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, religions and language.”³²
- The Il Chamus have the right to influence the formulation and implementation of public policy, and to be represented by

30 Kenya High Court Civil Application 305/2004 *Rangal Lemaiguran and Others v Attorney General and others* (Per J.G. Nyamu J. and M.J. Anyara Emukule J.).

31 Kenya at the time had no permanent constitutional court and used administrative powers granted to the Chief Justice to appoint a constitutional bench whenever an application of a constitutional nature was brought before the High Court.

32 The definition was proposed by the United Nations Special Rapporteur Francesco Capotorti of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in the context of Article 27 of the International Covenant on Civil and Political Rights.

people belonging to the same social, cultural and economic context as themselves. The Electoral Commission of Kenya had a duty to protect minority interests—the principle of one-man one vote notwithstanding. It should not submerge minority groups in drawn boundaries.

- For a political system to be truly democratic, it has to allow minorities a voice of their own, to articulate their distinct concerns and seek redress and thereby lay a sure base for deliberative democracy. Participation is a lifeline of democracy and a clear constitutional recognition of a minority—to participate in the State's political process and to influence State Policies.
- The Il Chamus' rights to exist, be treated without discrimination, the preservation of their cultural identity, freedom of conscience, freedom of association and their participation in public life had been violated.

The Court then directed the Electoral Commission of Kenya to take into account all the requirements set out in section 42 of the then Constitution of Kenya at its next Boundary Review and in particular ensure adequate representation of sparsely- populated rural areas, population trends, and community of interest, including those of minorities especially the Il Chamus. Despite this judicial determination, more than five years later the Il Chamus have yet to enjoy the political recognition ordered by the court due to the Kenyan state's failure to abide by the judgment.

These concerns are not limited to East Africa. In Southern Africa, the Basarwa, a hunting gathering and mobile minority and Indigenous community resident within the Central Kalahari Game Reserve³³ sought a High Court declaration that their removal from the Reserve was unlawful and unconstitutional and the termination by the Botswana government of provision of water and other essential services within the Reserve amounted to a deprivation of the right to life under the

33 Similar in size to Belgium, the Reserve is home to a significant population of wildlife, including antelopes such as gemsbok, hartebeest, eland, giraffe, kudu and wildebeest and carnivores such as lion, leopard, cheetah and hyenas.

Botswana constitution and international law.³⁴ The court acknowledged that there were clear structural bases for the historical disadvantage of the community in the social, economic and political social strata:

“The language employed by the Colonial Government makes reference to the Basarwa and the Bakgalagadi as ‘little people’, ‘uncivilized’ and ‘wild’... The Colonial Government’s failure to carve out a ‘tribal territory’ for either group, in the same way that it carved out ‘tribal territories’ or ‘native reserves’ for some ethnic groups in the then Bechuanaland Protectorate.”³⁵

Accepting the Basarwa’s arguments, the court recognized their claims of discrimination and State failures:

“The Basarwa and to some extent the Bakgalagadi, belong to an ethnic group that is not socially and politically organised in the same manner as the majority of other Tswana speaking ethnic groups and the importance of this is that programmes and projects that have worked with other groups in the country will not necessarily work when simply cut and pasted to the Applicants’ situation.”³⁶

It therefore found “...that creation of the [Reserve] did not extinguish the ‘native title’ of the Bushmen to the [Reserve]...[and therefore] neither the declaration of the Ghanzi Crown land nor of CKGR extinguished the native rights of the Bushmen to [Reserve].”³⁷ While the State, in this case the Botswana government, “saw the economic-development potential, the health benefits and the educational opportunities to the children of the Applicants (Basarwa), of the relocations, [it] failed to see the cultural and social upheavals that could result.”³⁸ Like, their Il Chamus counterpart in Kenya, the decision of the court

34 Botswana High Court Miscellaneous Application No. 52 of 2002 *Roy Sesane and Anor v. The Attorney General of Botswana*. Per Dipotelo J., Dow J., and Phumaphi J. (Delivered on December 13, 2006).

35 Judgment of Dow J. at p. 165.

36 *Supra*, note 34, pp. 231–232.

37 *Supra*, note 34, p. 337.

38 *Supra*, note 34, p. 243.

has not only been ignored by the Botswana government, but has also been actively resisted.³⁹

iii. African regional human rights mechanisms

Given the failures of African States in many instances to effectively implement their own constitutions or to abide by the decisions of their own courts, African Indigenous Peoples have sought access to justice in other fora. The African regional human rights system, including the African Commission on Human and Peoples' Rights (African Commission) and the African Court, has made rapid strides to recognize and protect the unique collective rights of Indigenous Peoples. Although the African human rights system is a creation of African States through the African Union, the African human rights system's approach to Indigenous Peoples' rights has far outstripped the comfort level of many African governments.

The main African human rights treaty is the African Charter on Human and Peoples' Rights (African Charter).⁴⁰ The African Charter has been signed by 53 African countries and has been supplemented by protocols on the rights of women and on the rights of the African child. The African Charter is among the most progressive human rights instruments in the world because of its clear recognition of not only civil-political and social-economic rights, but also Peoples' rights.

iii.a. The African Commission

The African Commission was established as the monitoring and enforcement body for the African Charter. The Commission has both a promotional and protective mandate with regard to the rights protected in the Charter; it not only examines and educates about human

39 Hitchcock Robert & K. Rodney, *Tourism, Conservation, and Culture in the Kalahari Desert, Botswana*, Cultural Survival. 2010 at <http://www.culturalsurvival.org/ourpublications/csq/article>.

40 African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

rights but receives complaints (communications) from individuals and organizations in relation to violations.⁴¹

During the past decade, the African Commission has made significant progress in interpreting and addressing the human rights situation of Indigenous Peoples in Africa. The African Commission's Working Group on Indigenous Populations/Communities (WGIP), established in 2001, has been the focal point for these efforts.⁴² Early on, the WGIP explored the place of Indigenous rights norms in the continent's human rights framework and worked to raise awareness about the human rights situation of Indigenous Peoples. The seminal Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities⁴³ issued in 2005 highlighted the significant and widespread violations of Indigenous Peoples' collective rights, and raised the profile of communities that had previously been unknown or unrecognized as Indigenous Peoples.

One section of the WGIP's report specifically addresses denial of justice to Indigenous Peoples.⁴⁴ The report primarily focused on discriminatory treatment of Indigenous Peoples in the criminal justice systems of multiple African countries, still an important issue today. The report highlighted the common pattern across Africa of criminalizing Indigenous Peoples' attempts to access traditional territory from which they have been forcibly removed. This practice of arrests, harassment, denial of bail, and then prosecution of Indigenous Peoples who carry out their traditional practices on their traditional territory has been particularly prevalent in regard to hunter-gatherers, such as Batwa in Uganda and DRC, Ogiek in Kenya, and San in Botswana. For Indigenous pastoralists (many of whose communities were split by arbitrary borders during colonial map-drawing exercises) arrests and harassment on the basis of cross-border movement also was identified by the Report as a significant denial of justice concern.

41 *Id.*, art. 30. Complaints can be brought to the commission only after exhaustion of domestic remedies.

42 ACHPR Resolution on the Rights of Indigenous Peoples' Communities in Africa (Resolution 51), 6 November 2000.

43 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, Adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2003), (published in 2005).

44 *Id.*, section 2.4.

Adoption and publication of the WGIP Report paved the way for the expansion of the mandate of the WGIP. The WGIP now gathers, requests, receives and exchanges information and communications from all relevant sources, including Governments, Indigenous populations and their communities and organizations on violations of their human rights and fundamental freedoms; it undertakes country visits to study the human rights situation of Indigenous populations/communities; it formulates recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of Indigenous populations/communities; and it cooperates with other international and regional human rights mechanisms, institutions and organizations.

Despite the WGIP not being an adjudicative mechanism, its role in raising awareness of the existence and rights of Indigenous Peoples in Africa has been extremely important for Indigenous Peoples' access to justice on the continent. Specifically, the 2005 WGIP Report laid the groundwork for adjudication of Indigenous Peoples' rights at the African Commission and at the African Court.

As described above, the African Commission's landmark 2010 decision in the *Endorois* communication⁴⁵ was a huge step forward for Indigenous Peoples' recognition on the continent. Apart from crafting clear indicators for Indigenousness in Africa, this decision recognized the validity of collectively held Indigenous ancestral lands as well as Indigenous communities' right to natural resources and self-determined development. As noted earlier, however, this decision has outstripped the national government's willingness and ability to take action on Indigenous Peoples' rights in Kenya. More than three years after the case was determined by the African Commission, the Kenyan government has not taken any concrete steps toward implementation of the Commission's recommendations despite continual advocacy by the Endorois community and their allies.

45 Communication No. 276/2003, *Centre for Minority Rights Development & Minority Rights Group International (on behalf of the Endorois community) v. Kenya* (2010).

iii.b. The African Court

The African Union (AU) adopted the Protocol to the African Charter on June 10, 1998 (the Protocol). The Protocol establishes the African Court on Human and Peoples' Rights (African Court) to "reinforce and complement the functions of the African Commission on Human and Peoples Rights."⁴⁶ Unlike the African Commission which issues recommendations to States, the African Court issues binding judgments. The Protocol also states that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the African Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned."⁴⁷ Accordingly, the African Court has broad discretion to receive submissions, particularly when governments fail to comply with the recommendations of the African Commission. Moreover, the African Court will apply the African Charter as well as other treaties ratified by the state concerned when determining a dispute.⁴⁸ These developments are important for Indigenous Peoples whose rights have been articulated both in the African Charter and in several other African Union treaties such as the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention),⁴⁹ the Convention on the Conservation of Nature and Natural Resources,⁵⁰ and the Protocol to the African Charter on the Rights of Women in Africa.⁵¹ The African Court's sources of law also include United Nations treaties ratified by the African state, such as the International Covenant on Civil and Political Rights and the International Convention on the Elimination of of All Forms of Racial Discrimination, both of which have been interpreted in favor of the protection of Indigenous rights.

46 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/ LEG/EXP/AFCHPR/PROT (III), at Preamble.

47 *Id.*, art. 3.

48 *Id.*, art. 7.

49 Adopted by Special Session of the African Union, 22 October 2009.

50 Adopted at the Second Ordinary Session of the African Union, 11 July 2003.

51 Adopted at the Second Ordinary Session of the African Union, 11 July 2003.

The African Court is in the very early stages of its operation. One of the first cases it accepted was an Indigenous rights case in 2012. The case relates to the Ogiek Indigenous hunter-gatherers of the Mau Forest in Kenya. Like many forest dwelling Indigenous Peoples, the Ogiek have been displaced in waves of evictions over the decades, in the name of forest conservation. International efforts to create a system of carbon trading and carbon credits have accelerated the process. Conservation of the forest, however, has not been the outcome of Ogiek evictions. On the contrary, huge tracts of forest have been settled by non-Ogiek communities with the consent of the government of Kenya and logging of the Mau Forest continues to date. Ogiek legal cases in the Kenyan courts languished for decades without resolution, and in 2009 the community brought a communication to the African Commission. The Commission promptly issued provisional measures, enjoining the Kenyan government from further evictions of the Ogiek or from further destruction or settlement in the Mau Forest. When the Kenyan government violated the provisional measures put in place by the Commission, the Commission referred the case to the African Court.

The Ogiek case at the African Court is set for trial in 2014. It is a pivotal case related to access to justice for Indigenous Peoples on the continent. The case is primed to develop precedent on a number of issues, such as the right to recognition as an Indigenous community, the right to own and manage land, territory and resources, the right to development, and principles related to the intersection of indigenous rights and environmental conservation.

Moreover, assuming that the Ogiek are successful in proving at least some of their claims, the African Court's judgment in this case will be a major test for the African human rights system in general. The case will provide a platform to assess whether an African State will comply with its obligations under the protocol that established the Court, namely to abide by the judgments and orders of the Court. Already, the Kenyan government has failed to comply with provisional orders issued by the Court which reiterated the provisional measures issued by the Commission. The behavior of the Kenyan State and the Court's response will be an important benchmark by which to measure the commitment of African governments to the rule of law and access to justice.

iv. Transitional justice mechanisms

The nexus between transitional justice in Africa and Indigenous Peoples in countries undergoing transition has not been extensively explored, but it is another important platform through which Indigenous groups are seeking redress for historical and contemporary wrongs in Africa. Transitional justice is a victim-centered field of practice and inquiry. The rights of victims, including the right to truth, the right to justice, the right to reparation, and the right to guarantees of non-repetition, form the guiding principles of transitional justice efforts. Tools of transitional justice include specialized prosecutions, truth seeking, amnesty, systems reform, vetting, lustration, memorials, official apologies, and reparations.⁵² In the past decades, transitional justice has moved from the “exception to the norm to become a paradigm of rule of law.”⁵³

In the African context, transitional justice in the past three decades has emerged as a full-fledged movement mirroring the field’s global dominance. Truth commissions and post-transition prosecutions have been implemented across Africa.⁵⁴ Truth commissions in particular have provided an important context in which to consider how Indigenous Peoples can gain redress for violations of their rights. The treatment of Indigenous Peoples in post-conflict transitional justice processes reflects a continuum of the way in which governments have approached the notion of Indigeneness in Africa. The transitional justice processes in Rwanda, South Africa, Kenya, and Morocco provide useful examples.

In Rwanda and South Africa, the transitional justice processes led to a denial of indigenous identity in the service of other political goals. After the genocide in that country, Rwanda embarked on multiple transitional justice initiatives, including an international criminal tribunal, the

52 L Bickford, *Transitional Justice*, in *The Encyclopedia of Genocide and Crimes Against Humanity*. 2004, 1045–47.

53 R Teitel, *Transitional Justice Genealogy*, *Harvard Human Rights Journal*, vol. 16, 2003, p. 71.

54 For information about the multiple truth commissions across Africa visit the United States Institute for Peace’s Margarita S. Studemeister Truth Commissions Digital Collection at <http://www.usip.org/publications/truth-commission-digital-collection>.

local *gacaca* justice mechanism, a truth and reconciliation commission which is now a permanent body, and extensive memorialization through museums and memorial sites around the country. Marginalized for centuries, the traditionally forest-dwelling Batwa have largely been left out of the dominant Hutu-Tutsi narrative of the genocide in Rwanda. The dominant narrative created out of Rwanda's transition led to an official policy of strict non-discrimination, but in practice went to the extreme of absolute denial of differential identity based on ethnicity. Batwa expressed strong concerns about how the local *gacaca* prosecutorial mechanism, put in place to deal with genocide perpetrators, would protect minority rights; there were no Batwa elected judges for the *gacaca* for example.⁵⁵ Indeed, a New Partnership for African Development (NEPAD) African Peer Review Mechanism report for Rwanda found that the government's actions with respect to the Batwa during the transitional justice process were based on "a policy of assimilation...[and] a desire to obliterate distinctive identities and to integrate all into some mainstream socio-economic fabric of the country."⁵⁶

The South African transition from apartheid to democracy was accompanied by multiple transitional justice measures, including a new constitution, institutional reforms, and a truth commission that operated from 1995–2002 (the latter four years being primarily amnesty application hearings). Despite the multitude of literature related to transitional justice in South Africa, especially the truth commission, there is hardly a mention of South Africa's first inhabitants, the Indigenous Khoe-San.⁵⁷ As with other truth commissions, the "terms and categories the TRC adopted served to organize, summon and exclude particular identities."⁵⁸ The TRC used the term "indigenous" in its report as a counterpoint to the category of white settlers,

55 *Twa Community Concerned Over Gacaca System*, *IRIN News*, June 6, 2001, <http://www.irinnews.org/report.aspx?reportid=21981>.

56 APRM, *Country Review Report of the Republic of Rwanda*, June 2006, para. 153.

57 The Khoe-San are recognized by multiple authorities as the first inhabitants and the self-identified Indigenous Peoples of South Africa. See, e.g., University of Pretoria Centre for Human Rights, *South Africa : constitutional, legislative and administrative provisions concerning indigenous Peoples*. (Geneva: ILO, 2009), 2–3.

58 Fullard & Rousseau 2010, *Truth Telling, Identities, and Power in South Africa and Guatemala*, in *Identities in Transition: Challenges for Transitional Justice in Divided Societies*, ed. Paige Arthur (Leiden: Cambridge University Press, 2010), p. 72.

setting up a dichotomous narrative between state “authorities” and an “indigenous liberation movement.”⁵⁹ This dichotomy appropriated Indigenous identity away from the Khoe-San in the service of other political interests in the post-apartheid era, specifically countering the white-settler narrative that Bantu Africans were migrants to South Africa. Moreover, the TRC interpreted its mandate in a manner that excluded many types of human rights violations that disproportionately impact Indigenous Peoples. The TRC stated that despite expectations to the contrary the TRC would not investigate “forced removals of people from their land” and thus victims of those types of violations would be excluded from reparations.⁶⁰ Indeed, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples noted in a 2005 report that Indigenous Peoples’ representatives in South Africa complained “that they were not included in the negotiations leading to the democratic transition, nor in the new national constitution nor in the Truth and Reconciliation process.”⁶¹ In these contexts, transitional justice mechanisms did little to enhance Indigenous Peoples’ access to justice.

In contrast, however, truth commissions elsewhere have taken more account of the rights of Indigenous Peoples. The transitional justice mechanisms operating in Kenya, in response to post-election violence in 2007–08, included a new constitution that has mandated an extensive slate of institutional reforms, a truth commission, memorialization efforts, and an international criminal court prosecution. The Truth, Justice and Reconciliation Commission (TJRC) provided the most explicit forum for the expression of Indigenous issues. The mandate of the Kenyan TJRC included a requirement that the commission “inquire into and establish the reality or otherwise of perceived economic marginalization of communities and make recommendations on how to address the marginalization.”⁶² Moreover, the TJRC was mandated to “inquire into the root causes of ethnic tensions and

59 Truth and Reconciliation Commission of South Africa, Final Report, vol. II (1998), para. 74.

60 *Ibid.*, para. 48–49.

61 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Mission to South Africa, UN Doc. E/CN.4/2006/78/Add.2, December 15, 2005, para. 32.

62 The Truth, Justice and Reconciliation Act, 2008, art. 6(p).

make recommendations on the promotion of healing, reconciliation and co-existence among ethnic communities.”⁶³ The TJRC interpreted this mandate in a way that allowed for significant interaction with Indigenous Peoples across Kenya.

The TJRC conducted outreach in Indigenous communities, hired Indigenous staff members, and in public hearings heard a substantial number of grievances from Indigenous Peoples. Leaders of Indigenous groups appeared on behalf of their communities to present their claims relative to ancestral lands, to discuss the roots of conflicts with neighbouring communities, and to highlight human rights violations by the State and corporations. Indigenous Peoples appeared before the TJRC in traditional dress, spoke in their community’s language, and specifically distinguished themselves from other ethnic communities who also testified to marginalization but who were not the “Indigenous” inhabitants of the land in pre-colonial days. The TJRC Final Report highlights the extensive concerns of Indigenous communities across Kenya, including discrimination, marginalization, and insecurity. The final report also highlights the *Endorois* decision as well as the *Il Chamus* political representation case and recommends that the State take action to urgently implement those decisions. The government is currently considering the process of implementation of the report.

In Morocco, although the truth commission did not explicitly have a mandate to deal with Indigenous Peoples’ concerns, the process of the ongoing transition in that country has been driven in substantial part by the demands of the Imazighen (Berbers), the Indigenous inhabitants of the Maghreb. Morocco’s truth commission, known as the IER (Instance Équité et Réconciliation), operated from December 2004 until November 2005. A member of the indigenous Berber community was appointed to lead the IER as its president, along with 16 other commission members.⁶⁴ The IER’s mandate stretched from 1956 to 1999 and was focused on establishing the truth about past violations, providing reparations to victims and families, and recommending measures aimed to prevent future abuses. However, the violations that the IER was mandated to address included only arbitrary detention

63 *Ibid.*, art.6(s).

64 John Hursh, *Moving toward Democracy in Morocco?*, ASPJ AFRICA & FRANCOPHONIE. 2010, pp. 64–78.

and disappearances. While many in Moroccan civil society were disappointed with the limited mandate of the IER and its narrow results, the advocacy and political process leading to its creation included several gains for Indigenous identity such as enhanced language and cultural rights. The Kenyan and Moroccan examples demonstrate that the recognition of Indigenous identity can be an important factor in peaceful transition and, indeed, that African Indigenous Peoples can be active participants and leaders in transitional justice processes. However, from an access to justice perspective, it remains to be seen—as with the implementation of progressive constitutions—how far implementation of truth commission reports and recommendations will substantively impact the justice concerns of Indigenous Peoples in Africa.

Conclusion

In Africa, the rights of Indigenous Peoples are increasingly being recognized in national constitutional frameworks, in some national laws, and in judicial decisions. However, access to justice remains a substantial challenge for Indigenous Peoples. Although Indigenous Peoples may be recognized on a formal legal level, substantive recognition continues to lag behind official law and policy. African regional human rights mechanisms have been progressive in addressing the rights of Indigenous Peoples, such as in the Endorois decision, but the problem of African States abiding by the decisions of these human rights mechanisms remains. Moreover, there have been substantial challenges in African States abiding by the judicial decisions of their own national courts when those decisions have supported the rights of Indigenous communities. For justice concerns within communities, custom remains a significant route for access to justice, though these systems are regularly under threat and have not been effectively integrated into national systems. The problem of access to justice is often a problem of political will and is intimately linked to the history of the concept of Indigenousness in Africa. African States remain reluctant to effectively address the concerns and claims of Indigenous Peoples and, accordingly, access to justice remains elusive.

EMPOWERING INDIGENOUS PEOPLES TO CLAIM THEIR RIGHTS BEFORE NATIONAL COURTS, AN EXPERIENCE FROM GUATEMALA

Antonio M. Cisneros de Alencar¹

Introduction

As the United Nations advances towards a better understanding of what elements are central in ensuring that the development assistance it provides is effective and results in tangible changes for the lives of the people it seeks to assist, it has recently begun to recognize the need to work in strengthening the capacity of rights-holders to demand their rights, as much as it works in strengthening the capacity of duty-bearers to meet their obligations; a key notion in the human rights-based approach to development the United Nations now promotes.²

Yet, development assistance programmes, even at the United Nations, still overwhelmingly focus on the duty-bearer's role, with fewer programmes devoted to working with rights-holders. The Office of the United Nations High Commissioner for Human Rights' (OHCHR) results framework for 2012–2013 for example, devotes five of its technical assistance global objectives (or “expected

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2 United Nations Development Group, UN Statement of Common Understanding on Human Rights-Based Approach to Development, Cooperation and programming (HRBA Portal, 2003), <http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies>

accomplishments”) to duty-bearers, four to the international community’s role, and only two focused on rights-holders.³

There are surely several reasons for this, but one element that I suspect contributes to this imbalance is the reduced number of experiences gathered in working with rights-holders, in comparison to the number of experiences gathered in working with duty-bearers; and the even fewer experiences, if we circumscribe our interest specifically to integrating Indigenous Peoples’ rights into development assistance programmes.⁴

The present article seeks to describe one such experience, highlighting key elements that could be of use to other similar programmes, to promote greater attention to the potential this form of international assistance has in empowering Indigenous Peoples to claim their rights.

Indigenous Peoples’ Rights in Guatemala

Guatemala is home to more than 25 different Indigenous Peoples, including the K’iche, Q’eqchi’, Kaqchikel, and Mamm-speaking Mayans who represent about 5 million, other less numerous Maya groups, and the non-Maya Garifunas and Xincas. While exact estimations differ, all figures place Guatemala’s Indigenous population above 40% of the general population.⁵

The country’s Constitution has a chapter devoted to “Indigenous Communities” that calls for the protection of Indigenous ways of life, customs, traditions, social organisations, and languages (Article 66),⁶

3 Office of the United Nations High Commissioner for Human Rights, OHCHR Report 2012. Annex I – OHCHR’s Results Framework (EAs and GMOs) (Geneva: OHCHR, 2013), http://www2.ohchr.org/english/ohchrreport2012/web_en/allegati/25_Annex_I_OHCHR_results_framework.pdf

4 Secretariat of the UN Permanent Forum on Indigenous Issues, *Indigenous Peoples and the MDGs: We Must Find Inclusive and Culturally Sensitive Solutions*, (2007) 4 *UN Chronicle*. http://www.un.org/esa/socdev/unpffi/documents/MDGs_article_in_UN_Chronicle.pdf

5 Secretaría de Planificación y Programación de la Presidencia, *Guatemala un país pluricultural*. http://www.segeplan.gob.gt/index2.php?option=com_content&do_pdf=1&id=85.

6 República de Guatemala, *Constitución de 1985 con las reformas de 1993* (2011) *Base de Datos Políticos de las Americas*. <http://pdba.georgetown.edu/Constitutions/Guate/guate93.html>

but the country is far from being a pluricultural state, with 73% of the Indigenous population living in poverty, widespread discrimination of Indigenous Peoples in the cultural, economic, political, and social spheres,⁷ and the Indigenous population greatly underrepresented in government posts.⁸

Despite advances in the investigation and prosecution of human rights violations committed during the internal armed conflict, including the conviction of former head of state Rios Montt for genocide in May 2013 (despite it being later overturned), and the convictions of other high-level officials for cases of massacre, rape and other crimes against humanity committed against the Indigenous population,⁹ justice is still an aspiration to be met.

The 1996 Peace Accords that ended 36 years of conflict included numerous provisions to ensure an independent and well-functioning judiciary, and grant Indigenous Peoples true access to justice (including, for example, measures for customary law and traditional norms to be recognized, for Indigenous languages to be used in court proceedings, for the establishment of agrarian courts, and for conflict resolution mechanisms). For the most part, however, these provisions are yet to be implemented.¹⁰

7 OHCHR, Annual report of the United Nations High Commissioner for Human Rights. Addendum: Report of the United Nations High Commissioner for Human Rights on the activities of her office in Guatemala, 19th Sess., UN Doc. A/HRC/19/21/Add.1 (2012), [http://www.ohchr.org/gt/documentos/informes/InformeAnual2011\(eng\).pdf](http://www.ohchr.org/gt/documentos/informes/InformeAnual2011(eng).pdf)

8 United Nations Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by Parties Under Article 9 of the Convention, 68th Sess., UN Doc. CERD/C/GTM/CO/11 (2006), [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.GTM.CO.11.En](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.GTM.CO.11.En)

9 OHCHR, Annual report of the United Nations High Commissioner for Human Rights. Addendum: Report of the United Nations High Commissioner for Human Rights on the activities of her office in Guatemala, 22nd Sess., UN Doc. A/HRC/22/17/Add.1 (2013), [http://www.ohchr.org/gt/documentos/informes/InformeAnual2012\(eng\).pdf](http://www.ohchr.org/gt/documentos/informes/InformeAnual2012(eng).pdf)

10 Oficina de Derechos Humanos del Arzobispado de Guatemala, Informe sobre su cumplimiento a 10 años de su Vigencia: Acuerdo de Identidad y Derechos de los Pueblos Indígenas. (Ciudad de Guatemala: Centro Impresor Piedra Santa, 2007), http://www.odhag.org.gt/pdf/Informe_10_anios_AIDPI.pdf

Similarly, the strong foundation Guatemala has established for meeting Indigenous Peoples rights, through the ratification of instruments like the ILO Convention 169 on Indigenous and Tribal Peoples' Rights or the International Convention on the Elimination of All Forms of Racial Discrimination; through the invitations made for United Nations experts (such as the Special Rapporteur on the Rights of Indigenous Peoples, and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance) to visit the country; and, through its collaboration with other human rights mechanisms like the Universal Periodic Review and the mechanisms of the Inter-American System, has provided the country with hundreds of precise recommendations on how to improve the situation of Indigenous Peoples in the country that still require attention.¹¹

Access to Justice for Indigenous Peoples in Guatemala

As part of these efforts to strengthen the international framework for human rights in the country, in 2005 Guatemala invited the United Nations High Commissioner for Human Rights to establish an Office in the country with a broad mandate to observe human rights and provide technical advice on how to improve the human rights situation in the country¹² (one of only 13 countries that have done so).¹³

Based on this mandate, OHCHR and local think tank ASIES (Asociación de Investigación y Estudios Sociales) conducted a study in 2008 into the conditions Indigenous Peoples in Guatemala found in accessing justice, both in the application of ordinary and customary

11 *Supra* note 9, [http://www.ohchr.org.gt/documentos/informes/InformeAnual2012\(eng\).pdf](http://www.ohchr.org.gt/documentos/informes/InformeAnual2012(eng).pdf)

12 United Nations, Acuerdo entre la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos y el Gobierno de la República de Guatemala relativo al establecimiento de una oficina en Guatemala, 16th Sess., UN Doc. A/HRC/16/20/Add.1 (2005), <http://www.ohchr.org.gt/documentos/Mandato.pdf>

13 OHCHR, OHCHR Report 2012: OHCHR's Approach to Field Work, (Geneva: OHCHR, 2013), http://www2.ohchr.org/english/ohchrreport2012/web_en/allegati/14_OHCHR_approach_to_field_work.pdf

law.¹⁴ The study found four main factors that impede Indigenous persons from accessing justice before the ordinary court system:

- a. The geographic and economic barriers caused by insufficient coverage of the ordinary law system, both in terms of location and number of justice operators; judicial processes before ordinary courts becoming especially costly to Indigenous Peoples, given that they often have to travel long distances to access justice operators, and when they do so, are faced with uncertainty over how long they will have to stay there or how many times they will have to return, given the delays that are common place in judicial processes. This, in addition to the onerous costs that litigation before ordinary courts already entails by requiring the person to hire a lawyer, and cover numerous legal costs throughout the process.
- b. The language and cultural barriers caused by the general lack of recognition by justice operators of the ethnic and cultural diversity of the country; evident in the common refusal by justice operators to recognize customary law, but also in the refusal by the ordinary legal system to integrate Indigenous languages and cultures into its proceedings, with the impossibility of submitting written documents in other languages than Spanish for example, a scarce availability, if any, of interpreters and experts to testify on Indigenous cultures, and a general refusal to recognise Indigenous authorities and worldviews in court proceedings. A problem compounded by the limited number of judges and justice operators of Indigenous origin, or knowledgeable of Indigenous cultures and customary laws.

In addition to these four barriers, the study found Indigenous persons seeking to access the ordinary or formal legal system often faced

14 OHCHR & Asociación de Investigación y Estudios Sociales, Acceso de los pueblos indígenas a la justicia desde el enfoque de derechos humanos: Perspectivas en el derecho indígena y en el sistema de justicia oficial, (OHCHR & ASIES, 2008), <http://www.asies.org.gt/sites/default/files/articulos/publicaciones/200805accesopueblosasiesoacnudh.pdf>

lack of information as to how to access the judicial institutions; justice operators with racist and discriminatory attitudes; discretion in the application of the law; widespread corruption and lack of transparency; lengthy processes with very low levels of conviction and sanction of perpetrators; and other problems that have translated in a significant number of Indigenous persons avoiding the ordinary law system as a mechanism to seek redress to the abuses committed against them.

In terms of the Indigenous customary law systems, the study found that both ordinary system judicial authorities and Indigenous customary law justice operators lack knowledge and understanding of the other system, due to the lack of coordination and dialogue between Indigenous authorities and authorities of the State legal system. The study also found Indigenous authorities exercised customary law without any formal state recognition, public funds, or even recognition of the customary laws they apply. In addition, the study found that the following are common: threats, coercion, and intimidation against Indigenous authorities exercising justice; and interference from State law operators who often do not recognize rulings by Indigenous authorities, or ask Indigenous authorities to withhold knowing certain cases, rather than discuss with Indigenous authorities how to coordinate legal jurisdictions in these type of cases. The study also determined that the customary law systems often lacked fundamental human rights principles for due process, such as the right to legal recourse when decisions involve punishment.

Notably, the study found that Indigenous women and girls are the least able to claim their rights and get protection from either justice system, as Indigenous authorities often inhibit themselves of knowing cases of domestic and sexual violence, and women and girls are re-victimized, suffering discrimination and stigmatization (both from their communities and from justice operators), when accessing the State legal system.

Advancing Access to Justice for Indigenous Peoples through National Courts

Based on these findings, the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Guatemala, initiated a pilot programme in 2009 to train Indigenous organisations in strategic litigation before the national State legal system, and provide them with technical assistance in presenting pilot cases before national courts. In this sense, the “Maya Programme” (as it came to be known within OHCHR) took a middle-of-the-ground approach to capacity-building, in an attempt to avoid two extremes: what we could call a “detached approach” to supporting Indigenous organisations, through the provision of trainings and funds only, on the one hand, and what could be called an “intrusive approach”, through the establishment of a new organisation to undertake strategic litigation to substitute earlier efforts by other Indigenous organisations to do so, on the other hand.

The combination of support to Indigenous organisations through trainings, funds and accompaniment throughout the litigation process, in the end proved to be the right choice, as four years after its implementation, an evaluation of the Maya Programme shows it has succeeded in promoting the use of litigation before the ordinary legal system as a tool for Indigenous Peoples to seek recognition of their rights, and has succeeded in testing the State legal system’s response to these demands, pressing it to advance its recognition of Indigenous Peoples’ rights beyond the specific litigation cases.

By succeeding in these two aspects, the Maya Programme has helped shape the wider dialogue between Guatemala’s Indigenous Peoples and the Government, on the State’s duty to fulfil Indigenous Peoples’ rights. Each of the 18 cases presented by Indigenous organisations before national State courts in Guatemala, with the Maya Programme’s accompaniment, helped advance one or more aspects of the Indigenous rights that are recognized by the international community and the State in human rights instruments like the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169.

The cases accompanied by the Maya Programme covered issues such as the Indigenous Peoples’ rights: to practise and revitalize their

distinct cultural traditions and customs; to have access to their religious and cultural sites; to have their educational institutions provide education in their own languages, in a culturally appropriate manner; to establish their own media in their own languages; to be free from exploitation, and enjoy fully all rights established under applicable international and domestic labour law; to participate in decision-making in matters which affect their rights, and maintain their own Indigenous decision-making institutions; to be secure in the enjoyment of their own means of subsistence and development; to be actively involved in developing and determining the economic and social programmes affecting them; to their traditional lands, territories and resources, or to restitution or compensation, when these lands, territories and resources are occupied, used or damaged without their free, prior and informed consent; to the conservation and protection of the environment and the productive capacity of their lands, territories and resources; and to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.

One case, for example, led to the establishment of a policy to recognize traditional territories within protected areas; another led the Court to demand the Government to review the Mining Law in light of the commitments acquired by the country when it ratified ILO Convention No. 169; a third case resulted in the reinstatement of a Q'eqchi' representative in a Departmental Development Council, after she had been barred from participating in their discussions of the budget; a fourth case resulted in the recognition of Indigenous communal property rights over four thousand hectares that a Kaqchikel community had occupied since pre-Columbian times; a fifth case resulted in the State modifying the rules of the National ID document, to conform to the Q'anjobal forms of name structure; a sixth case resulted in a ruling from the Court exhorting Congress to legislate a norm that would recognize Indigenous community radios. Other cases have advanced communities' demands for bilingual education in their schools, for access to sacred sites, and others. The list could continue, but the length of the article impedes citing each case's achievements in detail. I hope the above examples, however, illustrate the potential strategic litigation has to advance Indigenous Peoples' rights.

Some Difficulties in Advancing Access to Justice for Indigenous Peoples through Litigation

To be fair however, one should note that each of these achievements required overcoming considerable obstacles, beyond the four general barriers outlined above, as each right carries specific challenges when litigating for its recognition, such as the need to present documentary proof of Indigenous Peoples' territories or authorities, when claiming recognition of Indigenous lands and territories. In the case of the Indigenous community of Chuarrancho for example, the elders had kept titles from colonial times showing they had re-bought their land from the Spanish Crown, but even though they could prove the community had land titles, the elders did not have the documentary evidence to demonstrate their role as authorities in the community, so they had to first form as a legally-recognized organisation, before having the 4,185 hectares that had been mistakenly assigned to the municipal government, restored to them by the court.

In other cases, the main challenge has been to respond to counter suits brought against Indigenous organisations litigating for Indigenous rights, as some of the interests touched by Indigenous Peoples' litigation—especially those related to land and consultation in extractive industry projects—touch powerful interests, with much larger economic and political resources, which can resort to opening counter suits, in civil or criminal courts, against Indigenous organisations, or use the media to qualify these as delinquents or even criminals. As OHCHR has observed, defenders of Indigenous rights in Guatemala have been accused in the past of “activities against national security”, “radical groups” or “groups that are seeking to destabilize the system,” and even sentenced to prison for claiming their right to consultation.¹⁵

Finally, because of the same asymmetry of power, Indigenous organisations litigating on behalf of Indigenous rights have found an added obstacle in translating their legal victories into the changes in public policy sought. In the case of Indigenous community radios claiming the right to promote their languages, Indigenous

15 *Supra* note 7, [http://www.ohchr.org.gt/documentos/informes/InformeAnual2011\(eng\).pdf](http://www.ohchr.org.gt/documentos/informes/InformeAnual2011(eng).pdf)

organisations obtained a Constitutional Court sentence exhorting the National Congress to legislate a law that would cover the current vacuums on the promotion of Indigenous languages through media, but the sentence was ignored by Congress and the State, despite efforts at the national and international level for the sentence to be applied. In October 2012, Norway recommended Guatemala to follow up on the “decision that urges the legislative power to reform the legislation concerning access of Indigenous People to radio frequencies to promote, develop and diffuse their languages, traditions and other cultural expression” in the framework of the United Nations Universal Periodic Review.¹⁶ Guatemala accepted the recommendation, re-establishing hopes that the sentence will be applied before Guatemala’s next review in 2017.

Lessons Learned from the Implementation of the Maya Programme

Regardless of these obstacles, of the cases that did not achieve the objectives sought by the litigation, or other difficulties in litigation that the Maya Programme’s cases encountered, the final balance shows that strengthening Indigenous organisations’ capacities to claim for Indigenous Peoples’ rights through litigation was a worthwhile endeavour for OHCHR in Guatemala. OHCHR found that the mere act of litigating in favour of their rights is an empowering experience for Indigenous communities that can revitalize their social organisation, regardless of the results. The testimony provided (in her own language) before the Constitutional Court by Ana Isabel Caal Xi, representative of the Maya Q’eqchi that had been excluded from the Departmental Development Council in Petén for example, had an intrinsic value in itself for her community, even if the result had been different, and the Constitutional Court would not have upheld the community’s rights, ruling that the Departmental Development Council should include her in their deliberations. This empowerment

16 OHCHR, Report of the Working Group on the Universal Periodic Review: Guatemala, 22nd Sess., UN Doc. A/HRC/22/8 (2012), http://www.upr-info.org/IMG/pdf/a_hrc_22_8_guatemala_e.pdf

is perhaps as important as the outcomes of the litigation, and should not be overlooked.

In hindsight however, OHCHR realized that efforts to empower rights-holders, needed to be accompanied by efforts to strengthen the capacity of judges and other justice operators, including lawyers and attorneys, to deal with Indigenous Peoples' rights, enhancing their understanding of Indigenous Peoples' structures, ways of life and worldviews, as well as the international norms and standards and jurisprudence that exist to protect these. OHCHR also realized that it could do more to promote an unintended result of its assistance: the sharing of information on best practices and lessons learned between the Indigenous organisations that were part of the Maya Programme, and other Indigenous organisations with similar claims.

With regards to the latter, an informal support network for Indigenous organisations litigating in favour of Indigenous Peoples' rights has begun to emerge out of specific instances of cooperation with academic institutions, non-governmental organisation, and professionals that had assisted as expert witnesses, land surveyors, had submitted amicus briefs, or assisted in other ways in the litigation cases, and the sharing of experiences with other Indigenous organisations that are pursuing similar cases at the national and international level. In the Second Phase of the Maya Programme, which is set to begin in 2014, OHCHR expects to assist Indigenous organisations in developing tools to consolidate this collaboration. In response to the observed need for greater capacity building efforts with duty-bearers, the Second Phase of the Maya Programme will also begin new areas of work with the Judiciary, the Attorney General's Office, and the Institute of Public Defenders, to enhance their capacities to respond to the growing demands from Indigenous organisations through litigation, for the State to meet its obligations related to Indigenous Peoples' rights.

Conclusion

As the Maya Programme enters its second phase, the ultimate effect of OHCHR's approach remains to be seen, namely the approach in combining: a) support to Indigenous organisations' capacities to

litigate for the recognition of Indigenous Peoples' rights (through training, financial assistance, and accompaniment in the presentation of cases before national courts); b) support to the development of tools for Indigenous organisations to share their experiences in litigating on behalf of Indigenous Peoples' rights and form their own support networks; and c) support to the State officials' (Judges and judicial clerks, State Attorneys, and Public Defenders) capacities to respond to the increased demand for attention by Indigenous organisations to the recognition of their rights through courts. The programme's pertinence, relevance, effectiveness, efficiency, and the sustainability of its efforts, will only be measurable in four more years' time. But the potential this form of international assistance has, to empowering Indigenous Peoples to claim their rights can already be seen from the some of the results the programme has achieved. It is my hope that this short description of the Maya Programme will encourage other actors to consider similar approaches to assisting Indigenous Peoples in their quest for greater access to justice.

PART III
TRUTH, JUSTICE AND
RECONCILIATION

THE TRUTH AND RECONCILIATION COMMISSION OF CANADA

Marie Wilson

Truth and reconciliation in Canada

This contribution to the very important topic of Indigenous access to justice, and truth and reconciliation processes is informed by my role as one of three Commissioners of the first national Truth and Reconciliation Commission (TRC) ever to take place in Canada. We are in the midst of implementing a five-year TRC mandate which began in 2009. It is a complex, multi-faceted mandate, historical both in its nature, and in its content and purpose. We are reviewing the history of the injurious relations between the Canadian state and the Indigenous Peoples in Canada and the legacy of that history in today's lives, with our lens specifically centered on the 130-year long practice of forced residential schooling for Indigenous children. We are also re-writing that history, by documenting, sharing, and safeguarding a perspective of it that has never been told or taught, the perspective of the Indigenous Peoples.

That perspective is at the heart of our purpose, for it is the courage of Indigenous Peoples before the Canadian legal system that led to the creation of our Truth and Reconciliation Commission in the first place. Together, First Nations, Inuit and Metis, they stood up as adults to cry foul about what had happened to 150 thousand of them as children over the course of the previous seven generations. They mounted a legal case against the federal government, whose laws and policies established the longstanding residential school system, and against four national churches, which had run most of the residential schools, over the decades, on contract to the federal government.

Canada has a complex system of Treaties signed with diverse Indigenous nations across Canada, most dating back to the 1800's and early 1900's. Among the general promises made through these legally binding covenants was a Treaty right to education. Chiefs at the time had asked for these provisions so that their children could learn to read and write and function well in the face of the dramatic changes they saw coming

from the white man's world, as the lure of resources drew the European settler population ever westward and northward into traditional Indigenous lands. The general Treaty expectation from the Indigenous leaders was for schools in or near their communities. But almost immediately, and even before some of the later Treaties were signed, Canada began putting in place a range of laws and policies around Indian Residential Schools. Children were to be removed from the so-called pagan, heathen, savage influences of their parents and communities, so that within a generation they would be fully "civilized" and Christianized, and there would be no more "Indian problem" in Canada. The goal was to kill the Indian in the child, "in the best interests of the child", and so also to subdue an adult Indian population, who would not risk opposing the state as long as their children were in its custody.

As the harsh truths have been steadily emerging in recent years, many, including leaders within government and churches, have initially categorized the residential schools as a good intention gone wrong... But research of official records has shown that as far back as almost a hundred years ago, in the 1920s, an official appointed by the federal government to investigate the state of residential schools concluded that the treatment of children in the schools was a "national crime."

Courage and the courts

Some eighty years later, the nature and scope of that "crime" finally faced its day in court. Beginning in the 1990's, individual former students of the schools in various regions of Canada started coming together with a number of class actions against the government and the churches. Eventually, all the cases were combined, culminating in the largest class action law suit in Canadian history. This led to what also is the largest out of court settlement ever: the 2007 Indian Residential Schools Settlement Agreement (IRSSA).

The complex comprehensive agreement articulates both financial and practical obligations for the Government of Canada, more than 50 Roman Catholic entities, the Anglican Church of Canada, the United Church of Canada, and the Presbyterian Church in Canada. It also details a range of time-lined financial and healing provisions for the estimated

80,000 former residential school students, also referred to as Survivors, still living at the time of the settlement.

1. The **Common Experience Payment (CEP)** is a universal cash payment to all former students who went to schools on a somewhat controversial list of selected schools and residences. Payment calculations have been individually pro-rated, based on the number of years attended at school. This is an acknowledgment of the general harms of being removed from family, community, culture and all that was familiar to the child. Payment levels are modest, averaging about \$20,000 dollars, and are generally seen as a symbolic recognition.

2. The **Independent Assessment Process (IAP)** is not universal. It is an individually adjudicated review of evidence-based facts, in cases where students feel they have suffered harms beyond those generally recognized through the above, Common Experience Payment, harms that would fall into the category of severe abuse, whether physical, sexual, and/or psychological. Additional monies are awarded in cases where facts are accepted by specially-trained lawyer-adjudicators. Payments are calculated based on a scale of degrees of harm, as pre-determined in the Settlement Agreement. It is a similar approach to that used in the world of Workers Compensation pension calculations.

3. Another portion of the Settlement Agreement monies were contributed to a pre-existing national **Aboriginal Healing Fund**. These monies have already been fully expended, distributed across the country on a case-by-case application basis, for a very wide range of community-based healing projects.

4. A 20,000,000 dollar allocation of the government's portion of the Settlement monies was set aside for national, regional and local **Commemoration** projects. These monies have also been distributed on an application basis, for initiatives aimed at honouring the tens of thousands of children who went through the schools...and in remembrance of more than four thousand documented cases of children who died while away at these schools. Projects are still unfolding. They are widely diverse in nature; community arbours, monuments, books, sculptural installations, films, graveyard restorations, and even a commissioned national ballet.

5. The Survivors who brought the court action argued most ardently for the establishment of a national **Truth and Reconciliation Commission**.

They envisioned the TRC both as a vehicle for hearing the truth of what the Survivors had lived through as children, and for using that truth to educate, and engage with, all Canadians. It was their stated hope in the TRC mandate that such truth-telling would inspire meaningful reconciliation, and would contribute to healing and to freeing broken-spirits, both of individuals and of the country. On a practical level, and for its enormous historical and moral value, the TRC would also lead to the creation of a new public record of what had happened. This would serve as an alternative to the public record normally created by ‘your day in court,’ something that was *not* going to happen due to the out-of-court nature of the Settlement Agreement. This new, alternative public record would then make it impossible for governments, churches, or anyone else, to ever deny in the future that this actually happened in our Canada.

The Truth and Reconciliation Commission of Canada is both historic as a Commission, and as a national opportunity. It is unique in many of its aspects.

First, it exists not because of intentional political will and direction to look into what happened, as in the case of some of the other TRCs. Rather, it exists because the ‘victims of harms’ took action themselves. It was their court case and settlement that obliged the creation of the TRC. And it is the courts, not the government, which supervise the fulfillment of the TRC mandate (and all other obligations of the Settlement Agreement). The Truth and Reconciliation Commission of Canada is therefore independent of government.

Secondly, the TRC in Canada is the first in the world to specifically focus on harms done to children, children of specific ethnicity: First Nations, Inuit and Metis, the Indigenous children of Canada

Thirdly, unlike most TRCs, Canada’s is exploring harms that did *not* happen in the context of military conflict; rather, it is looking into the harms and legacy of harms done in and through state-sponsored institutions and intentional policy initiatives.

Finally, unlike the more usual time-frames for TRCs with a fairly narrowly-defined time-frame, such as a war, the Truth and Reconciliation Commission of Canada is considering a very long, multi-generational period of harms...over 130 years. It spans most of Canada’s entire history as a constituted country.

TRC mandate and purpose

The many prescribed responsibilities of the Truth and Reconciliation Commission of Canada might be simplified down to three broad areas of work. Each of these areas has a number of inter-related activities.

1. Understanding What Happened and How

To understand this long history, our mandate guides us to do new research; to assemble relevant records from existing archives; and to conduct fresh analysis.

We are conducting independent research into such things as the legal, policy and operational context of the schools. We are pulling together all that has been written and documented and stored over the years in vast government and church archives, collecting and assembling records from hundreds of these sources. And to the extent of our capacity, we are analyzing these records. Analysis to date, for example, has led to the early beginnings of a previously non-existent national record of the names and numbers of little children who died at residential schools, or as a result of conditions or incidents that occurred at them. We now know that a minimum of 4,125 children died in such circumstances and that this number will increase as more records are reviewed.

2. Truth-Telling and Healing

The Canadian TRC mandate suggests an unlimited number of community events across the country, as well as seven major National Events, as vehicles for contributing to truth-telling and healing. On one level, this work is about organizing the facilities, coordinating the equipment, and ensuring the written legal consents to record and preserve the statements that individuals may wish to give to the Commission. On another level...which has proven to be even more essential...it is about preparing what we Commissioners refer to as “the sacred space” for such statement gathering to take place safely. This is in keeping with our specifically stated obligation to ‘do no harm’. We hold this obligation in mind as we provide for the traditional ceremonies which typically begin and end our sessions, based on local advice as culturally appropriate to the respective territory where we are gathered. We also consider it

in assuring the presence of specially-trained health supports (one of the federal government's obligations to provide under the Settlement Agreement). These integrated teams of clinically and academically trained professionals, working together with traditional spiritual and cultural knowledge keepers, ensure that the space is emotionally safe, both for those who may be sharing, and for all those who witness their sharing. These may be family members, community members, media, or Commission staff. Finally, we also consider the nature of sacred space, and our duty to do no harm, in considering and providing a range of options for truth-sharing and statement-gathering. Of the nearly 5,000 Survivors we have heard from to date, many have chosen to give their statement publicly, as well as through books, blankets, and videos, in front of the Commissioners, 'so that all the world will know' what happened to them. Others have their own reasons for deciding to share their experiences privately. Still others take greatest comfort in sharing together with other Survivors, in a traditional circle setting. Whatever the venue, each is designed to keep the individual safe and sound, while contributing to individual and collective healing.

The TRC has a supplementary role of educating the Canadian public about this part of Canadian history, which has generally not been taught in Canadian schools. Statement gathering provides what many consider to be the most powerful venue for such education, with the survivors as the principal teachers. One measure of progress on this educational front is the ever-growing presence of 'witnesses' from the wider, non-Indigenous population. In increasing numbers they are attending TRC events, which are all free, voluntary, and open to the public and the media. Another measure is the growing number of intergenerational survivors (the children or grand-children of former students), and many others from churches or the general population who are also choosing to speak to the Commission. They may have been only indirectly associated with the residential school experience, or may be just recently learning about it. Their messages vary from expressing personal or organizational apologies or regrets, to statements of solidarity with Survivors, to messages of outrage and recommendations for change, whether to national governments or community leadership.

3. Responsibility To Remember

It has been said that the work of memory is more than the collecting of history and facts. It is about Re-Membering, about putting the dismembered pieces back together again. This perspective captures the TRC's responsibilities around reconciliation. It is related to truth gathering, and it is moving beyond the facts of these truths. It is moving into the shared responsibility and need for building respectful relations.

Many activities specified in the TRC mandate lend themselves to this dual role of remembering and inspiring reconciliation: Commemoration; Publication; Preservation, and Recommendation.

Commemoration: Hundreds of competing proposals for local, regional and national commemoration projects have been assessed and recommended for funding based on their potential to acknowledge and honour the experiences of residential school students, as well as their potential for contributing to new understandings and respect, within families and between peoples. As a Commission, we have especially considered it a high priority to honour the thousands of little ones who died at the schools, and to keep the memory of them alive in all aspects of our work. We have supported and welcomed special songs, ceremonies and commemoration activities that honour them. And we continue to make the telling of their collective story a priority for the national consciousness-raising and awakening that is unfolding.

Publication: To fulfill our mid-term obligation to report on the complete history of the schools, we produced a book called *They Came For The Children*. It is now being used as a school curriculum resource in some parts of the country, and it is available to all as a free download at the Truth and Reconciliation Commission of Canada website: www.trc.ca. An Interim Report of our work, with twenty preliminary recommendations, is also available at that website.

Preservation: To ensure the safe-keeping of all that survivors and others have told the TRC, and to ensure its accessibility for all future generations, whether family members or from the academic community, the TRC consulted internationally, seeking practical advice and lessons learned from a wide range of truth and memory projects, and from every continent. On June 21, 2013, the longest day of the year that is celebrated

as National Aboriginal Day in Canada, the TRC officially announced the establishment of a national research centre to be housed at the University of Manitoba in Winnipeg, Canada, in association with partner learning institutions in other parts of Canada, including the University of British Columbia in Vancouver. This centre will serve as the permanent home and point of accessibility for the entire TRC collection of material holdings and recorded statements. It is to be an independent resource centre, guided by the spirit reflected in the Truth and Reconciliation Commission mandate. Its governing circle will include representation from each of the three Indigenous Peoples of Canada; the First Nations, Inuit and Metis. This TRC research centre will be both physical and virtual in nature. This is to allow maximum accessibility throughout Canada and beyond, and in recognition that much more work in regard to studying and analyzing the complete records on residential schools, especially from the massive government and church archives, will fall to researchers and others over the many years following the Canadian TRC's five-year mandate.

Recommendation: The TRC has an obligation to make recommendations based on all that we hear and learn about the residential school history and its legacy. In Canada, along with some important and exceptional stories of success related to the schools, this legacy includes a much more common and directly related litany of negative measures: shame, fear, anger, blame, violence, inability to parent, unemployment and under-employment, poverty, alcoholism, drug dependency, family and community violence, failed relationships, child apprehension, incarceration, suicide, and hopelessness. Many of those who have given statements to the TRC have included their own thoughts on what they think will be needed for meaningful reconciliation to take place. Many describe their own personal journeys of resilience, healing and hope as testaments to what has happened to them, and as evidence of the critical factors that will also be needed for others, in order to make such healing possible for them too. Among the many things they identify, three areas stand out as the most often mentioned: 1) honest education for all Canadian youth, including the truth about the residential school history, and its impacts on the attitudes, realities and opportunities of individuals, families, nations, and the country as

a whole; 2) sustained, specialized healing resources, to address the long-term effects of untreated, multigenerational, childhood traumas; 3) people and resources for teaching Indigenous languages and cultural beliefs, including parenting skills, and spiritual practices. Many, many people have told the Commission that the key to their own healing has been a reclaiming of their Indigenous identity, positively associated with self-love and self-respect.

The TRC's final recommendations will form an important part of its final report, expected in 2014–2015.

Lessons unfolding

Both the nature and processes of the Canadian TRC are largely unprecedented, leaving the Commission to feel its way through the implementation of some aspects of its inherited mandate. There have been a variety of challenges along the way, and emerging outcomes.

Lack of Perceived Justice: One challenge continues to be the perceived fairness of the overall out-of-court Settlement Agreement. It was negotiated by the Survivors' legal and political representatives, with the federal government and the churches. In this sampling of their own words, many Survivors have questioned whether the legal agreement represents true "Justice," especially where claims for financial compensation have been minimized or totally denied:

"A little bit of money...Is that all my childhood, my innocence and my identity are worth?...They make me remember things I've spent my whole life trying to forget...and they still don't believe me...If the Apologies from the Government and the churches were so sincere, where are the Government and the churches now? Who is in the room?...Was the Apology sincere or just a bunch of words to make the Prime Minister look good?...Where is the walk behind the talk?"

Interpretation of Legal Obligations: A key obligation on the part of the government and churches is to provide the Truth and Reconciliation Commission with copies of all relevant documents from their respective and extensive archives. These documents would then form a cornerstone

of information to be held for posterity and ease of future access in the TRC's consolidated national research centre about residential schools. Narrow interpretations by the government and some of the Catholic church entities led the TRC to go back to the courts for direction on the correct interpretation of "all relevant documents." The result has been both negative and positive: a significant delay in this aspect of the Commission's work; but with a new assurance that the research centre will indeed receive the legacy of the much more comprehensive and complete set of archival records that the TRC was hoping for.

Public Engagement: Since the 2007 Indian Residential Schools Settlement Agreement (IRSSA) the Canadian government has spent millions of dollars in outreach to inform former students about the Agreement, and related deadlines for applying for specific provisions of it. This is not the case for other Canadians. Yet "the people of Canada" are specifically named in the TRC mandate as having a role in the "ongoing individual and collective process" of Reconciliation. As part of a court supervised agreement, this articulated role for "the people of Canada" indicates both a legal and moral obligation. To date there has been no concerted government effort to inform "the people of Canada" about the Agreement, and particularly about the Truth and Reconciliation Commission of Canada, and this obligation upon them. This lack of information is compounded by the general absence of history about Indigenous Peoples in the school curricula that most adult Canadians grew up with. The result is a continuing widespread perception of Indian Residential Schools as Indigenous history, and something that happened a long time ago...rather than as Canadian history that unfolded under the laws and policies of the Government of Canada, that continued until the last schools closed as recently as 1996, and with a societal legacy that therefore belongs to all Canadians to address. Similarly, the federal government has assigned its own obligations and responsibilities for the Truth and Reconciliation Commission and other aspects of the Agreement to the Department of Indian and Northern Affairs, more recently re-named the Department of Aboriginal Affairs and Northern Development. This assignment to a designated "Aboriginal Affairs" department also perpetuates a more narrow government and public perception of the history and legacy of

residential schools as an Indigenous issue, rather than as an issue of Human Rights and Justice.

Mass Media Reflection: Positioning the Truth and Reconciliation Commission of Canada within the media for both its national and international historical significance, and its newsworthiness as an unfolding story of national importance, has been a great challenge. The work of the Commission has received significant coverage from regional media outlets, particularly in and around community hearings, and focused primarily on the worst horrors of survivors' childhood experiences. The interest and focus on the reconciliation aspect of our work has been far less frequent. Most critically, the TRC has not succeeded in holding the ongoing attention of any national media outlet. Government-sponsored Commissions within Canada continue to receive more sustained coverage, including a provincial one that is still unfolding. Similarly, Canadians received far more regular, unfolding coverage from our own media outlets about the Truth and Reconciliation Commission in South Africa than we will have received about our own country's historic Truth and Reconciliation Commission. This may be a reflection of the dramatically changed corporate media landscape, with an increasing monopoly held by far fewer owners with narrowing editorial interests. Also important to consider is the extent to which increasing awareness, and changing attitudes, about Indigenous Peoples also needs to happen within the very media that currently portrays them or chooses not to.

Towards healing and reconciliation

Slowly but surely the TRC is both contributing to and witnessing positive changes. Some Survivors complain about the nature of their financial settlement. But many more say that the time and the resources needed for ongoing healing and reconciliation is much more important than money. Along with mental and emotional healing, many talk about cultural and spiritual healing. They say that the help of their elders and the return to their Indigenous traditions have given them their identity back along with self-respect and self-love.

The engagement of non-Indigenous Canadians is also gradually increasing. Our TRC Mandate says that Reconciliation is an ongoing

individual and collective process, involving former students and their families, former workers, the government of Canada, the churches and the people of Canada. The Commission intentionally reaches out to churches, universities, departments of education, the judiciary, legal and medical professions, youth leadership circles, the corporate sector and all levels of elected leadership; provincial and federal legislators, town and city Mayors, Indigenous Chiefs and leaders, Premiers and state governors. We are also engaging a growing number of prominent individual citizens who agree to be activist voices for ongoing reconciliation, by standing with us as designated ‘TRC Honorary Witnesses’. This includes a number of international Witnesses. Some Honorary Witnesses are institutions rather than individuals, such as the International Centre for Transitional Justice (New York), the Stolen Generations and Connecting Home (Australia), the Maine-Wabanaki State TRC (Maine), and the Quebec Native Women’s Association (Canada). We are also actively promoting a growing list of inspirational ‘Expressions of Reconciliation’. These are becoming increasingly creative and wide-ranging: from films, books, and art pieces to populate the TRC research centre; to new or renewed expressions of Apology; to the creation of specialized Scholarships for the study of Indigenous history; to the launching of revised curricula about the residential school history for high school students, interactive, developed with the multilingual input of residential school Survivors, and now mandatory learning as a condition for high school graduation in two of the 13 jurisdictions in Canada, with other jurisdictions now actively reviewing their own curriculum.

Voices of Hope on the Home Stretch

The Truth and Reconciliation Commission of Canada still has much work to do to complete the obligations and responsibilities set out in the TRC mandate. As we map out the recommendations that will inform our final report, we will need to carefully consider the gaps between how things are today for Indigenous Peoples, families and nations in Canada as a result of the 130 year history of residential schools, and how things should be, and need to yet become, in a country that has, through formal Apologies from all national Leaders including our Prime

Minister, declared itself to be fully committed to reconciliation, and new relationships of mutual respect.

In the meantime, just as it was the Survivors who took the courageous steps to bring their childhood school experiences to attention, seeking justice before the courts, the strongest indications are that it is also the Survivors themselves who are taking the lead on the equally courageous and often painful work of healing. Approximately 5000 statements have been voluntarily given to and recorded by the Truth and Reconciliation Commission of Canada. The correlation between addictions and healing is one of the most recurring and underlying themes of the stories shared with us. Approximately ninety percent tell the TRC that they have quit drugs and/or alcohol, and that has made other aspects of their healing possible. The importance of family and group support, and the positive examples of others, are other recurring themes for healing. At every session where experiences are shared we hear one or more Survivors say one or several of the following: “I have never told this to anyone before...I’m ‘inspired’ to speak, by the courage and stories of others...I feel so much lighter for setting down this load and getting these secrets and this shame out of me...I want to thank those who have already spoken today...I don’t feel so alone now...I’m not proud of how I was as a parent with my own kids, but I’m trying to do better with my grand-children...I want to thank those who have helped me...I’m beginning to like *me*...I’ll never forget the past but I don’t need to stay there...I’m learning to forgive myself and others and to move on. I can say, ‘Forgive me, I love you.’”

At one of the very first hearings we held, a very prominent and accomplished Indigenous leader summarized his statement to the Commission with these words: “I want my identity back...Is that too much to ask?” And everywhere we have gone, from coast to coast to coast, at least half the Survivors who speak say that it is precisely this reconnecting with their culture and identity that has been the key to their own healing, the key, as they so often put it, to “finding their way home”.

THE MAINE WABANAKI-STATE CHILD WELFARE TRUTH AND RECONCILIATION COMMISSION: PERCEPTIONS AND UNDERSTANDINGS

Bennett Collins,
Siobhan McEvoy-Levy
and Alison Watson¹

Introduction

On 29 June, 2012, the leaders of the five Wabanaki tribal governments within the state of Maine, the Aroostook Band of Micmacs, the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe at Motahkmikuk (Indian Township), the Passamaquoddy Tribe at Sipayik (Pleasant Point), and the Penobscot Indian Nation, sat alongside Republican Governor Paul LePage in the gallant Hall of Flags in the State Capitol building. For those familiar with the history of State-Tribal relations in Maine, it might be presumed that this was another tense debate over the many issues and obstacles the Wabanaki have faced throughout their history as the region's Indigenous,² and arguably most marginalized,

1 The authors are extremely grateful to those involved in the Truth and Reconciliation Commission and Wabanaki REACH for the access they have granted us to their sensitive and important truth-telling process and especially Esther Attean, Penthea Burns, Donna Loring, Heather Martin, Arla Patch and Martha Proulx. We are keenly aware that we approach this process as non-Native researchers, and so would like to make clear that we are in no way speaking for those involved. This paper was first presented at the AHDA's 'Historical Justice and Memory Conference' at Columbia University, December 2013. We would like to thank the conference participants who commented at that time, and also pay respect to the Lenape people who were the original inhabitants of the land upon which Columbia University now stands. Bennett Collins and Alison Watson thank Will Moore, Sandra Norrenbreck, Kerry Probert, Professor Nick Rengger and the University of St. Andrews for their support in making this research possible. Siobhan McEvoy-Levy thanks Kelly Hamman, Rachel Bergsieker, Steven Tyler, Dean Jay Howard and Butler University. All errors remain the authors' own.

2 Note that the term "Indigenous" is a generic one that has no officially recognized definition, with the exceptions of the 1957 ILO Convention No. 107 on Indigenous and Tribal Populations and 1989 ILO Convention No. 169 on Indigenous and Tribal Peoples, which have 27 and 20 ratifications respectively. The UN Permanent Forum on Indigenous Issues feels "the most fruitful approach is to identify, rather

Peoples³. However, in this case, an audience of around 200 people was present to watch the Wabanaki Leaders and the State Governor come together—with a collective desire to seek truth, healing, and change—to sign the mandate of Maine’s first Truth and Reconciliation Commission and the first Tribal and State government-endorsed Truth and Reconciliation Commission in the United States. This chapter presents preliminary findings from our study of the historic Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission (MWTRC), which held its first hearings in November 2013. Our ongoing research explores the origins and evolution of the MWTRC and the challenges and needs that it seeks to address.

As this chapter demonstrates, the MWTRC represents a unique and creative approach to healing in communities affected by historical trauma. This chapter presents the history and context of the MWTRC. Drawing on interviews with the key participants⁴ in the MWTRC

than define Indigenous Peoples. This is based on the fundamental criterion of self-identification as underlined in a number of human rights documents.” (United Nations Permanent Forum on Indigenous Issues, Indigenous Peoples Indigenous Voices Factsheet, http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf). One of the most frequently used descriptions of “Indigenous” is that of Jose R. Martinez Cobo, a former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, who noted: “Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on 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 system.” See: <http://www.unric.org/en/indigenous-people/27309-individual-vs-collective-rights>.

3 For thousands of years, the Algonquian-speaking Wabanaki People, or ‘People of the Dawnland’, have historically occupied most of the area now known as the Maritime Provinces of Canada, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Quebec, as well as the U.S. States of Massachusetts, Vermont, New Hampshire, and Maine.

4 The participants in the study were interviewed by Bennett Collins using a semi-structured questionnaire at different locations in Maine between August and September 2013. Those interviewed included TRC Commissioners and staff, staff and volunteers at Maine-Wabanaki REACH, members of the State Legislature, and Tribal Chiefs.

creation process, we explain the structure, mandate and role of the MWTRC and the accompanying community support structures that have been created. Key themes emerging from the interviews with the participants in the process are then discussed. The chapter shows that, originating in a deep understanding of the complex individual, family and community trauma that Wabanaki people have endured, the MWTRC embodies a collective desire for truth, healing and change. It provides a space for the articulation of a silenced history, and a process within which traumatic experiences and the trauma of memory can be shared in solidarity. The uniqueness of the MWTRC—a grassroots, community-organized, Indigenous community-state collaboration—makes it an important process for scholars and practitioners to follow. Although it faces challenges and tensions and involves difficult dialogues on race, privilege and accountability, this MWTRC is a new kind of truth commission, linking reconciliation with decolonization, and truth with practical policy change, in the process creating an important model of community-based conflict transformation and trauma recovery that has potentially wider implications for other communities—Indigenous, and non-Indigenous—seeking to reconcile, and to heal, after a period of long-term trauma. To see why such healing is truly necessary, this chapter turns to a summary of the historical context of trauma that the MWTRC aims to address.

1. History/Context

The mandate of the MWTRC, which will be discussed in the next section, is much like other truth and reconciliation commission (TRC) mandates (e.g. South Africa, Liberia, Canada) in that it demarcates the time and means that the MWTRC is allowed to work within. Thus the mandate specifically notes that the MWTRC will address events that occurred following 1978—the date that the US Federal Government passed the Indian Child Welfare Act (ICWA) in response to child welfare practices that resulted in high rates of removal of American Indian⁵ children and their placement in foster and adoptive care, as

5 We use the term “American Indian” rather than “Native American” throughout this chapter because the former is the term used under federal law, and also cited

evidenced by programs like the Indian Adoption Project and Adoption Resource Exchange of North America.

During the interview process those involved in the founding of the MWTRC noted that this time-frame would be very difficult to implement. As Esther Attean noted:

“What happened to Wabanaki people with state child welfare from 1978 to the present...didn’t happen in a vacuum and it’s not going to be talked about in a vacuum.”

Indeed, the Wabanaki peoples in Maine and those across the border in the Maritime Provinces of Canada, as well as Quebec, have experienced a shared legacy of discriminatory policies. As the jurisdiction of the MWTRC remains confined to Maine, however, our research has remained contained to the narrative of the Wabanaki people in Maine and the nuances of their history as a Native people within the borders of the United States.⁶ Within this narrative, we are able to pinpoint particular events, ranging from the very beginning of colonization to modern times, which have left the Wabanaki People of Maine in a state of “historical trauma.”

This recognition of historical trauma is an important one. Oglala Lakota scholar Maria Yellow Horse Brave Heart defines “historical trauma and unresolved grief” as the “cumulative wounding across generations”⁷ She recognizes American Indian experiences as “analogous to the ‘survivor syndrome and survivor’s child complex’—identified among those who endured the Jewish Holocaust, and their progeny.”⁸ Child survivor’s complex, according to Brave Heart and DeBruyn, is

by a number of organizations, e.g. the Bureau of Indian Affairs. In a less specific context the terms “Native” and “non-Native” are also used.

6 This does not imply that the narratives of the Wabanaki in Canada are in anyway less significant. On the contrary, we recognize that the Wabanaki will have a different narrative from other Native Americans/First Nations, not only because they will be under the jurisdiction of two different TRC mandates (i.e. the Canadian TRC and the Maine Wabanaki-State Child Welfare TRC), but also because the two TRCs have attracted attention and participation from across the international border. The opportunities and consequences that come out of these circumstances will need further attention at a later date.

7 Brave Heart, Maria Yellow Horse, *Wakiksuyapi: Carrying the Historical Trauma of the Lakota*, *Tulane Studies in Social Welfare*. 2000, p. 246.

8 *Ibid*, p. 247.

where “descendants of survivors feel responsible to undo the tragic pain of their ancestral past, often feeling overly protective of parents and grandparents, and are preoccupied with death and persecution.”⁹ Maria Yellow Horse Brave Heart draws the parallel between the high mortality rates on American Indian Reservations, due to alcoholism, substance abuse, and suicide, and their experience of historic trauma, resulting from centuries of genocide as well as racial and cultural discrimination.

For the Wabanaki People in Maine, their experience with historic trauma dates back further than most due to their geographic location on the east coast—the starting point for European and American colonization. Their history, like that of so many other American Indian communities and nations across North America, has been one of decimation. The Wabanaki lost around 90% of their population in a genocide that is perhaps most clearly summed up by the existence of the Spencer Phips Bounty Proclamation of 1755:¹⁰

“And I do hereby require his Majesty’s Subjects of this Province to embrace all Opportunities of pursuing, captivating, killing and destroying all and every of the aforesaid Indians.... For every Male *Penobscot* Indian above the Age of Twelve Years that shall be taken within the Time aforesaid and brought to *Boston*, *Fifty Pounds*. For every Scalp of a Male *Penobscot* Indian above the Age aforesaid, brought in as Evidence of their being killed as aforesaid, *Forty Pounds*. For every Female *Penobscot* Indian taken and brought in as aforesaid and for every Male Indian Prisoner under the Age of Twelve Years taken and brought in as aforesaid, *Twenty-five Pounds*. For every Scalp of such Female Indian or Male Indian under the Age of Twelve Years that shall be killed and brought in as Evidence of their being killed as aforesaid, *Twenty pounds*.”

9 Brave Heart, Maria Yellow Horse & M. Lemyra DeBruyn *The American Indian Holocaust: Healing Historical Unresolved Grief*, American Indian and Alaska Native Mental Health Research, 1995, p. 66.

10 Spencer Phips Governor of Massachusetts, Phips Proclamation. (1755), Documentary History of Maine. (1998) 24 p. 63, http://www.abbemuseum.org/phips_bounty.html

Spencer Phips, the then-Governor of the colony of Massachusetts, had placed this bounty on the members of the Penobscot Nation but, as was pointed out in our interviews, this was seen as an order to eliminate all Wabanaki. The Spencer Phips' Proclamation was one of many colonial policies that led to the complete destruction of more than 16 Wabanaki nations. Only five remain today: the Penobscot, Passamaquoddy, MicMac, Maliseet, and Abenaki.¹¹ This Declaration, a shocking document, was indicative of the social environment that had been created many years before by the Doctrine of Discovery (DOD). The DOD, articulated by papal decrees, gave Christian colonizers authority to control and enslave Indigenous Peoples in order to take their land and resources. This was frequently cited amongst interviewees as the foundation of oppression of Wabanaki Tribes. The impact of this Doctrine continues, as the UN Permanent Forum on Indigenous Issues noted in 2012, when the Forum "urged the rejection of such 'nefarious dogmas,'" instead encouraging "measures that would redefine relations between Native and aboriginal peoples and the State based on justice."¹² However, the Doctrine itself and its impact extend beyond the Catholic Church. For example, scholars have referenced the fact that the Doctrine of Discovery has already been institutionalized in US law via Supreme Court Cases, like *M'Intosh v. Johnson*.¹³ The Doctrine of Discovery is at the heart of the policies of assimilation that are characterized by the U.S. Indian boarding school system of which the Carlisle Indian Industrial School, based in Pennsylvania, was at the forefront. Founded in 1879, the goal was very clearly one of the assimilation of American Indian children into "mainstream" culture. As the School's Founder, Richard Henry Pratt noted: "In Indian civilization I am a Baptist, because I believe in immersing the Indians in our civilization and when we get them under

11 The Abenaki do not have federal recognition in the State of Maine, but are nonetheless one of the five members of the Wabanaki Confederacy.

12 Department of Public Information ECOSOC, *Concluding Session Permanent Forum says Impact of Racist 'Doctrine of Discovery' Endures Today, but Indigenous Rights Declaration offers Framework for Redress*, UN doc. HR/5099 (18 May 2012) www.un.org/News/Press/docs/2012/hr5099.doc.htm

13 See Blake Watson, *The Doctrine of Discovery and the Elusive Definition of Indian Title* (2012) 15 Lewis and Clark Law Review. <https://law.lclark.edu/live/files/10656-lcb154art5watsonpdf>

holding them there until they are thoroughly soaked.”¹⁴ Over 10,000 Native children attended the school between 1879 and its closure in 1918. A historical marker now highlights the place where 186 children who died whilst at Carlisle are buried.¹⁵ Carlisle’s founder, Henry Pratt gave us the phrase “Kill the Indian and save the man” a phrase that would become foundational in many Canadian residential schools. Carlisle’s rosters include 5 Abenaki, 8 Passamaquoddy and 44 Penobscot students.

Founded in 1958, the federally-financed Indian Adoption Project (IAP) replaced the practice of institutionalizing Native children in boarding schools like Carlisle, with a policy of placing Native children for adoption into white homes and was administered by the Child Welfare League of America and the Bureau of Indian Affairs. In its nine years of existence, it is thought that the IAP resulted in between 25 and 35 percent of Native children being adopted into non-Native homes, in a policy that activists “denounced...as the most recent in a long line of genocidal policies toward Native communities.”¹⁶ In Maine, the likelihood of Native children being removed from their homes was 19 times more than non-Native children. Sadly, even when the IAP ended, these policies continued with the creation in 1966 of the Adoption Resource Exchange of North America (ARENA), which continued placing American Indian children within white homes until the early 1970s.

According to the National Indian Child Welfare Association, “The Indian Child Welfare Act (ICWA) is a federal law that seeks to keep American Indian children with American Indian families.” Congress passed ICWA in 1978 in response to the high number of Indian children being removed (some sources report from their homes) by both public and private agencies. The intent of Congress under ICWA was to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.”¹⁷ ICWA sets federal

14 See Barbara Landis, Carlisle Indian Industrial School History. (1996), http://www.english.illinois.edu/maps/poets/a_f/erdrich/boarding/carlisle.htm

15 To see the marker, visit <http://carlisleindian.dickinson.edu/websites/carlisle-indian-industrial-school-historical-marker>

16 University of Oregon, Adoption History: Indian Adoption Project. (University of Oregon Department of History, 2012) <http://pages.uoregon.edu/adoption/topics/IAP.html>

17 25 U.S. Code § 1902—Congressional declaration of policy, Available at: <http://www.gpo.gov/fdsys/granule/USCODE-2011-title25/>

requirements that apply to State child custody proceedings involving an Indian child who is a member of or eligible for membership in a federally recognized tribe.” However, ICWA implementation in Maine, and across the country, was and has been extremely difficult to fulfill given the complete lack of trust that resulted from decades of discriminatory federal and State child welfare practice. Thus, even after ICWA was passed, social workers and police continued to remove Wabanaki children from their homes at alarmingly high rates. From interviews with social workers, it was gathered that many State workers at the time thought that what they were doing was in the best interests of the child. However, in other interviews with Wabanaki tribal members, it was reported that some social workers did indeed abuse their authority in relation to Wabanaki people. One particular interview with Chief Brenda Commander of the Houlton Band of Maliseet Indians made this point clear: “[The police and DHHS] were trying to remove two teenage girls and I said, ‘What’s going on?’ and [the DHHS representative] said, ‘We have an emergency protection order’ and I said, ‘Can I look at it?’ and she threw it at me. She threw it at me and it fell on the floor and it wasn’t signed by a judge...”

The experience that Chief Commander described was an important catalyst for State change. Also, in 1999 the Muskie School of Public Service, through a State contract, facilitated the founding of the ICWA Workgroup to improve the State’s compliance with the ICWA through staff training and other initiatives. It was after nearly 10 years of work, with successes and barriers, that this group began efforts to establish the MWTRC, at the suggestion of the State’s Child Welfare Director.

2. TRC mandate and Structure

The Declaration of Intent

The Declaration of Intent (DOI) was the start of a difficult journey in forming the MWTRC. Modeled after the ones used by the Mississippi Truth Project and the Greensboro Truth and Reconciliation Commission, the DOI was used to broadly outline the historical and

contemporary purpose of the MWTRC and the path that parties would need to take to establish a TRC. The drafting of the DOI was done by the ICWA Workgroup members (which included staff from tribal child welfare programs, Department of Health and Human Services Office for Family and Child Services, and the Muskie School of Public Service at the University of Southern Maine). These individuals formed what came to be known as the TRC Convening Group.

The effectiveness of the TRC Convening Group is seen in two particular instances. The TRC Convening Group, because of its long history of collaborative work, created the environment for comprehensive and leveled dialogue between the State of Maine and the five Wabanaki communities so that neither party would have a unilateral say over the planning process. Martha Proulx, from the Office of Child and Family Services stated, “[T]he value of this truth and reconciliation [process] is that it is a true partnership that we are undertaking as equals. It is a government-to-government effort to understand what happened, to promote healing for Wabanaki communities, and to improve child welfare practice.”¹⁸ Secondly, the TRC Convening Group demonstrated the significance and impact of historical dialogue at the grassroots level. Esther Attean states, “It has allowed us to learn about and discuss white privilege, racism, oppression, and internalized oppression.”¹⁹ This emotional journey that was shared by both Non-Native and Native members of the TRC Convening Group in drafting the DOI acts as a microcosmic example of the desired dialogue and relationship which would result from the MWTRC.

On May 24, 2011, the Chiefs and representatives of all five Wabanaki communities, Governor Paul LePage, and a representative from the Maine Indian Tribal State Commission (MITSC) signed the DOI into effect ceremoniously in the Penobscot community on Indian Island. The DOI was very concise in its ambitions in calling for pragmatic cooperation between the State of Maine, all tribal governments, MITSC, and the TRC Convening Group to carry out three objective goals: the drafting of a Mandate for the MWTRC, the drafting of

18 Attean, Esther and Jill Williams, *Homemade Justice*, Cultural Survival Quarterly. 2011. <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/united-states/homemade-justice>

19 *Ibid.*

Letters of Commitment for the tribal and state governments, and participating in the selection of the Commissioners for the MWTRC. In the end, the DOI carried the signatures of seven government entities and the agreed participation of community organizers at the grassroots level, which in itself made the process unprecedented in the history of US-based TRCs.

The Mandate

“This document creates the Truth and Reconciliation process between the State of Maine and the Wabanaki Tribes”²⁰.

The objectives of the DOI were already coming to fruition with the signing of the TRC’s Mandate on June 29, 2012 at the Hall of Flags within the State Capitol Building in Augusta. The Mandate officially established the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission and outlined the following objectives for the process:

- “1. Give voice to Wabanaki people who have had experiences with Maine state child welfare;
2. Give voice to state and tribal child welfare staff, care providers and legal community in regard to their work with Wabanaki families;
3. Create and establish a more complete account of the history of the Wabanaki people in the state child welfare system;
4. Work in collaboration with the TRC Community Groups and Convening Group to provide opportunities for healing and deeper understanding for Wabanaki people and state child welfare staff;
5. Improve child welfare practices and create sustainable change in child welfare that strives for the best possible system;
6. Formulate recommendations to state and tribal governments and other entities to ensure that the lessons of the

20 Maine Wabanaki-State TRC Mandate. 2012 Available at: <http://www.mainewabanakitrc.org/about/documents/>

truth are not forgotten and to further the objectives of the Commission; and

7. Promote individual, relational, systemic and cultural reconciliation.”

The Mandate stipulates a three-year timeline for the MWTRC to accomplish these objectives, allowing a 6-month extension if the signatories agree. By the end of the Mandate, 2015, the document calls for the MWTRC to provide a report, outlining their findings and recommendations on child welfare practices vis-à-vis the implementation of ICWA in Maine. It calls for the creation of an archive of “all such documents, materials, and transcripts or recordings of statements received, in a manner that will ensure their preservation and accessibility to the public and in accordance with agreements with individuals, between the Maine State and Wabanaki governments and any other applicable legislation.” Together, the report and archive follow the “traditional” TRC model of ensuring that the process has a long-term and continuing legacy. However, at the same time, non-binding Commission reports have been notorious for collecting dust on the shelves of government offices and thus require assistance with their implementation.

There are several significant points about the Mandate that showcase the process’ unique and unprecedented nature that should be observed over the duration of the MWTRC. First, the MWTRC is provided with clear autonomy from both Wabanaki and State governmental influence in assembling its final report. From interviews with members of the TRC Convening Group, this was intentionally done to give the MWTRC an apolitical character and as much objective credibility as possible. If this distance can be maintained, it will set a precedent for future US TRC’s and their cooperation with local government. Second, the MWTRC will not provide means of legal redress to survivors or witnesses of child welfare malpractice. “The Commission will have no authority to either pursue criminal or civil claims or to grant immunity from such claims.” This absence of legal recourse for survivors, victims, and their families is becoming a tradition of US-based TRCs, but its effects on the reconciliation and healing processes have yet to be properly examined. Lastly, the MWTRC will

adapt its activities aimed at truth-seeking, reconciliation, and healing according to the nuances and character of each Wabanaki community it seeks to engage. This is a notable feature of the bottom-up process that led to the establishment of the MWTRC and will be a significant element when considering future statewide truth-seeking, reconciliation, or healing projects.

Maine-Wabanaki REACH

By the time the Mandate was signed, the TRC Convening Group included the same affiliated organizations, as well as representatives from Wabanaki Health and Wellness and the Wabanaki Program of the American Friends Service Committee—a Quaker-affiliated non-governmental organization. The Mandate dictates the relationship that must be maintained between the MWTRC and TRC Convening Group. In 2013, the TRC Convening Group transformed itself into a coalition of organizations called “Maine-Wabanaki REACH” (known as REACH, an acronym for Reconciliation, Engagement, Advocacy, Change, and Healing). Described by its Co-Director Esther Attean as the ‘Mother’ organization of the MWTRC, REACH advises the MWTRC on the engagement of Wabanaki communities in truth-seeking activities, prepares communities prior to the MWTRC entering, provides education on the history of relations between Wabanaki and non-Native peoples, advises on Native child welfare practices, and will ultimately evaluate the impact of the MWTRC and REACH. Its current structure includes seven community organizers, a community engagement coordinator, and two co-directors—Esther Attean and Penthea Burns.

The Commission

As directed by the Mandate, the MWTRC is composed of five Commissioners, four of which must be residents of Maine. A confidential Commission selection panel was formed between the parties committed to the MWTRC in order to complete the directive. In the end the panel selected the following Commissioners: Maine Secretary of State Matthew Dunlap, Dr. Gail Werrbach, Director of

the School of Social Work at the University of Maine, Sicangu Lakota Sandra White Hawk from the First Nations Repatriation Association in Minnesota, Native rights activist and University of Maine instructor gkisedtanamoogk from the Wampanoag Nation, and former Chair of the Maine State Board of Education Carol Wishcamper. The MWTRC staff includes Executive Director Heather Martin and support staff including a research coordinator, a special projects coordinator and interns. During the field research, it became evident that the MWTRC faced skepticism over the selection of its Commissioners. Some interviews mentioned the controversy surrounding the decisions to not select a Wabanaki person to become a Commissioner, the appointment of a Maine government official as a Commissioner (thus bringing State politics into the MWTRC), and that the Executive Director is non-Native, citing that these issues may make the MWTRC look illegitimate in the eyes of some Wabanaki citizens.

Other Actors

The International Center for Transitional Justice

The ICTJ began in 2001, and is both a practitioner-based, and research-focused, organization. Its remit is “to help societies in transition address legacies of massive human rights violations and build civic trust in state institutions as protectors of human rights.”²¹ Their role so far in the MWTRC has been to provide advice and support for the establishment of the MWTRC, and, subsequently, to the MWTRC to publicize its activities, with the activities of the MWTRC being frequently highlighted on the ICTJ website.

American Friends Service Committee

This non-governmental organization seeks to put into action the Quaker commitment to peace, equality and non-violence in order to support communities in overcoming “oppression, discrimination, and

21 For further information on the ICTJ, visit their website at <http://ictj.org/about>.

violence.”²² The AFSC has a “Wabanaki Program,” based in Perry, Maine that has been highly significant in supporting the MWTRC in helping to bring “tribes, state workers, and communities together to confront injustices and promote healing.”²³ Denise Altvater is the AFSC’s Wabanaki Program Director, and also one of the key actors in the creation of the MWTRC, and a signatory to the Declaration of Intent.

The Portagers

The Portagers began as a group of mature students studying a course on American Indian women at Acadia Senior College. The Portagers’ ongoing role focuses on education, and in particular communicating with non-Native audiences the history of what the Wabanaki peoples have suffered, and the role of the MWTRC in helping to heal from this history. As one member of the Portagers, Anne Funderburk, noted, they are “out there...trying to educate people as to what is really going on and what really went on.” With this in mind, they have prepared Op-ed pieces for local newspapers, have organized events, and have helped in preparing presentation materials to raise awareness of the MWTRC, and the reasons why it is necessary.

3. Perspectives on the MWTRC

So, in review, ICWA did not in reality mean an immediate change in social welfare practice, nor did it eradicate painful memories and experiences. In Maine, Native children continued to be sent into foster care at a higher rate than in most other states, with little accountability, and with insufficient regard for local communities’ wishes or for maintaining familial and cultural connections. For the Wabanaki people, these child welfare policies mirrored and exacerbated their past dispossession, displacement and eradication through early settler-colonization. Thus, even though the MWTRC focuses on what has happened to children within the foster care and adoption systems since 1978, inevitably

22 For further information on the AFSC, visit their website at <http://afsc.org/our-work>.

23 For further information on the Wabanaki Program in Perry, Maine, visit <http://afsc.org/office/perry-me>.

this recent experience and the memory of it that remains is embedded within a much longer historical memory of mass extermination and an extended process of cultural genocide that included the placing of children in residential schools and the Indian Adoption Project. The MWTRC's purpose is to find out why this happened. Those involved in the early conceptualization and development of the idea for the MWTRC, and other involved parties in Maine, were interviewed in August and September 2013. Although the MWTRC process is still young and evolving, it is possible to identify several key themes in these interviews related to the envisioned role of the MWTRC.

4. Emerging themes

The emerging themes of the MWTRC are as follows:

- Breaking a “Killing” Silence;
- Acknowledging Suffering & Healing Trauma;
- Clarifying the Historical Record;
- Improving Child Welfare Policy;
- Better State-Tribal Relations; and
- Decolonization.

a) Breaking a “Killing” Silence

In remembering their history, Wabanaki participants in the MWTRC process have highlighted how child welfare policies perpetuated “cultural genocide” and contributed to community demoralization, feelings of powerlessness, stigma, and shame. In the everyday lives of the tribal communities in Maine there is a legacy of hyper-vigilance, fear and suspicion of the State, particularly of police and welfare officials. In addition to direct memories of children being taken away, failure to talk about and process this history has left a well of grief and unresolved trauma, transmitted across generations. For some witnesses and bystanders there is guilt and confusion at not being able to understand and stop the removals of children. Because extended kinship networks are part of Wabanaki culture the removal of children

affected not just individual families but the community as a whole. For others, there is a lack of knowledge due to the silence of traumatized individuals and communities. Therefore, in the first instance, the MWTRC offers a space for the voicing of complex trauma, that is both ongoing and trans-generational, both personal (affecting individuals) and rooted in community memory:

“I think the purpose is very important because we need to recognize what has happened to let the truth be told, and allow for healing because it [...] for so many years has been an unspoken thing. It’s been hidden. Nobody talks about it, and it’s killing us.”

—Belinda Miliano-Bernard, Community Organizer
(Sipayik), Maine-Wabanaki REACH

“I remember one day just the anxiety and the fear was so high. Somebody said ‘we can’t do this, this is wrong, we can’t do this, because as soon as people start talking about this, people are going to start drinking and drugging and killing themselves.’ And then we stopped and said, ‘You know what? We’re already doing that. The silence is not working for us.’”

—Esther Attean, Co-Director,
Maine-Wabanaki REACH

b) Acknowledging Suffering and Healing Historical Trauma

The MWTRC will acknowledge the suffering of the survivors through failures in child welfare policy, and draw attention to the wider suffering that the Wabanaki communities as a whole have experienced. Some interviewees stated that an apology could be appropriate if it was “sincere” and would help repair relationships. But they held that a more important development would be that the white population recognize and understand what has happened. Recognizing that historical trauma is deeply felt, lived, and passed on, but difficult to articulate, this process will allow a suppressed history to surface and to be faced so that mutual healing may begin:

“The TRC really represents a mechanism for us to be able to deal with historical trauma [...] whether it’s the taking of land, the fractionalization of communities, or what the TRC focuses on—the separation of our people from their communities, often into very vile situations. So the TRC represents an opportunity, in a very formal way, which is the most difficult thing to do, to put these mechanisms in place to be able to comprehensively deal with that trauma so we can get our communities healthy.”

—Chief Kirk Francis, Penobscot Nation

“And in my hope too is to see the reconciliation between [the] state workers who thought that they were doing their job but really caused more harm than good, police officers who went into the home[s] and [...] took children thinking that they were doing the right thing, and [that there is] reconciliation and healing for the people who had suffered at the hands of the state.”

—Belinda Miliano-Bernard, Community Organizer
(Sipayik), Maine-Wabanaki REACH

Thus, although the mandate for the MWTRC is focused, and deals with what happened to the Wabanaki people in the child welfare system from the period following the passing of ICWA to the present, it is clear that other issues will also emerge during the testimony process. The REACH coalition and many others are creating parallel processes to facilitate healing; recognizing that the natural expectation or hope for healing surpasses what the actual Commission can deliver given its limited timeframe and mandate.

c) Clarifying the historical record

“The purpose is to look into the history of the taking of children from Native families and placing them in the white community, often with standards and practices that were not culturally appropriate, and that continued after the passage of the Indian Child Welfare Act, and our job is to look into what happened, why it happened, and to recommend

practices in the future that will hopefully be more beneficial to children and to the tribes.”

—Carol Wishcamper, MWTRC Commissioner

The narrative that the MWTRC will document of the post-ICWA period contributes to a larger process of historicization for the Wabanaki people. Neither the Wabanaki story nor their child welfare history is told in traditional history textbooks. Some interviewees recalled their school years as times of alienation, and of being made to feel inferior, noting that they hoped that the MWTRC would help document material that could then be incorporated in textbooks and curricula. Another perspective, from a member of the State legislature, was that correcting the historical record was also important for the United States’ national identity and “our great experiment in democracy”:

“[T]he model of either pretending it didn’t happen or glossing over it briefly in a textbook, written by the victors, is not one that really serves to advance the American experiment in my view.”

—Seth Berry, Democratic Majority Leader,
Maine House of Representatives

Again, looking beyond its official mandate, some conceptualize the MWTRC as a mechanism for formally recording the 500-year-old dispossession of the Wabanaki people and then encoding the truth in the larger U.S narrative.

d) Improvements in Child Welfare Policy

Another theme emerging from the interviews was that the process of making this truth public should not only result in greater awareness and acknowledgement of suffering but lead to tangible changes in child welfare policy.

“[J]ust reflecting on what happened in the past is not going to be enough to promote healing in Wabanaki communities—but changing how we are together is the thing that will enable healing to go further and to prevent harm from

continuing—or continuing with the whole state system behind it.”

—Pentheia Burns, Co-Director,
Maine-Wabanaki REACH

The ultimate success of the MWTRC would not be in surfacing the past alone but in ensuring improved child welfare practices so that the abuses of the past never happen again. In individual and community memory, school and church abuse also loom large. Participants recall stories of mothers fearing that if they sent their children to school with dirty faces, the nuns would report them and help the State take their children into care. Some participants in the MWTRC believed that the role of the Catholic Church should be addressed, but recognized that it would be difficult and controversial because of the devout Catholicism of some of the Wabanaki people as well as resistance within the church hierarchy.

While broader accountability may be difficult to achieve and ultimately unsatisfactory for some, the final aim of the MWTRC is not to attribute blame but to elicit, from those most affected, the recommendations for future child welfare policy. While implementation of these recommendations cannot reverse the past, it can provide a constructive way to honor the survivors while ensuring that future children, families and communities are better supported and protected.

e) Improving State-Tribal Relations and Decolonization

“I really see it as a healing opportunity for tribal relations. There has obviously been a history of tension between the tribal relations and the state.”

—Mark Eves,
Speaker of the Maine House of Representatives (D)

In addition to improved child welfare practices, better Tribal-State relations are seen as a probable outcome of the MWTRC process. Interviewees mentioned issues such as gaming and fishing rights as areas that could be improved through engagement. For communities that have suffered long-term trauma their ability to heal can be

hampered by official policies that reproduce structural domination and harm. Indeed, some envision a much more significant transformation than only improved State-Tribal relations, citing “decolonization”²⁴ (undoing colonialism and unequal relationships) as a possible outcome. Some of the participants acknowledge that the MWTRC process will entail difficult conversations, internal soul-searching, and the surfacing of hard truths about white privilege and internalized racism. They describe the process as “decolonization of hearts and minds,” a conceptualization that challenges all parties:

“This country needs to understand that it’s built on the bodies of Native people, and they need to accept that, and they need to move forward, admit it, and then once that happens then they can handle other things, in other countries, but until they do, they’re...going to...keep making the same mistakes as they’re doing now.”

—Donna Loring, Tribal Elder,
Penobscot Nation Council member

On the other side, acknowledging that victimhood has been instrumentalized as a political tool is necessary. If the MWTRC is to truly represent and effect a decolonization of hearts and minds, then the survivors and their advocates will need to reject self-defeating stances where being victim is a comfortable but stagnating position, or as described below, “give up” this position in the interests of conflict transformation:

“[S]ometimes we’re put into that victim role and we gain something from that. I have been in meetings, mixed meetings with tribal and state people and we’re deferred to a lot. Sometimes we can get away with saying things that a white professional would not be able to get away with saying, and we’re placated because white people are so afraid of looking like a racist, or looking like a bigot, that it goes the other way. The TRC process means that we have to give that up. [...] I wasn’t able to articulate it then but what I was feeling

24 Ester Attean & Jill Williams, *Homemade Justice* (2011) 35 Cultural Survival Quarterly. <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/united-states/homemade-justice>.

and thinking about was this process of decolonization. And how we all have a role in that.”

—Esther Attean, Co-Director,
Maine-Wabanaki REACH

The MWTRC is a process in which different perspectives are currently being negotiated both within and between the Native and non-Native communities of Maine. Out of the process, new norms and values are likely to emerge.

5. Challenges and tensions

The challenges and tension of the MWTRC are related to:

- Mandate and Managing Expectations;
- Funding;
- Wider community engagement & youth engagement; and
- Reconciliation versus Decolonization.

a) Mandates, Managing Expectations and Funding

One of those more skeptical about the MWTRC stated that: “If the TRC touches the heart of the problem, the gates may be open for more action against colonialism.” The interview suggest that the heart of the problem is the historical trauma of colonization, but the mandate of the MWTRC is much narrower than that. The MWTRC will share with other processes the problem of how to manage the expectations of participants, particularly those of survivors. REACH’s work has been to prepare the communities and protect against re-traumatization. If the surrounding activities, support networks, dialogues and longer-term connections that the MWTRC idea has produced continue to thrive through the work of REACH, wider impact is achievable.

Funding, however, is an ongoing challenge. The founders of the MWTRC have sought to avoid financial ties with political parties in the Maine State Legislature in an attempt to keep the process independent of State politics. However, as stipulated by the mandate, the MWTRC has received payment in kind in that both Tribal and State governments

have permitted the involvement of the staff and use of public buildings (Tribal community centers, Hall of Flags). In addition, the MWTRC has received grants from national and Maine foundations, like the Andrus Family Fund, Casey Family Programs, Lerner Foundation, The Bingham Program, BroadReach Fund, and Maine Community Foundation. Fundraising continues at the grassroots level.

b) Wider Community Engagement and Youth Engagement

This TRC is not happening post-war or post-authoritarianism, and therefore is likely to avoid the problems of political expediency seen in such contexts. The MWTRC is not a part of a peace agreement or any formal political transition process, and its workings do not affect the success or failure of ceasefires and negotiations; nor do they involve prosecutions, amnesties, or reparations. The stakes, then, are relatively low, politically speaking. However, this does mean that the majority population of Maine and its welfare officials could potentially ignore or withdraw from the MWTRC if it proves too discomforting, as the costs of nonparticipation for the dominant group are low. This underlines the important role that REACH is playing in public education and community engagement. Additionally, youth engagement will be critically important in ending the trans-generational transmission of trauma within the Wabanaki communities and for preparing Maine's young people more widely for a transformed understanding of their relationship to their Wabanaki neighbors.

c) Reconciliation Versus Decolonization

Although there appears to be a significant consensus around the role that the MWTRC can play in improving child welfare policies going forward, there may be differences between different stakeholders in Maine about the extent to which both reconciliation and decolonization can occur and what these concepts actually mean. For example, members of the majority population and politicians emphasize the process as a "transition" in Tribal and State relations leading to healing between the Tribes and the State, while Wabanaki interviewees

emphasized their community's healing, and publically acknowledged truth about, and change in, child welfare practices.

Indeed, it should be expected that the Maine process entails tensions seen in other processes where power relations are asymmetrical or in flux. For example, in Northern Ireland and Israel/Palestine, the use of the term "reconciliation" remains controversial, understood by many to imply a return to an earlier period of "good" relations that either never existed or were overtly stable but unjust. Reconciliation is thus viewed as re-legitimizing existing power relations and injustice, as normalization and/or pacification.

The MWTRC commissioners, staff and community activists supporting the process are keenly aware of the importance of language and how concepts shape dialogue. A MWTRC Commissioner recognized the difficulties of the term "reconciliation":

"We have talked about it, we have not come up with a single term, the term reconciliation is problematic. And we haven't been able to define it, so, and I think we probably won't, I think we'll get through the process [...] defining our work as truth, healing and change."

—Carol Wishcamper, MWTRC Commissioner

Addressing this problem, some of the interviewees contrasted this understanding of "reconciliation" with "decolonization." For these actors, the MWTRC involves a deliberate re-appropriation of the colonial State's counter-insurgency strategy with a view to throwing off the mental chains of victimhood and oppression. Along with the ideas of Truth, Healing and Change, this reframing of reconciliation promises to be one of the MWTRC's most important theoretical contributions.

6. Contributions

The contributions that the MWTRC will make include:

- A first for the U.S (involving Indigenous and State actors);
- Hybrid model (bottom up, but state participation);
- Discrete focus (child welfare) with in-built wider social impact;

- Role in public education and conflict transformations;
- Space for “new forms of solidarity” in addressing historical trauma; and
- Reframing reconciliation: a “truth, healing and change” commission.

The first TRC in the U.S. to involve Native peoples and State government, the hybrid model that the MWTRC represents distinguishes it from other processes in North America. The Canadian TRC has been criticized for being elite-driven and disconnected from the everyday realities of ongoing marginalization and injustice affecting the Indigenous Peoples of Canada. The MWTRC, on the other hand, originated in a tribal-state grassroots initiative that later expanded to draw in leaders from the Maine and Wabanaki governments. As reported in the introduction, during the ceremonial signing in the state capitol Augusta, a space was claimed for the Wabanaki in the public, political landscape, an important step in reversing historic invisibility. But the MWTRC process remains micro-locally driven by the Wabanaki community organizers and allies and has not been co-opted or taken over by the legislature or other high level officials. This seems to be in part due to both the commonsense of some political actors and the apathy of others. Most importantly it appears to result from the unique support structure created for the MWTRC (see section 3), a structure which may suggest a model for a more hands-off and humble role for official State and high profile actors in future truth-telling processes.

The MWTRC process in Maine is also developing an approach to conflict transformation that makes communities stronger and more resilient, building peace both within and between communities that have historically been in conflict.

“If we can work together in that good way [for the TRC], in a system of mutual respect, to work for our children, then I think we can work together in anything because nothing is more sacred than our children.”

—Esther Attean, Co-Director,
Maine-Wabanaki REACH

While emphasizing commonalities, as above, it also is recognized that uncomfortable truths would emerge for both the majority community in Maine and for the Wabanaki people. For example, several of the interviewees noted that current social problems should be traced not only to colonization, long-term discrimination and injustice but also understood as a manifestation of internalized racism. Yet, the risks, while well understood, were not perceived to outweigh the need for and the potential benefits of uncovering the truth. Local community leaders and activists have been preparing the survivors and those around them, hoping to mitigate the possibilities of re-traumatization. As Esther Attean conceptualizes it, the ability to withstand the sadness that a wave of truth will bring, is a collective one, developed through many conversations, reflections and a solid support system of relationships:

“We’ve focused a lot of energy and time to prepare our people and to make sure there’s a safety net for them so when we do open this can of worms, when they do start sharing this grief, there’s a way to support them—there’s no way to shield them from it. I like to think it’s like you’re standing on the edge of the ocean and there’s a huge wave coming, there’s no way to stop the wave, you’re going to have to let it just wash over you and we’re there to hold their feet to the ground so they don’t get sucked into the water. And we’re there to help them withstand that wave together.”

—Esther Attean, Co-Director,
Maine-Wabanaki REACH

A distinctive feature of the MWTRC is its focus on child welfare, a tackling of a ‘manageable’ issue that models how to make reconciliation a practically implementable norm. Learning from the MWTRC will help us expand and enrich the transitional justice “tool kit.” We can compare it with approaches taken in other cases of institutionalized abuses of children.

Further, the MWTRC shows how a discrete issue, such as child welfare, reaches into the heart of much deeper historical injustices such as, in this case, colonialism and settler-Native conflict. “From the earliest days of the American republic, one of the primary intents of federal Indian policy was to eradicate the “Indianness” in young

people.”²⁵ A formal TRC on child welfare effectively places a full stop at the end of this historical policy, at least in Maine. Moreover, because child welfare policies intersect with many social practices and institutions—including family, school, church, police and the judicial system—as well as the welfare system, some wider social impacts are in-built. The MWTRC may demonstrate how a narrow focus on a very specific issue of social suffering can open a window into a larger landscape of collective trauma. It promises to open up “multidirectional” dialogues across groups and time, which create “new forms of solidarity and visions of justice.”²⁶

The MWTRC is emerging as a new form of truth commission, where the grassroots originators of the process are asserting their authorial power and redefining reconciliation as “truth, healing and change” and, perhaps more controversially, as decolonization. It is likely to enhance the current body of knowledge on TRC processes and their efficacy, particularly for the United States for which the literature on reconciliation models remains scarce. Moreover, the new kind of the truth commission that has been created in Maine offers hope for healing not only for the Wabanaki People, but also for those in other conflicts between Indigenous Peoples and contemporary States, and for the prevention of abuses within other child welfare systems.

7. Potential Wider Implications

The previous section opened up the discussion regarding some of the contributions that the MWTRC can potentially make not only to the future of tribal-state relations in Maine, but also to other communities seeking to reconcile and to heal following a period of long-term trauma. This section will take this discussion one stage further by examining the wider implications that the MWTRC has in potentially paving the way for other processes of healing for those communities that have been wounded by colonial practice whether across the United States or globally.

25 Marc Mannes, *Factors and Events Leading to the Passage of the Indian Child Welfare Act* (1995) 74 *Child Welfare Journal*. p. 266.

26 Michael Rothberg, *Multidirectional Memory. Remembering the Holocaust in the Age of Decolonization*. (Stanford, CA: Stanford University Press, 2009) p. 5.

As noted earlier, the construction of the MWTRC is groundbreaking—and as a grassroots model of reconciliation and healing, its unique structure may eventually be used as a model elsewhere. This has not only been noted in Maine itself, where Seth Berry (D), Majority Leader of the Maine House of Representatives, observed,

“We need to make sure the TRC is successful and if it is, that will certainly make it more likely that others will try it out.”

But it has also been recognized by others with a specific interest in the improvement of Indigenous Peoples’ rights. As previously mentioned, one key external advocate for the MWTRC has been the International Center for Transitional Justice (ICTJ). As Esther Attean notes, Eduardo Gonzalez, Director of the Truth and Memory Program at ICTJ:

“came up at the signing of the mandate, he was here, and he met with us...He has been the consistent voice helping us [and]...has shown us how what we’re doing here has never been done before this way in the world.”

In turn, Gonzalez has publicly acknowledged the potential significance of the MWTRC (ICTJ, 2013):

“The TRC is addressing one specific issue—treatment of indigenous children by the child welfare institutions...But it’s also trying to throw light over issues of marginalization, and discrimination, to cast some light on race relations in the state of Maine.”²⁷

Of course, the universality of genocidal policies towards American Indians means that there is the same need for healing right across the United States. Those Tribes that were not wiped out completely were largely left with only the remnants of their Tribal communities, and the deep wounds from policies that were designed, one way or another, to wipe them out. Wabanaki, Lakota, Hopi, Navaho, Cherokee, Navajo, Ojibwe, the list goes on, as do the battles that they face, for rights and

²⁷ ICTJ, New Release, *Maine Truth Commission to Tell Story of Forced Assimilation of Wabanaki Children* (19 February 2013)

<http://www.ictj.org/news/maine-truth-commission-tell-story-forced-assimilation-wabanaki-children>

for healing. As James Anaya, the U.N. Special Rapporteur on the Rights of Indigenous Peoples, stated in 2012 (in Charbonneau, 2012)²⁸:

“It is clear that this history does not just blemish the past, but translates into present day disadvantage for indigenous peoples in the country... There have still not been adequate measures of reconciliation to overcome the persistent legacies of the history of oppression, and... there is still much healing that needs to be done.”

The unique way in which the MWTRC was constructed and designed to operate—with its emphasis on a healing process that is bottom-up as opposed to top down, and its unique Tribal-State collaboration—is a model that therefore offers a great deal of promise in overcoming this “persistent legac[y] of the history of oppression:” in the US; in other “Settler Nations;” and in Indigenous and non-Indigenous communities across the globe. Despite the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in September 2007, Indigenous communities are not noticeably any further forward in their claims for rights. The case of Canada, of course, is a particularly interesting one, in that they too are in the middle of an active process of healing—the TRC of Canada—that is also centered on child welfare (Indian Residential Schools) but theirs is being conducted in a noticeably different way from the MWTRC. The Canadian TRC is both top-down and nationwide. Given that the Wabanaki Tribes cross the US-Canadian border, when both TRC’s mandates have expired, there will be an opportunity to examine the similarities and differences between how the communities perceive their process of healing, and to consider how the alternative models have worked and, thus, their applicability to other Indigenous rights claims. Indeed even in a country like Guatemala, with a majority Indigenous population, there remain grave problems for securing rights, creating representation, and addressing the issues that surround the political participation of Indigenous Peoples, if indeed those issues are even on the agenda which, for so many Indigenous Peoples, they are not.

28 Louis Charbonneau, *U.S. Must Heal Native Peoples’ Wounds, Return Lands: UN*, Reuters (4 May 2012), <http://mobile.reuters.com/article/idUSBRE8431Q220120504?irpc=932>.

Of course, it must also be remembered that the MWTRC is not only a model that can inform processes that aim to heal the hurt caused to Indigenous Peoples, but may potentially be applicable to a variety of truth and reconciliation processes globally. As Pat Clark, one of the Commissioners on the Greensboro TRC noted when discussing the MWTRC, these events do not “happen in a vacuum.”²⁹ Issues of dispossession and oppression are universal for those needing the justice and healing that a truth and reconciliation process can offer. Thus, just as the MWTRC learned from the process at Greensboro, future processes, whether inside or outside the U.S, will learn from the experiences that the MWTRC model can provide, whatever its eventual outcome. What is also particularly noteworthy is that the gaze of the MWTRC is not only focused on what is happening in the Maine Tribal communities, but instead looks out to others to find parallels with their own, and to learn from others, as they themselves continue to teach the impact that the U.S.’ genocidal policies has had upon them. One process that closely parallels the MWTRC in many ways is Fambul Tok, a community based and supported process in post-conflict Sierra Leone that “provides Sierra Leonean citizens with an opportunity to come to terms with what happened during the war, to talk, to heal, and to chart a new path forward, together.”³⁰ The Fambul Tok initiative (Fambul Tok means ‘Family Talk’ in Krio) has now been broadened to be used as a model in other post-conflict communities in recognition of the fact that there are similarities between those communities in their need for reconciliation. These initiatives recognize that many of those impacted by conflict want to be able to tell their stories, and to have them listened to, in order to attempt to put the past behind them and to have hope for a more peaceful future.

29 Nick McCrea, *Wabanaki Truth and Reconciliation commissioners sworn in; prepare to begin learning, healing* Bangor Daily News. (12 February 2013). <http://bangordailynews.com/slideshow/wabanaki-truth-and-reconciliation-commissioners-sworn-in-prepare-to-begin-learning-healing/>

30 Fambul Tok International, *What is Fambul Tok* <http://www.fambultok.org/what-is-fambul-tok>.

Conclusion

On 20 November 2013 the first hearings of the MWTRC opened in the Passamaquoddy Community of Sipayik (Pleasant Point). Early in the morning, on a clear Maine day, the sacred fire was lit and three days of testimonies began, testimonies that would start to reveal the true human cost of the State of Maine's child welfare policies with regard to the Wabanaki Nation. Only at the end of those three days were the sacred fires extinguished, ready to be lit again at the next set of testimonies.

These sacred fires not only mark the testimony process itself, but are also symbolic of the cleansing of hurt that the MWTRC process seeks to engender, and of the hope for new beginnings in its aftermath. This chapter has examined the history and context of the MWTRC, its structure, the perspectives that those close to the process have about its themes, challenges, and contributions, and the process' potentially wider implications. It is a landmark process because it is a Tribal and State government-endorsed truth and reconciliation commission, working from the grassroots level up, and with a structure that, if successful, could be used by other communities. Perhaps most important of all, however, is that this process offers an opportunity for the wrongs that the Wabanaki peoples have endured, like those that other Native communities have endured—for the past 500 years—to be recognized and for attitudes to begin to change, both systemically and culturally. The MWTRC is more than a process. As Maine artist Robert Shetterly recently said, the:³¹

“TRC [is] a metaphoric altar...a sacred place which people can approach carrying whatever piece of this traumatic burden that they own, lay it down, and find reconciliation in seeing all those true pieces laid out together.”

31 Arla Patch & Robert Shetterly, *A Story of Forgiveness, a moment of grace*, *Sun Journal*, (22 December 2013), <http://www.sunjournal.com/news/columns-analysis/2013/12/22/story-forgiveness-moment-grace/1469348>

IMPOSSIBLE MEMORY AND POST-COLONIAL SILENCES: A CRITICAL VIEW OF THE HISTORICAL CLARIFICATION COMMISSION (CEH) IN GUATEMALA

Marcia Esparza¹

Introduction

While truth commissions help break the silence over the past, they do so with limited effects. As in other Latin American countries,² the Truth Commission in Guatemala was the non-judicial, transitional justice mechanism the state adopted to address the war's mass violence (1962–1996) and its legacy. The 1994 Oslo Agreement, signed by the government and the left wing guerrillas known as the National Guatemalan Revolutionary Unity (URNG), established the legal mandate of the United Nations' Historical Clarification Commission (CEH in Spanish).³ Without having the capacity to prosecute, the Commission's main goal was to compile the country's official record by piecing together its history of war atrocities. The mandate called for everyone who had knowledge about killings, forced disappearances or torture during the war, regardless of their role, to tell their war stories to prevent the past from repeating itself. Eventually, it was assumed, the record would contribute to challenging the State's widespread

1 Professor of the Department of Criminal Justice, and Director, Historical Memory Project (HMP), John Jay College City University of New York, CUNY.

2 See, Priscilla B. Hayner's seminal study (2001) Unspeakable Truths: Confronting State Terror and Atrocity. New York: Routledge. Since 1982, more than thirty Truth Commissions have been established around the world, according to Sara Parker in *All Aboard the Truth Bandwagon. An Examination of the fascination with truth commissions*. *Antipoda*, 4 Enero – Junio 2007. For a list of TRCs setup, see also the Office of the United Nations High Commissioner for Human Rights. 2006. Rule of Law Tools for Post-Conflict States: Truth Commissions. New York: United Nations. For a detailed review of past studies, see, Eric Brahm. Peace & Conflict Review. Volume 3, Issue 2. Year 2009.

3 The Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer. See Comisión para el Esclarecimiento Histórico (CEH).1999. *Guatemala: Memory of Silence*. Guatemala: Unops.

impunity and to achieving justice. Yet, it was told primarily by victims, leaving behind a legacy of collective silences, as I suggest in this brief essay.

Among the undeniable merits of CEH was to document that over 200,000 victims had been killed or disappeared,⁴ and that the non-Indigenous State committed genocide against ethnic groups in Maya regions (1981–1983): the Q’anjob’al and Chuj, in Huehuetenango; the Ixil and K’iche in Quiché; and the Achi in Baja Verapaz.⁵ Both the CEH and the investigation by the Catholic Church, known as the Reconstruction of the Historical Memory (*Reconstrucción de la Memoria Histórica*, REHMI) (1998), concluded that in the early 1980s, state violence razed Indigenous areas in attacks aimed at the eradication of the Maya-led popular movement, cooperatives, peasant leagues, trade unions and democratic parties, demanding land and economic reforms.⁶

When establishing truth commissions within Indigenous communities, the Center for Transitional Justice in *Strengthening Indigenous Rights through Truth Commissions*,⁷ rightly noted the need to 4 “As a result of the fratricidal confrontation” (1999, p. 17), as warring forces disputed the mass based support, the Commission concluded. *Guatemala, Memory of Silence*. 1999. Commission for Historical Clarification. Conclusions and Recommendations (CEH, in Spanish). Unops, Guatemala.

5 CEH, 1999, *Conclusiones*, p.39.

6 REMHI, 1998, vol. III, pp. 122–126. Oficina de Derechos Humanos del Arzobispado de Guatemala (ODHA), Informe Proyecto Interdiocesano de Recuperación de la Memoria Histórica (REHMI). 1998. Guatemala: Nunca Más. For the indigenous uprising see most recently Konefal, Betsy. 2010. For Every Indio Who Falls. A History of Maya Activism in Guatemala, 1960–1990. Albuquerque: University of New Mexico Press. There are approximately 40,000,000 people in Latin America and the Caribbean that belong to the almost 600 indigenous peoples of the continent. According to the International Working Group for Indigenous Affairs, in Guatemala, the situation of indigenous peoples continued to be dire during 2010: 73% are poor in contrast to 35% of the non-indigenous population, and 26% are extremely poor. <http://www.iwgia.org/regions/latin-america/guatemala> July 12, 2013.

7 International Center for Transitional Justice. 2012. Strengthening Indigenous Rights through Truth Commissions. For other analysis of transitional justice and indigenous peoples, see, Chris Chapman, “Transitional Justice and the Rights of Minorities and Indigenous Peoples” in Paige Arthur, Ed. 2011, Identities in Transition: Challenges for Transitional Justice Cambridge, Cambridge University Press.

“go beyond an individualistic form of analysis; going beyond recent violations; and going beyond archival and written sources.” But the report also stressed, “going beyond a state-centric view of transitional justice,” an approach that fails to recognize the role non-Indigenous States play in punctuating Indigenous subjectivity.⁸

My critique of the transitional justice paradigm as a vehicle to achieve war justice for Indigenous Peoples is informed by my field-work for the Commission from 1997 to 1998, when I became privy to survivors’ harrowing war narratives in the Quiche Department, where half of the over 600 massacres took place. Drawing from genocide and postcolonial studies, my aim as a sociologist is to suggest that despite its many contributions, the truth commission did little to reveal a layered system of constructed social silence, hiding what French political scientist René Lemarchand calls (2009) the war’s “unpalatable truths.”⁹

The Commission, I would argue, did not quite reveal the war myths, and, above all, the ways the army managed to build its mass-based support in the countryside prior to the genocide—which has historical continuity within the context of internal colonialism (Anders, 1971; Blauner, 1969; Gutierrez, 2004; Memmi 1991; Stavenhagen 1970; Quijano 2000)¹⁰ exploiting Indigenous communities. Thus, in contrast

8 For the militarization of indigenous peoples in Latin America, see for example, Lynn Stephen, “The Construction of Indigenous Suspects: Militarization and the Gendered and Ethnic Dynamics of Human Rights Abuses in Southern Mexico” *American Ethnologist*, Vol. 26, No. 4 (Nov., 1999), pp. 822–842; Also see, Cecilia Mendez on the Peruvian case, *Las paradojas del autoritarismo: ejército, campesinado y etnicidad en el Perú, siglos XIX al XX* (*The paradoxes of authoritarianism: army, peasants, and ethnicity in Peru, from XIX to XX centuries*) University of California in Santa Bárbara. http://www.flacso.org.ec/docs/i26_mendez2.pdf Accessed November 24, 2013.

9 Lemarchand, René. 2009. *The Dynamics of Violence in Central Africa*. Pennsylvania: University of Pennsylvania Press.

10 For the internal colonialism affecting Latin American societies, see, Robert C. J. Young “whereby a colonial rule was replaced by the heirs of the autocracy of European settlers” (2001, p. 20). *Postcolonialism: An Historical Introduction*. Oxford: Blackwell Publishers. This notion is traced back to subordinated groups such as Chicanos in the United States and to Marxist traditions in Latin America. Comparatively, see also, Anthony L. Smith “Papua: Moving Beyond Internal Colonialism”. *New Zealand Journal of Asian Studies* 4, 2 (December, 2002): 90–114; Anders, Gary. 1979. *The Internal Colonization of Cherokee Native*

to the ICJT, I will suggest that failing to examine the historical role States play shaping the lives of colonized Indigenous Peoples precludes us from engaging in an in-depth discussion of the devastating ties the army builds with poverty-stricken communities.¹¹ This has a significant bearing on the construction and preservation of war memories, and ultimately, on achieving criminal and social justice.¹²

Based on this analysis, I suggest that the Truth Commission ultimately prevented the history of complicated, postcolonial relations tying Indigenous Peoples to the genocidal army from coming to light. Instead, the memory of the Indigenous survivors and witnesses to atrocities became not only a “manipulated memory” (Ricoeur 2004) but also an impossible memory understood as a truncated memory, rooted in the genocide and its legacy.¹³ As the genocide unfolded, through sheer terrorism and policy of cooptation, the army wiped out what French sociologist Maurice Halbwachs (1992)¹⁴ terms the frameworks of memory: the cultural spaces, family, Church, and the

Americans. *Development and Change* ISAGE, London and Beverly Hills, Vol. 10, 1979, 41–55. Gonzalez Casanova, Pablo. *Colonialismo Interno, Una Redefinicion*. <http://biblioteca.clacso.edu.ar/ar/libros/campus/marxis/P4C2Casanova.pdf>. Accessed March 6, 2013; Blauner, Robert, *Internal Colonialism and Ghetto Revolt*. 16 *Soc. Probs.* 393 1968–1969; Aimé Césaire. 2000. *Discourse on Colonialism*. New York: Monthly Review Press. Quijano, Anibal & Michael Ennis. 2000. The Coloniality of Power, Eurocentrism and Latin America. *Nepantla: Views from South*. Volume 1, Issue 3, 2000 pp. 533–580. Duke University Press; Gutiérrez, Ramón A., *Internal Colonialism and American Theory of Race*. *Du Bois Review*, Volume 1 Issue 02 September 2004, pp 281–295 Institute for African and African American Research; Moore, Joan. *Colonialism: the Case of Mexican Americans*, 17 *Soc. Prob.* 463 (1970); Stavenhagen, Rodolfo. 1970. *Class, Colonialism, and Acculturation*. In Irving L. Horowitz (Ed). *Masses in Latin America* pp. 235–288. New York: Oxford University Press.

11 For Frantz Fanon, a colonized people is “people in whom an inferiority complex has taken root, whose local culture originality has been committed to the grave—position themselves in relation to the civilizing language: i.e., the metropolitan culture. The more the colonized has assimilated the cultural values of the metropolis, the more he will have escaped the bush.” *Black Sin, White Masks*. Pluto Press, 2008, p.2.

12 A thorough discussion about what this means, is outside the scope of this study.
13 Ricoeur, Paul. 2004. *Memory, History, Forgetting*. Chicago: the University of Chicago Press.

14 Halbwachs, Maurice. 1992. *On Collective Memory*. Chicago: the University of Chicago Press.

broader society that help communities find a sense of collective identity, a shared base to remember their class and ethnic exploitation. Instead it replaced them with its own institutional memory, which was comprised of the step-by-step process involved in the militarization (Enloe 1980)¹⁵ and the further colonization of sectors of Indigenous Peoples. As Alejandro Cerda Garcia notes in the *Decolonizing Potential of Indigenous Peoples' Memory*, colonizing projects affecting communities take place by either “appropriation or impugnation.¹⁶ To compare, since their public appearance as an organized Indigenous force, the Mexican Zapatista Movement stands as a symbol of the active subaltern,¹⁷ whose memory is used to reclaim human dignity and social justice.

In the first section, I discuss the absence in testimony, based on survivors who did not testify before the CEH. Rather than only hiding criminal ties with the army, I argue more specifically, that the lack of testimonies from pro-army groups collaborating with the army, such as members of the Civil Self-Defense Patrols (PAC in Spanish), resulted in silences over the army's efforts to convince Indigenous groups to collaborate with its genocidal policy. Second, to illustrate the army's long-term efforts to coopt rural communities' ideological support, pre-dating the onset of the genocidal violence, I analyze a 1970s photograph of the Army's Civic Action Program promoted by the U.S.-AID.¹⁸ In joint operations with the Guatemalan armed forces, including the Navy and the Air Force, since the late 1950s, Civic Action Programs were comprised by a range of poverty-aid projects designed to gain the “hearts and minds” of the population, also used

15 Enloe, Cynthia. 2000. *Maneuvers: the International Politics of Militarizing Women's Lives*. Berkeley: University of California Press.

16 Alejandro Cerda, El potencial descolonizador de la memoria indígena. Elementos para su problematización. *Tramas* 38. UNAM, Mexico, 2012, pp.179–205. Das Veena y Debroah Pool (Eds), *Anthropology in the Margin of the State*. 2004, School of American Research Press, Santa Fe; Silvia Rivera Cusicanqui, *Ch'ixinakax utxiwa: una reflexión sobre prácticas y discursos descolonizadores*, Buenos Aires, Tinta Limón, 2010.

17 Ranajit Guha and Gayatri Chakravorty Spivak (Eds.). *Selected Subaltern Studies*. Oxford: Oxford University Press, 1988.

18 For the penetration of the state ideologically within Maya communities, see for example, Carol A. Smith (Ed.) *Guatemalan Indians and the State 1540 to 1988*, Austin: University Press, 1990.

by the United States in Vietnam and the British in Malaysia, but also elsewhere.¹⁹ Health, agricultural, and forestation experts participated in this type of Program, which brought palliative poverty projects to remote communities in army's trucks. In the process of delivering this poverty-aid, the army shaped remote communities' collective memory of the army as their guardians and "friend," instead of as their oppressors. This discussion of who came forward to testify and the resulting silence can perhaps begin to explain why so many victims told the Truth Commission they did not believe the army could have attacked their communities.

Absence in testimony: Who came and who did not come forward to testify

It is mistakenly conceived that "everyone testifies" before truth commissions. Of all the commissions implemented thus far, only the South African Truth and Reconciliation Commission (1996–1998) offered amnesty to perpetrators in exchange for their testimonies.²⁰ Yet, even in this case, a study entitled "*The Theater of Violence*" shows, "relatively few applications came from the parties recognized as the largest single category of perpetrators, the former South African government and its security forces".²¹ Notably, there is insufficient scholarly attention given to the fact that those directly or indirectly participating in mass murders—torture, forced disappearances, sexual abuse, and looting—do not come forward to

19 For this type of civic action in Malaysia, see, Susan L. Carruthers. Winning Hearts and Minds : British Governments, the Media and Colonial Counter-Insurgency, 1944–1960. New York : Leicester University Press, 1995.

20 The Commission also had the powers of subpoena, and search and seizure.

21 Foster D. & et al. 2005, p.13. The Theatre of Violence: Narratives of Protagonists in the South African Conflict. Cape Town: Institute for Justice and Reconciliation.

In fact, only 17.8 percent of the total 1,646 number of applicants accepted for amnesty came from state security forces. Out of the over 7,000 amnesty applications coming mostly from low-ranking officials (Tepperman 2002, p.4), in fact most were rejected for not meeting the necessary requirements. This study concludes, "Many persons, it has to be said, simply did not come forward. They remain unknown."

take part, a point that seems to be rather obvious, but that needs to be considered in more depth.²²

From a victim's perspective, testimonies are key in holding perpetrators and collaborators accountable in a court of law. For many survivors who gave their testimonies, widows, mothers, grandmothers, wives, sisters, aunts, and cousins, godparents and neighbors, telling their sufferings to the CEH was the first time they ever spoke to an internationally recognized institution about the gruesome violence that besieged them during *La Violencia*.²³ Largely, organized victims mobilized to participate in the commission as members and representatives took courageous initiatives to break the silence that engulfed them since low-level perpetrators continued to co-exist in their communities: PAC, military commissioners, their auxiliaries, the army's eyes and ears in each community, low ranking soldiers, and reserves.

While scholarly attention has been given to highlight the pivotal role victims testimonies have for the recovery of the historical memory, as a sociologist I am interested in addressing the lack of PAC voices, a rural militia force organized, trained and armed by the army, which the Truth Commission identified as being responsible for eighteen percent of all the human rights violations committed between 1962 and 1996.²⁴ Out of this percentage, in 85 percent of the cases, PACs acted in complicity with the army—leaving 15 percent of cases where they acted on their own, without the army's presence.

For Indigenous Peoples “coming to know the past has been part of the critical pedagogy of decolonization” (Tuhivai 1999, p. 34).²⁵ Yet,

22 Hayner acknowledges that the state does not cooperate with TRCs' investigations, not even for the most successful commissions (2001, pp. 32–49).

Unspeakable Truths: Confronting State Terror and Atrocity.

23 For a discussion about whether individual healing can lead into national healing or reconciliation, see for example, Hamber, B. & Wilson, R. 1999. Symbolic Closure Through Memory, Reparation and Revenge in Post-Conflict Societies. Paper presented at the *Traumatic Stress in South Africa Conference* hosted by the Centre for the Study of Violence and Reconciliation in Association with the *African Society for Traumatic Stress Studies*, Johannesburg, South Africa, 27–29 January.

24 CEH, 1999, *Conclusiones*, p. 85.

25 Tuhivai, Linda. 2002. Decolonizing Methodologies. Research and Indigenous Peoples. New York: Zed Books Ltd.

it was only on one occasion during my fieldwork with the Commission, that I took testimony from army collaborators. Two men, in their mid-thirties, testified as former patrol members and told of their role in one of the two July 1983 Chijtinimit massacres of other patrols.²⁶

In gruesome details, ex-patrollers described their human rights crime: six patrols stood on each side of the victims and pulled the rope placed around the victims' necks until they could no longer breathe. They claimed to be remorseful, and thought that by telling the truth to the CEH, would be exonerated from their guilt. They also confessed to being born-again Christians, and said they were aware that only God could be their judge, not an earthly criminal justice system—a statement that soundly echoed the preaching of right-wing, Evangelical churches in Guatemala (Stoll, 1990).²⁷ This type of testimony, however, was largely absent from the Commission, which begs the question: Can a truth be fully constructed without the testimonies of those who pledged their oath of allegiance to Guatemala and collaborated in the slaughtering of thousands of their own kin? And, as I discuss briefly in the next section, What did this absence of testimonies conceal?

Hiding enduring postcolonial relationships

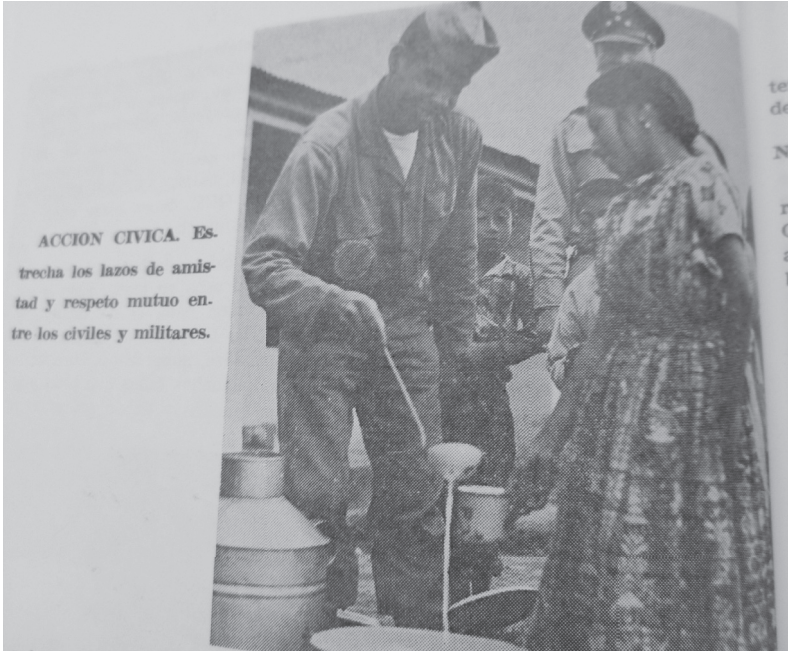
Brandon Hamber and Steve Kibble (1999) have argued that truth commissions can help “break the culture of silence that prevails under authoritarian rule.”²⁸ Yet, paradoxically, truth commissions have also prevented some information from entering public discourse. As Allen Feldman has suggested in the South African case, the transitional justice process has impeded the development of a

26 The CEH judged that the collective killing of four or more people at the same moment constituted a massacre. CEH Case 15379. The victims were identified as Manuel Chirum Susuqui, Tomas Chirum Sucuqui, Miguel Equila Chirum, Tomas Equila Taze, Manuel Jeronimo, Tomas Jeronimo, Sebastian Sajquic Nich, Tomas Sajquic Suy, Tomas Sajquic Felix, and Tomas Sajquic Nich. Also see, *Coleccion Holandesa Caja* No. 6, No. 3 Inforpress, Centroamericana 1987–1988. CIRMA.
27 Stoll, David. 1993. Between Two Armies in the Ixil Towns of Guatemala. New York: Columbia University Press.

28 Hamber, Brandon & Kibble, Steve 1999. From Truth to Transformation: The Truth and Reconciliation Commission in South Africa. Catholic Institute for International Relations Report, February.

critique of violence, which “proved incapable of depicting and addressing the racialization of state violence at the core of the [state] counterinsurgency project.”²⁹

To illustrate the collective silences over enduring post-colonial relations, I show a photograph revealing the army’s efforts to promote its 1970s Civic Action program in the highlands.



*Revista Militar del Ejercito.*³⁰

This illustration of an army soldier happily serving a drink to a young Maya girl served the army’s goal to promote the paternalistic notion that its presence brings nothing but caring support for Indigenous families’ health. Yet, the army is not interested in improving the health of a population it despises, but with whom, simultaneously, is tied through an “implacable dependence,” as suggested by postcolonial

29 Feldman, Allen. 2010. Traumatizing the Truth Commission: Amnesty, Performativity, Intentionalist Teleology and the Event. 7.2 After Truth, Winter. <http://hemisphericinstitute.org/hemi/en/e-misferica-72/feldman> July 26, 2013.

30 *Revista Militar*, Vol 65 (Julio-Septiembre 1970: 50–55). Hemeroteca Nacional de Guatemala, Clemente Marroquín Rojas.

thinker, Tunisian Albert Memmi (1965, p.ix).³¹ In other words, the army needs Indigenous groups to wage wars and Indigenous groups need the army to survive. Although space limitations preclude me from delving into details about acts of resistance by Indigenous Peoples' groups, it is important to note that rather than an "implacable dependence," there are countless examples of resistance to the army's encroachment, suggested by historians.³² French sociologist Maurice Halbwachs maintains that the recovery of the historical memory is a collective process where "the individual remembers only in relation to an interaction with the memories of others," in this case, with the army. By portraying itself as the army of and for the people, the military promotes its institutional memory precluding families from experiencing their own traditions and historical memory as a tool of empowerment.³³ Like during colonial times when Indigenous Peoples were perceived as less than human, "uncivilized and barbarians," whose duty was to serve the colonial power (Soria 1996),³⁴ the State's views of Indigenous Peoples—in war or peace times—is infused with racist ideological underpinnings, a colonial legacy that has continuities to this day.³⁵

As a result, the army's paternalistic aid delivered to the Indigenous Peoples in the countryside, as shown in the below table, includes offering a wide range of knowledge, services and basic infrastructure: the production of animals, insect and rodent control, repair and building of roads and bridges, the latter led by the Corps of Engineers.

31 Memmi, Albert. 1991. The Colonizer and the Colonized. Boston: Beacon Press.

32 See, Severo Martinez, 1991. Motines de Indios. Guatemala: Ediciones en Marcha.

33 For a discussion of the role played by collective remembrance within peasant societies, see Pierre Nora's "quintessential repository of collective memory." Pierre Nora, "Between Memory and History: Les Lieux de Memoire" Representations, No. 26, Special Issue: Memory and Counter-Memory (Spring, 1989) 7–24, p.7.

34 Pinto Soria, J.C. 1996. El regimen colonial y la formacion de identidades en Guatemala (1524 -1821) Guatemala. Centro de Estudios Urbanos y Regionales. Boletín 29. Junio.

35 "As Michael Rolph-Trouillot, suggests, colonialism provided discourses about degrees of humanity where some humans are more so than others (p.76). 1995. Silencing the Past: Power and the Production of History. Boston: Beacon Press.

Conclusion

Rather than going “beyond a state-centered approach,” as suggested by transitional justice scholars, I maintain that the opposite is needed and, indeed, more scholarly attention should be given to the role State armies plays in shaping Indigenous subjectivity and support during times both of peace and genocide. From this perspective, the CEH represented a Eurocentric lens largely imposed upon “transitional societies” by multinational institutions in the Global South. As Greg Grandin has suggested, the recent wave of truth commissions, beginning with such a commission in Bolivia, the National Commission on the Disappeared (*Comision Nacional de Desaparecido*), have marked a turn in the way of transitional justice, “but not in the way legal theorists and social scientists like to use the term.” Rather, argues Grandin, truth commissions marked a turning point to a neoliberal-type of peace and stability.³⁶ The dominant transitional justice legalistic view has masked how a “pax neoliberal” approach, to paraphrase Grandin, emerged promoting a new wave of capitalist “development” in the region. Left behind, was an underlying system of constructed silences over the role the army plays within Indigenous communities, rendering impossible the emergence of accurate or true Indigenous memories about the war atrocities that the State perpetrated against their communities.

36 Grandin, Greg & Klubock, Thomas Miller. “Truth Commissions: State Terror, History, and Memory”. *Radical History Review*. Issue 97 (Winter 2007) Duke University Press, MARHO: The Radical Historian’s Organization, Inc. p.1.

Source: The Center for Mesoamerican Research, CIRMA, La Morgue Collection

Natural and Agricultural Resources	Military units required	Communications industry	Military units required	Transportation	Military units required	Health and Welfare	Military units required
1. To increase or to improve the production of animals, grains, or produce	Individuals with agricultural experience	1. Evaluation and development of acceptable sources of sand and stone for work on roads and construction in general	Engineering units	1. To build, repair, or improve roads and bridges	Engineering units and troop with available workers and/or trucks	1. To improve health standards	Medical and Public Health Units
2. Insect and rodent control	Troops or units with ground or aerial spray equipment	2. Installation, operation, and maintenance of telephone, telegraph, and radio systems	Transmission units	2. To build, repair, or improve railroads	Transportation Corps Units and troop units with available workers	2. To establish and operate clinics for treating outpatients, or for providing first-aid services	Medical units
3. Transportation of agricultural products, seeds, and fertilizers	Units with transportation facilities.	3. Construction of housing and buildings.	Engineers for layouts, supervision, troop units for construction	3. To build, repair, or improve inland waterways, docks, and ports.	Transportation Corps Units and troop units with available workers	3. To devise acceptable methods for the disposal of human waste.	Medical and engineering units and of troop work

CHALLENGES OF TRUTH COMMISSIONS TO DEAL WITH INJUSTICE AGAINST INDIGENOUS PEOPLES

M. Florencia Librizzi¹

I. Introduction: From a general framework for truth commissions to reflecting on how best to address specific contexts

Truth commissions are still being created around the world in order to redress human rights violations, in accordance to the right of victims to an effective remedy and the right to know the truth² to the fullest extent possible.³ As non-judicial official bodies, which investigate violent historical periods often silenced or denied, truth commissions recognize the dignity of the victims, and propose policies to prevent⁴ more violations from happening in the future. Further to that purpose, the recommendations of truth commissions generally seek to identify the causes of the violations, determining patterns of abuse and preventing recurrence.⁵

Based on the experiences of many past truth commissions, the best practices and legal standards have been systematized to provide

1 Consultant for the International Center for Transitional Justice (ICTJ). This paper is the result of a joint investigation with Eduardo González-Cuevas, Director of the Truth and Memory Program at ICTJ, to whom I am very grateful for his guidance, support and valuable comments.

2 The right to know the truth includes the establishment of the identity of perpetrator, causes, circumstances and facts surrounding the violations and the whereabouts of the victims in case of forced disappearances.

3 Varney & Gonzalez (Eds.), Thematic Studies on Truth Commissions. Brasília: Brazilian Amnesty Commission, Ministry of Justice; New York: International Center for Transitional Justice, 2011m, p.1. The right to truth has been increasingly recognized by various UN resolutions, expert reports, and national courts, regional and international decisions. See, United Nations Commission on Human Rights. Resolution on the Right to Truth. A/HRC/RES/9/11, United Nations Commission on Human Rights. Promotion and Protection of Human Rights. Study on the Right to the Truth. Report of the office of the United Nations High Commissioner for Human Rights. E/CN.4/2006/91.

4 Varney & Gonzalez (Eds.), Thematic Studies on Truth Commissions, p. 9.

5 See UN Office of the High Commissioner For Human Rights, “Rule of law tools for post-conflict states. Truth Commissions”, 2006, p. 1.

a general framework for establishing a truth commission, as well as for helping to identify inauthentic commissions created to cover up lack of political will to conduct prosecutions. However, relying too heavily on this framework poses risks of limiting creativity or imposing general formulas that might not be adequate for some specific situations,⁶ since truth commissions modeled on this framework may be inadequate to redress serious human rights violations in some contexts. Therefore, it is important to point out that while the many tools and practice guidelines⁷ for truth commissions that have been adopted over time are very important as a general framework on how truth commissions should be established, the fulfillment of these guidelines are not *per se* sufficient, and a thoughtful reflection on how to address specific contexts that might pose concrete challenges is imperative.

In that sense, we have seen that truth commissions are going further than the traditional focus on individual human rights violations often affecting physical and mental integrity (*i.e.* torture, forced disappearances, murders, or sexual violence) to tackle collective human rights violations to economic, social, cultural and environmental rights.⁸ For instance, some truth commissions have been starting to look at structural racial inequality⁹, environmental damage,¹⁰ as well as serious human rights violations experienced by Indigenous Peoples around the world.¹¹

This paper examines some of the challenges that truth commissions face when addressing Indigenous Peoples' issues, reflecting what measures have to be taken into account in order to establish truth

6 González-Cueva, Eduardo, *Where are truth commissions headed?* in Transitional Justice: Handbook for Latin America/Editor Felix Reategui – Brasilia: Brazilian Amnesty Commission, Ministry of Justice; New York: International Center for Transitional Justice, 2011, p. 315.

7 E.g. UN Office of the High Commissioner For Human Rights, “Rule of law tools for post-conflict states. Truth Commissions”, 2006

8 *Id.*, p. 11

9 Such is the case of the Metropolitan Detroit Truth & Reconciliation Commission on Racial Inequality, in the State of Michigan, United States. See <http://www.metrodetroittruth.com/>

10 The Center for Earth, Energy and Democracy aims to create a truth commission to acknowledge and reconcile the losses associated with environmental harms. See <http://www.ceed.org/>

11 Truth commission looking into violations experienced by Indigenous Peoples has been established in Chile, Canada and the State of Maine, United States.

commissions that respect the rights, perspectives and needs of Indigenous Peoples.

II. The needs, perspectives and rights of Indigenous Peoples as reality and a normative framework to take into account when establishing truth commissions

Indigenous Peoples are among the groups most affected by contemporary conflicts as well as unresolved historic injustice involving their territories, resources and cultures, and often this situation is aggravated by their weak voice in the political arena. Therefore, even when societies decide to confront the legacy of mass atrocity, the violation of Indigenous Peoples' rights is often inadequately addressed.¹²

Some truth commissions have already focused on addressing cases of violence against Indigenous People such as Guatemala¹³, Peru¹⁴ and Paraguay.¹⁵ Recently, new truth commissions have emerged investigating contexts in which Indigenous Peoples were targeted by serious human rights violations such as Chile¹⁶, Canada¹⁷, and the State of Maine in the

12 ICTJ, *Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource*, ICTJ (2012), 3. Available at <http://ictj.org/publication/strengthening-indigenous-rights-through-truth-commissions-practitioners-resource>, p.1

13 The Commission for Historical Clarification took place from 1997 until 1999. Even though Indigenous Peoples were not mentioned in the mandate, the truth commission investigated crimes committed against Indigenous Peoples and addressed them separately in the final report.

14 The Truth and Reconciliation Commission operated from 2001 until 2003 with a mandate that explicitly included investigating violations to collective rights of Indigenous Peoples.

15 The Truth and Justice Commission worked from 2004 until 2008. The commission found that Indigenous Peoples were among the most victimized during the dictatorship, suffering from massacres, trafficking of Indigenous children, and seizure of their lands.

16 The historical Truth and New Deal Commission took place in Chile from 2000 until 2004 preparing as a result a report on the historical relationship between Indigenous Peoples and the Chilean State and making recommendations for more inclusive governmental policies.

17 The Truth and Reconciliation Commission of Canada, in operation since 2009, was established to look into abuses suffered by Indigenous Peoples through forced assimilation during the life of residential schools system set up by the Federal Government in 1874.

United States.¹⁸ In Colombia, for example, while there has not yet been a national, comprehensive truth commission, some public and private institutions have initiated truth-telling initiatives in a context in which Indigenous Peoples' rights have been severely violated.¹⁹

This tendency to focus on abuses suffered by Indigenous Peoples has coincided with the international community's recognition of Indigenous Peoples' human rights. For instance, the International Labor Organization (ILO) adopted Convention 169²⁰ which recognizes, *inter alia*, the State's responsibility for the participation of Indigenous Peoples,²¹ the duty of consultation,²² that the application of national legislation shall take into account their customs and customary law²³ and the establishment of measures to ensure mutual understanding in legal proceedings.²⁴ In addition, The United Nations Declaration on the Rights of Indigenous Peoples²⁵ recognizes that Indigenous Peoples have the right to maintain and strengthen their legal, political, social, economic and cultural institutions and to participate in the State in which they live²⁶ and the State's obligation to provide mechanisms to prevent and repair any action that deprives them of their integrity as

18 The Child Welfare Truth and Reconciliation Commission is working from 2012 to look into the legacy of abuse under the Indian Adoption Project which caused hundreds of Indigenous children to be taken from their families and tribes to be placed in foster homes managed by the State in the 1950s and 1960s.

19 For instance in Colombia, the civil society has organized many memorialization and truth-telling initiatives from diverse communities and NGOs. As a result, databases on human right violations and fact-collection exercises have provided information that could advance truth-telling processes. An official truth commission should build on the expertise and experience of these civil society-led initiatives, taking into account the general framework for truth commissions, and furthermore being informed by a holistic analysis of relevant social and political dynamics, including a thoughtful analysis of how to redress the human rights violations of Indigenous Peoples who have suffered torture, extrajudicial killings, displacement, etc. See, ICTJ, Roberto Vida-Lopez, *Truth-Telling and Internal Displacement in Colombia*, available at <http://ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Truth-Telling-Colombia-CaseStudy-2012-English.pdf>, p. 9.

20 See the Convention 169, International Labor Organization, art. 1.1.

21 *Id.* Art. 2.

22 *Id.* Art. 6.

23 *Id.* Art. 8.1.

24 *Id.* Art. 12.

25 *Id.*

26 *Id.* Art. 7 y 8.

distinct peoples with distinct cultural and ethnical identities, and their possession of lands, territories and resources.²⁷

This normative framework, in addition to the specific perspectives and needs that Indigenous Peoples have in different contexts compel us to a thoughtful reflection on what are the challenges that truth commissions as a transitional justice tool pose when dealing with Indigenous Peoples' issues, and how truth-telling initiatives can be adapted to adequately serve in redressing human rights violations suffered by Indigenous Peoples.

III. Rethinking truth commissions in the light of the Indigenous Peoples' rights

Truth commissions have significant potential to help remedy abuses suffered by Indigenous Peoples and strengthen their rights. Implemented properly, with strong guarantees of independence, integrity and adequate leadership, as well as considering the rights, perspectives and needs of Indigenous Peoples, truth commissions can help strengthen the rights of Indigenous Peoples by fulfilling the right to know the truth, recognizing the dignity of Indigenous Peoples and proposing policies to prevent further violations. In this sense, truth commissions can strengthen the recognition of sovereignty, the identity and Indigenous perspectives and respect for their civil, political, economic, social and cultural rights as well as their rights to ancestral lands and natural resources.

Truth commissions often have found serious human rights violations against Indigenous Peoples, have recognized the historical value and cultural identities of Indigenous Peoples, and have also proposed reparation measures and the establishment of mechanisms for the full realization of their rights. Furthermore, these truth-seeking mechanisms can help inform non-Indigenous society, which has largely turned its back on the needs and rights of Indigenous Peoples.²⁸

²⁷ *Id.* Art. 8.

²⁸ For instance, in Peru, after the work of the Truth and Reconciliation Commission, a historical documentation centre was opened that exhibited iconic photographs from the conflict. This exhibition called "*Yuyanapag*" (To remember) had a profound impact on the Peruvian society.

However, the traditional model of truth commission requires consideration of several features in order to adapt this tool to the context, rights and perspectives of Indigenous Peoples.²⁹ Truth commissions have generally been established as a tool to reaffirm the goals of reconciliation and unity within a nation-state.³⁰ A model, focused only on the reconciliation and unity within a nation-state that does not properly acknowledge, consult and warrant participation of the Indigenous Peoples, may not be best for commissions working with people who claim an identity as “First Nations” and should be recognized as such.³¹

Truth commissions have generally focused on recent abuse cases, which can be recalled by witnesses who directly lived those experiences. Indigenous Peoples have suffered historical violence, whose history is usually transmitted by oral tradition, so existing methods of truth commissions may be insufficient. In addition, Indigenous Peoples have suffered violations that affected not only individual rights of its members, but their collective rights affecting their communal way of life and identity.

Consequently, truth-seeking mechanisms involving Indigenous issues must go beyond one-way analysis focused on individual violations to tackle the violation of collective rights and should go beyond the State, as well as consider other sources beyond the written and archival such as the oral tradition and performance of rituals and ceremonies.³² In order to properly implement this, truth commissions should involve Indigenous Peoples during all phases of their operations, ensuring consultation to seek to obtain free, prior and informed consent, respecting their representative institutions and providing attention to the needs of Indigenous People, women and children.

29 *Id.* ICTJ, Strengthening Indigenous Rights through Truth Commissions.

30 It is important to distinguish those truth commissions that have been created with the specific goal of analyzing Indigenous issues, such as Chile, Canada or Maine, from those that have analyzed Indigenous issues in a much broader context.

31 The term “First Nations” it is often used in the context of Indigenous Peoples in Canada. Other Indigenous Peoples around the world use this term referring to national identities that differ from the State in which they live.

32 *Id.* ICTJ, Strengthening Indigenous Rights through Truth Commissions. p. 3.

1. Questioning some traditional assumptions of truth commissions

1.1. Focus on the national identity of a State

Truth commissions are often designed to achieve national reconciliation projects: “a process of setting the record straight and re-establishing trust among communities, reaffirming a damaged national identity”.³³ While reconciliation within a country is a worthwhile goal, from an Indigenous perspective it should not mean to strengthen one dominant national identity at the exclusion of others, as many conflicts began with patterns of dominance or denial of multi-ethnic societies.

The UN Declaration on the Rights of Indigenous Peoples recognizes the right of Indigenous Peoples to affirm their own nationhood, in accordance with their traditions and customs, while retaining the right of citizenship in the state in which they live. This distinction is relevant when discussing the potential function of reconciliation of certain truth commissions conceived with a “nation-to-nation” focus instead of a “mono-national” approach. In this sense, truth commissions should set new standards of practice that go beyond the general framework of traditional truth commissions, and ensure the Indigenous Peoples’ right to free, prior, and informed consent for each step of the process; recognizing the value of customary Indigenous legal practices alongside the mainstream law.³⁴

For instance, the Historical Truth and New Deal Commission in Chile found that Indigenous Peoples living in Chile were descendants of the original occupants in Chilean territory and determined that the Chilean nation was established in an attempt to assimilate native peoples by using violence, denying their identity, with serious consequences for Indigenous Peoples. In that sense, the Commission recommended seizing this historic opportunity for understanding between the State, society and the different Indigenous Peoples’ groups, recognizing the cultural diversity and multi-ethnic reality of Chilean society. While

³³ *Id.*

³⁴ *Id.*, p. 4.

there is still much to be done in this respect, this is a small first step on the right direction.

A truth commission that deals with injustice against Indigenous Peoples has to take into account the different nations existing within the State's territory, without intending to strengthen the dominant national identity.

1.2. Focus in an individualistic form of analysis

Truth commissions have often focused on violations such as torture, killings, and forced disappearances. This approach may not be sufficient for establishing how individual violations impact a community or to confirm whether individual violations targeted Indigenous Peoples through systemic persecution, forced displacement, or genocide. An exclusive focus on individual rights may relegate attention to violations of economic, social, cultural or environmental rights. This could generate problems when examining Indigenous rights which cannot be examined without addressing other connected issues, such as access to their lands, territories and resources and their right to practice their languages, rituals, and religious or spiritual beliefs. Abuses such as occupying ancestral territories, forcibly assimilating children into other cultures or forbidding the use of traditional languages, ceremonies, and technologies, not only harm individual rights but also Indigenous identities as effectively as physical persecution³⁵.

For instance, the Commission for Historical Clarification in Guatemala has identified many abuses against Indigenous Peoples including aggressions against elements of deep symbolic significance for native peoples, such as the extrajudicial killing of elders, custodians of traditional knowledge, or the destruction of cornfields.³⁶ These violations exceed the concept of individual rights to constitute violations to collective rights having serious negative impact on the identity of Indigenous Peoples, and perturbing the transmission of their culture from generation to generation.

35 *Id.*

36 See Final Report para. 122. Available at <http://shr.aaas.org/guatemala/ceh/report/english/toc.html>.

In consequence, truth commissions looking into abuses suffered by Indigenous Peoples should go beyond violations of individual rights to comprehensively address violations of economic, social, cultural or environmental rights.

1.3. Focus on recent violations

Traditionally, truth commissions focus on recent violations as they work mainly with individual living witnesses. For Indigenous Peoples, such an approach might be inadequate to address long-term human rights violations as well as experiences of marginalization and persecution. Historical abuses suffered by ancestors might still remain in the memory and oral traditions of the living and should be addressed for the community to adequately recognize and redress those experiences. The mandate and inquiries of truth commissions should focus on injustices, even if abuses took place in a distant past, questioning official national historical narrative.

For instance, the Truth and Reconciliation Commission in Canada is looking into abuse suffered by Indigenous Peoples through forced assimilation resulting from residential schools since 1874. The experiences of residential schools include prohibition of the use of the Indigenous languages and cultural practices and often sexual, physical and psychological abuse generating long-lasting negative impacts transmitted generation after generation. Other examples of abuses toward Indigenous Peoples—such as those suffered during colonization—are able to pose even more significant challenges given that they have happened long time ago, on a continued basis. Nevertheless, this also becomes an opportunity for Indigenous Peoples to tell their stories and give their history the same consideration given to the national narratives.

1.4. Focus on archival and written sources

Truth commissions traditionally rely on oral sources, especially during their inquiries and outreach. However, these sources are translated into written statements and reports, a more appropriate format for State use and policy making. In Indigenous communities,

oral tradition plays an important role as a source of law, a basis for claims and a guarantee of action. The performance of ceremonies and rituals to witness or commemorate is an important element in validating and dignifying storytelling. Truth commissions should understand and incorporate such manifestations. For instance, the Truth and Reconciliation Commission of Canada has been carrying out a vast public education campaign, holding more than two hundred conferences and commemorative events in which victims tell their stories, as well as theatre and sports events.

This approach would demand discussing: “How can we assess the validity of oral tradition as evidence? How do different cultures treat time and causality in the narratives of the past? Who speaks for a community, and how might that differ from community members’ individual accounts?” On the basis of these reflections, truth commissions should devise innovative techniques for taking statements, processing data, and developing standards of evidence. Similarly, learning from Indigenous Peoples on a contextual basis, on the most appropriate form to transmit information should inform a particular truth commission’s approach on outreach and dissemination of findings and conclusions.³⁷

2. Devising New Procedures for Truth Commissions

2.1. Consulting in Good Faith to Obtain Free, Prior, and Informed Consent

A broad and ongoing consultation with constituent groups is crucial to the success of truth commissions. This principle already enjoys consensus among transitional justice practitioners, but it is especially critical when Indigenous Peoples are involved. Governments have a duty to consult in good faith and to seek to obtain free, prior, and informed consent for any legislative or administrative measure affecting Indigenous Peoples. Good-faith consultation is premised on transparent objective and an openness to change initial goals and continue the process meaningfully—until consent is obtained or not.

³⁷ *Id.* p.4.

This can be a difficult process, requiring time and commitment from governments, particularly in societies where the consent of Indigenous Peoples has never been genuinely sought.

Regardless of the challenge associated with a thorough and extensive consultation, it should be seen as an essential component of the work of a truth commission—the process is as important as the outcome. These processes start well before testimonies are delivered, in the discussions in city halls, religious houses, and Indigenous communities. Moreover, if truth commissions are to recognize and offer remedies to victims, they should do so from their inception.

2.2. Respecting Indigenous Peoples' Representative Institutions

It is important to acknowledge that the principle of free, prior, and informed consent is complicated by community representation. Indigenous communities, like any political community, have multiple leaderships, representing different components within a society. Coordinating with multiple leaderships is a challenge for truth commissions, and even in the most successful cases it is difficult to ensure everyone who ought to be heard will have an opportunity. There are no firm guidelines for negotiating who will represent others during consultation, in testimony, or on the staff of a commission. The principle should be to ensure that the work of a truth commission does no harm: that it does not augment existing divisions or victimize those who have already suffered abuse.

It is also important to acknowledge that representatives of Indigenous institutions may not represent the views of women or children. The UN Declaration on the Rights of Indigenous Peoples explicitly recognizes the rights of Indigenous women and the need for specific attention to Indigenous children. These challenges are significant, but cooperating with local leaders during a commission's process strengthens and legitimizes the process. One of the most significant achievements of the Guatemalan truth commission was the mobilization of leadership to form new coalitions between Indigenous organizations, well beyond the achievements of the commission itself.

2.3. Providing Attention to the Specific Needs of Indigenous Witnesses

A truth commission is a large-scale research project with thousands of people providing information, most of who will talk about events that had a profoundly negative impact on their lives. Commissions should adopt culturally appropriate methods to document the experiences of Indigenous witnesses.

Participants are being asked to share something they are likely to have spent much of their lives trying to forget. Returning to these memories risks re-traumatization, which is rarely emphasized in transitional justice literature. Culturally appropriate mental health support is an important staffing consideration when planning operations, and efforts should be made to partner with government and civil society support networks. Where access and sustainability of care is constrained, participants should be aware of the options and limitations they face.

It is also important for truth commissions to employ Indigenous staff and provide special consideration to any limitations of language and translation. Concepts critical in the legal framework of the inquiry may not translate accurately into Indigenous languages, and, similarly, some expressions for violent events in Indigenous languages may not be clearly understood by non-Indigenous researchers.³⁸

IV. Conclusion

We are at the beginning of a long road toward dealing with injustice against Indigenous Peoples. Truth commissions are useful tools to further this important and challenging endeavor. While truth commissions have already been used to investigate human rights violations experienced by Indigenous Peoples these initiatives often were not the result of a conscious effort. There is still much work to be done on defining how truth commissions that focus on the rights

38 For further recommendations, see *Guidelines for the Observance of Indigenous Rights in Truth Commissions* in ICTJ, Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource. ICTJ (2012). Available at <http://ictj.org/publication/strengthening-indigenous-rights-through-truth-commissions-practitioners-resource> p. 49.

of Indigenous Peoples have to look like in order to give concrete expression to the right to know the truth, recognize the rights and dignity of Indigenous Peoples and propose policies that prevent further abuses.

While a general framework and recommendations on how to establish truth commissions help to guarantee independence, and integrity and adequate leadership, it is also important to take into account the needs, perspectives and rights of Indigenous Peoples. We are pleased to see an increasing attention of academics, practitioners as well as NGOs and the United Nations³⁹ on these topics, by analyzing experiences and lessons learned in order to come up with guidelines and recommendations to facilitate properly addressing these issues. These resources should be taken into account when establishing truth commissions involving Indigenous Peoples. However, it is worth highlighting that these general frameworks should not intend to substitute a proper analysis of the context in which this institution will operate, nor the free decision-making process by Indigenous Peoples whom have to be consulted in good faith to obtain free, prior and informed consent in all the different phases of a given truth-seeking process.

39 See the Study on the rights of Indigenous Peoples and truth commissions and other truth-seeking mechanisms on the American continent, E/C.19/2013/13 in which my colleague Eduardo Gonzalez Cuevas and I had the privilege to contribute on behalf of the International Center for Transitional Justice (ICTJ).

THE CHALLENGE OF TIME AND RESPONSES OF INTERNATIONAL HUMAN RIGHTS LAW

Elsa Stamatopoulou

Introduction

There are some special characteristics, when we talk about truth-seeking and reconciliation to deal with injustice against Indigenous Peoples. These characteristics appear as big challenges, which are difficult to grapple with, even difficult to broach and discuss in public policy today, whether through the techniques of the relatively new field of truth, justice and reconciliation or otherwise. These challenges have one thing in common: they have to do with **time**.

Questions that have to do with truth and seeking truth have always been a philosophical, practical, political and profoundly existential challenge for human beings and societies. Adding the time element to truth seeking complicates the question further. The issue of time regarding Indigenous Peoples' access to justice is often different from other situations that truth, justice and reconciliation processes address, the latter referring, more often than not, to more recent circumstances that need to be addressed

The first of those time-related challenges relevant for Indigenous Peoples is **settler colonialism**,¹ the usually long time since Indigenous Peoples were first subjected to colonization and its devastating physical, cultural, economic, social and moral repercussions that last to-date.

1 According to the Settler Colonial Studies website: "Settler colonialism is a global and transnational phenomenon, and as much a thing of the past as a thing of the present. There is no such thing as neo-settler colonialism or post-settler colonialism because settler colonialism is a resilient formation that rarely ends. Not all migrants are settlers: settlers come to stay, and are founders of political orders who carry with them a distinct sovereign capacity. And settler colonialism is not colonialism: settlers want Indigenous people to vanish (but can make use of their labour before they are made to disappear). Sometimes settler colonial forms operate within colonial ones, sometimes they subvert them, sometimes they replace them. But even if colonialism and settler colonialism interpenetrate and overlap, they remain separate as they co-define each other."(<http://settlercolonialstudies.org>).

Moreover, as has been amply demonstrated in studies, including that of the UN Permanent Forum on Indigenous Issues, the “doctrine of discovery” is still having a negative impact on Indigenous Peoples’ human rights today.² And a major question is how can a settler society or descendants of settlers and Indigenous Peoples find just solutions for these injustices?

The second time-related challenge that affects access to justice is that many Indigenous Peoples were subjected to **genocide and genocidal practices** at the time of colonization, settlement or subjugation, and there are also contemporary cases where Indigenous Peoples are threatened with extinction. However, this topic is still almost a taboo word in current international and national public affairs *precisely* because of its contemporary implications, namely the fact that there are survivor Indigenous Peoples, who are making considerable claims within a post-World War II human rights framework. After all, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is the only international instrument, after the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute of the International Criminal Court that mentions genocide.³ In addition, the UNDRIP is the international instrument that contains the most extensive recognition of cultural rights, as one of the remedial measures for genocide sustained by Indigenous Peoples.⁴

Although the formal international legal definition of “genocide” is contained in the 1948 Anti-Genocide Convention,⁵ its subtle

2 Tonya Gonnella Frichner, Study on the Impact on Indigenous Peoples of the International Legal construct known as the Doctrine of Discovery, which has served as the Foundation of the Violation of their Human Rights, UN doc. E/C.19/2010/13, www.un.org/esa/socdev/unpffi/documents/E.C.19.2010.13%20EN.pdf

3 Article 7, paragraph 2, states that: “Indigenous Peoples have the collective right to live in freedom, peace and security as distinct Peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.”

4 See Elsa Stamatopoulou, “Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples”, in The UN Declaration on the Rights of Indigenous Peoples, 2011, Stephen Allen and Alexandra Xanthaki eds., Hart Publishing Ltd., Oxford and Portland, Oregon. pp 387–412.

5 Article 2 states: “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national,

understandings continue to be the object of debate and analysis today.⁶ Genocide committed against Indigenous Peoples has both to do with the past, but also with the present and the future. In addition to its well-known political sensitivity, the topic raises some time-related questions within a legal framework as far as genocides committed in the distant past are concerned: Can the definition of genocide as captured in an international treaty of 1948 apply to circumstances five centuries before that and, if so, with what legal implications?

The above-mentioned underlying time-related challenges regarding Indigenous Peoples' access to justice must be addressed in any truth, justice and reconciliation process.

In this brief essay, I will first explore what international human rights theory and practice can contribute to the time-related challenges mentioned above. Then I will try to bring out the dynamics that the experiences of the past 40 years have created, namely through the birth and growth of the international Indigenous Peoples' movement and its interface with the UN: what special conditions has this interface created that need to be taken into account in any Truth, Reconciliation and Justice process concerning Indigenous Peoples?

Social media networks of Indigenous Peoples almost daily reflect the profound desire of Indigenous Peoples to grapple with historical injustice as it is reflected in their lives today. Indigenous Peoples are also concerned about and examine critically the gestures of States to deal with such injustice, including truth and reconciliation processes, apologies and similar acts.

Apologies have been a trend in the past couple of decades. The United States, for example, adopted the Apology Bill (Public Law 103-150, signed by President Bill Clinton) on 28 November 1993, to

ethnical, racial or religious group, as such:

Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.”

⁶ See for example Bartolome Clavero, *Genocide or Ethnocide, 1933–2007: How to make, unmake and remake law through words*, Milano, Giuffrè Editore, 2008.

See also the essay of Alexandra Xanthaki in this volume.

acknowledge the 100th anniversary of the 17 January 1893 overthrow of the Kingdom of Hawai'i, and to offer an apology to Native Hawaiians on behalf of the United States.⁷ In Australia, the first day of the new Parliament in February 2008, saw the declaration of a formal apology to the Lost Generation of Aboriginal Peoples due to the boarding schools policies. This was followed by a similar apology in spring 2008 by Canada, again regarding boarding schools, and, in June 2008, Japan recognized the Ainu people of Hokaido as the Indigenous Peoples of the country. In 2010 came the apology of the government of El Salvador to the Indigenous Peoples there. Is apology enough? Is any form and process of apology enough?

One of the recent stories is about the little-known USA apology of 2010. In December 2012, an article became known entitled "Navajo man wants the nation to hear its official apology." The article essentially critiques the 2010 apology that the US Congress passed in paragraph 45 of the 2010 Defense Act. The apology says that the United States, acting through Congress recognizes that there have been years of official deprecations, ill-conceived policies, and the breaking of covenants by the federal government regarding Indian tribes; and apologizes on behalf of the people of the United States to all native peoples for the many instances of violence, maltreatment, and neglect inflicted on native peoples by citizens of the United States. Little publicity was given to this apology. And the Navajo person, Mark Charles, says in the article circulated "...I don't believe it's an accident that our people are marginalized. Our country is so undereducated in Native American history that most people don't even know why the country is apologizing."⁸

Another story was also circulated in December 2012. It is about a bill proposed in Australia,⁹ the article's title is "Anderson Says

7 See publication of Hawaiian Affairs, Apology Bill, also www.OHA.org

8 Moni Basu, CNN, Dec. 19th 2012, CNN – IN AMERICA, <http://inamerica.blogs.cnn.com/2012/12/19/native-american-apology/>

9 Indigenous Portal, <http://www.indigenousportal.com/Politics/Australia-Anderson-Says-Act-Of-Recognition-Is-An-Insult.html>, 6 December 2012. http://indigenousPeoplesissues.com/index.php?option=com_content&%3Bview=article&%3Bid=16878%3Aaustralia-anderson-says-act-of-recognition-is-an-insult&%3Bcatid=24%3Aaustralia-indigenous-Peoples&%3BItemid=57#.
UL_FLvZ5q_U.twitter

Act of Recognition Is An Insult.” Aboriginal rights campaigner, Michael Ghillar Anderson slams the Act of Recognition introduced by Minister Jenny Macklin as an absolute insult to First Nations Peoples. He says that Aboriginal people have been denied human rights since the invasion under military rules in 1788....He asks for the government to withdraw this Act of Recognition immediately and first consult Aboriginal people nationwide whether they approve of this type of action.”

According to the Study on Indigenous Peoples’ Access to Justice by the UN Expert Mechanism on the Rights of Indigenous Peoples, a particular dimension of access to justice relates to overcoming long-standing historical injustices and discrimination, including in relation to colonization and dispossession of Indigenous Peoples’ lands, territories and resources. Injustices of the past that remain without remedies constitute a continuing affront to the dignity of the group. This contributes to continued mistrust towards the perpetrators, especially when it is the State that claims authority over Indigenous Peoples as a result of that same historical wrong.¹⁰

In the same study the Expert Mechanism also stated that the right to a remedy and related procedural and substantive rights essential to securing a remedy are protected in a wide range of international instruments. The United Nations treaty bodies have found that, when providing for remedies, they should be adapted so as to take account of the special vulnerability of certain categories of persons. Moreover, without the provision of reparations, the duty to provide remedies has not been discharged. Reparations can take the form of restitution, rehabilitation and measures such as public apologies, public memorials, guarantees of non-repetition and changes in the relevant laws and practices and bringing to justice the perpetrators of human rights violations. The Expert Mechanism has recommended previously that, in providing redress to Indigenous Peoples for the negative impacts of State laws and policies, States should prioritize the views of indigenous Peoples on appropriate forms of redress.¹¹

10 UN doc.A/HRC/EMRIP/2013/2

11 A/HRC/21/53, para. 23.

Time, law and human rights norms and practice

How does international law, including human rights law, dealt with the issue of **time**? And what can be learned from this when it comes to truth, justice and reconciliation processes?

Law, including international law, as a social science, is indeed concerned with time. In some instances, law is concerned with history, for example about accountability for international crimes, or about reparations. One of the questions law has to grapple with is how far back is too far back to make a legal issue out of something? I mean a *legal* issue instead of a *political or social* issue. To be provocative, one can ask, isn't history made up of wars and conflicts, some people occupying the lands of others and all that this entails? How do we deal with the desire of society to lay conflict to rest? But, how can we lay conflict to rest if we don't grapple with old yet open wounds that injustice has inflicted on people, in this case, the Indigenous Peoples, and that underlie the fine grain of society, in this case, of both Indigenous and non-Indigenous society? How do we bring together, in a new spirit of justice, the descendants of the original oppressors with those of the originally oppressed? What is the role of law in all this? Hasn't the purpose of the law included the mission of dealing with the time element as well, i.e. saying when a dispute can no longer be litigated and has to stop so that social peace can ensue? Unless, of course, it's an imprescriptible crime, like genocide, a crime against humanity.

The issue of remedying historic injustices looms high in Indigenous Peoples' concerns and in their political and legal discourse. I would like to make special mention of cultural rights in this context. Groups claim cultural rights as collective rights vis-à-vis the majority society, with corresponding obligations, which are necessary to preserve and develop the cultural integrity of the group, often in order to remedy historical injustices.¹² The fact of past injustice does not necessarily lead to an automatic legal obligation to remedy all those injustices, but it is clear that from a moral, political and societal point of view, the

¹² Anaya finds that in the case of Indigenous Peoples, the norm of cultural integrity has developed remedial aspects in light of their historical and continuing vulnerability. S. James Anaya, *Indigenous Peoples in International Law*, 1996, Oxford University Press, New York/Oxford, p. 102.

State and society have to find mechanisms to deal with such injustices. In common criminal or civil cases, modern national legal systems normally provide for a statute of limitations, for example twenty years, so that beyond that time behavior that the law considers illegal will not hover in perpetuity as an unsolved matter in society. It is known that some traditional legal systems, including those of Indigenous Peoples, place strong emphasis on reconciliation and re-socialization so that the social fabric will be mended sooner rather than later.¹³

However, when it comes to *historic injustice vis-a-vis a group that continues to suffer discrimination* and disempowerment by the dominant society, the issue of dealing with such historical injustice gets even more complex. Questions arise as to what can constitute fair moral or material remedies that will restore social justice for the victimized/survivor group; how far back in history should a state go to deal with historic injustices; how to deal with the competing rights and needs of other populations, majority and minority, who did not commit these injustices, but are descendants of those who did, and their demands on public resources; what action should a “well-meaning state” take in various public areas simultaneously so that the effect will be harmonious and peaceful relations among various ethnic, racial, religious and linguistic communities in society.¹⁴

Since every society is unique in its history, culture and political circumstances, there do not seem to exist easy or homogenous answers to such questions. A key element, however, for the response is whether or not the descendants of groups to whom historic injustice

13 A good example is cited by the Special Rapporteur on human rights and fundamental freedoms of Indigenous Peoples regarding Greenland Home Rule (E/CN.4/2004, para 55). The Greenland the justice system, although based on the Danish system and administered by the Danish authorities, is responsive to the standards and values of Greenlandic society and traditional Inuit legal practice and customary law, with extensive lay participation. The judicial system differs significantly from the Danish system to which it is attached. Citizens are called to act as district judges, lay judges and defense counsel while local police handle the prosecuting function. In 1994, the Justice Review Commission recommended, inter alia, that local judges must have knowledge of the local community and its cultural values, and language skills in Greenlandic.

14 Elsa Stamatopoulou, Cultural Rights in International Law, Article 27 of the Universal Declaration of Human Rights and Beyond, Leiden/Boston, Martinus Nijhoff Publishers, 2007, pp 163–225.

was done continue or not to suffer discrimination, marginalization and disempowerment by the dominant society.

How does international human rights law and practice respond to historically-linked injustices?

One of the responses has been to create new norms that will help avoid repetition of atrocious acts and promote processes to rehabilitate the victims. The Convention on the Prevention and Punishment of the Crime of Genocide is one international instrument responding to this need. The list includes others such as the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the International Convention for the Protection of All Persons from Enforced Disappearance and last but not least the UN Declaration on the Rights of Indigenous Peoples.¹⁵

By examining international practice, we see that the UN Human Rights Council, and its predecessor, the Commission on Human Rights, has, over a long protracted period, and not without meeting political difficulty, tried to grapple with human rights violations that were “old”, i.e. that took place even before the creation of the United Nations or before establishment of those human rights bodies and their complaints procedures. An example was the issue of the Korean “comfort women,” who were subjected to slavery-like practices and prostitution by the Japanese army during WWII or with the human rights situation of Indigenous Peoples.¹⁶ The first approach of the Commission on Human Rights over decades was a more legalistic one, i.e. that the Commission on Human Rights could not deal with cases that took place before its establishment, before the establishment of its complaints procedures or before the establishment of the UN. However, we have seen an increased openness of the Commission

15 For the texts of international human rights instruments, see website of the Office of the UN High Commissioner for Human Rights, www.ohchr.org.

16 The first testimony at the CHR was in 1992 by the International Education Development (E/CN.4/1992/SR.30/Add.1). The Special Rapporteur on Violence against Women reported on the case in 1996 (see OHCHR website). Japan has not issued an apology.

on Human Rights and now the Human Rights Council to deal with “older” situations.

International legal thinking developed, however, by formulating and analyzing the *concept of continuing violations of human rights*, i.e. injustice that stems from far back, but the effects of which still continue in the present¹⁷. The Human Rights Committee that monitors the implementation of the International Covenant on Civil and Political Rights, has defined a continuing violation as an affirmation by act or by clear implication, of the previous violations of the State party.¹⁸

Another major normative concept that was devised was to promote *positive measures (positive action/affirmative action)*. For example, the Convention on the Elimination of All Forms of Racial Discrimination adopted in 1965, boldly recognizes positive measures to deal with past discrimination.

The third normative concept devised was *imprescriptibility for crimes against humanity and gross and systematic violations of human rights and humanitarian law*.

The fourth, both normative and policy-oriented, measure is the one on *truth commissions and transitional justice*.

At the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the issue of reparations occupied center stage at the negotiations. That moment was the boldest in terms of the recognition of past wrongs at a massive scale. The controversy had also to do with the fact that this became a major North/South conflict over the ills of colonization and slavery, with the North fearing major demands for reparations for colonialism and slavery. Finally, the text adopted condemned slavery and slave trade as an international crime and said that it should have always been viewed as such (implying that it was not viewed as such at the time of colonialism, also implicitly, saying that there is no justiciable legal demand, strictly speaking, that can be raised for reparations in a contemporary timeframe).

17 Before that, the International Law Commission had long debated and finally adopted a definition of a “continuing act”.

18 *Simunek vs. Czech Republic*, Case No. 516/1992, para. 6.4, fifty-fourth session.

The declaration at the World Conference made a pronouncement both about the past and about the present. Indigenous Peoples figured prominently in these texts.

The World Conference also addressed cultural rights eloquently, recommending policies on Indigenous Peoples, minorities, Afro descendants, migrants and Roma/Sinti/Travelers,¹⁹ in other words, groups that had suffered profoundly from racial discrimination, colonialism and slavery in the past.

Today considerable attention is being paid by the UN human rights system to righting the wrongs of the past, and certainly the increasing discussions at the UN Human Rights Council on impunity, transitional justice and truth and reconciliation commissions bear witness to this. The most recent action of the Human Rights Council is the establishment in 2011 of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.²⁰

A perusal of the website of OHCHR devoted to the Special Rapporteur contains a list of 22 “core international instruments relevant to the mandate”, and this demonstrates the solid normative framework that surrounds truth, justice and reconciliation processes from the point of view of human rights.

The international Indigenous Peoples movement and its interface with the UN: what results for past and present injustices?

How did the international Indigenous Peoples’ movement’s interface with the UN bring into relief the historical injustices that Indigenous Peoples sustained and what can this interface signify for truth, justice and reconciliation processes?

Stories of political and cultural resistance of Indigenous Peoples to colonialism, domination and exploitation abound, but these did not find resonance at the international level for a long time. In the post-World War II era, questions of ethnicity and minorities were viewed with suspicion.

19 See detailed account of the conference outcome in Chapter I.C above; the full text of the outcome appears in UN doc. A/CONF.189/12.

20 Human Rights Council resolution 18/7.

States changed their stand *vis-a-vis* Indigenous Peoples over the years. In the 1970s, when the issue of gross violations of human rights was brought up in the human rights bodies, States viewed this issue mostly as a humanitarian one, one of “kindness,” so to speak, to disappearing civilizations, in the process of assimilation. Anti-colonial values were predominant in the era of decolonization, the 1950s and 1960s, therefore this international ethic, in a certain sense, fed the guilt of States, of colonial States and their successors. One could, therefore, see some permissiveness on the part of governments in UN processes. States allowed the birth of exceptional, unprecedented and extensive participatory procedures for Indigenous Peoples—which, in turn, increased the numbers of Indigenous representatives at the UN as well as their overall political impact.

The adoption of UNDRIP in 2007 can be seen as a way that States and Indigenous Peoples try to mend the hurt of the past and seek constructive solutions for the future. In this context, it is “still ongoing work and the UN Declaration calls on us to work together.”²¹

The three main pillars of the Declaration should be integrated in truth, justice and reconciliation (TJR) processes regarding indigenous Peoples. Those 3 pillars are a) the right to self-determination, b) the right to lands, territories and resources and c) cultural rights. What do these pillars mean for truth, justice and reconciliation processes? As other articles in this collection discuss each of the three in detail, I will only outline their significance in brief:

- a. The right to self-determination: In terms of TJR processes this means that Indigenous Peoples will have to have ownership and be full partners around the table, with their own representatives, that any measures taken should be meaningful to Indigenous Peoples themselves, and should respect Indigenous Peoples’ right to self-determination.
- b. Indigenous Peoples’ cultural rights, including language, custom, traditional knowledge and traditional legal systems: in TJR processes, cultural rights of Indigenous

21 As stated by International Chief Wilton Littlechild during the Expert Seminar on Access to Justice for Indigenous Peoples, including Truth and Reconciliation Processes, Columbia University, New York, New York, 27 February to 1 March 2013.

Peoples should be addressed boldly, since cultural integrity is crucial for survival. I agree with James Anaya who finds that for Indigenous Peoples cultural integrity has developed remedial aspects in light of their historical and continuing vulnerability.

- c. The right to lands, territories and resources: In any TJR process, recognition of Indigenous Peoples' land rights should be dealt with as part of the concept of equality and non-discrimination.

Conclusion

In conclusion, in order to have good processes of truth-seeking, justice and reconciliation to deal with injustice against Indigenous Peoples given the complexities identified above, there are particular substantive, normative and strategic points to take into account. What are those three points?

- a. The historic aspect of injustice that goes far back into time and that is linked to settler colonialism, genocide, devastation, discrimination and their continuing legacies to-date;
- b. The creation and growth of a robust international Indigenous Peoples' movement and its productive interface with the UN, especially through human rights. This implies that Indigenous Peoples are particularly aware of human rights issues and the normative framework of the UN Declaration on the Rights of Indigenous Peoples and that any discussion of how to mend the grave injustices of the past will have to bring the Declaration to the table.
- c. The UNDRIP underpins three main areas that any TJR process must encompass: i) self-determination, which, among many things, implies that Indigenous Peoples should participate substantively through their own representative institutions in any TRJ process, so that such process can be effective; ii) discussion of lands, territories and resources, including fair redress, and iii) a broad array of cultural rights described in the Declaration, whose respect, protection and fulfillment would provide a significant response to such historic injustices.

INDIGENOUS SELF-DETERMINATION AND POLITICAL RIGHTS: PRACTICAL RECOMMENDATIONS FOR TRUTH COMMISSIONS¹

Paige Arthur

Truth commissions and commissions of inquiry are not new for Indigenous Peoples. In Guatemala, Peru, Australia, Chile, and Canada, Indigenous Peoples have been consulted, given statements, read reports, and more. Yet the larger question for Indigenous Peoples must be: how can a truth commission advance their longer-term vision of self-determination and full exercise of their political rights? Can a truth commission even make a difference on these issues?

In the past, truth commissions have not made much of a difference on these particular issues, it is true. Perhaps Guatemala's Commission of Historical Clarification (CEH) is the only one that has made a demonstrable contribution to the participation of indigenous people in public life. The commission's finding that the state had committed acts of genocide against Indigenous Peoples helped to reframe political debate in Guatemala, and the struggle for truth and reparations galvanized a range of indigenous groups to become more active politically.² The story continues, more than 10 years after the government initially rejected the CEH's report. In June 2011, a former general in the Guatemalan army was arrested—the first person to be arrested in Guatemala on charges of genocide.

A truth commission cannot lead to self-determination by itself. But it may be part of a longer-term process leading in that direction. In order to contribute, however, they may need to operate a bit differently than in the past. The goal of this paper is to identify some practical

1 This article was first published by the International Center for Transitional Justice in Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource (New York: ICTJ, 2012), 37–48. It is reproduced in this volume by permission of the International Center for Transitional Justice.

2 See Anita Isaacs, "At War with the Past: The Politics of Truth Seeking in Guatemala," *International Journal of Transitional Justice* 4, no. 2 (2010): 251–74.

recommendations for a truth commission to consider, to contribute to the realization of self-determination and other political rights for Indigenous Peoples.

In international law, self-determination is defined as the right of all peoples to “freely determine their political status and freely pursue their economic, social, and cultural development.” While recognizing that there is a diversity of opinion within indigenous communities about what form self-determination should take, this paper will focus on claims that do not involve secession from a state. This choice is made due to two simple facts. First, claims for secession are not the dominant ones among Indigenous Peoples today (although they do exist). And, second, achieving secession, whether for indigenous groups or national minorities, has proved extremely difficult, the recent case of Kosovo notwithstanding. Therefore, the paper will look at a group’s right to freely determine its own development in terms of pursuing that development as part of an existing state.

Political rights refer to the rights of all individuals to participate in decisions that affect their lives, and effective participation will be the focus of this paper. This includes, among other things, voting, membership of a political party, and standing for election. Effective participation is important for other political and civil rights, as well as economic, social, and cultural rights.

Finally, since other authors in this resource deal with cultural rights and land claims, this paper will avoid those topics. However, it must be noted that these issues are intertwined. Claims to self-determination are often deeply linked to land among Indigenous Peoples, as a special connection with a territory shapes the distinctive identity—as well as the livelihoods—of indigenous groups. Effective participation is often linked to protecting important cultural rights, as well as a community’s capacity to reproduce its culture across generations.

I. Appropriate Goals for a Truth Commission

Truth commissions attempt to provide a definitive account of human rights abuse, explain why the abuse took place, identify the institutions responsible for the abuse, recognize victims, and make

recommendations on ways to provide remedy and to prevent the violations from happening again.

From Peru to South Africa, truth commissions have proved adept at contributing to a number of social changes. They can catalyze a growth in local civil society organizations, as groups coalesce in order to engage with the commission, as happened during the Peruvian Truth and Reconciliation Commission (TRC) process. They can help both to legitimize and to delegitimize political and state actors, by revealing the truth about how actors behaved during the period under investigation. Certainly the South African police were severely discredited by the South African TRC process, and have undergone extensive reforms since. Truth commissions can also help to reframe political issues and legitimize the claims of marginalized groups. A finding that a state has committed acts of genocide against a people, as happened in Guatemala, can be used to assert claims for a stronger political voice for reparation or for special protections from the state.

There is no clear example of a truth commission having an intended, direct impact on claims for self-determination or political rights of Indigenous Peoples. This paper aims to offer some practical suggestions based on the above analysis of what truth commissions have shown they can do: they can enhance civil society; they can legitimate or delegitimize political actors; and they can reframe important political issues for a broader public.

Based on this analysis, then, what are some realistic goals for truth commissions with respect to self-determination and other political rights? Identifying realistic goals will not only ensure that all parties have clarity about what a truth commission might achieve; it will also help to define strategies for a truth commission to deploy, and allow people to assess whether the desired changes have either taken place or are underway at the end of a truth commission process. It should be noted that these modest goals should be achievable to some degree even if the truth commission is not focused solely on abuses suffered by Indigenous Peoples, but also looking at other abuses. This is an important point, because although recent commissions in Canada and Australia have focused specifically on Indigenous Peoples, most commissions throughout the world do not. Instead, commissions typically look at a range of abuses that have affected the population as

a whole and provide special mention of the often unique impact that abuse has on Indigenous Peoples.

Appropriate goals for a truth commission with respect to self-determination and other political rights might include, depending on the context:

- An improved understanding among Indigenous Peoples, the state, and the general public (if possible) of how the lack of self-determination and effective political rights contributed to the conditions for human rights violations.
- An increased number of civil society groups representing Indigenous Peoples within the truth-seeking process.
- Increased legitimacy of formal and informal indigenous decision-making bodies participating in the truth-seeking process.
- Increased capacity (where appropriate) of formal and informal indigenous decision-making bodies participating in the truth-seeking process.
- Increased capacity (where appropriate) of indigenous civil society groups to engage effectively with critical parts of democratic life: the media, education, the justice sector, and others.
- Increased practice of consultation: more indigenous organizations are consulted about all actions of the truth-seeking process that may affect their rights or interests.
- Increased participation of Indigenous Peoples, communally and individually, in the truth-seeking process, including indigenous women and young people

Truth commissions have sometimes been burdened with outsized expectations for change. There are broader social changes that a truth commission may aspire to contribute to, but may ultimately have only an indirect effect on. For example:

- The constitution is changed in order to recognize rights of Indigenous Peoples.
- Public attitudes among non-indigenous people change from rejecting the notion of self-determination for Indigenous Peoples to accepting it.

- Indigenous Peoples form viable political parties or other forms of political participation, as appropriate.
- Indigenous Peoples effectively exercise self-determination in matters of justice, land, and other critical concerns.
- Woman, children, youth, and lower “castes” internal to indigenous communities have increased understanding of and access to their political rights.

While these goals are important, they are also outside of the bounds of what a truth commission can accomplish on its own. While the main focus of the paper will be on the first set of goals, it is important to keep these larger goals in mind as a kind of “ideal” that we might be striving for.

What follows are some practical recommendations for a truth commission to achieve the more modest goals listed above.

II. Truth Commission Processes

The suggestions below are all oriented around the idea of effective participation. Some ensure that Indigenous Peoples participate effectively in both a truth commission’s planning and in its work. Others are intended to ensure that a truth commission’s own actions can help to accord deeper legitimacy and respect to indigenous political actors, or empower citizens’ organizations in areas beyond the narrow work of a truth commission.

1. *For every aspect that is likely to have effects on the rights or interests of Indigenous Peoples, the state must respect fully the duty to gain the free, prior, and informed consent of Indigenous Peoples, following the principles stated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Such consent may require a horizontal, free, respectful “peoples-to-peoples” framework, which is applied to different aspects of the mandate of the truth commission, such as its objectives, scope of research, powers, composition, and form of establishment. All major aspects of the commission’s framework, both*

procedural and substantive, should be negotiated and agreed by representatives of relevant parties.

The central importance of free, prior, and informed consent is that it ensures both that an indigenous perspective fully informs the mandate of a truth commission and that Indigenous Peoples are offered political recognition and respect.

The value of this approach can be understood by looking at the current TRC in Canada. The TRC was established by the Canadian courts, stemming from the settlement of a class-action lawsuit brought by survivors of Canada's residential schools system. The mandate of the commission is narrowly defined around the residential schools and does not include examination of other harms important to aboriginal peoples in Canada, such as past and ongoing expropriation of land. Further, the mandate does not include the thousands of aboriginal children who attended residential schools as day students rather than boarders. In general, if there been a good-faith negotiation process, rather than a court settlement, there would have been a better chance that the Canadian TRC would address a broader range of issues important to aboriginal communities.³

Yet another example is the creation of the CEH in Guatemala. The peace accord that created it was negotiated between the government and the guerillas; Indigenous Peoples (among other interested parties) were largely excluded from the process, resulting in a vague mandate. That a whitewash did not in fact take place ultimately was due to intensive mobilization after the creation of the mandate—effort that might have been saved had indigenous actors been included from the start.⁴

It should be noted, however, that how the principle of free, prior, and informed consent is implemented may depend on many different factors. One of these is whether the truth commission is designed specifically to deal with indigenous issues, or whether indigenous issues are among a larger set of issues that the commission will examine. In the case of the CEH in Guatemala, violations against Indigenous Peoples were examined along with other human rights

3 Author interview with Jeff Corntassel, June 22, 2011.

4 See Issacs, "At War with the Past."

violations against human rights activists, labor activists, and others. It would seem unfair to these other groups if negotiations with indigenous groups were to stall the process entirely. Care should thus be taken in thinking through how best to put the principle of consent into practice in different contexts.

2. *The commission establishes regular consultations with both formal and informal indigenous political authorities—whether the state recognizes these authorities or not. This should include bringing diverse local authorities together, especially when they are spread out over a large area and have little contact. It may take the form of an advisory committee with a distinct mandate.*

Truth commissions usually operate as top-down structures that—for the sake of efficiency or other reasons—bypass local government. However, since most indigenous government is local government, it makes sense for a truth commission to engage with local political authorities. That is, a truth commission is unlikely to have meaningful relationships with indigenous political authorities if it operates only at the level of the state. One counterexample to this pattern is Canada's Assembly of First Nations (AFN), which is a national organization that has engaged effectively with the state and Canada's TRC. Even in this case, however, there is debate within aboriginal groups in Canada about whether the AFN adequately represents them. This underscores the importance of considering engaging with local authorities.

One example of how this has worked is in Australia, where a Council for Aboriginal Reconciliation was established in 1991 to promote reconciliation between Aboriginal and Torres Strait Islanders, and the wider Australian community—in particular, to educate non-aboriginal Australians about why a treaty with aboriginals might be desirable. It operated for 10 years, with an average annual budget of \$4 million. As part of its work, the council created a network of "Australians for Reconciliation" in which communities came together in various ways. For example, a number of municipalities in the suburbs of Melbourne joined with local aboriginal communities to develop official statements supporting justice and equity for indigenous Australians,

which included acknowledging the aborigines' prior occupation of the area.⁵ The council also held a number of national "reconciliation conventions," in which aboriginal and non-aboriginal leaders gathered to discuss agendas and progress.⁶

It should be noted, though, that the work of the Council for Aboriginal Reconciliation was not very successful. For one, the community movement avoided important aboriginal issues, such as self-determination and rights to land, for fear of alienating non-aboriginals. Further, the conventions did not have enough funds to pay for the attendance of aboriginal leaders lacking resources. The example is still an instructive one, however. The breadth of the effort in attempting to engage local communities was a good idea. The problem was that the initiative never went far enough in terms of the actual issues discussed, and it was ultimately a disappointment to many aboriginal peoples.⁷

What is the lesson for truth commissions? While one cannot generalize from a single case, it is safe to say that truth commissions should attempt to engage local authorities and also bring them together on the national level. These are good ideas, and they are at the heart of the ideas of participation and legitimacy. But such efforts should not ignore the issues close to the hearts of Indigenous Peoples, or they are likely doomed to failure. They may even have the negative consequence of further alienating Indigenous Peoples.

Another way of including local authorities is through an advisory committee—such as the one that supports the work of the Canadian TRC. We cannot yet say what the impact of such a committee might be, however.

3. *The commission establishes regular communications with the UN Permanent Forum on Indigenous Issues (UNPFII), the Special*

5 For a successful instance of this kind of recognition, see Council for Aboriginal Reconciliation, *Walking together the First Steps* (Canberra: Australian Government Printing Service, 1994), Ch. 19; available at www.austlii.edu.au/au/other/IndigLRes/car/1994/1/168.html.

6 Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Aldershot, UK: Ashgate Publishing, 2008), Ch. 6.

7 Ibid.

Rapporteur on the rights of Indigenous Peoples, and the Expert Mechanism on the Rights of Indigenous Peoples, as appropriate.

The UNPFII, the special rapporteur, and the Expert Mechanism together make up a structure at the international level that holds states accountable for their obligations under UNDRIP and other instruments of international law. It would make sense for these entities—at a minimum—to know that a truth commission related to Indigenous Peoples has been established. Beyond that minimum, these entities could pressure states that are not willing to grant Indigenous Peoples adequate participation in the truth commission process.

Further, these entities should receive the final reports, along with the commission's recommendations. They could then help to monitor implementation of the recommendations—especially those that are most closely related to the provisions of UNDRIP.

While this has never been done in relation to truth commissions, it has been done in relation to monitoring peace agreements in which Indigenous Peoples are key actors. The special rapporteur on the rights of Indigenous Peoples, Rodolfo Stavenhagen, helped to monitor the implementation of the Guatemalan peace agreements. He visited the country in 2002 and 2007, and his reports after both visits emphasized that more progress was needed from the government's side, especially institutional support and budgetary allocations.⁸

4. Authority over aspects of the commission's work—such as setting up public hearings, responsibility for gathering statements, or creating commemorative events—are devolved to formal and informal indigenous political authorities or at a minimum are done in partnership with such authorities.

There is little precedent among other commissions—which tend to be administratively centralized in their work—to devolve authority to local bodies. For example, in spite of the South African Truth and

⁸ See Jérémie Gilbert, "Indigenous Peoples and Peace-Agreements: Transforming Relationships or Empty Rhetoric?" in Gaby Ore Aguilar and Felipe Gomez Isa, Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict (Antwerp/Cambridge: Intersentia, forthcoming 2011).

Reconciliation Commission's relative decentralization and extensive national reach, these aspects were achieved through the creation of separate committees of investigation, rather than through devolving power or authority, whether to a local or an indigenous authority.⁹

One exception to this general approach is the Commission for Reception, Truth, and Reconciliation in Timor-Leste. This commission developed a community-based reconciliation process for those who admitted to committing a crime during the conflict (assuming that the crime was not so grave as to be forwarded to the special court set up to try serious crimes). Power was devolved to regional panels, which organized public hearings in which both the perpetrator and members of the community were allowed to speak. At the conclusion of the hearing, the panel would decide on appropriate amends for the perpetrator to make in order to be accepted back into the community, such as public apology, community service, or reparations.¹⁰

The impact of this decentralization is hard to evaluate. It was not designed to recognize or legitimize local authorities, so it has not been evaluated according to those criteria. Evaluation of its impact on local-level reconciliation reveals mixed results, although it does not appear that any of the supposed negative results were related to the decentralized nature of the proceedings.¹¹

5. The commission establishes a preference for working with indigenous civil society organizations in all aspects of its functioning. This includes not only the obvious areas of outreach to communities and help with statement taking or hearings, but also the less obvious areas, such as working with media, outreach to educators, or establishing an archive or museum.

9 Correspondence between the author and Graeme Simpson, June 30, 2011.

10 *Chega! Final Report of the Commission for Reception, Truth, and Reconciliation in Timor-Leste* (Dili, 2006), Part 2, pp. 12–14; available at www.cavr-timorleste.org/en/chegaReport.htm.

11 For a review of literature evaluating the impact of the CAVR, see Amy Seiner, "Traditional Justice as Transitional Justice: A Comparative Study of Rwanda and East Timor," *Praxis: The Fletcher Journal of Human Security* 23 (2008): 78–80; available at fletcher.tufts.edu/praxis/archives/xxiii/PRAXIS-TraditionalJustice.pdf.

The intent of this suggestion is to extend the practical benefits of a truth commission beyond the period of its actual operation. While there seems to be little precedent of this with respect to a truth commission, another relevant example comes from Guatemala. In the late 1990s, the UN Verification Mission in Guatemala developed radio infrastructure to communicate its work with groups—mainly Indigenous Peoples—cut off from mainstream forms of media. Indigenous activists have since inherited that infrastructure, expanding to a network of 175 community radio stations that broadcast in a range of indigenous languages.¹²

6. The commission provides adequate funding to indigenous civil society organizations and formal and informal political authorities with which it works in partnership.

If a truth commission needs help from indigenous organizations in order to do its work, then it should set aside adequate funds for those organizations, rather than expecting them to raise funds on their own.

While not related to a truth commission, an important example comes from Bosnia-Herzegovina. In the mid-2000s, Bosnia-Herzegovina established a War Crimes Chamber to take over cases from the International Criminal Tribunal for the Former Yugoslavia as well as to try new cases. In developing its outreach strategy to the broader community, the court initially partnered with local organizations who were trusted in their communities and who could act as mediators of information about the court. After one year, however, the court cut off funding to the organizations at a crucial moment in the project's development, and asked them to raise funds on their own. At that point, the outreach strategy collapsed.¹³

It is important for truth commissions to have trusted mediators between themselves and local communities—whether it is to explain the work of the commission, to help with statement taking, or to offer support in the wake of giving testimony.¹⁴ This is especially true in the

12 Cultural Survival, “Guatemala Radio Project”; available at www.culturalsurvival.org/current-projects/guatemala-radio-project.

13 Author interview with Refik Hodzic, September 10, 2008.

14 On this point, see Paige Arthur, “‘Fear of the Future, Lived through the Past’:

case of Indigenous Peoples, who may severely distrust the state and its representatives. If a commission wants local organizations to work to support its aims, than it should ensure that it budgets for that work.

7. The commission provides training and other capacity-building measures to indigenous authorities and civil society groups when needed, and also provides for adequate follow-up to training to ensure that people have the support that they need. This may include obvious areas such as training on statement taking, but it may also include less obvious areas such as dealing with the media, educators, and archives.

Truth commissions typically provide training in areas where it is needed—such as statement taking—but to whom? If the suggestion above is taken to prioritize working with indigenous civil society groups, then members of those groups would be the ones to benefit.

One broader area where indigenous civil society groups might stand to benefit from engaging with a truth commission is in learning how to deal with the media, and ultimately to ensure their perspectives are represented in mainstream media more frequently than they currently do. Access to media—both as a consumer and as a producer—is critical to political participation. A truth commission’s outreach strategy could include media training and networking as part of its work; if done well it could have tangible benefits for indigenous communities.

8. Symbols of Indigenous Peoples’ political authority are accorded equal status with the symbols of the state in all official documentation, correspondence, public hearings, and media outreach.

A recent example of how symbols have been managed is the Maine Wabanaki Child Welfare Truth and Reconciliation Commission. The commission, launched in May 2011, will investigate the effects

Pursuing Transitional Justice in the Wake of Ethnic Conflict,” in Paige Arthur, ed., Identities in Transition: Challenges for Transitional Justice in Divided Societies (New York: Cambridge University Press, 2010), 291.

of state child-welfare policies on native children. It was established through agreement of the five Wabanaki nations of Maine and the state government of Maine. In all of its official brochures, symbols of all six groups—the five tribes and the state—are represented.

In the case of Maine, the number of parties is relatively small, making their representation easy. In cases where Indigenous Peoples are more numerous—such at the national level in Canada and the United States, which each boast more than 500 different communities—it may be much more challenging, if not impossible.

For example, in Australia, aboriginal peoples recognize a common flag, which is recognized as an official flag and displayed at many public buildings in Australia alongside the national flag. It is worth noting that that recognition of the flag moved first from the municipal level then to the provincial level and finally to the national level—thus the local level was formative in this case.¹⁵ This symbolic representation has not been without controversy—for example, when Cathy Freeman held the aboriginal flag after her gold medal wins at the 1994 Commonwealth Games.¹⁶ This controversy perhaps underscores how important the symbolic level can be in bringing formal recognition to groups. It should be noted, however, that it is likely that many aboriginal peoples in Australia would wish to be represented by their own particular symbols, rather than by the aboriginal flag.¹⁷

As challenging as it may be in some contexts, the equal representation of indigenous symbols should at least be considered. Using them suggests that the process is not one imposed by the state, but agreed to equally by all parties. This representation signals that the commission's legal and administrative spaces can be trusted by indigenous groups—an important point for Indigenous Peoples, who may have a history of mistrust of state authorities.

Additionally, a truth commission could support smaller symbolic acts, such as recognizing Indigenous Peoples' preferred names for places and people.

15 See Council for Aboriginal Reconciliation, *Walking together the First Steps*, Ch. 19.

16 Daniel Williams, "Cathy Freeman," *Time Magazine*, Dec. 25, 2000; available online at www.time.com/time/world/article/0,8599,2047953,00.html.

17 Author interview with Damien Short, July 1, 2011.

III. Truth Commission Substance

The central idea of the suggestions below is “context.” If a truth commission wants to contribute to Indigenous Peoples’ self determination and political rights, then it must put individual human rights violations in their historical and social contexts. Additionally, it must make clear links between the absence of self-determination and political rights, on the one hand, and massive human rights violations on the other.

1. The truth commission adopts the terminology of indigenous “peoples”—or otherwise the preferred designation of Indigenous Peoples—and refers to the UN Declaration on the Rights of Indigenous Peoples, in addition to other standard human rights instruments, in its mandate.

While a number of official commissions (not necessarily “truth” commissions) have been respectful of Indigenous Peoples’ preferred terminology—the commissions in Australia and Canada are examples—none of them have so far referenced obligations under international law in their mandates. For truth commissions, which deal especially with human rights violations, these obligations should offer guidance to commissions not just about how they should behave (for example, obtaining the free, prior, informed consent of Indigenous Peoples), but also the kind of society that they should contribute to realizing (for example, one in which Indigenous Peoples freely determine their political status).

Including mention of these international documents signals their value to the broader public. It also may help commissioners interpret their mandate in cases where the mandate is not well defined. For example, the mandate of the Guatemalan Historical Clarification Commission was both brief and vague. The progressively minded commissioners interpreted it in such a way as to include investigation of specific harms to Indigenous Peoples, including acts of genocide—a decision that resulted not just from the commissioners’ willingness, but also intense pressure from indigenous civil society

groups. Making reference to UNDRIP would only strengthen the position of commissioners who wish to interpret a commission's mandate in this direction.

2. *A section of the report is devoted to explaining how self-determination and other political rights of Indigenous Peoples were eroded or destroyed over time.*

Commissions generally have a good record on this issue. Commissions of inquiry such as the Royal Commission on Aboriginal Deaths in Custody (Australia) and the Royal Commission on Aboriginal Peoples (Canada) have made special efforts to explain how the concept of "terra nullius" was used by colonizers to appropriate land from Indigenous Peoples and, in some cases, either to forcibly relocate or to exterminate them. The report of the Guatemalan CEH has strong words for the exclusionary, racist, and anti-democratic nature of the colonial state.¹⁸ In each case, however, the analysis could be taken even further in describing how Indigenous Peoples' ability to govern themselves, specifically, was eroded over time through colonial imposition of control.¹⁹ In many cases, current reports focus more on the actions of the colonizing state than they do on the impact of these actions on Indigenous Peoples. It would be welcome for reports to include both perspectives, as evidence permits.

Attention should also be paid to the ways in which contact may have affected gender roles within indigenous communities. In some cases, contact with Christian missionaries, who assumed a subservient role for women, may have led to a diminution of women's roles and responsibilities within the life of the community.²⁰ Indeed, in Canada, the 1876 Indian Act shut out First Nation women from political

18 Commission for Historical Clarification, "Conclusions" in *Guatemala: Memory of Silence*, English trans. (Washington, DC: AAAS, 1999).

19 See Report of the Royal Commission on Aboriginal Deaths in Custody, Vol. 2, Ch. 10.3.

20 See, e.g., Cynthia C. Wesley-Esquimaux, "Trauma to Resilience: Notes on Decolonization," in Gail Guthrie Valaskakis, Madeleine Dion Stout, and Eric Guimond, eds., Restoring the Balance: First Nations Women, Community, and Culture (Winnipeg: University of Manitoba Press, 2009).

leadership and influence, when hitherto they held sway as hereditary chiefs, clan mothers, or through women's councils.²¹

3. *A section of the report analyzes how lack of self-determination and other political rights created conditions for state-led human rights abuse.*

Here again, existing reports are good models, yet they still could go further to clarify the links. For example, *Bringing Them Home: the report on the Stolen Generation in Australia*, describes how self-governance—which was critical to protecting aboriginal children from abduction—was lost over the course of the nineteenth century by forcing aboriginal peoples off their land, pushing them to the edge of starvation, and establishing “protectorates,” among others.²² Yet it does not explicitly use the term “self-governance” or state that the loss of self-governance was either an intention or a direct result of these events, and indeed the subject was not part of its mandate. Thus, while the needed information is there, the over-arching theme of self-governance remains buried. If reports in the future can unearth the issue and make it explicit, it would be a welcome improvement.

Attention to gender is important in this respect as well, and has been dealt with by some commissions. In Australia, the Royal Commission on Aboriginal Deaths in Custody offers a more complete gender analysis, describing the impact of colonialism and, later, the modern welfare state on gender roles—both of which had a variety of effects on men and women, some empowering and some disempowering. Since one of the goals of the report is to understand the relatively high incarceration rates of young aboriginal men, this more expansive analysis makes sense.²³ It can also serve as a model for analyzing other situations.

21 Kim Anderson, “Leading by Action: Female Chiefs and the Political Landscape,” in *ibid.*, 100.

22 See Human Rights and Equal Opportunity Commission, *Bringing them Home* (Sydney, 1997), esp. Part 2, Ch. 2.

23 Royal Commission into Aboriginal Deaths in Custody, *National Report*, Chs. 10 and 11.

4. Outreach strategies to non-indigenous people explain why exercise of self-determination and other political rights are critical to reconciliation.

Many non-indigenous people are simply unaware of indigenous people's aspirations and rights. It is understandable that a broader public may not understand what all the "fuss" is about when confronted with a truth commission for Indigenous Peoples—and they may thus be dismissive or even hostile toward it. It is important that the broader public start to understand the broader issues facing Indigenous Peoples for the work of the commission itself to be successful.

The case of the Australian Council for Aboriginal Reconciliation demonstrates this point very clearly. The council was the government's response to a social movement among aborigines to finally establish a treaty between aboriginal communities and the Australian government. (No treaty had ever been signed with aborigines in Australia.) The government believed that more "public education" on the issue was needed before it could discuss a treaty. It thus created the council to undertake this education over a period of 10 years. As mentioned, however, the education process did not broach the issues of self-determination and land—which, obviously, are important elements in any treaty settlement in Australia. It therefore left out the very things about which the public most needed to be educated.

Truth commissions can reframe issues for the public—and they should not necessarily avoid reframing the issues of self-determination and political rights for Indigenous Peoples. A reasoned discussion of what self-determination and political rights might look like could play an important role in establishing a truth commission's recommendations. And it could also discredit the myth that self-determination is synonymous with secession.

5. The commission makes recommendations that will improve the self-determination and other political rights of Indigenous Peoples. This includes concrete recommendations related to the work of the truth commission. It should also include broader proposals related to constitutional reform, the protection of land rights, and other similar issues.

Canada's Royal Commission on Aboriginal Peoples placed emphasis on the fact that Indigenous Peoples never gave up their right to "self-governance," and that they still hope to exercise it. It also insists that there are three orders of government in Canada: "federal, provincial/territorial, and Aboriginal," and that these three share sovereignty.²⁴

The challenge for a truth commission is to make this broad sentiment more practical in its recommendations. With respect to its own work, a truth commission could recommend that Indigenous Peoples should have control of one of the copies of the truth commission archive, that they would be delivered the final report directly, that they would be asked to host hearings, or that their decision-making bodies should develop proposals for reparations.

A truth commission can also make recommendations related to the broader, more aspirational goals listed above—that is, that the state consider amending its constitution or that it establish a good-faith plan to rewrite official representations of history and educate the non-indigenous community about the value of indigenous self-determination and political rights.

6. The commission proposes oversight mechanisms for the implementation of its recommendations that include the Permanent Forum on Indigenous Issues, the special rapporteur on the rights of Indigenous Peoples, and the Expert Mechanism on the Rights of Indigenous Peoples.

This suggestion is an extension of the earlier one to establish regular communications with these international entities. Since it is often the case that a truth commission's recommendations are taken selectively, external pressure on a state to adhere to its international obligations may be helpful.

²⁴ Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples* (Ottawa, 1996); available at www.ainc-inac.gc.ca/ap/pubs/rpt/rpt-eng.asp#chp4.

IV. Risk of Addressing Self-Determination and Other Political Rights in a Truth Commission

Taking some of the steps outlined above is not without its risks, and as such, the risks should be duly weighed before proceeding.

First, there is no question that the issue of self-determination, in particular, has the potential to create a public and political backlash in some countries. Some may interpret claims to self-determination as a slippery slope toward secession and division of the state. Additionally, in some countries, even the effective exercise of political rights by Indigenous Peoples can appear threatening to non-indigenous groups who are used to being in power and who may even deploy racist ideologies to maintain their position.

As a result, depending on the context, it may be politically risky to raise these issues—especially for state authorities, even if they are personally sympathetic to such claims. That said, the critical issue is perhaps not so much that the issue cannot be raised, but rather that it must be adequately explained, so that the non-indigenous community understands what is being asked for, which usually is not secession. The Council for Aboriginal Reconciliation in Australia found out—only at the very end of its work—that non-aboriginals were in fact quite receptive to aboriginal notions of self-determination, if they were discussed and explained in small groups.²⁵

Second, using a peoples-to-peoples framework could expose a truth commission to negotiations that may take a long time, which is not in the interests of victims. Especially when there are a large number of parties involved, or where there are strong disagreements, this approach may be questionable. In these cases, a concept of “adequate consultation” may be more appropriate.

Third, there is a risk that formal and informal political authorities—just like political authorities everywhere—may not be representative of their group or may be representing the interests of only some of their group members. Truth commissions should pay close attention to the

²⁵ The Council commissioned a study based on “deliberative polling,” in which people are polled before and after they have a chance to be informed, question competing experts, and discuss with their peers. See Damien Short, Reconciliation and Colonial Power, 125–27.

gender dynamics of such groups, to ensure that male authority is not exclusive. In general, it will not reflect well on a truth commission if its local partners are themselves repressive or illiberal. In cases where local partners are not adequately representative of their peoples, a truth commission could try to encourage more democratic representation through a number of means. It may, for instance, withhold the right to participate in the process until an authority becomes more inclusive or invite people from the group in addition to the local authority.

It is thus critical to assess the current state of gender roles and women's participation specifically in public decision-making before embarking on a truth commission process. Where women are excluded, issues that are important to them tend to be marginalized. This appears to have been the case in Canadian politics, where, according to one observer, First Nations women's concerns about stopping family violence have taken a back seat to men's concerns about land and resources.²⁶ The Canadian TRC, however, has done its work in such a way so far that it has avoided such criticism. When women are formally or informally excluded from participating, some countries have taken steps to remedy the situation. For example, in the 1980s, Nicaragua created two autonomous zones on the Atlantic coast—an area mainly populated by Indigenous Peoples who had divided their loyalties between the Sandinistas and the Somoza regime during the conflict. The government made provisions to ensure the participation of women, such as requiring regional councils to consult with women's organizations before executing new health, education, and cultural plans (it is unclear how well these provisions have worked).²⁷

Fourth, reliance on formal and informal political authorities may be difficult if those authorities have little experience with the tasks they are responsible for. A truth commission usually involves a fair amount of bureaucracy and standardized procedures—which is not surprising, since it is usually a manifestation of the state. This helps to confer legitimacy on the commission's findings. But many Indigenous Peoples have little contact with the state, which usually operates in

26 Kim Anderson, "Leading by Action: Female Chiefs and the Political Landscape," 101.

27 Sandra Brunnegger, "From Conflict to Autonomy in Nicaragua: Lessons Learnt" (London: Minority Rights Group, April 2007), 5.

a different language and is often located far away. They also may have a history of suspicion and mistrust of the state. Thus, for some indigenous authorities, there may be both reluctance and a lack of capacity to play a responsible role in a truth commission.

V. Conclusion

Narrowing the goals of truth commissions with respect to self-determination and political rights may feel disappointing. Indigenous Peoples have waited for justice for so long that there may be reason to hope that a truth commission could deliver it instantly. But this is asking too much of a truth commission, and it raises expectations among victims and their families that are likely to be dashed. The last thing that victims need is more false hope, so it is important that a truth commission be honest and forthright about its particular role in a larger social change process.

What a truth commission can reasonably do is to enhance the political legitimacy and the capacity of Indigenous Peoples—in particular their authorities and their civil society groups. It can also create an unassailable record of how the erosion of self-determination and other political rights has been detrimental to the basic human rights of Indigenous Peoples. In this way, a truth commission can hope to be one catalyst among many for positive change in a society that is finally ready to recognize Indigenous Peoples as equal partners with distinctive rights.

A HUMAN RIGHTS-BASED APPROACH TO TRUTH AND RECONCILIATION ¹

Nekane Lavin

Introduction

This paper focuses on the work and experience of the United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR) in promoting and assisting truth-seeking and reconciliation processes from a human rights perspective, in the context of transitional justice processes. It maps the normative and operational framework to engage in such processes from a human rights perspective, describes the development of an internationally recognized right to the truth for victims of gross violations of human rights, and presents examples of participation and truth-seeking mechanisms for the realization of the right to the truth, namely national consultations and truth commissions. Finally, it addresses the issue of how human-rights-based truth and reconciliation processes can complement justice processes and result in improvements in access to justice for Indigenous Peoples.

Since 2002, OHCHR has promoted, supported and assisted truth and reconciliation processes in conflict and post-conflict contexts, as part of transitional justice processes. For OHCHR and the UN generally, the notion of transitional justice is concerned with how societies emerging from conflict or from repressive rule address the legacy of past violations of human rights and international humanitarian law. In this context, transitional justice mechanisms should be understood

¹ This paper emanates from a presentation made at the International Expert Seminar on Access to Justice for Indigenous Peoples, including Truth and Reconciliation Processes, organized in New York by the Institute for the Study of Human Rights (ISHR) - Columbia University, the Office of the High Commissioner for Human Rights (OHCHR) and International Center for Transitional Justice, on 27 February–1 March 2013. The author participated at the expert seminar in her capacity as Human Rights Officer working on transitional justice issues at OHCHR. This article is submitted in a personal capacity and the views presented therein do not necessarily reflect those of the United Nations.

as exceptional measures, which can only be justified by the needs of particular transitional situations.

The UN has acquired long experience in assisting societies devastated by conflict or emerging from repressive rule to deal with their past, ensuring accountability, justice and reconciliation, as priorities in a transitional environment. The work that OHCHR performs in supporting transitional justice programmes encompasses the development of international standards and good practices; identifying gaps and responding to needs through targeted operational guidance and materials;² providing technical advice and assistance to member States, civil society and UN partners in the design and implementation of transitional justice mechanisms; providing capacity building and training to national stakeholders; and engaging in global and national advocacy to ensure that human rights and transitional justice considerations are reflected in peace agreements and missions.

In its activities, OHCHR has placed particular importance upon the centrality of those who have experienced human rights violations in shaping transitional justice responses. This has led to an increased respect for and concrete implementation of victims' rights to an effective remedy.

I. Normative and operational framework

OHCHR's comprehensive approach to transitional justice is underpinned by international legal obligations with regard to the so-called four pillars of transitional justice, namely the right to the truth, the right to justice, the right to reparations, and the duty of States to prevent the recurrence of violations. At its heart, transitional justice seeks to do two things: first, to restore and protect the dignity of individuals as bearers of fundamental human rights and freedoms, and second, to help recreate the bonds of trust between citizens and

² OHCHR has published nine manuals under the series of Rule of Law Tools for Post-Conflict States. These tools cover the following topics: Prosecution initiatives (2006), Truth commissions (2006), Vetting and institutional reform (2006), Mapping the justice sector in post-conflict states (2006), Legal systems monitoring (2006), Reparations programmes (2008), Legacy of hybrid tribunals (2008), Amnesties (2009), and National consultations on transitional justice (2009).

States, especially through the respect of the rule of law, essential for the functioning of a rights-respecting society.

The normative and operational guidance for OHCHR's work in transitional justice is found in two UN documents which, taken together, form the basis for much of OHCHR's work in this area, namely: the updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity ("Set of Principles"), endorsed by the UN Commission on Human Rights in 2005,³ and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles and Guidelines"), adopted by the UN General Assembly in 2006.⁴

The principal elements of OHCHR's approach to strengthening rule of law and addressing impunity are further informed by the Secretary-General's 2004 report to the Security Council on "The rule of law and transitional justice in conflict and post-conflict societies,"⁵ which defines transitional justice as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."⁶ For the UN, transitional justice consists of both judicial and non-judicial processes and mechanisms, including truth-seeking initiatives, prosecutions, reparations programmes, institutional reform or a combination of these measures.

The Guidance Note of the Secretary-General on the UN Approach to Transitional Justice, of March 2010, provides a rights-based perspective on transitional justice, and offers various approaches for

3 Commission on Human Rights, Promotion and Protection of Human Rights Impunity: Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher Addendum. 71st Sess., UN doc. E/CN.4/2005/102/Add.1. (2005).

4 General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. GA Res. 60/147, 60th Sess., UN doc. A/RES/60/147(2005).

5 Security Council, The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary General, UN doc. S/2004/616 (2004).

6 *Ibid.*, at para. 8.

further strengthening the UN's transitional justice activities, such as taking human rights and transitional justice considerations into account during peace processes, considering the root causes of conflict or repressive rule, and addressing the violations of all rights, including economic, social and cultural rights.

In addition, the Guidance Note contains a number of guiding principles for transitional justice activities, such as the need to incorporate a gender perspective, and to take into account the particular context of a country when designing and implementing transitional justice mechanisms. The Guidance Note also places emphasis on a victim-centered approach and on participation, including participation of victims and civil society organizations, in the design and implementation of transitional justice mechanisms. It further states that national consultations, conducted with the explicit inclusion of victims and other traditionally excluded groups, are particularly effective in allowing them to share their priorities for achieving sustainable peace and accountability.

The notion of a comprehensive and victim-centered approach has also been promoted by the first UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, for instance, in his initial reports to the UN Human Right Council and the UN General Assembly.⁷ In this regard, it should be noted that the creation of a new mandate and the appointment of a special rapporteur has enabled increased visibility and further consideration of transitional justice issues from a human rights perspective.

II. The right to the truth and the concept of reconciliation

In 2006, OHCHR presented a study on the right to the truth, which concluded that the right to the truth about gross human rights violations and serious violations of international humanitarian law is an inalienable and autonomous right, linked to the duty and obligation

⁷ Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, 21st Sess., UN doc. A/HRC/21/46 (2012) and General Assembly Promotion of truth, justice, reparation and guarantees of non-recurrence, Note by the Secretary General, 67th Sess., UN doc. A/67/368 (2012).

of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations.⁸

The study establishes that the right to the truth finds its roots in international humanitarian law, in particular, in relation to the right of families to know the fate of their relatives, together with the obligation of parties to armed conflict to search for missing persons.⁹ With the proliferation of enforced disappearances in the 1970s, the concept of the right to the truth was further studied by international and regional human rights monitoring mechanisms, and extended to other serious human rights violations, such as extrajudicial executions and torture.¹⁰

In the past decade, the right to the truth has been explicitly recognized in several international instruments and by intergovernmental mechanisms.¹¹ More recently, the International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly on 20 December 2006, in its article 24(2) states that: “Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”¹²

The OHCHR study also analyses the linkages of the right to the truth with other rights, such as the right to an effective investigation and to an effective remedy, and more importantly, its linkages with the State’s obligation, *inter alia*, to conduct an effective investigation and to provide an effective judicial remedy. The study concludes that amnesty laws and similar measures that prevent the investigation and prosecution of perpetrators of gross human rights violations may violate the right to the truth.¹³ This conclusion is also reflected by developments in international law and UN policy, which consider

8 Commission on Human Rights, Promotion and Protection of Human Rights Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights, 62nd Sess., UN doc. E/CN.4/2006/91 (2006).

9 *Ibid.*, at para. 5.

10 *Ibid.*, at para. 8.

11 *Supra* note 4, see principles 1, 2, 3 and 4 of the Set of Principles and principles 11, 22(b) and 24 of the Basic Principles and Guidelines.

12 General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, GA res. 61/77, 61st Sess., UN doc. A/RES/61/177 (2007).

13 *Supra* note 9, at paras. 42 and 45.

amnesties as impermissible if they prevent prosecution of alleged perpetrators of war crimes, crimes against humanity, genocide, and gross violations of human rights, based on the need to combat impunity for these crimes and to ensure that victims and their relatives know the truth.¹⁴

As for the concept of reconciliation, OHCHR conceives it as one of the objectives of transitional justice. In this context, reconciliation would seek to overcome divisions and to build trust within societies recovering from conflict or repressive rule. Even though there is no single model of reconciliation, OHCHR considers that it cannot be understood as a call for impunity, nor as a burden placed on victims to forgive. Any efforts in this regard must respect the victims' rights to justice, to know the truth, reparations and guarantees of non-recurrence. Similarly, efforts towards reconciliation should seek to re-establish the confidence of citizens in public institutions, which have direct bearing on the protection of their rights. Therefore, transitional justice initiatives should aim at building trust among victims, society and the State through measures that provide an acknowledgement to victims and redress for the rights that have been violated.

III. Mechanisms to implement the right to the truth: the importance of national consultations

OHCHR promotes and supports the organization of national consultations, which allow identifying the concerns, needs and grievances of rights holders, victims' organizations and marginalized groups. These participation mechanisms promote the involvement of rights-holders in the decision-making process about the measures that are most suited to address past abuses.

Comprehensive national consultations are a critical element of the human rights-based approach to transitional justice, and are founded on the principle that successful, legitimate and sustainable transitional justice strategies require inclusive and meaningful public participation. As stated by the Guidance Note of the UN Approach to Transitional

14 For an analysis of amnesties from a human rights perspective, see OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties*. (OHCHR, 2009).

Justice, public participation reveals the needs of conflict-affected communities, allowing states to design appropriate context-specific transitional justice strategies, and endowing victims and other members of civil society with local ownership of the resulting strategy.

Consultations should extend to a broad range of stakeholders, to include individuals, groups and regions that have traditionally been marginalized. The participation of civil society, women's organizations, Indigenous Peoples and interest groups, particularly victims, is crucial. Those affected by oppression and conflict need to be listened to and have their experiences and needs adequately reflected.¹⁵

OHCHR supports national consultative processes in conformity with international norms and standards, by providing legal and technical advice, promoting civil society and victim participation, supporting capacity-building and mobilizing resources.¹⁶

- In Togo, national consultations took place in 2008 to raise public awareness on transitional justice issues and seek the views of national stakeholders on potential mechanisms. Consultations were conducted over a period of four months, and included organizing 167 meetings in 5 administrative regions of the country, attracting approximately 2,000 participants. In July 2008, OHCHR Togo produced a report summarizing the findings of the national consultations and outlining recommendations, including the establishment of a truth and reconciliation commission. OHCHR Togo was further instrumental in providing support to the Truth, Justice and Reconciliation Commission established in 2009.
- In Burundi, the UN Security Council requested the Secretary General to organize consultations with the Government of Burundi and Burundian stakeholders regarding the establishment of a truth commission and a special tribunal. In 2007, a tripartite steering committee composed of the Government, civil society and UN representatives was

15 For more information on national consultations, see OHCHR, *Rule-of-Law Tools for Post-Conflict States: National consultations on transitional justice*. (OHCHR, 2009).

16 For additional examples of national consultations supported by OHCHR, see the OHCHR, *Report of the UN High Commissioner for Human Rights on human rights and transitional justice*, 18th Sess., UN doc. A/HRC/18/23 (2011).

established to organize the national consultations. These began in July 2009 and were completed in April 2010 with the publication of the report. In total, 3,887 Burundians participated in the national consultations through individual interviews, focal groups and community meetings. In October 2011, a technical committee appointed by the President submitted a draft law on the establishment of the Truth and Reconciliation Commission. A new draft law on a Truth and Reconciliation Commission was submitted for approval by the National Assembly in December 2012. The UN made recommendations to the Government to take into account the conclusions of the national consultations and to respect international norms and standards with regards to the creation of a truth and reconciliation commission.

- In Tunisia, in April 2012, OHCHR supported the launching of the National Dialogue on Transitional Justice aimed at informing the drafting of a consensus-driven law on a holistic transitional justice process. OHCHR provided training to the technical committee—composed of representatives of the Ministry on Human Rights and Transitional Justice as well as civil society—and sub-committees that were created to oversee the national consultations at regional and local levels. Between September and October 2012, twenty-four regional dialogues were organized across the country. The consultations reached out to about 2,500 participants who were asked to fill out a questionnaire about their attitudes and expectations regarding transitional justice. Subsequently, OHCHR provided comments on the draft law on transitional justice, which foresees the creation of a national “Truth and Dignity Commission.”

IV. Truth commissions

A key factor that contributed to the development of the right to the truth is the establishment of “truth commissions” or other similar truth-seeking mechanisms as a means to deal with past gross human

rights violations.¹⁷ In general, truth commissions are conceived as a means to respond to the need of the victims, their relatives and society to know the truth about what has taken place, to contribute to the fight against impunity, to facilitate the reconciliation process, and to strengthen democracy and the rule of law.¹⁸

As concluded by the OHCHR study on the right to the truth, truth commissions have played an important role in promoting justice, uncovering truth, proposing reparations, and recommending reforms of abusive institutions.¹⁹ Truth commissions or other similar truth-seeking mechanisms have varied greatly in terms of mandate, procedure, composition and purpose: most have sought to investigate events and to analyse the reasons for them, with a view to making a credible historical record and to preventing the recurrence of such events; some provide a cathartic forum for victims, perpetrators and the broader society to publicly discuss violations, often with the ultimate aim of reconciliation and sometimes to achieve a measure of justice.²⁰

Each truth commission is a unique institution, designed within a specific societal context, and should be founded on national consultations inclusive of victims and civil society organizations.²¹ OHCHR assists in the design and establishment of truth commissions, including by sharing applicable standards and best practices.²²

- The Truth and Reconciliation Commission of Sierra Leone was established in 2002, completed its hearings in July 2003 and, with the assistance of OHCHR, prepared a report summarizing its findings and recommendations, which was presented to the President in October 2004. OHCHR and the UN assisted the Government with the implementation of the recommendations, including enactment of legislation protecting the rights of women and children. Through the

17 *Supra* note 9, at para. 13.

18 *Ibid.*, at para. 14.

19 *Ibid.*, at para. 50.

20 *Ibid.*, at para. 15.

21 *Supra* note 17, at para. 9.

22 For an analysis of truth commissions from a human rights perspective, see OHCHR, *Rule-of-Law Tools for Post-Conflict States: Truth Commissions* (OHCHR, 2006).

UN Peacebuilding Fund, the UN mission supported the establishment of reparations programmes, which conducted symbolic community reparations events and delivered partial benefits to 20,000 of the 32,000 registered victims. A National Trust Fund for Victims was also established in order to facilitate the sustainability of the programme. Following advocacy and technical advice by the UN, the Government established the National Human Rights Commission, which serves, *inter alia*, as the follow-up mechanism for the implementation of the recommendations.

- The Truth and Reconciliation Commission in Liberia was established by law in June 2005. The UN mission and OHCHR played a significant role in the consultation process leading up to the promulgation of the law, which provided for a selection procedure for truth commissioners and the appointment of an international technical advisory committee to support their work. The selection panel was composed of two representatives appointed by the Economic Community of West African States and the UN, and five representatives appointed by civil society. The selection panel was tasked with screening nominees and preparing a shortlist of candidates, from which the Government appointed nine commissioners from a variety of backgrounds. The UN mission supported the capacity-building of commissioners and staff through training programmes on investigatory procedures, case management, and human rights and international humanitarian law.

The Commission was established in February 2006. OHCHR and the UN Development Programme (UNDP) executed a conflict mapping project, collecting and compiling up to 13,000 witness statements, which were handed over to the Commission. In December 2009, the Truth and Reconciliation Commission released its final report. The UN mission advocated for the establishment of the Independent National Commission on Human Rights, which was officially established in October 2010, and was tasked, among others, with ensuring the implementation of the recommendations.

- The Truth, Justice and Reconciliation Commission of Togo was established by Presidential Decree in 2009. OHCHR supported

the commission in a variety of forms: having dedicated staff to provide technical assistance, holding workshops for commissioners and staff on transitional justice, arranging for dialogue between commissioners and members of truth and reconciliation commissions from other countries, providing training for staff on gathering information, investigation and analysis, and facilitating workshops on relevant topics, such as witness protection and reparations. In 2011, the Commission held over 400 hearings.

The Commission handed over its final report in 2012, and OHCHR conducted extensive advocacy and awareness raising activities to ensure its wide dissemination. At the end of 2012, the President of the Republic announced the decision to create the Office of High-Commissioner for Reconciliation and the Strengthening of National Unity, which is responsible for the implementation of the recommendations, especially on reparations.²³

Despite the opportunities and advantages offered by participation and truth-seeking mechanisms in transitional justice contexts, experience shows that they are often faced with major difficulties and challenges. In respect of national consultations, while there have been advances over the past years with regard to the participation of victims and civil society organizations, challenges remain with regard to: (i) ensuring adequate representation of victims, women and marginalized groups, including Indigenous Peoples and minorities; (ii) ensuring comprehensive outcomes of participatory mechanisms; and (iii) ensuring that consultations will not be a one-off event.

With regard to the work of truth commissions, major challenges include: (i) ensuring the independence and credibility of the commission; (ii) political interference and manipulation; (iii) ensuring continued participation of marginalized groups, civil society and victims' organizations; (iv) ensuring a gender perspective in the work of the commissions; (v) restrictions in the mandate regarding time periods under investigation, material scope and the lifespan of

23 For additional examples of experiences of truth commissions assisted by OHCHR, see *supra* note 17.

the commissions; (v) pardons and amnesties; (vi) effective victim and witness protection measures; (vii) raising unrealistic or undue expectations; and (viii) ensuring political support and resources to implement recommendations.

V. How can truth and reconciliation processes result in improvements in access to justice for Indigenous Peoples?

In the context of truth and reconciliation processes, the link between the right to the truth and justice can be made through a number of measures, such as the participation of Indigenous Peoples in consultations processes on transitional justice mechanisms that should be established to address their grievances, and through final recommendations of truth and reconciliation mechanisms, which can include referrals of cases to the justice system, the establishment of reparations programmes, and the adoption of institutional reforms.

National consultations can offer the means to identify and take into account historic and contemporary grievances or violations suffered by Indigenous Peoples. Inclusive consultations can give a voice and a role to Indigenous Peoples to channel their specific concerns and needs, and to take part in the decision-making process concerning transitional justice mechanisms that are most suitable for them. For instance, Indigenous Peoples should be considered and involved in the design of the methodology that is used to conduct national consultations. In addition, Indigenous representatives should be appointed to ensure that their concerns and needs are appropriately defined and considered when determining the most suitable transitional justice mechanism to address them.

For OHCHR, the experience of national consultations in Burundi, and the role of the Batwa people therein, constitute a lesson learned. Even though the Batwa people were consulted during the process (e.g. they were invited to awareness-raising and training meetings; issues of their concern were included in the questionnaires used in the consultations), they were not given enough of a role, or a specific one, in the consultation process through, for instance, the appointment of a representative in the tripartite committee in charge of organizing

the national consultations, to ensure that the grievances of the Batwa would be taken into account. Consequently, there was a very weak reference to the concerns of the Batwa people in the final report of the national consultations.

Indigenous Peoples should also be involved in the creation of transitional justice mechanisms that result from national consultations, for instance, through the appointment of commissioners who will be able to gather and interpret their specific concerns, and ensure that they are properly addressed as part of the conclusions and recommendations of the final report. Truth-seeking mechanisms can issue recommendations to ensure access to justice of Indigenous Peoples, through referrals of specific cases to (national or international) justice mechanisms. Moreover, recommendations by truth commissions can include institutional reforms, such as the reform of the justice sector, to ensure that it is closer to those who most need it due to (historic or contemporary) exclusion or marginalization. Finally, truth-seeking mechanisms can also recommend the establishment of reparation programmes, which address the needs of victims.

In conclusion, a human-rights based approach to transitional justice allows for the consideration of grievances suffered by Indigenous Peoples, through their participation in consultations and truth-seeking processes that complement justice systems. OHCHR, together with other partners and stakeholders, can play a crucial role in ensuring the participation of Indigenous Peoples in these processes, and in promoting their rights to the truth, justice, reparations and guarantees of non-repetition.

PART IV

WHO HAS BEEN LEFT OUT?

INDIGENOUS CHILDREN AND YOUTH: THE CASE OF MARAE¹ COURTS IN AOTEAROA/NEW ZEALAND

Valmaine Toki

Background

Marae²-based Courts are an initiative of the Judiciary that builds on existing programmes for offenders such as Te Whanau Awhina, and informed by the Koori Courts in Australia.³ This is the first time that a New Zealand court has conducted criminal cases on a Marae within the jurisdiction of the Youth Court. Most offenders referred to the programme are Maori⁴ and the process incorporates Maori tikanga (Maori customs).

The Judges of Nga Kooti Rangatahi⁵ consider that ‘rangatahi (youth) offending is related to lack of self-esteem, a confused sense of self identity and a strong sense of resentment which in turn leads to anger and ultimately leads to offending’.⁶

To modify the behavior of an offender one needs to understand how they feel. Emotions such as resentment, anger, greed, confusion and hate often drive youth offending.⁷ The most effective way to encourage this change is to place the offender in a community of People who understand and recognise his or her feelings, and who also have the

1 This article builds on text already published in the Commonwealth Law Bulletin, *Tikanga Maori – a Constitutional Right: A Case Study*, December 2013. See glossary of terms at the end of the article.

2 Although the term Marae, in contemporary times, is the term for the traditional meeting house, the term more appropriately refers to the area in front of the whare nui, big house or traditional meeting house.

3 Evaluation of the early outcomes of Nga Kooti Rangatahi. Submitted to the Ministry of Justice 17 December 2012, p 8. Available also http://www.justice.govt.nz/publications/global-publications/r/rangatahi-court-evaluation-of-the-early-outcomes-of-te-kooti-rangatahi/publication/at_download/file.

4 Maori are the Indigenous Peoples of Aotearoa/New Zealand.

5 The term Nga Kooti Rangatahi refers to the Youth Court process that is held on the Marae.

6 Report above n 3, 8–9.

7 See comments by Judge Bidois as cited in Report above n 3, 25.

power and respect to alter those feelings.⁸ According to Judge Bidois, ‘there needs to be inclusion rather than exclusion to effect change. This process can be achieved on a Marae.’

The ability to reconnect the offender with their identity and whanau (extended family) is seen to contribute positively to the success of the process. The ultimate outcome for the Judge is ‘for the rangatahi (youth) to be empowered to achieve their potential’.⁹ Challenges including adequate resourcing and continuing support by the whanau (extended family) and wider community will, however, influence the outcome.

It is acknowledged that the support of the community is paramount. Organisations such as the ‘Courts, Ministry of Justice, Child Youth and Family, Police Youth Services, Iwi (tribe) Liaison Officers, Iwi (tribe) Social Services, Programme Providers, Youth Advocates and Lay Advocates are all critical to this initiative materializing to provide our rangatahi (youth) and their whanau (extended family) the opportunity to have cases heard in a more appropriate way and with the opportunity for greater rangatahi (youth), whanau (extended family) and community engagement and involvement’.¹⁰

Process¹¹

The Marae process is open to all, providing a possibility that non-Maori can also seek to be heard in this process. Although Nga Kooti Rangatahi is specifically to support tikanga Maori (Maori customs) Nga Kooti Rangatahi is available to any young person, not limited to Maori. There is no mandatory requirement for young People to be dealt with on the Marae. If this option is not sought, the normal Youth Court process applies.

Prior to transfer to the Marae, the process adheres to the normal Youth Court procedures. Upon appearance at the Youth Court, the rangatahi (youth) is assigned an advocate and the case is remanded. The charge is usually not denied or admitted in the normal manner in the Youth Court. If the charge is admitted a lay advocate is still appointed.

⁸ *Ibid.*

⁹ Report above n 3, 9.

¹⁰ Report above n 3, 74.

¹¹ I am grateful for the advice of Judge Heemi Taumaunu in writing this section.

A Family Group Conference (“FGC”) is convened and held in the normal manner where the young person who has offended and their family, victim, agencies, social worker and advocate discuss and approve a FGC plan. The aim of the plan is to encourage the young person to take accountability for his/her actions, find practical ways to rectify the situation, ascertain why he/she offended and how amends can be reached.¹² The Marae hearings are designed to monitor the young person’s performance of the FGC plan and also to sentence the young person on completion of the FGC plan. If the victim disagrees with the rangatahi (youth) referral to Nga Kooti Rangatahi, the rangatahi (youth) will not be referred. The presiding Judge after considering the FGC plan will make the final decision on the eligibility of the rangatahi (youth) to have the case monitored by Nga Kooti Rangatahi. If the referral is accepted the rangatahi (youth) is remanded until the next sitting date. Whilst on remand the rangatahi (youth) is encouraged to learn their whakapapa (genealogy) and pepeha (oral speech denoting your genealogy) to inform the Judge when they appear.¹³

In accordance with Maori protocol, the Marae hearings begin with a powhiri (a formal Maori welcome) that is initiated on the morning of the court sitting. A kuia (respected Maori female elder) stands outside the whare nui (traditional meeting house) and calls the judge, court staff, lawyers, social workers, lay advocates, respected elders, young People appearing and their families, onto the Marae. The powhiri (a formal Maori welcome) is supported by the tangata whenua (local People).

A kuia (respected Maori female elder) from the visitor group will respond to the call of welcome. All those present then move inside the whare nui (traditional meeting house) where formal speeches are conducted. Once the formalities are completed, everyone proceeds to the dining hall for a cup of tea.

The court then convenes and the proceedings commence inside the whare nui (traditional meeting house). The kaumatua (respected Maori elder) who also assists in the court process then recites a karakia (a prayer). When each case is called, the kaumatua (respected Maori elder),

12 Report above n 3, p 21.

13 *Ibid.*

who sits next to the judge, will give a specific speech of welcome to the young person and his/her family.

The young person is encouraged to respond to the welcome by saying a mihi (a Maori speech). This is aimed at re-establishing the young person in their identity as a Maori. The young person and his or her family are invited to participate fully in the hearing, as are all of the professionals. Together with the whanau (extended family), hapu (sub-tribes) and iwi (tribes), solutions are actively sought with the co-operation of agencies.

Additional applicable principles include holding the young person accountable, ensuring the victim's issues and interests are recognised, and addressing the underlying causes of the offending behaviour. The ultimate goal is to keep communities safer by reducing recidivism.

The Judge will then sum up the proceeding noting, after consultation, the next date for appearance of the rangatahi (youth). At the completion of the hearing whanau (extended family) members are invited to address the rangatahi (youth).

The hearing concludes with the kaumatua (respected Maori elder) and judge participating in a hongī (a pressing of noses) with the young person and their families and finally a karakia (prayer). This is in accordance with Maori protocol.

Positioning the process in the whare nui (traditional meeting house) on the Marae is a positive step; it provides an environment that seeks to reconnect the offender with his/her culture and community. The implementation of the Maori language, tikanga Maori (Maori customs) into the court process further consolidates this reconnection. Encouraging the offender to be accountable and addressing the underlying reasons for offending also contribute to the positive nature of Marae based courts. The environment of the Marae has engendered an ability for rangatahi (youth) to engage, one rangatahi (youth) notes:¹⁴

“It’s easier to stand up in court [be]cause you feel like everyone is your family. You’re able to let it out. Go hard—let it out. Youth Court is a cold court. The judges and lawyers—everyone is more subdued and long faced. We all share kai (food) here. It makes a huge difference to how you feel. A far better process. When we hongī (a pressing of noses) we are connecting our mana (power or prestige) to one another. It’s less

¹⁴ Report above n 3, 36.

tense. Obviously we are willing to speak a bit freer, more comfortable. (Male rangatahi/youth).”

It should be applauded that the Criminal Justice System is seeking a creative path to assist Maori youth offending. However tikanga Maori (Maori customs) and the realm of Te Ao Maori (Maori world) is more complex than this process currently adopted.

For Maori, the legal system is sourced from Te Ao Maori, the Maori World,¹⁵ which is a complex three dimensional philosophy. Cosmology and the creation accounts are intrinsic to Te Ao Maori. Cosmology establishes the relationships, or whakapapa (genealogy), between People, the environment and the spiritual world. The dynamic between these elements underpins a mechanism similar to that of a social constitution. Translating these concepts into a non-Maori criminal justice system is problematic.

To retain the integrity of tikanga Maori (Maori customs) and Te Ao Maori, these should not be subject to codification or interpretation by the legal profession. First, there is the danger of translation, which invariably results in some redefinition of the original concept or term. In general, the incorporation of tikanga (Maori customs) into Pakeha law implies a degree of acceptance and understanding of the tikanga (Maori customs), which may not always be the case.

Second, the isolation of one concept or term from tikanga (Maori customs) is an unnatural separation of the concept from its tikanga (Maori customs) roots, its philosophical underpinnings and cultural constructs. Third, the codification or placement of tikanga (Maori customs) within mainstream legislation is one consideration, amongst many, that is also unnatural and degrading to tikanga (Maori customs).

Case Study¹⁶

“Tagger has to learn his mihi (speech of greeting).

A 14-YEAR-OLD who has admitted a charge of graffiti crime stands before Judge Heemi Taumaunu.

15 Although Te Ao Maori is often referred to as the Maori worldview, Te Ao Maori more correctly is the Maori World.

16 Marty Sharp, *Rangatahi Courts: A quiet revolution in teen justice*. (Newswire, New Zealand, October 2011). <http://newswirenz.wordpress.com>.

“Have you got your mihi (speech of greeting) ready to go today?” the judge asks.

“No.”

“I’m sure we can help your maunga (mountain)?”

“My what?”

“Your maunga (mountain).”

“Not too sure.”

“You knew it last time. Have you forgotten it?”, the judge says, referring to the boy’s previous appearance on the same charge in May.

“Yep.”

“What’s the name of your marae?”

“I dunno.”

“Have you ever been to it?”

“Nah.”

Kaumatua (respected Maori elder) Denis Hansen, who sits alongside the judge, stands and recites the entire mihi (speech of greeting), naming the boy’s mountain, river, marae, iwi (tribe) and hapu (sub-tribe).

Then he tells the boy: “Lunch is at one o’clock. Don’t go away after that. You’re going to have a bit of whakapapa (genealogy) education.”

“Matua will teach you your mihi (speech of greeting),” the judge says. “After that you can go away. We’re going to see a lot of improvement next time. We expect that from you. I expect you to be able to say the mihi (speech of greeting), the kaumatua (respected Maori elder) just said to you,” the judge says.

He says that the boy, who is Ngati Kahu, needs more monitoring.

The boy’s advocate, Steve Trent, says he has improved attendance of his alternative education course, turning up 80 per cent of the time.

This boy had virtually zero attendance a few months ago. The judge says he expects 100 per cent attendance and asks why this is not happening. The boy says he has lost his bus pass.

When the boy first appeared he was sentenced to 80 hours of community work, and was ordered to attend courses on life skills as well as alternative education. He was also put under a 24-hour curfew.

It transpired that he had not been completing his community work.

After a brief conversation involving elders, a social worker, and the judge, a kaumatua (respected Maori elder) volunteers to collect the boy

from his home each weekend to bring him to the marae where he can carry out his community work. The kaumatua (respected Maori elder) says this will also provide an opportunity for him to teach the boy his mihi (speech of greeting).

Judge Taumaunu is pleased with that and adds that it has been three months since the boy last offended. He remands him on bail to reappear on October 6.”

Marae-Based Courts—Evaluation

Offences before the Marae Based Court are confined to those perpetrated by youth. While the Rangatahi Court process is focused on young Maori, both Maori and non-Maori are eligible. This is an attempt to overcome the perception that separate courts, separate procedures or special treatment have been instituted.

A recent Evaluation Report of Nga Kooti Rangatahi noted the positive outcomes rangatahi (youth) were experiencing as a result of engaging and attending Nga Kooti Rangatahi.¹⁷ These positive experiences were also echoed by the youth justice professionals and manifest in the high level of attendance by the rangatahi (youth) and support whanau (extended family) who felt welcomed and respected.¹⁸ The ability for the rangatahi (youth) to deliver their pepeha (oral speech denoting your genealogy) and feel connected to their culture imbued a sense of pride and achievement. The flow on effect was that the rangatahi (youth) understood the court process showing improved behavior and positive attitude, taking responsibility for their offending and its impact.

Notwithstanding the recognition of tikanga (Maori customs), the underlying principle that applies to this approach is not tikanga (Maori customs), but legislative, to honour and apply the objects and principles in the *Children and Young Persons Act*. Although this project represents an attempt to incorporate Maori tikanga (Maori customs) with the law, it is not designed to abandon the law and start a tikanga-based Court. That is beyond the jurisdiction of the Court.

17 Report above n. 3, 9.

18 Report above n. 3, 10.

The implementation of tikanga (Maori customs), under the auspices of legislation, questions the robust nature of any tikanga-based outcome. Further, this will question the degree of respect any offender or whanau (extended family) will have for such an outcome if the kawa (protocol) of tikanga (Maori customs) is not one to which they adhere. At this stage it is not clear whether this has been addressed.

It is difficult to overlay two different worldviews, that of Te Ao Maori over Te Ao Pakeha (Pakeha world). There are inherent problems, such as that of the urban Maori, who do not identify with tikanga (Maori customs) or the notion of the collective and the question of where they fit.¹⁹ Other questions arising are: “Which kawa (protocol) is to be adopted during the Marae Court Process? What if the kawa (protocol) of the offender does not align with the kawa (protocol) of the Marae Court Process? If the process is to be a Marae process then surely a kaumatua (respected Maori elder) rather than a Judge should lead this process? For a person, who does not affiliate with the Marae or the offender, to lead the process is a slight on the mana (power or prestige) of the kaumatua (respected Maori elder) and the whanau (extended family)”

The kaumatua (respected Maori elder) is connected to the offender through whakapapa (genealogy). Ultimately it is the kaumatua (respected Maori elder) who holds the responsibility for the offender. It is difficult to reconcile how, in a Marae Court, the Judge can be bestowed the same status as a kaumatua (respected Maori elder), at times usurping that role, when there is no whakapapa (genealogy) connection or same sense of responsibility.

In small communities, this is even more pronounced. Kuia (respected Maori female elder) and kaumatua (respected Maori elder) are often intimately linked to the offender and a Judge is effectively viewed as an outsider attracting a lesser standing. In this instance, it is difficult for the offender to respect the Judge since the offender perceives their kuia (respected Maori female elder) or kaumatua (respected Maori elder) as having the mana (power or prestige), not the Judge. Furthermore, the offender perceives that the Marae is the elders' turangawaewae (place to

19 See discussion J Tauri *Reforming Justice the Potential of Maori processes* in E McLaughlin, R Ferguson, G Hughes and L Westmarland (eds), Restorative Justice Critical Issues. (Sage Publications, London, 2003).

stand) and not that of the Judge. According to academic and kaumatua (respected Maori elder) Matiu Dickson:²⁰

“...Judges are doing the kaumatua’s job and thus taking away the last bastion of Maori ownership of the process. On a marae all decisions are made by People who are affiliated to the marae, but the final decision rests with the kaumatua (respected Maori elder) who hold the mana (power or prestige). The marae community should have the right to decide how low-risk young offenders are dealt with.”

Although available research indicates some level of success for Marae Courts, and this initiative should be applauded, the concerns still exist. Matiu Dickson stipulates two issues that are required to be satisfied prior to the establishment of a Marae Court:²¹

1. To retain mana (power or prestige) and authority for decisions made concerning the young offender and
2. To ensure that the young offender be connected by whakapapa (genealogy) to his/her Marae.

Arguably, Marae Courts, are a justice initiative that builds on the Koori Courts and does not tackle the root problems of indigenous offending such as the legacy of government oppression and effect of colonization.²² This is a view shared by Marchetti and Daly, who state:²³

“Any effort to address the over-representation of Indigenous People in the criminal justice system must also confront a legacy of government policies and practices over the past two centuries, which systematically disadvantaged and oppressed Indigenous People.”

20 Radio NZ, *Judges doing kaumatua’s job in youth courts* 13 October 2011. <http://www.radionz.co.nz>.

21 M Dickson, *The Rangatahi Court* [2011] W Law Rev 85 – 107.

22 See discussion in Tauri, J. M., Webb, R. (2012). *A Critical Appraisal of Responses to Māori Offending*. *The International Indigenous Policy Journal*. 3(4). Retrieved from: <http://ir.lib.uwo.ca/iipj/vol3/iss4/5>.

23 E Marchetti and K Daly, *Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model*, (2007) Sydney Law Review 443.

Also, these courts may place further strain on Indigenous communities who are already affected by economic marginalisation and have few social services/resources. Often kuia (respected Maori female elder) and kaumatua (respected Maori elder) voluntarily contribute their time and efforts to this process, thus compounding the economic strain on small indigenous communities. Unlike the Koori Courts where Elderly Respected Persons are statutorily appointed and are paid a sitting fee, the kuia (respected Maori female elder) and kaumatua (respected Maori elder) from the Marae-based Courts are not.

Having regard to the growing success of these courts and the subsequent increase in numbers of both offenders accessing this court and the increase of courts; the economic impact this will have on small regional communities becomes exacerbated. Although the Evaluation Report provides positive outcomes for the participants, the Report lacks hard statistical data on recidivism rates. Notwithstanding this absence of statistics Judith Collins, Minister of Justice, announced that the Government's Drivers of Crime programmes' progress report indicated that the offending rates for Maori youth between 2008 and 2012 were down 32 per cent.²⁴

Irrespective of the critique, if a Marae-based Court led by a kaumatua, (respected Maori elder) who was linked by whakapapa (genealogy) to the offender, within a tikanga (Maori customs) paradigm, can assist to reduce the offending and recidivism rates for Maori, this recognition would contribute to confronting the legacy of government policies and practices that have systemically disadvantaged Indigenous People. Further if they are successful, these Courts should attract funding in order to alleviate the strain on Indigenous communities.

It has been acknowledged that Nga Kooti Rangatahi is a significant step and there is much interest from international jurisdictions.²⁵ However, these Courts are not a separate youth justice system neither are they a sentencing Court, but it is a Court that helps empower and galvanise a community based response to the young person's offending; it supports

24 Judith Collins, Pita Sharples, *Youth Maori Offending down 32 per cent*. Available also at <http://www.beehive.govt.nz/release/young-m%C4%81ori-offending-down-32-cent>

25 The Rangatahi Newsletter Special Edition Rangatahi Courts' Hui, p 2

Available also at <http://www.justice.govt.nz/courts/youth/publications-and-media/principal-youth-court-newsletter/rangatahi-courts-newsletter-vol-3>

and monitors all the components of the family group conference plan formulated in response to the young person's offending.²⁶

It may be the case that these Courts will achieve a transformation of the law in a way that reduces disproportionately negative outcomes for Maori. Only time will tell.²⁷

Glossary of Terms

Hongi	To press noses in greeting
Iwi	Tribe, extended kinship, nation, People
Kai	Food
Karakia	Prayer
Kaumatua	Maori elderly man or woman
Kawa	Customs and protocol
Kuia	Maori elderly woman, grandmother
Mana	Power, prestige
Marae	Courtyard, area in front of the whare nui
Maunga	Mountain
Mihi	Maori speech of greeting
Pepeha	Oral speech usually denoting your genealogy
Powhiri	Maori welcome
Rangatahi	Youth
Tangata Whenua	People of the Land, local People
Turangawaewae	Place to stand, rights of residence

²⁶ *Ibid.*

²⁷ Ministry of Justice has just called for expressions of interest to conduct a qualitative evaluation of Te Kooti Rangatahi.

Tikanga	Correct procedure, custom, habit,
Whakapapa	Genealogy, lineage, descent
Whanau	Extended family, family group
Whare Nui	Traditional meeting house, large hui

AMERICAN INDIAN BOARDING SCHOOLS IN THE UNITED STATES: A BRIEF HISTORY AND THEIR CURRENT LEGACY

Denise K. Lajimodiere

Introduction

My interest in American Indian boarding school survivors' stories evolved from recording my father, and other family members, speaking of their experiences. Stories I never knew existed, because they had all maintained silence on their experiences until I began asking questions.

Historical Background

American Indian children were taken from reservation homes into off-reservation boarding schools beginning in 1879. Boarding schools physically separated children in the formative years of their lives from the influence of family and tribe.¹ The schools were closely tied to the purpose of assimilationist education. On March 3, 1819, the U.S. Congress passed an act to provide education “for the purpose of providing...for the teaching of their [American Indian] children in reading, writing and arithmetic...”² Government officials “believed if

1 David Adams, Education for extinction: American Indians and the boarding school Experience 1875–1928. (Lawrence: University Press of Kansas, 1995).

Tsianina Lomawaima, They called it prairie light: The story of Chilocco Indian School. (Lincoln: University of Nebraska Press, 1994).

Brenda Child, Boarding school season: American Indian families, 1900–1940. (Lincoln: University of Nebraska Press, 2000).

Brenda Child, Margaret Archeletta & Tsianina Lomawaima, (eds.) Away from home: American Indian boarding school experiences 1879–2000. (Phoenix: Heard Museum, 2000)

Clifford Trafzer, Jean Keller & Lorene Sisquoc, (Eds.) Boarding school blues: Revisiting American Indian educational experiences. (Lincoln: University of Nebraska Press, 2006).

Michael Cooper, Indian school: Teaching the White Man's Way. (New York: Clarion Books, 1999).

Esther Horne & Sally McBeth, Essie's story: The life and legacy of a Shoshone teacher.

2 US Statues At Large, (4) 16 Stat. 40 (April 10, 1869).

they carried out their educational program on a sufficiently large scale it would transmogrify whole tribal cultures and eventually assimilate Indians into the lower strata of American society.”³ The Indian Boarding School policy has been a collaboration of the Christian churches and the federal government since its earliest inception, beginning with the Indian Civilization Act Fund of March 3, 1819. The Act’s purpose was the “civilization” of Native Americans; stripping them of their traditions and customs and teaching them the ways of the majority culture in missionary schools, i.e., transform them into Christian farmers or laborers.⁴

The federal government allowed school facilities, often run by churches and missionary societies to be situated close to the communities served.⁵ Assimilationists of the time viewed this as a disadvantage, as the students remained in their home communities under the influence of parents and tribal elders, and often went ‘back to the blanket,’ maintaining tribal traditions and language⁶.

They Came For the Children

Rations, annuities, and other goods were withheld from parents and guardians who refused to send children to school after a compulsory attendance law for American Indians was passed by Congress in 1891.⁷ The 1890s through the 1930s were the heyday of the off-reservation boarding schools. In 1931, 29% of Indian children in school were in boarding schools. Off reservation boarding schools housed 15 % of all Indian children in school. ⁸ By the late 1920s, nearly half of boarding school enrollments were in off-reservation schools.⁹ The total

3 J Hamley, Cultural genocide in the classroom: A history of the federal boarding school movement in American Indian education. 1875–1920, (Harvard: Harvard University Press, 1994) [unpublished dissertation].

4 An Act Making Provision for the Civilization of the Indian Tribes Adjoining the Frontier Settlements, 3 Stat, 516 (March 3, 1819)]

5 Andrea Smith, Conquest: Sexual violence and American Indian genocide. (Cambridge: South End Press, 2005).

6 Adams 1995

7 Adams, 1995; Tsianina Lomawaima, 1994.

8 Indian Schools and Education. U. S. Bureau of Indian Affairs

9 Laurence F. Schmeckebier, The Office of Indian Affairs. (Baltimore: Johns Hopkins University Press, 1927)216.

number of off-reservation boarding schools by 1909 was 25, along with 157 on-reservation boarding schools and 307 Day Schools were in operation.¹⁰ An estimated 100,000 children passed through these schools between 1879 and the 1960s.

Indian Boarding schools or industrial schools prepared boys for manual labor or farming, and girls for domestic work. Schools also extensively utilized an Outing program where Smith (2005) states, “Children were involuntarily leased out to white homes as menial labor during the summers rather than sent back to their homes.”¹¹ Additionally, government expenditures for boarding schools were always small, and the schools exploited the free labor of Indian children in order to function.¹² Due to overcrowding in these schools, tuberculosis, trachoma and other contagious diseases flourished.¹³ Adams states “... epidemics of tuberculosis, trachoma, measles, pneumonia, mumps and influenza regularly swept through overcrowded dormitories, taking a terrible toll on the bodies and spirits of the stricken... Thus, disease and death were also aspects of the boarding school experience.”¹⁴

The boarding school, whether on or off the reservation, became the institutional manifestation of the government’s determination to completely restructure the Indians’ minds and personalities. Boarding schools were established for the sole purpose of severing the Indian child’s physical, cultural and spiritual connection to his or her tribe.¹⁵

My qualitative interview research study of twenty American Indian boarding school survivors “Stringing Rosaries: A Qualitative Study of Sixteen Northern Plains American Indian Boarding School Survivors,” revealed four major themes, including: a) The participants attending boarding school experienced loss in the form of: loss of identity, language, culture, ceremonies and traditions; loss of self-esteem; loneliness due to loss of parents and extended family; feeling of abandonment by parents; feeling lost and out of place when they returned home. b) The participants attending boarding

10 Adams 1995

11 *Supra* 5, p. 37

12 Child, 2000

13 Adams, 1995; Child, 2000; Smith, 2005).

14 *Ibid*, pp. 124–125

15 Adams, 1995; Lomawaima, 1994; Cooper, 1999; Hamley, 1994; Smith, 2005

school experienced abuse in the form of: corporal punishment; forced child labor; the Outing program; hunger/malnourished; and sexual and mental abuse. c) The participants experienced unresolved grief: maintaining silence; mental health issues, relationship issues and alcohol abuse. d) The participants expressed ways for healing in the form of: a return to Native spirituality and forgiveness.¹⁶

The boarding school survivors in the study experienced human rights abuses. Fundamental human rights of American Indian children were violated in boarding schools as documented by this study and oral stories. They were treated as less than human and undeserving of respect and dignity as children, as human beings and as members of an ethnic group. Their most basic rights and fundamental moral entitlements were violated.

These boarding school survivors in the study experienced severe beatings or they witnessed the beatings of fellow students by staff; were caused mental harm; were sexually abused or witnessed sexual abuse; were often located hundreds of miles from their homes; were forced to do manual labor; were hungry; and experienced the forced loss of language, culture, tribal traditions and spirituality. These boarding school survivors are experiencing continued emotional trauma from beatings, hunger, physical and sexual abuse. The survivors have expressed a way for healing these soul wounds both personally and as tribes: a return to American Indian spirituality, including languages and ceremonies.

Even though asked about positive experiences, favorite teachers or mentors and friendships, these interviewees had a majority of negative experiences. What is most poignant to me is the resounding silence the interviewees have maintained throughout their lives regarding their experiences at boarding schools, whether positive or abusive, refusing to, or unable to, talk to siblings or their children. The stories told here are filled with sorrow, pain and lasting trauma. Yet they are stories told with a look to the future, a future filled with American Indian traditions, languages, cultures, and most importantly, forgiveness.

16 Denise Lajimodiere, *Stringing Rosaries: A Qualitative Study of Sixteen Northern Plains American Indian Boarding School Survivors* (2012) 8 Journal of Multiculturalism in Education.

Important to me is that this study provided a vehicle to fifteen boarding school survivors to tell their story.

Historical Trauma

In researching boarding schools I came across terms I had not heard of before, terms such as historical trauma, generational trauma, collective trauma, multigenerational trauma and unresolved grieving. Historical trauma, the term used most often by scholars of American Indian trauma, is conceptualized as a collective complex trauma inflicted on a group of people who have a specific group identity or affiliation—ethnicity, nationality, and religious affiliation. It is the legacy of numerous traumatic events, a community's experiences over generations and encompasses the psychological and social responses to such events. Scholars have suggested that the effects of these historically traumatic events are transmitted intergenerationally as descendants continue to identify emotionally with ancestral suffering. This collective trauma has been characterized by scholars as the soul wound, knowledge of which has been present in Indian country for many generations.¹⁷

Increasingly, the damage from boarding school abuse—loneliness, lack of love and lack of parenting—is being seen as a major factor in ills that plague tribes today, passing from one generation to the next and manifesting in high rates of poverty, substance abuse, domestic violence, depression and suicide. There have been a variety of terms used to describe the multigenerational nature of distress in communities, including collective trauma, intergenerational trauma, multigenerational trauma, and historical trauma.

Responses to such trauma have an impact at the individual, familial and community level. Research suggests that responses at the individual level fall within the context of individual mental and physical health and may include symptoms of post traumatic syndrome

17 E Duran et al, *Healing the American soul wound*, International Handbook of Multigenerational Legacies of Trauma. Ed. by Yael Danieli. (New York: Plenum Press, 1998). Smith 2005.

Andrea Smith, Soul Wound: the legacy of Native American schools. (Amnesty Now, 2003) pp. 14–17.

disorder (PTSD), guilt, anxiety, grief and depressive symptomology. Responses at the familial level have received much less research attention: however, emerging work suggests that impacts may include impaired family communication and stress around parenting.¹⁸ High numbers of parents growing up in boarding schools were deprived of traditional parental role models, suggesting that boarding school experiences may have not only interrupted the intergenerational transmission of healthy child-rearing practices but also instilled new, negative behaviors instead.

At the community level, responses may include the breakdown of traditional culture and values, the loss of traditional rites of passage, high rates of alcoholism, high rates of physical illness (e.g., obesity), and internalized racism.¹⁹ Unresolved trauma has been found to be intergenerationally cumulative, compounding the subsequent health problems of the community. Further, mourning that has not been completed and the ensuing depression are absorbed by children from birth on.

The Legacy of the Boarding Schools

The children victimized in the schools, their children, grandchildren and great-grandchildren, have become the legacy of the boarding schools and the federal policy that established and sustained them. Many of those that returned to their communities returned as wounded human beings. Denied the security and safety necessary for healthy growth and development, they retained only fractured cultural skills to connect them with their families and communities. For many of the girls and boys, the only touch they received from the small population of adults stationed at the schools, were the beatings or, perhaps worse, forced sexual contact with adults, or older students who themselves had been victims. Kept at the boarding school year round, many grew up solely in the company of other children, under the control of a few adults, who shared the perception that their wards were savages

18 Brave Heart & Debryun, *The American Indian Holocaust: Healing Historical Unresolved Grief*. (1998) 8 American Indian and Alaska Native Mental Health Research. pp. 56–78.

19 *Supra* 17.

and heathens to be managed, tamed and “civilized.” The survivors of boarding schools were left with varying degrees of scars and skills, but most profoundly, psychological subordination. Many report feeling self-hatred for being Indian. Others report feeling bereft of spirit, knowledge, language and social tools to reenter their own societies, or have suffered negative attitudes from non-Natives. With only limited labor skills, exacerbated by the subordinated spirit trained into them, too many carried undefined and unremitting anxieties that drove them to alcoholism, drug abuse, violence against their own families and communities, and suicide.

The United States has yet to issue a formal apology regarding the boarding school era. A Congressional inquiry into boarding school abuses will be requested by the National Native American Boarding School Coalition (N-NABS-HC) members. A goal is to obtain monies for community-based healing. The Coalition is working closely with members of the Canadian Truth and Reconciliation Commission in determining what ‘healing’ would look like and how to proceed as we move toward approaching the US Congress about this important issue.

THE CASE OF BOARDING SCHOOLS IN THE UNITED STATES OF AMERICA¹

Denise Lajimodiere and Andrea Carmen
on behalf of the National Native American Boarding School
Healing Coalition and the International Indian Treaty Council

Introduction

The National Native American Boarding School Healing Coalition (N-NABS-HC) was formed in 2011 by Indigenous Peoples and organizations in the United States. Its purposes include initiating discussion, building awareness and developing a national strategy to focus public and political attention on the past and ongoing human rights violations imposed on Native Americans, including thousands of young children and their families, communities and Tribal Nations by the United States' Boarding School policy. The Coalition works to ensure appropriate redress from responsible government and church institutions and securing resources in support of lasting and true community-directed healing programs.

We affirm that the US Boarding School policies severely impacted the thousands of children who experienced forced removal from their parents, families and communities and the brutal physical, sexual, cultural, spiritual and emotional abuse that took place in the government mandated schools. We also stress the importance of redress and restitution for the ongoing intergenerational suffering and cultural loss that are a direct result of these policies for so many Indigenous individuals, families communities and Tribal Nations across the United States.

1 This position paper was submitted to the United Nations Expert Mechanism on the Rights of Indigenous Peoples Study on access to justice in the promotion and protection of the rights of Indigenous Peoples by the National Native American Boarding School Healing Coalition and the International Indian Treaty Council. The paper was presented at the Expert Seminar on Access to Justice for Indigenous Peoples including Truth and Reconciliation Processes, at Columbia University, New York (27 February–1 March 2013).

The United States Boarding School Policy and its Ongoing Legacy for Indigenous Peoples

During the 19th and into the 20th century, Native American children were forcibly abducted from their homes to attend Christian Church and government-run boarding schools. The purpose was to “civilize” the Indian and to stamp out Native culture. It was a deliberate policy of ethnocide or cultural genocide. There were almost 500 such schools across the US with the stated intention of “Kill the Indian, Save the Man.”

Thousands of Indian children were forcibly abducted from their homes by government agents, and were taken to boarding schools where they were beaten, starved or otherwise brutally abused. Deliberately cut off from their families and culture, often hundreds or thousands of miles from home, children were punished for speaking their Native language, banned from traditional cultural practices, shorn of their long hair, stripped of their traditional clothing and other signs of Native culture, and taught to be ashamed of being Native American. These children passed on the legacy of the boarding school policy, returning to their communities, not as the Christianized farmers that the boarding school policy envisioned, but as deeply scarred human beings with none of the skills—community identity, parenting, extended family relationships, Native languages, ceremonial and cultural practices—learned by those raised within their own cultures.

Indigenous languages and cultures were a focal point for abuse with lasting impacts. Professor Denise Lajimodiere, Chair of the National Native American Boarding School Healing Coalition, testified to the Inter-American Commission on Human Rights October 29th, 2010,² that “[M]y mother was locked in a closet because she didn’t speak English.” Based on interviews with survivors she added that “[P]eople told me about having pins stuck in their tongues and getting their mouths washed out with lye soap if they spoke Indigenous languages.” Andrea Smith testified at the same hearing that as direct result of these

2 Lajimodiere, D. (2012) “Stringing Rosaries: A Qualitative Study of Sixteen Northern Plains American Indian Boarding School Survivors”. Journal of Multiculturalism in Education. (West Texas A&MN University).

policies, of the approximately 155 Indigenous languages still spoken in the US, it is estimated that 90% will be extinct in 10 years. By 2050, there will be only 20 languages left, of which 90 percent will be facing extinction by 2060.³

The loss of culture, language, and other devastating impacts of the Boarding School policy continue to affect Native American individuals, families, communities, Tribes, Pueblos and Alaska Native villages throughout the US. The lasting legacy is reflected in elevated levels of alcoholism, disproportionate rates of incarceration, large numbers of children still being removed from their communities and placed into non-Native foster care, low levels of educational achievement, high rates of domestic and other violence, mental health concerns including the highest suicide rates in the US, economic disparities, high rates of poverty, and rampant dissociation in family settings.

The Failure of the US Government and the Churches to Acknowledge Wrongs and to Provide Access to Justice in the US

The devastating human rights violations carried out against Indigenous children and families by the US Boarding School Policy and Practices, and their ongoing inter-generational impacts have never been addressed by the United States. There has been scant recognition by the federal government or responsible churches that they initiated and carried out this policy, and no acceptance of responsibility for the indisputable fact that its purpose was cultural genocide. There are no realistic avenues in the US, for example a US Human Rights Commission, to seek redress or healing from these deep and enduring wounds inflicted on individuals and communities within the United States system. Lawsuits by individuals have been turned aside, and unlike other countries that implemented similar policies—e.g. Canada, New Zealand, and Australia—there has been no official proposal for healing or reconciliation. Incredibly, the Catholic Diocese in South Dakota went to the State legislature and secured legislation blocking claims for related abuse against the church.⁴

3 *The Indigenous World*. (2007). Sille Stidsen, Ed. Somerset, (NH: Transaction Publishers), p. 89.

4 *Zephier v United States*. <http://www.indianz.com/docs/court/zephier/>

Proposals and Recommendation for Restitution, Redress, Healing and Reconciliation to United States and United Nations

We affirm that without access to justice as defined and agreed by the victims and survivors themselves, there can be no true reconciliation.

The initiation of actions to secure justice and reparations for Native American individuals, families, communities, Tribes, Pueblos and Native Alaskans in the US impacted by the US Boarding School policy must include acknowledgment of responsibility by government and churches for the implementation of this policy of cultural genocide and forced removal of children. In addition, redress in the form of financial and other resources must be made available to Indigenous communities to plan, design, implement and manage programs and processes for healing the longstanding inter-generational and historical traumas that continue to plague them, including programs to reverse language loss. These programs and processes must be locally conceived and administered with input from impacted families as well as traditional spiritual and cultural knowledge-holders, healers and other practitioners.

Support for communities, families and Nations in the healing process must be based on community-driven, culturally appropriate healing, using Indigenous principles and understandings. The quest for a fully participatory process that results in meaningful and just reparations, redress, reconciliation and restoration of what can be restored will involve engaging impacted Indigenous individuals and Peoples to define what justice, healing and redress looks like for them, recognizing this may differ among and between distinct communities. It will include collecting input as to what measures are needed in each Nation and community to begin to reverse the bitter legacy of this policy, which many define as deliberate genocide.

order102904.pdf Also: *South Dakota Boarding School Survivors Detail Sexual Abuse*. <http://indiancountrytodaymedianetwork.com/2011/07/28/south-dakota-boarding-school-survivors-detail-sexual-abuse-42420>. See also *South Dakota Legislature Quashes New Childhood Sexual Abuse Bill*. http://sol-reform.com/South_Dakota/South-Dakota-Legislature-Quashes-New%20Childhood-Sexual-Abuse%20Bill-%20ICTMNcom.pdf.

In order to gather the necessary information to inform an acceptable framework for understanding the scope and depth of these concerns, we are recommending that the United States create a Commission on Boarding School Policy with the full and active participation of impacted Indigenous Peoples at all stages to carry out a range of essential tasks. These include: providing accurate and comprehensive information to the United States government, Indigenous Peoples and the American public about the purposes and human rights abuses of Boarding School Policies; gathering documentation from survivors, their families and others about the treatment of children in the schools, the abuse and neglect they suffered, and the number of deaths that to date are unreported; receiving recommendations for reparations and programs to facilitate and support healing for individuals, families, Native communities, Tribes, Pueblos and Alaskan Natives Villages; and recommending legislative provisions that will remove the barriers to access to justice for individuals, Native communities, Tribes, Pueblos and Alaskan Natives Villages.

We affirm the importance of continuing opportunities for Indigenous Peoples from different regions and countries to share experiences and their successful processes for healing, justice and restitution. We thank the Truth and Reconciliation Commission of Canada, the Commissioners and Indigenous Peoples of Whitehorse Yukon Territory Canada for their invitation for us to participate as international witnesses at the Truth and Reconciliation Commission regional hearing 14–15 January, 2013. The information, inspiration and spiritual blessings we received there will make an essential contribution to our process in the US.

In addition, we recommend that the EMRIP in its report to the UN Human Rights Council on Access to Justice for Indigenous Peoples:

1. Call on the US, other States and all involved churches to accept moral responsibility for the human rights violations carried out under this policy as well as their ongoing impacts;
2. Call on the US to establish a National Commission in full collaboration with impacted Indigenous communities and Nations to conduct hearings on boarding school abuses and

- their continuing impacts on Native American and Alaska Natives Peoples and recommend programs for justice, restitution, redress and healing;
3. Recommend national and international recognition of and support for the healing, restoration and reconciliation processes initiated by Indigenous Peoples and communities;
 4. Recommend that other United Nations human rights processes, including the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence examine the impacts and outcomes of Truth and Reconciliation and Restorative Justice processes addressing historic violations with continuing and inter-generational impacts, as well as the situation in countries such as the US where no such processes have been initiated;
 5. Finally, we recommend that the report of this Seminar be submitted to the UN Special Rapporteur on the Rights of Indigenous Peoples, recommending that he consider preparing a study addressing the ongoing impacts of Boarding school policies as well as current foster care and adoption policies, which include any form of forced or coerced removal of Indigenous children from their homes and communities in the US, and requesting that he make recommendations regarding redress and non-repetition.

In conclusion, we thank the organizers of this Seminar and the UN Expert Mechanism on the Rights of Indigenous Peoples for taking these important steps and hearing our proposals for reversing the lack of access to justice and redress for the Indigenous Peoples. The victims of these historic and ongoing human rights violations have too long been denied the healing power of restorative justice. Cheoque Utesia, Migwech.

CASE STUDIES IN ASIA REGARDING INDIGENOUS WOMEN, DEVELOPMENT AND ACCESS TO JUSTICE¹

Asian Indigenous Peoples Pact

1. Introduction

Case studies were conducted in the five countries—Cambodia, Lao PDR, Malaysia, Philippines and Thailand—on issues that Indigenous women in Asia are facing with respect to development projects: access to justice; and the promotion, protection and respect of their rights both as women and as Indigenous Peoples. Development projects in this context refer to both State and corporate projects that are intended to support national development, i.e., economic growth or national priorities like the establishment of protected areas. These projects include mining, economic land concessions, national parks and plantations. The case studies look at the national legal and policy framework on women’s rights and Indigenous Peoples’ rights as it relates to the situation of Indigenous women in the respective countries. A community profile is provided for each case to establish the context. Information is shared on the development project and the violations of the rights of Indigenous women that the project causes. Analysis is also provided on obstacles that Indigenous women face for accessing justice related to the development project. In the conclusion, Indigenous women propose recommendations to address these obstacles to access to justice.

In the following, an overview on the community profiles is provided for all cases (Section 2). This is followed by a synthesis of the national legal framework for each case (Section 3); a synthesis of the impacts of each development project on Indigenous women

¹ This is an excerpt from *Tilting the Balance: Indigenous Women, Development and Access to Justice, A Report on the Southeast Asia Consultation on Development, Access to Justice and Human Rights of Indigenous Women* (October 30–November 2, 2012, Chiang Mai, Thailand), pp 50–66, Asia Indigenous Peoples Pact (AIPP), Overall writers: Bernice See and Charlotte Hinterberger, 2013, AIPP Press, Chiang Mai; the excerpt is reprinted here by permission of the AIPP. Minor editing and formatting adaptations have been made to the text for this publication.

(Section 4); and a synthesis of different development-induced violations of their rights (Section 5). Finally, a summary is provided of the international obligations of each government described in each of the studies (Section 6); as well as the key obstacles identified that hamper Indigenous women's right to justice across countries are outlined (Section 7).²

2. Profile of the communities

The five case studies provide background information on seven different Indigenous Peoples and their community profiles: the Kui (Cambodia), the Karen, Lisu and Akha (Thailand), the Kri (Laos), the B'laan (Philippines) and the Dayak (Sarawak, Malaysia).

Kui (Cambodia)

The Kui is one of the 24 Indigenous Peoples recognized by the Royal Government of Cambodia, part of the 1.34% of the country's total population of approximately 14 million based according to the 2008 census. The government collectively refers to Indigenous Peoples as *chuncheat* meaning 'national people.' Indigenous Peoples prefer to collectively refer to themselves as *chuncheat daoem pheak tech*, meaning original minority ethnic group. The site of the case study is Prame commune, District of Tbaeng Mean Chey, Preah Vihear Province. The commune is composed of three villages all peopled by Kui: Srey Preang, Bothum and Prame proper. It has a total population of 2,680 individuals belonging to 568 families and the inhabitants are predominantly young. The Kui have their own traditional political and social systems. There is a public elementary school (Grades 1–6). The nearest health facility is about 11 kilometers away. Although there is no public transportation to the three villages, the roads are in very good condition as Prame commune is traversed by the Asian Highway Network.

2 In the full AIPP publication subsequently, the case studies are presented in detail for each country, combined with testimonies on other development-induced rights violations faced by Indigenous women in South-East Asia.

Most of the Kui in Prame are heavily dependent on the forests. They get their subsistence from rotational rice cultivation, animal husbandry, hunting, honey collection, and gathering different kinds of non-timber forest products for subsistence. Cash income is earned from selling resin they gather from the forests and their own plantations. Kui women are mainly responsible for gathering food from the forests. They collect non-timber forest products like wild vegetables, fruits, honey, mushrooms, and others which form the bulk of the family's food supply. They also gather rattan, firewood, and resin. An important member of the Kui community is the Yeak Chaeng or Yeak Chheon Chaeng, a woman spiritual leader who is responsible for maintaining the faith and solidarity of the community. There are parts of the forests which are sacred sites, spirit forests, which are of significance to the Kui spiritual belief. Because of their affinity with the forest, Kui women regularly visit these sites for worship and spiritual renewal which are important for their mental/psychological well-being and community solidarity. However, despite their important role in ensuring family and community food security, Kui women are still marginalized in community decision-making processes. Although most of the adults, including women, can speak Khmer, Kui is the language in daily life in Prame. The three Indigenous communities have received a letter of community identity from Minister of Rural Development, and the traditional authorities (committee) have been acknowledged by Commune Council. Since April 2012, two companies which had been awarded economic land concessions (ELCs) have started bulldozing parts of the Kui territory destroying hectares of farm land, resin trees, forests, sacred sites and burial grounds. Because of the National Assembly election on 28 July 2013, there is a lull from the clearing operations. It is expected that the clearings accelerate after the election.

Karen, Lisu and Akha (Thailand)

Mainly in the uplands of northern and western Thailand, various groups of Indigenous Peoples live who are categorized as “Chao kao” (Thai), or “hill tribes”, such as the Karen, Lisu, Hmong, Lahu, Akha

and Mien, amongst others. According to the Department of Social Development and Welfare (2002), their total population is 925,825 in the north and west, but there are still no numbers available for the rest of the country. Almost all of them live in protected areas, including forest reserves, national parks, wildlife preserves. Over the course of time, the term ‘hill tribes’ has become closely connected to negative stereotypes such as opium cultivation and forest destruction. Indigenous Peoples prefer the term “chon phao phuen mueang” as the translation of Indigenous Peoples to refer to themselves. One part of the case study was conducted in the Lisu and Akha villages of Doi Chang and Doi Lan in the Mae Suai District of Chiang Rai Province, in northern Thailand. This is where the Lam Nam Kok National Park, as well as a national reserve forest and forest parks, is located. The livelihood of the Mae Suai Lisu and Akha combine both commercial production of coffee and other introduced temperate-climate crops and products and selling their labor. A Lisu and an Akha woman had been arrested for the crime of encroaching on national parks. The other site in the study is the Kaeng Krachan District, Phetchaburi Province in central Thailand at the Thailand-Burma border where the biggest national park in Thailand, Kaeng Krachan National Park, is located. The Indigenous Peoples who live here are the Karen who are almost fully dependent on their traditional rotational farming for their subsistence. The Kaeng Krachan Karen had their homes and other properties torched for being located in a national park several times, the worst being in 2011.

Kri (Laos)

Lao People’s Democratic Republic (PDR) refers to its Indigenous Peoples as ethnic groups while the peoples refer to themselves by their specific names. The Kri (alternative names: Krih, Kree; Kha Tong Luang, Yellow Leaves) in Laos have a complicated history of migration, and opinions of local and international anthropologists diverge considerably. It is widely agreed that Kri is a Vietec language and belongs to the Mon-Khmer language group, even though it has no written script. Nowadays, the Kri mainly inhabit the provinces of

Bolikhamsai and Khammuan near the Laos-Vietnam border. Locals refer to them as ‘Yellow Leaves’, similar to the Mlabri ethnic group in Thailand and Laos, as they build their homes from banana leaves which they leave once these turn yellow. There is no accurate data on the population of the Kri but they are considered one of the least numerous of the minorities in Laos.

The Kri depend on the forest, land and rivers for their sustenance, practicing rotational agriculture, forest product gathering and inland fishing. Kri women are especially dependent on mountain rice production, forests and the rivers as their task is to provide daily food and maintain the family’s welfare through their swiddens and forest food collection. They use the jungle to gather various forest products, vegetables and fruits. The study site is Sepon, Vilabouly District, Savannakhet Province, south-central Laos. The Kri have been relocated from their original villages under the government’s village clustering program by merging of villages and relocating them to priority zones or focal sites as a means of addressing access to basic services. After the pollution by mining of the river on which they depend for their livelihood, they voluntarily relocated to the mining project’s resettlement site.

B’laan (Philippines)

In the island of Mindanao, Philippines, the Indigenous Peoples are collectively called Lumad. One of these peoples is the B’laan. Bong Mal, which means “big river” in the local language of the B’laan, is a community that sits at the boundary of three provinces in Mindanao. It has several “sitio” or smaller zones, three of which are the focus of the study—Sitios Bosbang, Alyong 1 and Nakultana. These mountainous areas are home to an estimated 18 B’laan families or clans, with around 170 individual members. Women comprise 40% of the population. They subsist mainly on their own crops such as corn, glutinous rice, root crops and vegetables. They also hunt animals and gather other food and medicinal items from the forests. The B’laan women play a major role in the community as they are the producers of food and nurturers of the family. They do the farm work in their fields

and swidden farms or “*uma*,” along with the men. The community has a relatively strong functional Indigenous knowledge and socio-political systems. They consider the traditional leader, “*fulong*,” as their representative and leader, instead of the official barangay captain of the local government unit.

B’laan women traditionally enjoy an equal status with men in decision-making processes. In their culture of conducting “*kastifun*” or community consultation, all community members, including women and children, are present. Women may freely voice out their opinions during the *kastifun*. The “*fulong*” may not declare a final decision until there is a consensus of everyone in the community, including the women. Should there be a dissenting opinion, the *fulong* will talk to that person, until she or he finally accepts the resolution of the community. They also practice “*ksaafuh*” or getting permission from the owner before entering his or her house which also applies if one wants to enter another clan’s community. The practice of “*pangayaw*” or waging war is very strong, especially in the past years when mining companies started to encroach in their territory. The threat of displacement from their ancestral domain due to mining has forced the B’laan of Bong Mal to militantly oppose such incursions even declaring ‘*pangayaw*’ (armed defense of their ancestral domain) against the mining company. The State and the company have responded with more militarization and violence. The people have and are experiencing threats, harassments, intimidations, theft, extrajudicial killings, demolition of houses and crop storage facilities, destruction of farms lots and crops by agents of the military and paramilitary, and tribal warriors now declared as “bandits” and “fugitives” by the State forces and hunted as criminals. Like many Indigenous communities in the country, the community of Bong Mal lacks social services from the government.

Dayak (Sarawak, Malaysia)

Sarawak has an estimated population of 2.2 million and the Indigenous Peoples, the Dayak, form the majority of the population. The generic term “Dayak” covers various subgroups, each with its

own culture and language. One of these subgroups is the Iban. Eighty percent of Dayak are rural dwellers, subsistence agriculturists, hunters and gatherers. The Dayak are dependent on their land and forests for livelihood. They practice rice shifting cultivation, grow sago palms, fruit trees and vegetables. They collect forest products while their land and forests also provide them with traditional medicines and wild animals.

The Iban hold customary rights over land and territories that they have inhabited since time immemorial. Like most Indigenous Peoples of Sarawak, the Iban inhabit traditional longhouses (rumah), communal houses built on stilts that provide shelter for up to 100 families in separate living units. The Iban classify the land surrounding their longhouses under two general categories: the menoa which refers to the collective village territory with its own clear boundaries, and the temuda, which refers to land close to the longhouses, land cleared for farming and land left fallow to regenerate. The temuda extends to an area of communal land for the collection of forest products (fruit, medicinal plants, building materials), for hunting, fishing and to be used as burial grounds. The sites of the study are Rumah Nyawin in Bintulu and Rumah Bangga in Sungai Babai, both in Sarawak. The Rumah Nyawin was demolished and the Iban left with a relocation site which does not meet their needs and to which they do not have legal ownership. The Iban of Rumah Bangga suffered the death of one of their longhouse residents in a botched mission to arrest the protesting Iban leaders. Although the owners and the majority population in Sarawak, the Dayak are marginalized from both the political and economic life of the state, and at the national level.

In all of the case studies, it was not possible to get full information on populations, nor disaggregated data with respect to sex and ethnicity.

3. Legal and policy framework

Each case study provided background on the country's legal environment and legislation affecting Indigenous People in general and Indigenous women in particular. At the national level, there is little the legal recognition of Indigenous Peoples with collective rights

in these countries. The national constitutions of these countries grant the State the overall ownership over the national territory, and give it the power to regulate the ownership, use, control and access to any and all parts of the national territory. All countries have national women's organizations whose main function is the advancement of women's rights with the formulation of national action plans to operationalize this mandate. On the other hand, Malaysia, Philippines and Thailand have national human rights institutions to safeguard human rights. The key laws affecting Indigenous women in these countries can be summarized as follows:

Cambodia

Cambodia recognizes Indigenous Peoples as understood by international law in their legal and policy instruments. This recognition is reflected in their National Policy on the Development of Indigenous Peoples (2009), Strategic plan for the Development of Indigenous Peoples 2006–2008, the 2001 Land Law (Ch. 3 Sec. 2), and the 2002 Forestry Law (Art. 37). The Cambodian Constitution of 1993 regards Indigenous Peoples as equal citizens of Cambodia. The National Policy on the Development of Indigenous Peoples sets out policies related to Indigenous Peoples in the fields of culture, education, vocational training, health, environment, land, agriculture, water resources, infrastructure, justice, tourism and industry, mines and energy. The 2001 Land Law affirms the collective ownership of Indigenous land, recognizes traditional land management systems of Indigenous communities, and the right of men and women to co-own lands. This law sets the basis for the legal recognition of collective land rights of Indigenous communities, and affirms the role of traditional authorities, mechanisms and customs in decision-making processes. The 2002 Forest Law provides for the official recognition of community forestry. The 2005 Sub-decree on Economic Land Concessions (ELCs) stipulates that ELCs may be granted only on State private land on the condition that environmental and social impact assessments have been completed with respect to the land use and development plan. The 2009 Policy on Registration and Right

to Use of Land of Indigenous Communities and the Sub-Decree on Procedures of Registration of Land of Indigenous Communities (2009) strengthens the 2001 Land Law on communal/collective land titling.

Thailand

In Thailand, the 2007 Constitution includes several provisions that are closely linked to Indigenous Peoples' livelihood, although it does not recognize Indigenous Peoples as understood in international law. Article 66 provides the right of local communities to maintain their cultural traditions, as well as to protect and manage their environment and natural resources. According to Article 67, people have the right to participate with the State and communities in the conservation of natural resources under certain conditions. The Cabinet resolution approved in 2010 stipulates policies on the "Restoration of the Traditional Practices and Livelihoods of Karen people." However, these affirmative measures are overshadowed by the Forest Act of 1941 which states that any land not acquired under the land law is considered forest, and therefore belongs to the State. Further, the National Forest Policy of 1985 tries to frame forest policy within the context of overall national development and emphasizes the importance of a partnership between State and the private sector, meaning business, not Indigenous Peoples. This policy and all the related laws have been used to criminalize forest-dwelling Indigenous Peoples who are living in their homelands and practicing their traditional occupations. During the last decades, state agencies like the military and the Royal Forest Department (RFD) had been trying to secure protected areas and to eliminate conflicts over use-rights by using force, pursuing a strategy of exclusion and enforced resettlement of the Indigenous Peoples living the forest reserves.

Laos

In Lao PDR, the concept of "Indigenous Peoples" is not officially recognized. Article 8 of the Constitution of the Lao PDR stipulates that the State pursues a policy of promoting unity and equality among

all ethnic groups, and that all ethnic groups have the right to protect, preserve and promote the fine customs and cultures of their own tribes and of the nation. Further, it obliges the State to implement every measure to gradually develop and upgrade the socio-economic development levels of all ethnic groups. Various legal and policy instruments affect ethnic minorities, their livelihoods, living conditions, agricultural practices, village organization and administration as well as the provision of socio-economic and infrastructural facilities. Directive Order No.92004, Instruction Order on the Establishment of Village and Village Cluster for Merging Administration, is the most important policy in a series of decrees affecting ethnic minority communities. In order to contribute to poverty reduction, it regulates the merging of villages and relocating them to priority zones or focal sites. Directive No.9 is the major policy document cited by provinces and districts to grant concessions in order to turn land into economic opportunities to accelerate national development, as well as to resettle villages. Under national laws, the national territory and the minerals therein are owned by the national community represented by the State as stipulated in the Constitution (Art.15) and reiterated in the Land Law (No. 01/97/NA 2002) and Mining Law (No. 04/97/NA 1997). The State exercises administrative and regulatory functions over these resources. The State has the right to assign user rights to individuals, families, state and economic organizations. Generalized land classifications used in both forest and land legislation were elaborated by foresters, not ethnic minority groups, mainly in order to abate swidden agriculture. Therefore, they do not mirror ethnic groups' knowledge of different land types, resource management systems, or of general environmental and soil differences. The legislation does not recognize "communal land" collectively or customarily managed by a village community. Instead, the State claims ownership to all land not registered to an individual organization. In Lao PDR, customary tenure rights are not officially recognized even as they remain important to rural communities.

Philippines

Like Cambodia, the Philippines recognizes Indigenous Peoples as understood in international law through their legal and policy instruments. The Indigenous Peoples Rights Act (IPRA, 1997) of the Philippines states that the “State shall recognize and promote the rights of ICCs/IPs within the framework of national unity and development” (Sec.2a). This law has general provisions on protecting the rights of Indigenous Peoples to ancestral domain, self-governance, social justice and cultural integrity. Section 26 states that “indigenous women shall enjoy equal rights and opportunities with men,... in the decision-making process in all levels, as well as in the development of society...” The IPRA has a provision on “Free, Prior and Informed Consent” (FPIC) which is defined as: “the consensus of all the members of indigenous peoples to be determined in accordance with their respective customary laws and practices.” This is required before a development intervention takes place in a community. The National Commission on Indigenous Peoples (NCIP) created under IPRA released administrative orders (2002, 2006, and 2012) to serve as guidelines for the conduct of FPIC in Indigenous communities. The Philippines also enacted the Magna Carta of Women in 2009 which contains some provisions for Indigenous women specifically found in Chapter V (Rights and Empowerment of Marginalized Sectors), Section 20 (Food Security and Productive Resources), Paragraph (b) Right to Resources for Food production. Indigenous women are viewed as nurturers of resources and have important roles in the food security of Indigenous communities. Mechanisms for redress are also available at the local government units (provincial, municipal and police stations) where gender desks are established. Despite the affirmative laws which defend Indigenous Peoples rights, the Mining Act of 1995, which liberalised the mining industry giving more rights to corporations than communities, is the bone of contention between the State and corporation on one hand, and Indigenous communities on the other. The current mining program of the government hinges on the extraction and export of minerals which has not changed since Spanish colonization, and which is done mostly in Indigenous lands.

Malaysia

Malaysia is a federation with Sarawak as one of the thirteen states and three federal territories that comprise it. The powers of the state governments are limited by the Federal Constitution and under the terms of the Federation. Sabah and Sarawak are entitled to seats in House of Representatives, and the legislative assemblies of Sabah and Sarawak have the power to make laws on additional matters including native law and custom. Malaysia has a plural legal system and accepts the concurrent operation of distinct bodies of law. In Sarawak, customary laws are officially recognized by the Federal Constitution. Several constitutional provisions protect native customary practices. Traditional Indigenous decision making mechanisms, and native authorities and courts continue to administer local community affairs. In several state and federal court rulings, recognition of native titles have essentially been accorded to the lands, territories and resource traditionally owned, occupied or acquired by Indigenous Peoples, including those in Sarawak. However, federal government and its agencies have refused to accept these legal precedents of decisions of the local courts recognizing native titles, and instead require Indigenous communities to treat each native title claim as a fresh legal argument. On the other hand, some state courts assert autonomy on how states treat the rights of Indigenous Peoples to their traditional lands. There are specific national laws, e.g., the Land Code, which protect and promote Indigenous Peoples' rights, especially their Native Customary Rights (NCR), including the right to cultivate land, hunting and fishing rights, the right to use land for burial and ceremonial purposes, as well as rights of land inheritance and transfer.

4. Impacts of development projects on Indigenous women

The development projects covered in the five cases studies can be summarized as follows: they all are land—and resource-related cases, mostly impinging on access, use, control and the collective ownership of land, territories and resources of Indigenous Peoples and their impact on Indigenous women. Land grabbing, or alienation, in the

form of unilateral granting of concessions for plantations, mines and appropriation of Indigenous territories for national development and interests, like parks, denies the prior rights Indigenous Peoples have over their territories and their right to self-determination. It is clear that the Indigenous Peoples in the case study areas had possession of such territories even before the creation of the respective nation-states. In all cases, the Indigenous Peoples, especially the women, were not consulted nor did they give their consent for the use of their lands for the projects. In most of the cases, the women came to know of these projects only when they were about to be implemented.

Indigenous women in all the study areas are responsible for home management, ensuring family food security and welfare, and in this regard for community food security as a whole. They do so through the utilization of natural resources found in their territories, including lands, rivers and forests, flora and fauna for subsistence production, and the collection of wild products. This entails an intricate knowledge of the biodiversity, the soil and climatic conditions, etc., in their territories which had been handed down through generations of practice, and through experimentation, observation and exchanges. Indigenous women in these communities are the repositories of expert knowledge on food, firewood, fibers, and herbs. For those who maintain spiritual sites in forests, like the Kui women, because of their regular presence in the forests, they are also keepers of these spiritual sites. Land and territories also define the identity of the peoples or the individuals therein. Among the Karen, i.e., a newborn baby's umbilical cord and placenta are placed in a bamboo node, and hung up in a tree. This tree is nurtured as part of the family, and care is taken to ensure that that no harm comes to it as it is akin to being the person's twin. The intricate relationship between Indigenous women and their territories and resources are the sources of Indigenous knowledge, which allow for the sustainable use of such resources for the present and next generations. The case studies show that the Kri, Karen, Lisu, Akha, and Iban Indigenous women were very adversely impacted by the development projects that were implemented in their land and territories, or that the impact will be significant, e.g., among the Kui and B'laan. The major impacts experienced by the Indigenous women in each country are described below.

Cambodia

In Cambodia, the lands, resources and properties included in the ELCs, which were destroyed, included forests, farms, grasslands, burial grounds, the spirit forest called “Rolumtung”, ancient Kui sacred sites including the remnants of ancient Kui temples called Yaek Chung Kuoy (Grandmother Chung Kuoy) and YaekPluok (Grandmother with grey hair) and other temple ruins, as well as the nearby site of an ancient Kui village as shown by the shards, bones, etc. This has led to loss of food sources and livelihood, access to the spirit forests, sacred sites and other culturally-significant sites. Destruction of the forests and difficulty in accessing the forest eliminates or restricts the use of natural resources, gathering of resin, wild foods, wildlife and traditional medicine. The desecration of spirit forests, culturally-significant sites and burial grounds threatens the Kui identity. The destruction of Rolumtung has a direct impact on the solidarity of the community since this has destroyed some of the venues in which the priestess performs the solidarity rites. The plantations have caused reduction of the water supply further burdening the women in their home and health management. Intra-community conflicts have arisen among villagers because of the perceived benefits arising from the concessions and the harassment they face when they claim their rights. Kui women are more severely affected by the loss of natural resources and their access to these than the men because of their traditional role as main food providers and gatherers of forest food products. Apart from direct destruction, the ELCs have fenced part of their concessions denying access to the forests and farms by the road. Women now have to travel a longer route in order to reach the extant forests and farms beyond the concessions.

Thailand

For the Lisu, Akha and Karen women of Thailand, the denial and restrictions on their access to their lands and forests affects the women in all aspects of their lives. Just like Indigenous women in other countries, these women are the main food producers, natural

resource management experts, ethno-botanists, and transmitters of culture and Indigenous knowledge. The arrests, incarceration, intimidation, assaults, arson and forced evictions by park, police and military authorities not only traumatized the women, but also, resulted in loss of their livelihood, biogenetic resources, food, material culture, income, rest and recreation; as well as extra expenses, additional physical difficulties, more confusion on the law, and devaluation of their worth. A lack of awareness on the laws and policies turns the women unwittingly into offenders. On the other hand, the government is remiss in its duties to conform to the provisions of the laws to inform and consult affected communities; as well as to demarcate their lands prior to the establishment of parks; and to enforce the laws respecting Indigenous livelihoods and natural resource management practices. It has also been remiss in not making its laws aligned with its commitments to international law. The Akha and Lisu women victims in Mae Suai have experienced severe hardships due to the demarcation and ambiguous demarcation of protected areas, and aggravated by their lack of citizenship. In Kaeng Krachan, the violent eviction of Karen from their forest homes in Kaeng Krachan National Park resulted in hunger, poverty and depression among the affected forest-dwellers especially among women who are the traditional knowledge-keepers of forest resources. The Kaeng Krachan Karen women do not have access to natural resources making it impossible for them to provide traditional food for their families. As farming is extremely restricted, they suffer from food insecurity and increasing poverty. They are living in constant fear and uncertainty because they were violently evicted and suffered the use of force by wardens and the military forces. Almost all of their belongings were destroyed/burned, often, assets inherited from the grandparents and ancestors. Karen women who were forced to relocate cannot find jobs to meet their needs because they do not have the necessary knowledge and skill for the market economy. Also, because of their lack or limited Thai language skills and insecure legal status, it is difficult for them to go out and find jobs.

Laos

The Kri People have such a small population that they can be considered endangered. Removing them from their homeland would lead to their extinction as a people. Apart from this fundamental issue, the relocated Kri women face difficulties to find food and ensure potable water in their homes. Like many Indigenous Peoples in Laos, they are heavily dependent on natural resources in their territory for their subsistence. Their forced relocation to focal sites due to village clustering has alienated them from their source of identity—their territory. They had to leave these sites because the pollution of the river severely limited their traditional farming practices and subsistence sources, crucial parts of the Kri ethnic identity. As they are injected into a completely new environment, the Kri women are having trouble providing for their families as they do not have the necessary skills to compete in the labour market. For instance, they do not have the skills and knowledge for cash crop production, particularly in the form of monocrop plantation. If they are employed in this chemical- and technology-dependent mode of production, they do not know the safety measures to protect their health. The environmental differences can cause health problems. Even the diseases, like malaria, are new to the relocatees. Secondly, the design of the relocation area is not culturally friendly for the performance of rituals, and thus, the Kri cultural integrity has been undermined and threatened. Traditional knowledge and customary land management practices are likely to get lost as they cannot be practiced in the resettlement area. Third, the Kri and other peoples have been lumped together in one hamlet without much consideration for the cultural diversities and sensitivities of each people. Many women now work in the weaving center or as daily workers. As a consequence, community cooperation mechanisms and collective activities have changed. While the mine seems to have more benefits for young single individuals, already married women experience fewer benefits and greater hardship to adjust to lifestyle changes. Older women have gained the least from the mine's operations as they do not have any direct benefits from the

mine.³ Moreover, their integration into the cash economy forces them to use cash to meet their needs, something new compared to the non-cash subsistence economy in the mountains. Now, they have problems finding clean water to keep house and to drink since they have to have cash in order buy water or they have to compete with others for water from wells which is not sufficient for all, and is not clean. This is an added burden to women in the resettlement sites.

Philippines

The militarization of the Bong Mal B'laan community in the Philippines because of the mining project worsens the suffering of the B'laan women. Their already marginalized situation due to lack of social services has been aggravated by the presence of military agents in their community who are constantly harassing and intimidating them. Because of military operations, the women have been prohibited by military agents from going to their swidden farms. This has resulted in insufficient food for the family. Even help and relief goods from outside, such as from the church, have been barred from entering the community. The practice of “aksafu” or sharing of food has been limited because of this. The military detachment was erected on a place above the village and near the spring where the community gets their drinking water leading to contamination of the water source, not only physically but also spiritually. Water springs are considered sacred which must be kept ‘pure’ by barring the construction of human structures near them. The women now have to get water from a source farther away. With the ongoing “pangayaw” of the tribal warriors, their wives and children have been left vulnerable to attacks of the military. These tribal warriors are now declared “bandits” and “fugitives” by the state forces and are vulnerable to being executed without due process. There had been incidences where the wife and children of the warriors, who have been declared bandits and fugitives by the government, were intimidated into divulging where their husbands

3 International Council on Mining and Metals, Utilizing mining and mineral resources to foster the sustainable development of the Lao PDR (London: ICMM, 2011), <http://www.icmm.com/page/59737/utilizing-mining-and-mineral-resources-to-foster-the-sustainable-development-of-the>

and fathers are hiding. The wife and son of one of the tribal warriors were killed extra-judicially by military forces on October 18, 2012 on the pretext that it was a military operation to capture the husband warrior. Houses and crop storage facilities were demolished and farm lots with crops were destroyed. These incidents have not only resulted in insufficient food, but also psychological stress.

Malaysia

Iban women in Sarawak are mainly responsible for subsistence production which insures family food security and some cash income from forest products and handicrafts. They now lack access to crucial food and income sources, and can no longer produce their own goods and handicrafts, but most importantly, they lost part of their culture rooted in the NCR and the solidarity they enjoyed before their leader was co-opted. The promised 250-hectare land for them by MARDI is nowhere in sight. Family welfare depends on the decisions made by women as they are almost solely responsible for household chores and child-rearing depriving them of time and energy to participate in meetings or attend events where decisions are made and discussions are had that will ultimately affect their status and the role of women in that society. Thus, when it comes to community decision-making, they are marginalized. Additionally, most Iban women do not know how to read and write, and do not know about their rights. They also lack negotiation skills as they are not exposed to opportunities to develop such skills. Thus, when the Rumah Nyawin was demolished early one morning, mostly women and children were there, and they were not able to do anything except to ensure their family's safety. Until now, they are unable to take any action because they do not know their rights and what actions to be taken. For the Iban women of Rumah Nyawin, MARDI's appropriation of their NCR land led to the loss not only their rights over their land, but also their temuda (farm), basic source of their livelihood. As one woman describes it: "Our life is very poor and poor life makes us depressed." The women and men of Rumah Bangga fought against Empresa because they knew what they will lose if they do not defend their NCR land.

5. Violations of Indigenous women's rights

Development-induced violations of Indigenous women's rights identified in each case study can be summarized as follows: the Constitutions of Cambodia, Laos PDR, Malaysia, Philippines and Thailand all contain non-discrimination as a principle, granting all citizens, men and women, ethnic groups, equal rights. Many of the natural resources needed for national development and priorities are now found mostly in Indigenous territories. Because the population of Indigenous Peoples is most often in the minority, these peoples are often sacrificed in the name of development. The greatest impact of these developments is the alienation of the Indigenous Peoples from their source of identity and subsistence, and the base of their culture including their spirituality. Their eviction from and the destruction of their territories impact on their collective rights as peoples. This is the case of the Kui of Prame in Cambodia whose territory has been handed over for an ELC to the Chinese companies Lan Feng and Rui Feng. Similar expropriations have occurred of the Iban territories for the MARDI and Empresa for plantations; of the B'laan territory for the Sagittarius Mines, Inc. (SMI) with the Anglo-Swiss firm Xstrata for the Tampakan Copper-Gold Project; and of the Karen in Thailand for national parks and/or forest reserves. The Kri of Sepon have been displaced several times from their original ancestral territory and the Lisu and Akha have traditionally been moved around the Mekong sub-region.

In all cases, there was lack of adequate information shared with the women and their communities beforehand in a language and manner that they would have understood and given in a timeframe that allowed them to analyze the impacts of the development—to either reject, approve or negotiate for better arrangements. Except for the B'laan who have had a long-drawn case, the others only came to know of the projects or the government action, when it was about to be done. For instance, the Kui women came to know of the plantation only when the clearing of their farms and forests was about to start. Iban women only came to know of the MARDI and Empresa plans when their longhouse was to be demolished. The Karen only came to know

of their eviction when soldiers came and burned their homes, despite the fact that had entertained them the day before. The Kri were only informed that their village will be affected by the mining but no input was sought from them on how the relocation was to be done. The Lisu and the Akha women of Mae Suai were arrested on the days they were summoned. In summary, violations of Indigenous women's rights in each country comprise the following aspects:

Cambodia

The Cambodian 2001 Land Law, which stipulates that no authority from outside of the community may acquire any rights to immovable collective property of the Kui People has been violated. The government has not provided official recognition of their community forests, which include their spirit forests, in violation of the provisions of the 2002 Forestry Law. No feasibility study and environmental and social impact assessment (ESIA) were conducted to demarcate clearly the perimeters of the concessions before the granting of ELCs. All this is in violation of the provisions of the 2005 sub-decree on ELCs. The sub-decree further requires that these documents must be shared with the affected communities. When the Kui women demanded these documents from the local authorities whose offices are mandated to have them, they were informed that no such documents exist.

Thailand

In Thailand, the arrests, intimidation, assaults and forced evictions by authorities of the Kaeng Krachan Karen is in direct contravention to the Thai Cabinet resolution 2010 on the restoration of Karen livelihood and traditional practices which explicitly grants the Karen people the right to remain on their land and to practice their traditional farming system. Sec. 57 of the 2007 Constitution provides that before any determination of land use is made that affects the material interest of the public, thorough public consultations must be undertaken. Sec. 85 reiterates the above principle on peoples' participation and indicates that the State shall encourage local communities to participate in the

determination of measures to conserve and protect the quality of the environment sustainably. Surely the Lisu and Akha in Mae Suai and the Karen in Kaeng Krachan are part of the public who have material interest in the establishment of parks and thanks to their traditional knowledge can contribute to environmental sustainability. This Constitutional provision has not been used to inform, consult and get the consent of the concerned peoples, even as national parks are being expanded, like Kaeng Krachan. Information on the National Forest Policy and all pertinent laws that affect their lives has not been shared with the Lisu and Akha of Mae Suai and the Karen of Kaeng Krachan. As a consequence, forest dwellers and people relying on forest resources often unwittingly become offenders even without being aware of it.

Laos

In Lao PDR, Kri women are protected under the 2002 Land Law as users of the land of good standing through their subsistence farming and sustainable forest products gathering. They are also assured by the Mining Law that they are entitled to a safe drinking water as mining companies have to guarantee that water quality in its area of operation is safe for human consumption and the environment (Art. 40). The 1997 Mining Law ensures environmental protection and states that studies on the socio-economic impacts of the mining operation, and environmental impact assessment are required for mining exploitation. Despite these requirements, until today, the affected Kri and others do not know if such studies and assessments were undertaken, and if so, what were the results. Remedies to the negative impacts, like the polluted waterways have been proposed to concerned company officials and authorities, but no action has been taken, nor is there assurance that action will be taken.

Philippines

In the Philippines, when SMI started its operations in the B'laan territory in Tampakan in 2002, they did not conduct any process to obtain the free, prior and informed consent (FPIC) of the B'laan. What they did was to connive with fake tribal leaders appointed by the local government unit. Material inducements were given in violation of the Implementing Rules and Regulations of the conduct of FPIC. Some community members were also hired as members of the Resettlement Committee which is tasked by SMI to act as conduit between the affected communities and SMI management to discuss resettlement plans and benefits. In one of the meetings conducted by the RC in the middle of 2012, packed lunches were distributed to community members. They were then asked to sign on a paper, without a heading. They found out later that their signatures signified their consent to the mining project. Personnel of the National Commission on Indigenous Peoples (NCIP) were reportedly present in this activity but were silent and did not even mention what FPIC is, as mandated of them. To further confuse and deceive the community into surrendering their lands, the process of "RUSH" was introduced. In this scheme, the community was made to believe by agents of SMI that their lands can be easily taken away from them since they do not have any proof of ownership. To remedy this, it was suggested that they should have their pictures taken in front of their fields. This picture would then become their proof of ownership of the land. However, these pictures were subsequently used by SMI as proof of the community member's consent to turn over the land to SMI for mining. Those who refused to have their pictures taken were threatened that their homes will be demolished. SMI also imposed a "cut-off date" (March 22, 2012) for the community to express their agreement to their relocation. If not, any structures built or improvements to the land done by the B'laan would not be compensated if they are destroyed once the open-pit mine operations started. The company also offered payment of land within a 20-year lease period but these were rejected. Since displacement from their land is like death, the community decided to put up barricades to prevent the agents of the company from entering their ancestral land.

Malaysia

In Malaysia, the issuance of licenses over NCR lands to MARDI and Empresa and the non-recognition of NCR land of the Rumah Nyawin and Rumah Bangga Iban are violations of the Constitution and the Sarawak Land Code which protects Native Customary Rights (NCR), including the right to cultivate land, hunting and fishing rights, the right to use land for burial and ceremonial purposes, as well as rights of land inheritance and transfer. The destruction of Rumah Nyawin and the arrest of the leaders of Rumah Bangga are violations of the Federal Constitution which grants the defense of private property. Moreover, despite Malaysia's national legislation, NCR lands often are not issued titles, or the process is too cumbersome and the Sarawak government continues to consider these native lands as "idle land". This is also because of differences in understanding of what constitutes NCR land among different government agencies. Logging licenses and provisional leases are often issued for communal land and reserved virgin forests. According to the national legislation, a survey has to be done before the government leases land in order to determine if Indigenous Peoples have rights over the area. Nevertheless, in case of the affected Iban, areas covered by leases include the Native Customary Rights land. In none of the cases was there an appropriate prior survey undertaken in the knowledge of the longhouse owners. Iban women continue to be discriminated against and their access to political life and basic social services limited, despite the avowed pronouncements of the Malaysian government that "the various ethnic groups are given the opportunity to participate at every level of political and decision making process as well as administration of the country."⁴ Furthermore, the government claims to have "developed comprehensive policies and strategies for the development of Indigenous groups which focuses on uplifting the status and quality of life of the Indigenous community via socio-economic programmes."⁵

4 HRC, Working Group on the Universal Periodic Review, National Report Submitted in Accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1: Malaysia, HRC 4th Sess., UN doc. A/HRC/WG.6/4/MYS/1/Rev.1 (2009) para.51.

5 *Ibid.*, at para. 91.

Moreover, it recognised the right to shelter and adequate housing being “an imperative aspect of economic, social and cultural rights.”⁶ The eviction from and the appropriation of the Iban of Rumah Nyawin from their longhouse and NCR lands, and the attempt to do the same to the Rumah Bangga Iban in favour of corporate plantations has not given them the opportunity to participate in decision-making, nor has it uplifted their quality of life. These government actions, as a matter of fact, have violated their individual and collective rights. Iban women are not able to participate in decision-making because gender discrimination has not been eliminated not only in their culture, but in law and practice. In the case of Rumah Nyawin, the Bintulu LSD and MARDI did not ensure that the Iban women were part of the discussions and decisions.

6. International obligations

The governments of Cambodia, Lao PDR, Malaysia, Philippines and Thailand have also committed to promote, protect and respect the rights of Indigenous women and girls under national and international human rights treaties. Specifically, all these governments have committed to uphold the rights of Indigenous women and girls under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). To combat discrimination based on race, color, descent, national origin or ethnicity, Cambodia, Thailand, Lao PDR, and the Philippines are all States Parties to the International Convention on the Elimination of Racial Discrimination (ICERD) and the International Covenant on Economic, Social and Cultural Rights (IESCR). All subject countries of the case studies, including Malaysia, are State Parties to the Convention on Biological Diversity (CBD) of which they committed to the conservation, sustainable use and fair and equitable sharing of the use of biological diversity and its components, with due consideration for all rights related to these resources. Further, under the CBD, they are obliged to promote Indigenous knowledge and traditional ways of life in natural resource management and

6 *Ibid*, at para. 58.

conservation and to recognize rights to practice specific cultures and means of livelihood. All these countries have voted for the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) in September 2007. The Declaration consolidates all the rights contained in international law as it relates to Indigenous Peoples into a single instrument.

Cambodia, Thailand, Laos, Philippines, Malaysia

All the countries, as State Parties to international treaties, have violated the rights of Indigenous women that they have committed to promote, protect and respect. They are obliged under the CEDAW and ICERD to take measures to eliminate discrimination against Indigenous women and Peoples due to differences in birth, race, Indigenous origin or identity, language, and sex, among others. All enunciate equal rights for all groups, and stipulate that there is no legal discrimination against any person or group. Although most of the States Parties have adopted measures and strategies in their legal policy framework, Indigenous women still cannot enjoy equal opportunities and fundamental rights and freedoms, as men do. In these countries, Indigenous women still belong to the most disadvantaged segment of society, as the national legislation fails to protect their rights and address their specific needs. For instance, facility of Indigenous women in the national language is a problem in all the cases, as well as knowledge of their rights. General Recommendation 23 (4d) of the CERD calls on States Parties to obtain the informed consent of Indigenous Peoples in decisions relating to their rights and interests. The Kui, the Kri, the Iban, the B'laan, the Lisu, Akha and Karen women and their communities have not given their informed consent on the projects and they remain socially and politically disadvantaged. Their access to political and public life as well as to the social services system remains limited due to physical, economic, social, political and cultural constraints that had not been addressed effectively by governments. Discrimination prevails, not only in the wider society and among authorities, but also within communities. This is also prevalent within the legal justice system, as has becomes evident in all these cases. The disproportionate impact

of the ELCs in Cambodia on the Kui; of Sepon Gold and Copper Project on the Kri; the MARDI and Empresa plantations on the Iban; the Tampakan Copper-Gold Project on the B'laan; and the National Forestry Policy on the Lisu, Akha and Karen women; discriminates against them as women and as Indigenous Peoples.

The governments of Cambodia, Laos, Malaysia, Philippines and Thailand have failed to fulfill their obligations under the CEDAW to end any form of discrimination against Indigenous women. They have not effectively undertaken measures that protect the Indigenous women from the discrimination they face due to development policies and natural resource exploitation. In Malaysia for instance, the non-recognition of NCR lands, the delayed processing of applications for NCR land recognition, forced evictions, etc. have disproportionate impacts on Iban women which constitutes discrimination. In its first ever periodic report to the CEDAW in 2004, the government of Malaysia acknowledges that “indigenous women and those who are in estates and plantations are marginalised in terms of access to health services and facilities.⁷ This marginalization denies the Iban women the right to reach their full potential as women and as Indigenous Peoples. The same is true of the Kui women in Cambodia, the Karen women in Thailand, the Kri women in Laos and the B'laan women in the Philippines.

The eviction of Indigenous women from their ancestral territories does not support the governments' commitments assumed under the CBD to support traditional knowledge and practices in natural resource management and conservation. The States Parties also have not amended their development policies in order to bring them in line with the CBD, but have actually strengthened national policies that will bring in more investments and create and expand more national parks in Indigenous Peoples territories. In granting concessions in Indigenous territories which include biologically critical resources, all governments violated their commitment under the Convention on

7 CEDAW, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined initial and second periodic reports of States parties Malaysia, UN Doc. CEDAW/C/MYS/1-2 (2004) para.243.

Biological Diversity (CBD) and the UN Declaration on the Rights of Indigenous Peoples (the Declaration). The lack of recognition of land ownership and land use rights in the described cases also conflict with States Parties obligations under the CBD. In Thailand, for instance, state policies and laws on protected areas still have not been amended in order to bring them in line with the CBD. In granting plantation concessions over NCR lands of the Iban to MARDI and Empresa, Malaysia has reneged on its obligation to “respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.”

Article 1 of the ICESCR states, amongst others, that “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” All the States Parties themselves violated the right of Indigenous men and women, to freely determine their social and cultural development and to maintain their traditional ways of living. The right to adequate food is a basic human right. Except for Malaysia, the other four countries are State Parties to the ICESCR, which comprehensively addresses the right to adequate food, and, therefore, have committed to progressively realize the right of everyone, including the Indigenous women, “to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions” (art. 11.1). They have violated their obligation to fulfill this right by preventing Indigenous women’s access to their existing sources of subsistence—their traditional forest gardens, swidden, temuda, waterways, and cultivated farms and plantations. They have failed in their obligation to protect by giving concessions to Lan Feng, Rui Feng, MARDI, Empresa, SMI, MMG Limited, and appropriating forests for national parks, thus depriving Indigenous women of their access to adequate food. Despite the protests of the Prame Kui, Bintulu Iban, and Bong Mal B’laan demanding the cancelations of the concessions over their traditional sources of food, the States have failed in their obligation by not taking action to ensure the Indigenous Peoples’ right to their means of subsistence, including food security.

In all countries, the Indigenous women's rights to practice their traditional occupation and livelihood have been violated. States Parties are obligated to guarantee the right of employment and livelihood, including the provision of "continuing technical advice and support" (ICESCR art. 6). Indigenous Peoples, however, do not have the right to their traditional occupations and means of subsistence but are rather punished for practicing their traditional livelihood systems.

The governments' claims of ownership of all forestland and the imposition of national parks violate the governments' commitments to the Declaration. The fact that they have failed to consult the Indigenous women and their communities and not provided any information in a way understandable to them about the projects, violates the Indigenous Peoples' right to self-determination (Art. 1–5), their right to Free, Prior and Informed Consent (e.g., Art. 10, 11, 19, 28), as well as their right to land, territory and natural resources (e.g., Art. 25, 26, 8, and 10). The latter includes the right to practice cultural traditions and customs by maintaining religious and cultural sites. These initiatives disrespect Indigenous knowledge, cultures and traditional practice, which contribute to sustainable development and proper management of the environment (see Art. 11). The governments makes use of forcible eviction (as prohibited in Article 10, the Declaration) to undermine Indigenous Peoples' right to land, territory and resources (see Art. 26). The Declaration further stipulates that Indigenous Peoples have the right to determine their own priorities on development, health, economic and social programs. Despite these provisions, the Sarawak government continues to deny Indigenous People's rights, and the principles set out in the Declaration have yet to be explicitly incorporated in the national legislation.

Eviction and the use of force in Prame (Cambodia), Doi Chang, Doi Lan, Kaeng Krachan (Thailand), Vilabouly (Laos), Bintulu (Malaysia), and Bong Mal (Philippines) are contrary to the Declaration, the CBD and the International Covenant on Economic, Social and Cultural Rights. The denial of citizenship to Indigenous Peoples, especially Indigenous women, is a violation of their human rights, depriving them of fundamental rights, access to basic social services, and making them especially vulnerable for exploitation.

As Parties to the CRC, all these countries violate the principle of the best interest of the Indigenous boy and girl children by forcibly evicting them from their ancestral homelands and enforcing national development agendas which discriminate against and neglect Indigenous Peoples. This is exacerbated by the lack of remedial measures to mitigate the adverse impacts of such actions on Indigenous children.

7. Indigenous Women's Access to Justice: Key Obstacles

In the case studies, the Indigenous women suffer from multiple forms of discrimination due to their gender and ethnicity, which is often further aggravated by their socio-economic marginalization. The majority of them face significant barriers to accessing justice both in formal official and Indigenous justice systems. Even though these barriers are often country- or context-specific, some key factors can be identified that are severely limiting the Indigenous women's access to justice throughout Southeast Asia. The following analysis relied mainly on the case studies from Cambodia, Thailand, Laos, Philippines and Malaysia presented during the consultation and on the additional testimonies of other participants.

1. Weak enforcement of existing national laws and implementation of orders and decrees, as well as conflicting laws/policies, abuse of authority and powers, corruption, patronage

The lack of legal recognition of Indigenous Peoples and their collective rights as enshrined in the Declaration is the root of many violations inflicted against Indigenous Peoples in Southeast Asia. Some laws and policies in some countries mention the rights of communities to their lands but enforcement is weak or nonexistent.

Weak enforcement of laws and implementation of orders and decrees have been reported in all the case study countries due to any or all of the following: lack of knowledge of the law and other fiats by law enforcement agencies, corruption, absence of rule of law, militarization, patronage politics, poorly functioning law enforcement systems, among others. In Prame commune, the provincial and district officials did not

know the prerequisites under the Sub-decree on ELCs. The Cambodian Land Law, Forestry Law and the Sub-decree on ELCs are very clear on the rights of Indigenous Peoples with respect to their land and resources but these had not been enforced. In the case of the Karen of Kaeng Krachan, it is difficult to ascertain why there had been no redress on the arson that gutted their homes and properties by government authorities. In the Sepon mine case, the government has not acted on the repeated complaints by villagers regarding the polluted river which must be addressed under the Mining Law. In the Rumah Bangga case, the conditions of the lease to Empresa were not followed but still the longhouse was considered the violator of Empresa's rights.

Excessive number of laws and conflicting laws/policies/decrees have also been reported in Cambodia, Thailand, Philippines and Malaysia. Different government agencies do not coordinate and try to exercise their power over people to the detriment of human rights and the welfare of Indigenous women and their communities. In Thailand, despite Constitutional guarantees on the rights to maintain cultural traditions and to participate with the State and communities in the conservation of natural resources, parks seem to take precedence over the human rights of Indigenous Peoples. In the Philippines, the IPRA, the Forestry Reform Code and the Mining Act of 1995 are still not fully harmonized in terms of the rights of Indigenous Peoples over their land, territories and resources. In Sarawak, the federal government and its agencies refuse to accept legal precedents in state and federal court rulings recognizing native titles. Instead, they treat each native title claim as a new and unprecedented legal argument. In Cambodia, the titling and registration of communal land titles has been hampered by lack of or lackadaisical enforcement of relevant laws and decrees. Indigenous communities must meet 29 requirements before they are granted communal land titles. The Prime Minister's Directive 01 further confused Indigenous communities into thinking that to secure their lands, they must have individual titles as contained by the directive. In a very recent study⁸ on this, almost all respondents were

8 Peter Zsombor & Pheap Aun, "Land-Titling Project Denied Minorities of Property Rights" *The Cambodia Daily*, (23 April 2013), <http://www.cambodiadaily.com/archive/land-titling-project-denied-minorities-of-property-rights-19528/>

of the view that the directive has actually facilitated the loss of their ancestral lands through their individual titles because by having the latter, they cannot have communal titles.

Abuse of authority and power by government officials and corruption are rampant throughout the sub-region resulting in unlawful searches, seizures, detention, imprisonment, forced evacuations, and even extra-judicial killings. Homes and properties were torched in Kaeng Krachan; Juvy Capion of Bong Mal and her son were extra-judicially killed; the Rumah Nyawin, with only 120 residents, was unilaterally demolished by 200 policemen and two bulldozers and chainsaws.

2. Severe limitations in existing remedies provided either by law or in practice

Most legal systems fail to provide remedies to Indigenous women, by law or in practice, that are effective, preventive, timely, non-discriminatory, adequate, just and culturally-sensitive. The barriers that limit Indigenous women's access to existing remedies, like lack of education and illiteracy, poverty, language, lack of knowledge of their rights, among other factors, often hamper Indigenous women's use of available justice remedies. Since most of the Indigenous women and communities are poor, lack of free legal assistance limits access to quality legal advice and services. The Lisu and Akha women did not have counsel when they were interrogated. For instance, Meechae and Urai face financial difficulties in complying with the requirement to report every three weeks to the courts. The Rumah Bangga Iban could not have fought their cases if they did not have allies among the NGOs who gave them free service. The same is true for the Kui.

The experience of the participating Indigenous women has shown that apart from the fact that their FPIC has not been obtained before the entry of projects in their territories, there are no oversight mechanisms that will address emerging issues during the implementation and post-implementation of projects. For instance, so many human rights issues emerged after the grant of ELCs in Cambodia, the national parks in Thailand, the mines in Indonesia, Laos and Philippines, and the plantations in Malaysia. In terms of compensation and resettlement,

often the Indigenous women and their communities are not provided any participation in designing such programmes. In many cases, compensation and relocation programmes target per family without due consideration to the gender roles within the family and thus fail to seize the opportunity to provide more support for women during these trying times in their lives.

3. Inefficient justice systems, unresponsive complaint-making procedure, long delays of the legal process

Official justice systems are often further characterized by structural weaknesses and deficiencies. At the very outset, the complaint-making procedure is neither sensitive, nor responsive or conducive to receiving complaints from Indigenous women. As shown in the case of Rumah Bangga, the Iban reported the destruction of their property with the Belaru and Marudi police stations but the police refused to accept their complaint. Court cases are often greatly delayed, taking months or even years before trial. It took 13 years for Ndukmit anak Egot to get justice for the death of her husband in the Rumah Bangga case. Justice delayed is justice denied. For the Rumah Nyawin Iban, the court did not rule on the petition for injunction within a reasonable time that would have allowed the petitioners due process. Two months beyond the validity of the order, the eviction was enforced. In the experience of the Bong Mal B'laan and other Indigenous Peoples in the Philippines, the NCIP, as the facilitator of the FPIC process, has in almost all cases allowed corporations to manipulate the process, leading to the cooptation of some Indigenous leaders, and the granting of contentious Certificates of Precondition that certifies that such process took place. Procrastinations and court delays discourage female victims to take action and seek justice in official legal institutions. As for the Prame Kui, they have learned from previous court cases that the resolution of land cases linked to government officials and big corporations is very rarely in favour of victims, and cases are delayed endlessly. Thus, the Kui prefer to seek support from other communities in struggle, NGOs and the UN agencies in the country rather than relying on the formal justice system. Moreover, a court procedure is expensive and time-consuming.

4. Gender and ethnic biases in the legal system and laws, discrimination, discriminatory attitudes, internalization of racial prejudice, limited participation in decision-making in both formal and traditional systems

Indigenous women often face multiple forms of gender- and ethnicity-based discrimination in formal justice systems, judicial and administrative offices. Due to inadequacies, existing laws and remedies fail to protect them, and gender-specific restrictions hamper them in finding their way through the system to redress their grievances and claim their rights.

As parties to the CEDAW and ICERD, the governments of Cambodia, Lao PDR, Malaysia, Philippines and Thailand are obliged to take measures to combat discrimination in all its forms. The many barriers that Indigenous women face in seeking redress in the formal justice system show that Indigenous women are not particularly targeted in efforts to promote gender equality and combat discrimination. These barriers include their economic status. From the cases studies and testimonies, Indigenous women continue to belong to the poorest sectors of the society. Forced displacements and destruction of their means of subsistence due to state and corporate development projects exacerbate this situation. Indigenous women are disproportionately found in low- income and unreliable forms of employment, compared to their previous self-sustaining and autonomous status as practitioners of traditional livelihoods. The majority cannot afford the prohibitive costs of using the system, expensive legal procedures or a reliable legal representation. Often Indigenous women refrain from making use of existing institutions as they are afraid that they have to pay additional fees and/or bribes. The threat of sexual harassment within these formal systems is always hanging over their heads too. Since they are not used to public negotiations, they are afraid to negotiate with authorities. They shoulder the majority of domestic responsibilities which makes it doubly burdensome to meet the requirements of a legal battle. As a consequence of inequalities in educational opportunities, they frequently suffer from illiteracy and the limitations of monolingualism. All official systems and officials

use the national language. Indigenous women living in rural areas face the added barrier of geographical distance, as legal institutions are often based in town centers and capitals.

Constitutional guarantees are all in place that promote equality of men and women, and non-discrimination with respect to race, national or ethnic origin, color, sex, among other attributes, but there is a disproportionate impact of development projects on Indigenous Peoples because of the resources in their territories. Many government officials and authorities still hold the view that Indigenous Peoples are backward, ignorant, etc. In Thailand, the persistent attitude against Indigenous Peoples as national security threats, foreigners, forest destroyers and drug-related issues, among officials and the general majority Thai, creates a climate that does not augur well for a just and fair access to justice. An alternative report in 2008 recommended that the Thai government should train officials assigned to the Indigenous areas to have cultural sensitivity and gender perspective. The lack of citizenship of Indigenous women compounds their vulnerability and their gender makes them prone to sexual violence. In Cambodia, a parliamentarian openly used the name of an Indigenous People to insult a colleague, perpetuating discrimination against Indigenous Peoples in Cambodia by characterizing them as barbarians or savages.

The States, together with national women's organizations in the different countries, have the responsibility to ensure that women in general, and Indigenous women, in particular, do not face discrimination in all aspects of formal and traditional justice systems. They must take measures especially to eliminate discrimination among the state bureaucracy, including the justice system, which will enhance Indigenous women's access to justice. However, in all cases, the women's organizations have not been accessible to Indigenous women, nor their issues related to development projects included in official CEDAW reports. It is in the shadow reports that we find the reporting of Indigenous women's situation related to development projects. In

Cambodia, a shadow report⁹ mentioned that the official report did not mention the magnitude of human rights violations against Indigenous women which included the severe impact of land loss, exclusion from basic services like education, health services and clean water. In Malaysia, a shadow report¹⁰ cited the resettlement of Indigenous communities due to dams and the appropriation of customary lands for plantations as major concerns. The report concluded that the loss of safely accessible resources increases the burden and security risk for Indigenous women and when this happens, the traditional roles of forest product gathering is taken over by men.

The patriarchal ideologies within the dominant as well as the Indigenous societies cement gender inequalities in both formal and customary justice systems. When Indigenous Peoples face problems due to state and corporate development (as in the communities under study), Indigenous women suffer disproportionately. If this situation does not change, then the next generations of women will continue to be discriminated against and excluded from decision making processes and denied access to remedies for violations of their rights related to development projects.

5. Lack of adequate information about existing laws and remedies, limited knowledge of rights

Indigenous Peoples often have little knowledge of the existing legal framework, the court system in general, as well as specific legal procedures. As a consequence, they often lack confidence to

9 CEDAW NGO Working Group Thai Women Watch (TW2), Thailand's Second NGO Alternative Report on the Implementation of the Convention on the Elimination of all Form of Discrimination Against Women, (Bangkok: TW2, 2003), <http://www.iwraw---ap.org/resources/pdf/Thailand2005.pdf> also see NGO Committee on CEDAW & the Cambodian Committee of Women NGO, Joint Coalition Shadow Report for the CEDAW Committee, (Phnom Pehn: CCEDAW & CCW, 2006), <http://www.iwraw---ap.org/resources/pdf/Cambodia2005.pdf>

10 NGO Shadow Report Group & National Council for Women's Organizations, NGO Shadow Report on Initial and Secondary Report of the Government of Malaysia, Reviewing the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (Kuala Lumpur: NGOSRG, 2005), http://www.iwraw---ap.org/resources/pdf/Malaysia_SR.pdf

actively engage in a lawsuit. Compared to men, Indigenous women's knowledge and understanding of the existing laws, regulations, and policies is often even more limited as they have fewer opportunities of receiving education and have limited official language skills. Limited knowledge and language barriers, in turn, constitute constraints for Indigenous women to fully make their voice heard and to participate in formal legal processes, and to engage with government offices. Thus when Indigenous Peoples face problems due to state and corporate development (as in the communities under study), Indigenous women suffer disproportionately.

Many Indigenous women do not know their constitutional rights, let alone their rights under international law, and national laws and policies that relate to their land, territories and resources. As mentioned above, accessibility to adequate and quality information is hindered by their gender and ethnicity. In the Thailand case, although forestry laws are always used against Indigenous women, there has not been substantial efforts made from authorities to educate Indigenous Peoples on these laws and related policies, nor has there been a clear demarcation of parks with the participation of communities. Indigenous People only come to know that they are violating laws when they are arrested or evicted, as in the case of the Meechae and Urai, and the Rumah Nyawin Iban. Not enough time is given to process information or to seek legal advice. The psychological impacts of these experiences and the subsequent alienation from their lands and homes impact severely on the well-being of Indigenous women. In Thailand, many Indigenous women do not understand how their normal practice of traditional subsistence agriculture is considered a crime.

Even government authorities are often found to lack knowledge of the law and their enforcement, including the treaties to which the States are party to and the other international instruments that their governments are signatories to. In Cambodia, local authorities did not even know the requirements for the establishments of ELCs. Instead of responding to requests for documents, authorities just responded that whether they like it or not, the Kui lands will be taken away.

Lack of information on remedies further denies the Indigenous women access to justice. In the Sepon mine case, the Kri women

and others affected by the pollution of the river do not have any other knowledge of where else to bring their complaints as the local authorities and company have not given any concrete response nor advice to them of where to seek redress. The Rumah Nyawin were left with a coopted leader and the loss of their longhouse and NCR lands, for want of other options to redress their case. In all cases, it is Indigenous Peoples' organizations and advocates that had provided information on other remedies like alerting UN bodies and mechanisms, reporting to national human rights institutions, and the like.

6. Non-recognition of traditional justice and dispute resolution systems, limited available support systems, gag laws, weak organizational capacities

The lack of capacity of the majority of formal justice systems to accommodate the Indigenous justice and dispute resolution systems means the exclusion of resources that can facilitate the delivery of justice to Indigenous women for development-induced violations. As already mentioned, Indigenous justice systems in Asia are prevalently patriarchal but in the absence of an accessible alternative, they are the ones that are accessible and familiar, and Indigenous women are left with little choice.

Lack of or limited availability to and limitations of alternative legal support groups, human rights organizations and other civil society actors in the countries (such as Cambodia and Laos) restrict the provision or facilitation of remedies and of legal aid/counsel, as well as the lobby for the repeal of laws that infringe on Indigenous Peoples' rights. Several governments have enacted, or are in the process of enacting laws that aim to regulate non-governmental organizations from exercising their watchdog functions in the respect, protection and fulfillment of the human rights of their constituencies, e.g., Cambodia, Malaysia, and Indonesia. The overall aim is to gag criticism of government both as an institution as well as the officials holding positions. The legislation of laws that limit the freedoms of advocacy groups to operate independently also hampers support for access to justice for Indigenous women and their communities.

Related to this, the freedoms of speech, association, religion or belief, and to information are slowly being curtailed in many of the countries where the case studies were conducted.

In addition to all these constraints, Indigenous women are also faced with weak organizational capacities. There are only a limited number of women's organizations in Southeast Asia which are taking on issues to redress violations of Indigenous women's rights, and advocating for changes for the promotion, protection and respect of these rights.

ACCESS TO JUSTICE FOR INDIGENOUS PERSONS WITH DISABILITIES: KEY ISSUES AND OPPORTUNITIES

Carol A. Pollack¹

Introduction

In addressing access to justice issues experienced by Indigenous Peoples, the rights and concerns of Indigenous persons with disabilities must be taken into consideration. This is critical both because of the magnitude of the barriers to justice faced by many Indigenous persons with disabilities and because of the number of people impacted. Over 1 billion people, or approximately 15 percent of the world's population, have disabilities.² While no global data exists regarding Indigenous persons with disabilities, available statistics show that Indigenous persons are often disproportionately likely to live with a disability in comparison to the general population.³ Indigenous persons with disabilities frequently experience multiple forms of discrimination and face barriers to the full enjoyment of their rights, based on their Indigenous status and also on disability.

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2 World Health Organization and World Bank, *World Report on Disabilities* (2011).

3 For example, in 1991, 31 per cent of Canada's adult Indigenous population, aged between 34 and 45, reported a disability, compared to 13% for the total Canadian population. (See: <http://www.statcan.gc.ca/pub/82-003-x/1996001/article/2823-eng.pdf>). In 2002, in Australia, over one third of Aboriginal and Torres Strait Islander people aged 15 years or older reported a disability or long term health condition. (See The National Aboriginal and Torres Strait Islander Social Survey (NATSISS, 2002), summary at: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4714.0Main+Features12002?OpenDocument>).

International Normative Framework

The United Nations Declaration on the Rights of Indigenous Peoples (the UN Declaration) and the Convention on the Rights of Persons with Disabilities (the CRPD or the Convention) are the most comprehensive international instruments expressing the rights of Indigenous Peoples and of persons with disabilities. As such, they provide key frameworks for ensuring access to justice for Indigenous persons with disabilities and should guide the interpretation of other relevant international human rights and development instruments in this regard.

As detailed throughout this volume, the Declaration includes extensive and detailed provisions relating to access to justice. It also calls for specific attention to be paid to the rights and special needs of Indigenous persons with disabilities, including to measures taken by States to ensure continuing improvement of economic and social conditions for Indigenous Peoples (UN Declaration, arts. 21(2) and 22(1)). These provisions must accordingly be considered in terms of the Declaration's protections relating to access to justice.

Non-discrimination is a general principle of the CRPD, (art. 3b), to be applied in interpretation of all of its provisions. The Convention expresses a particular concern regarding the situation of persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of, *inter alia*, Indigenous status (preamble para (p)).

The Convention specifies that States Parties are to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of specified accommodations, in order to facilitate their effective role as direct and indirect participants (art. 13(1)). It further prescribes positive measures to be taken for the fulfillment of the rights of persons with disabilities in relation to justice. For example, States Parties are to promote appropriate training for those working in the field of administration of justice, including police and prison staff (art. 13(2)).

The Convention reaffirms that persons with disabilities have the right to recognition everywhere as persons before the law, enjoying legal capacity on an equal basis with others in all aspects of life (art. 12). To ensure effect is given to this right, States Parties are to take measures to

provide persons with disabilities access to the support they may require. Moreover, all measures that relate to the exercise of legal capacity are to include safeguards to prevent abuse in accordance with human rights law. (art. 12 (3)).

Specific Issues Faced by Indigenous Persons with Disabilities

In spite of protections such as these, Indigenous persons with disabilities face considerable obstacles in terms of access to justice. Barriers and impediments are often complex, involving combined forms of inaccessibility⁴ and other forms of discrimination, as well as their socio-economic impacts.

These overarching barriers, which can be compounded for those living in rural areas, include, for example:

Limited access to information provided in accessible formats and appropriate languages, such as educational materials regarding one's rights, what constitutes a crime and how to report it, and how to find legal or other services. Lack of initiatives to educate people in this regard can be compounded by the limited information technology infrastructure available for Indigenous Peoples in rural areas.

Inaccessibility of legal counsel, for example where appropriate free legal aid is needed, but not offered, or where available counsel is not appropriately trained to address the legal and other needs of Indigenous clients with disabilities. Moreover, Indigenous persons with disabilities may face transportation-related barriers to obtaining legal or related services, for example, where long distances must be travelled to obtain services and where there is a lack of accessible transportation to reach these.

Inaccessibility of proceedings may be experienced in international, State or traditional systems in cases where measures have not been taken to ensure the accessibility of physical environments, including

4 Accessibility is a general principle of the CRPD (art. 3), which specifies that States Parties are to take measures to ensure to persons with disabilities, on an equal basis with others, access to the physical environment, to transportation, to information and communications, and to other facilities and services open or provided to the public, both in urban and rural areas (art. 9(1)).

courthouses,⁵ and where there is a lack of assistive technology, such as hearing loops, sign language interpretation, CART services⁶ and materials in alternative formats, to enable persons with disabilities to understand or participate in proceedings. For Indigenous persons with disabilities, inaccessibility may be compounded in instances where educational materials and proceedings are also not available or conducted in Indigenous languages.

These overarching barriers can compound additional specific access to justice issues faced by Indigenous persons with disabilities, which can include and relate to some of the following, among others:

Legal capacity

Persons with disabilities, including Indigenous persons with disabilities, are at risk of being deprived, in contravention to the Convention, of legal capacity to make their own decisions. Deprivation of legal capacity has been seen to facilitate involuntary institutionalization and medical treatment, including forced electroshock therapy, intake of psychotropic drugs or other forced psychiatric treatment.⁷

Family law

While little data exists on Indigenous women with disabilities, existing information indicates that women with disabilities are often at increased risk of having their children removed because of their disability.⁸ Contributing factors may include assumptions by child protection authorities regarding competence of mothers with disabilities; lack of support for parents with disabilities (as called for in article 23 of the CRPD) and lack of access to adequate legal representation and assistance in judicial proceedings.

5 A/HRC/24/50, para. 72.

6 CART (Communication Access Real Time Translation) Services provide instant translation of the spoken word into written text using a computer and relevant software. The text produced can be displayed in a number of ways, including on individual computer monitors, projected onto a screen or combined with video presentation.

7 Women Enabled, Submission to the Committee on the Elimination of Discrimination Against Women (2013).

8 See, for example, National Council on Disabilities (United States), Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children. 2012.

The United Nations Permanent Forum on Indigenous Issues has found evidence that a lack of support and services for families with Indigenous children with disabilities has also led to children being separated from their families, communities and cultures, and placed in institutions or with non-Indigenous families. This is particularly the case in societies in which Indigenous Peoples suffer historical trauma caused by, among other things, generations of children having been removed from their families.⁹

Imprisonment and Detention

While data on incarceration rates of Indigenous persons with disabilities are scarce, the data available suggest that Indigenous persons with disabilities may experience disproportionately high rates of incarceration.¹⁰ People with mental health conditions and intellectual disabilities are also sometimes subject to arbitrary and indefinite detention in long-stay institutions.¹¹

There are also concerns regarding the treatment of Indigenous persons with disabilities in detention. The United Nations Office on Drugs and Crimes (UNODC) has found that “the difficulties people with

9 E/C.19/2013/6, para. 46

10 See, for example, Aboriginal Disability Justice Campaign, *No End in Sight: The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment*, prepared for the National Justice Chief Executives Officers Working Group, September 2012, finding that Indigenous Australians with cognitive impairments (compared to the non-disabled population) are “more likely to come to the attention of police, more likely to be charged, more likely to be remanded in custody, and more likely to be sentenced and imprisoned. They spend longer in custody than people without cognitive impairments, have far fewer opportunities in terms of program pathways when incarcerated and are less likely to be granted parole. They also have substantially fewer program and treatment options, including drug and alcohol support, both in prison, and the community when released, than their non-disabled and non-Indigenous counterparts.” p. 8.

11 See, Women Enabled, Submission to the Committee on the Elimination of Discrimination Against Women (2013); See also Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Mental illness and cognitive disability in Aboriginal and Torres Strait Islander prisoners – a human rights approach*, speech delivered to the 22nd Annual National Mental Health Services Conference (2012), available at: www.humanrights.gov.au/news/speeches.

disabilities face in society are magnified in prisons”¹² and has detailed many shortcomings in the treatment of both Indigenous prisoners and prisoners with disabilities, including in terms of protection, discriminatory treatment, lack of access to appropriate health care, and separation from family, communities and culture. In terms of protection, the UNODC has found that women prisoners with disabilities are at a particularly high risk of manipulation, violence, sexual abuse and rape.¹³

Access to Justice in relation to physical and sexual violence

There is a lack of data regarding the specific situation of Indigenous women with disabilities. However, available information shows that both Indigenous women¹⁴ and women with disabilities¹⁵ often experience higher rates of violence and sexual abuse than the general population of women.

Violence may be experienced in the home and in other settings, including institutions, and may be perpetrated by care givers, family members or strangers, among others. Violence can also take the form of forced medical treatment or procedures, including forced sterilization, the incidence of which has been documented in many countries and regions.¹⁶

Significant barriers exist to escaping and reporting violence, and in accessing justice and services. These include the overarching barriers detailed above relating to lack of access to communications, information

12 United Nations Office on Drugs and Crime (UNODC), Handbook on Prisoners with Special Needs. (United Nations Publication, 2009), p. 43,) available at <http://www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf>.

13 UNODC, p. 45.

14 See, for example, Amnesty International, *No More Stolen Sisters: The need for a comprehensive response to discrimination and violence against Indigenous women in Canada* (2009), and *Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA* (2007).

15 In his 2006 In-Depth Study on All Forms of Violence against Women, the Secretary-General observed that surveys conducted in Europe, North America and Australia have shown that over half of women with disabilities have experienced physical abuse, compared to one third of non-disabled women. A/61/122/Add.1, para. 152, citing to Human Rights Watch, “Women and girls with disabilities”, available at: <http://hrw.org/women/disabled.html>.

16 Thematic study of the Office of the High Commission for Human Rights on the issue of violence against women and girls and disability, A/HRC/20/5, para. 22.

and education regarding violence; and barriers to mobility, including lack of accessible transportation to relevant services. In addition, Indigenous women with disabilities may experience fear of losing independence or fear of retaliation, or may rely upon a perpetrator for assistance with life activities. In some instances, complicated jurisdictional laws may result in confusion regarding which authorities (for example, national, local or tribal) have authority over a particular case, and may contribute to inadequate response in cases where violence is reported. In addition, law enforcement officers or other relevant service providers, such as those responsible for carrying out sexual assault forensic examinations, may not be prepared to respond adequately to reports of violence against Indigenous women with disabilities.

What factors could contribute to overcoming these challenges?

The last two years have witnessed a growing international movement of Indigenous persons with disabilities, culminating in the launching of a Disability Caucus at the 12th session of the UN Permanent Forum on Indigenous Issues. This movement, with the support of the international community, can play an important role in bringing attention to and engendering change with regard to access to justice and other issues faced by Indigenous persons with disabilities. At the international level, there are a number of entry points for this.

The Committee on the Rights of Persons with Disabilities, the United Nation's newest treaty body, has already taken the opportunity in its concluding observations to comment on the situation of Indigenous persons with disabilities in ways that relate to access to justice. Its relevant observations to date have focused, *inter alia*, on:

- Equality and non-discrimination,¹⁷ including in relation to judicial and administrative remedies¹⁸ and relating to the need for policies and programmes for persons with disabilities who belong to Indigenous Peoples with a view to ending the many forms of discrimination to which they may be subjected.¹⁹

17 CRPD/C/AUS/CO/1, para. 15.

18 CRPD/C/ARG/CO/1, para. 11.

19 CRPD/C/ARG/CO/1, para. 12, CRPD/C/PER/CO/1

- Liberty and security of the person, including with regard to the overrepresentation of persons with disabilities, in particular Indigenous persons with disabilities, in prison and juvenile justice systems. In this regard, the Committee has recommended the establishment of legislative, administrative and support frameworks that comply with the Convention.²⁰
- The importance of disaggregated data and statistics on persons with disabilities, to understand the situations of specific groups who may be subject to varying degrees of exclusion, including Indigenous Peoples, in particular Indigenous women and children with disabilities.²¹
- The Committee has addressed the situation of Indigenous children with disabilities. Its recommendations in this regard have called for the strengthening of legislation and adoption of specific programs to guarantee the rights of children with disabilities, with particular attention to Indigenous children,²² and that a State make special care and assistance to children with disabilities, in particular Indigenous children, a matter of high priority; invest in the elimination of discrimination against them; and take steps to prevent violence, abuse and abandonment.²³

UN entities with mandates focused specifically on Indigenous Peoples, as well as their Secretariats, have demonstrated a growing commitment to addressing the needs and rights of Indigenous persons with disabilities. The Permanent Forum on Indigenous Issues issued a series of recommendations specifically focused on disability in the reports of its 11th and 12th sessions. It also prepared and adopted a “Study on the situation of Indigenous persons with disabilities, with a particular focus on challenges faced with regard to the full enjoyment of human rights and inclusion in development.”²⁴ The UN Expert Mechanism on the Rights of Indigenous Peoples addressed the situation of Indigenous persons with disabilities in its recent study on “Access to justice in the

20 CRPD/C/AUS/CO/1, paras. 31–32.

21 CRPD/C/AUS/CO/1, paras 53 and 55.

22 CRPD/C/SLV/CO/1, para. 20.

23 CRPD/C/PER/CO/1, para. 17.

24 E/C.129/2013/6

promotion and protection of the rights of Indigenous Peoples,” as well as relevant recommendations in its advice No. 5(2013) on the same theme.²⁵

Going forward, there is room to encourage increased attention by these mandates, as well as those of the Special Rapporteurs on the rights of Indigenous Peoples and on disability, to access to justice issues faced by Indigenous persons with disabilities, including through the submission of parallel reports to the CRPD, as well as attendance and participation in the sessions of each mandate, as well as their various consultation processes, as relevant.

There are also opportunities for Indigenous persons with disabilities to raise awareness regarding access to justice concerns at other relevant UN development or human rights forums and conferences. For example, Indigenous persons with disabilities participated in the preparatory process for the 23 September 2013 General Assembly High-level Meeting on disability and development. Member States subsequently included, in the very concise outcome document adopted at that Meeting, a call for all development policies and their decision-making processes to take into account the needs of and benefit all persons with disabilities, including Indigenous Peoples.²⁶ The World Conference on Indigenous Peoples, to be held from 22–23 September 2014 presents a new opportunity for commitment to the inclusion of the voices and concerns of Indigenous persons with disabilities in efforts towards implementation of the UN Declaration.

Going forward, of particular significance is the ongoing process towards a future international sustainable development agenda, to be put into place following the 2015 deadline for achievement of the Millennium Development Goals. The development agenda has important implications for Indigenous persons with disabilities, particularly with regard to social, economic and cultural barriers.

Similarly, there are disability-related developments at the regional level with access to justice implications, and in which Indigenous persons with disabilities should have a voice. These include the African Union’s launching of a new, strengthened regional approach to advance the rights of persons with disabilities and the implementation of the

25 A/HRC/24/50

26 A/68/L.1, para. 4(b).

Incheon Strategy to Make the Right Real for persons with disabilities in Asia and the Pacific.

At the national level, there are also important opportunities for advancing access to justice for Indigenous persons with disabilities, particularly through efforts to translate the Convention and the UN Declaration, as well as other relevant instruments, such as the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Rights of the Child, into real changes on the ground.

In terms of traditional justice mechanisms, there is great scope for exploration of how traditional justice systems ensure or do not ensure accessibility and the full participation of Indigenous persons with disabilities, as well as the gathering of examples of good practices in this regard. This could be examined in the Expert Mechanism's Follow-up Study on Access to Justice, planned for 2014.

PART V

FUTURES FOR INDIGENOUS JUSTICE

DISPUTE RESOLUTION: RESTORATIVE JUSTICE UNDER NATIVE CUSTOMARY JUSTICE IN MALAYSIA

Ramy Bulan,¹

Utai besai gaga mit (Big matter make it small)
Utai mit gaga nadai (Small matter make it nothing)
—An Iban saying on dispute resolution

Introduction

Dispute resolution is an important aspect of Indigenous Peoples' legal traditions. Underpinning these traditions is the need to settle conflicts and controversies to ensure social cohesion and harmonious existence. These legal traditions are products of practice and deliberations over long periods of time. Through repetitious patterns of social interactions, they are accepted as binding by those who participate in them. In many Indigenous communities, customary laws constitute a very important source of Indigenous legal traditions² through which justice is meted.

This paper looks at the character and administration of dispute resolution mechanism under the native customary justice system as a “court of first resort”³ for native peoples in Malaysia.⁴ “Native” is a

1 I thank Professor Dimbab Ngidang and Jayl Langub, both of University Malaysia Sarawak, Kuching, Sarawak for reading through the draft of this paper and for their comments.

2 John Borrows discusses sources of Indigenous legal traditions which would apply to Indigenous Peoples in other parts of the world in Canada's Indigenous Constitution. (Toronto: University of Toronto Press, 2010).

3 Thomas James, Be Reconciled! Meaningful Steps for Mending Relationships. (Mississauga: McDougal & Associates, 2007) p. 175.

4 The term “native” is used in article 161A (clause 6) of the Malaysian Federal Constitution to refer to the Indigenous Peoples of Sabah and Sarawak. Other legislation that define them as “natives” include the Schedule to the Sarawak Interpretation Ordinance (1958) and the Sabah (Interpretation) Ordinance (1953). Determination of native identity is important because of the entitlement to rights accorded to natives. For a detailed discussion on who is a native, see Ramy Bulan, *Indigenous Identity and the Law: Who is a Native?*, (1998) 25 Journal of Malaysian and Comparative Law. pp127–167.

legal term used to refer to Indigenous Peoples in the Malaysian states of Sabah and Sarawak. While some references will be made to Sabah, the paper will focus on two native communities, the Iban and Kelabit, in Sarawak to illustrate how linking the customary dispute resolution mechanism with the courts established by the State, could assist in the overall function and implementation of customary justice. It highlights the importance of restorative justice within the native customary justice system and how the sanctions and remedies granted thereunder are shaped by the Indigenous communities' worldview,⁵ as they relate to their economic, physical and spiritual environment. In this discussion, the concept of justice refers not only to enforcement of rights, and imposition of judgment or punishment, but also the restoration of what was lost. This includes loss of peaceful co-existence and the need to restore relationships. In this context, restorative justice refers to an approach to justice that emphasizes repairing the harm done to people and relationships rather than mere retribution or punishment. It also takes into account the restoration of the state of balance with the economic, physical, and spiritual environment. The view is taken that the provision of better access to justice in the forums that they normally use is fundamental to the empowerment of Indigenous communities. This may be through formal legal institutions, but more often, the informal socio-cultural order and mechanisms for managing disputes and the administration of justice.

Justice and Law

According to the Merriam Webster's Dictionary, justice has to do with "the maintenance or administration of what is just, especially by the impartial adjustment of conflicting claims or the assignment of merited rewards or punishments." It is "the principle or ideal of

5 A working definition of world view is that "it is a cognitive trajectory, based on one's presupposition of reality from a particular point of belief system, that bears upon the meaning of existence and of the world we live in." Edmund Chan, A Certain Kind. (Singapore: Covenant Evangelical Free Church, 2013) p 188. Thus, an Indigenous world view is the view of reality which shapes the understanding of life and the world they live in.

just dealing or right action” and “quality of conforming to law.”⁶ Law and its meaning is often a subject of conflict and its meaning depends on whose perspective it is processing. Many a law student is first introduced to the concept of law and its institution, and courts of law, as the means to achieve social order and justice. For example, an introductory book on law by Kinyon defines law in this way:

The ‘law’ in the broad sense of our whole legal system with its institutions, rules, procedures, remedies etc., is society’s attempt, through government, to control human behavior and prevent anarchy, violence, oppression and injustice by providing and enforcing orderly, rational, fair and workable alternatives to the indiscriminate use of force by individuals or groups in advancing or protecting their interests and resolving their controversies. ‘Law’ seeks to achieve both social order and individual protection, freedom and justice.⁷

The “law” is defined here as an “attempt” by society to prevent anarchy and injustice,⁸ and it puts the government or the State at the core of all social discipline, protection and administration of law. The law aims to achieve social order, justice and protection of individual freedom. The definition speaks of orderly and “rational” alternatives to protecting and resolving controversies. However, in attempts to achieve justice, there are social realities and complexities as well as systems of normative rules that may be rational in one culture but may not necessarily be rational when seen through the lens of another, but they are norms that need to be understood and accommodated.

This writer takes as a starting point that law has both a formal and informal content. The view is taken of the concept of justice as something to be achieved not only through the work of lawyers, access to State legal institutions and enforcement agencies or judicial access, but justice through non-State institutions, rooted in Indigenous legal traditions. It is well known that there are informal dispute resolution

6 Merriam Webster Dictionary definition of Justice. <http://www.merriam-webster.com/dictionary/justice>, accessed on 22 January 2014.

7 Stanley Kinyon, Law Study and Law Examination in a Nutshell. (St Paul: West Publishing Co, 1971) p. 9.

8 Sally Moore, Law as a Process, An Anthropological Approach. (London: Routledge & Kegan Paul Plc, 1978) p. 2.

mechanisms that include a wide array of traditional or customary justice systems, representing the very first access to justice for most Indigenous communities. As their “court of first resort” customary justice institutions are the major platform for obtaining remedies for their grievances. It is foundational to their legal empowerment that they get better access to justice in the forums such as their own customary justice systems that they normally use.⁹ Heppel, who wrote on the Iban noted that native judicial decisions need not result in what a westerner would regard as a just solution, but it does result in adversaries openly agreeing to the terms which extinguish a dispute and enable a modicum of harmony to be restored to the group.¹⁰ Understanding their communities’ traditional and customary systems can lead to a better appreciation of their contemporary potential, including how they might be enforced, implemented and how they might meet the needs of present and future Indigenous communities.¹¹

Customary Justice Systems

Customary justice systems have variously been described as informal, traditional or non-State justice systems. The International Council on Human Rights uses the term non-State legal order to indicate that

[T]hese are norms and institutions that tend to draw moral authority more from contemporary or traditional cultural, or customary or religious beliefs, ideas and practices, and less from the political authority of the state. They are law to the extent that people who are subject to them voluntarily or otherwise consider them to be the authority of the law.¹²

9 Eva Wojkowska & Johanna Cunningham, *Justice Reform’s New Frontier: Engaging with Customary Systems to Legally Empower the Poor*, in Stephen Golub, Thomas McInnerney eds., (2010) 2 Legal Empowerment: Practitioners’ Perspectives, Legal Reform and Governance Reform: Lessons Learned. p. 95.

10 Michael Heppel, Iban Social Control, The Infant and The Adult. (Unpublished Ph.D Dissertation, Australian National University, 1975).

11 John Borrows, Canada’s Indigenous Constitution. (Toronto: University of Toronto Press 2010) p. 23.

12 Ewa Wojkowska & Johanna Cunningham, Justice Reform’s New Frontier. (Rome: International Development Law Organization, 2010) p. 95.

Hoebel refers to the underlying cultural values of a particular society as the “basic social postulates” on which he contends the law of society is based.¹³ The reasoning is that, law is then the practical working out of the values of society. In the case of many Indigenous societies, while their traditions can be as historically and different from one another as other cultures and nations of the world, legal traditions and law to which they are subject, are often characterized by rules and regulations regarding economics, physical and religious sanctions governing social interactions and relationships.¹⁴ Indeed, spiritual principles often form part of most every culture’s legal inheritance. This is clearly evident within the native customary justice, where the concept and system of justice and fairness is underpinned by cultural, or customary or religious beliefs and ideas. These laws are generally referred to as customary laws.

In Sabah and Sarawak, multiple versions of customary laws exist. It is possible to identify codified customary law, judicial customary laws as declared by the courts, textbook customary laws as recorded by scholars and others.¹⁵ References to and recognition of customs are also made through statutes or administrative codes.¹⁶ Customary laws

13 E.A Hoebel, *The Law of Primitive Man*. (Cambridge, Mass.: Harvard University Press, 1954) cited in S F Moore, *supra* n 8, p. 11.

14 Masaru Miyamoto explored the presence of these characteristics in the native customary traditions of the Kadazan-Dusun, the Lotud and Rungus in Sabah in *Indigenous Law and Native Courts in Sabah: A Case Study of the Penampang Kadazan* (Masaru Miyamoto and Judeth John Baptist eds.) (2008) 11 Legal Culture in South-east Asia and East Africa, Sabah Museum Monograph. p. 21. The same principles apply to the Iban and Kelabit customary laws.

15 Among the more comprehensive records of native laws are the writings of M.B Hooker in Native Law in Sabah and Sarawak. (Singapore: Malayan Law Journal, Pte. Ltd, 1980).

16 A large part of the substantive content of native law in both Sabah and Sarawak is found in codes drawn up by administrative officials and published by the government printing press. For e.g., there are seven native law codes in Sabah known collectively as Woolley’s Code, named after the author, G.C. Woolley Esq, of the North Borneo Civil Service. The Codes were originally produced between 1932–37, with printed versions put out by the North Borneo Government Printing Office in 1953, and reprinted in 1962 as Native Affairs Bulletin. Nos.1–7. The codes deal with a variety of subjects which form the basis of native law as understood by the people concerned.

or *adat*¹⁷ govern the lives of native communities¹⁸ as living customary and legal traditions, which evolve through a period of time to address contemporary issues.

Established through long usage and common consent, the norms that govern relationships in those communities are accepted as correct and beneficial for generating harmonious interpersonal relations for a cohesive society. By repeated usage and common practice, they attain a degree of coercive authority that requires them to be observed on pain of sanction by the community or the traditional authority.¹⁹ This developed into a customary justice system through the making and reiterating of social order as an active process, not as something which, once achieved is fixed.²⁰ Customary justice is dynamic and fluid, and able to accommodate changes as the society evolves. They are susceptible to being made, remade, transformed and reproduced.²¹

Compared with established formal State systems, customary justice systems are generally much more accessible because those involved in their administration are often from within the community, and would settle disputes in a manner that is culturally acceptable to the parties. For the weak and the poor who would prefer to seek and obtain remedy for grievances in a “safe,” familiar, unthreatening and culturally acceptable manner, it may be the best option.²² Many Indigenous Peoples have found the formal court systems with their procedures and evidentiary rules, and harsh burdens of proof²³ to be alien and cold.

17 AJN Richards writing on Iban customary laws defines *adat* as “a way of life, basic values, culture, accepted code of conduct, manners and conventions”. AJN Richards, *Dayak (Iban Adat)*. (Kuching: Government Printing Press, 1963).

18 Commonly referred to as Dayaks,

19 Gerunsin Lemat, *The Dynamics of Customary Laws and Indigenous Identity: The Case of the Dayak of Sarawak*, Paper presented at the International Seminar on Indigenous Peoples, (Kuala Lumpur: ISIP, November 29–December 1, 1993), Kuala Lumpur; See also Ramy Bulan, *Resolution of Conflict and Dispute Resolution under Native Customary Law*, in Wan Zawawi (ed.), *Representation, Identity and Multiculturalism in Sarawak*. (Kuala Lumpur: Social Science Academy, 2008) p. 156.

20 *Supra* note 8, at p. 6.

21 *Ibid.*

22 *Supra* note 12, at p. 97.

23 John Borrowes, *Listening for a Change, The Courts and Oral Traditions* (2001)

39 *Osgoode Hall Law Journal*. p. 1.

When their testimony is subject to discrediting cross-examination, they can feel that they are not given the respectful space that they deserve. This has been the experience of native peoples, testifying in adversarial court systems.

Like other native communities, for the Iban and Kelabit communities, their *adat* is taken to be the “staff” to guide and to support them through life. *Adat* is a way of life, basic values and accepted conduct and conventions and it is about shared norms and values. This is embodied in the Iban saying:

*Bejalai betungkat ka adat,
Tinduk bepanggal ka pengingat*
Walk the path of life with the staff of custom,
Sleep upon the pillow of beliefs and traditions.

Gerunsin Lemat a prominent native leader wrote, “At the core of *adat* it is a system of justice.”²⁴

Despite being practiced since time immemorial, the administration of the customary justice system is not without problems. The applicable norms and customs can be complex, requiring identification of appropriate norms to a certain behavior or dispute. Customs are generally “local” requiring knowledge and understanding of applicable customs on the part of adjudicators of a conflict.

There may be instances where the administration of justice according to traditional conventions is characterized by violence and brute force and they would be considered inhumane. For instance, in many native communities, incest is considered an affront to the communities’ sensibilities and a very grave breach of the *adat*. In the past, among the Iban, penalty for incest was meted by driving bamboo poles through the bodies of the offenders. Adulterers could be killed by spouses, and unjustified homicide would be revenged through retaliatory killings.²⁵ Personal conflicts were settled through ordeals of diving contests or forced immersions, scalding with boiling oil, clubbing or public humiliation and even through cockfighting and

24 *Supra* note 19.

25 Empeni Lang, *Administration of Native Courts and Enforcement of native Customary Laws* (1998) 25 *Journal of Malaysian and Comparative Law*. p106

appropriation of property.²⁶ These were often in violation of human rights standards.

These ordeals and brutish systems were outlawed by the Brooke government²⁷ who introduced the concept of *bicara*, or “hearing in court” where the dispute between two parties would be heard by an arbiter. Along with the concept of *bicara* came the term *ukum*, or fine as penalty. However under the *adat*, many conflicts and breaches of customs were dealt with through the provision of ritual propitiation or restitution. As disputes continue to be dealt with under customary laws, elements of fines as penalty, might accompany ritual propitiation as forms of ‘remedies’ in settlement of disputes. These will be dealt with later.

The question is whether customary justice systems are effectively implemented as stand alone systems through traditional institutions, implemented through the hierarchy of the traditional leadership. In the contemporary period of rapid social and economic change and the advent of money economy, the social realities are such that in many Indigenous communities certain sections of the society may be more powerful and influential. Unequal power that often exists makes the system susceptible to elite capture. Such unequal power based on economic strength, or even a traditional social stratification and hierarchy may serve to reinforce existing unequal power at the expense of the poor and disadvantaged. In such situations, where the enforcement would mainly be at the lower courts, in the administrative offices and the villages, it is likely that customary obligations would be evaded. Based on her work on alternative dispute resolution in Africa, Nader states that “the ideal of equal justice is incompatible with the social realities of unequal power so that disputing without the force of law is doomed for failure.”²⁸ She argues that there must be a backup and the possibility of State law as a last resort.

²⁶ *Ibid.*

²⁷ Sarawak was ruled by the Brooke Rajahs (who themselves were British) for 105 years before it was ceded to Great Britain as a colony in 1946.

²⁸ Laura Nader, *The Underside of Conflict Management in Africa and Elsewhere* (2001) 32 *IDS Bulletin*. cited in Ubink & Benjamin Rooij. *Towards Customary Legal Empowerment: An Introduction*, in *Customary Justice: Perspective in Legal Empowerment*. Jannine Ubink & Thomas McInery Series ed. (Rome: IDLO Books, 2011) p. 9.

Following that line of argument, and considering Malaysia's own experience, it is suggested that the functioning and effectiveness of customary justices systems would be improved through institutional links between customary and State justice systems.²⁹ More effectual implementation and better acceptance of Indigenous legal traditions may be achieved when acknowledged and backed by official or State institutions.

Linking Customary and State Justice Systems

Three possible levels of linkages have been aptly suggested by Ubink and Van Rooij.³⁰ These are linkages (a) between State and customary norms; (b) between State and customary dispute resolution mechanisms, and (c) between State and customary administration. Such linkages would provide the possibility of some supervisory roles and the "potential to incorporate human rights into customary norms, dispute resolution and administration."³¹

The first institutional normative linkage takes the form of the State's recognition of customary norms. In Malaysia, article 160 of the Federal Constitution, defines law to "include written law, common law and custom and usage having the force of law." In the State of Sarawak, customary laws of the native communities have been codified through the work of the the *Majlis Adat Istiadat* (Council for the Preservation of Customs), the body set up for the purpose of preserving native customs.³² Through a process of consultation, with the elders and members of Indigenous communities, the customary laws of the various Indigenous communities are recorded in written form and codified. This necessarily involved the process of selecting the versions of customary laws that were the common practice in all

29 See Janine Ubink & Benjamin Rooij, *Towards Customary Legal Empowerment: An Introduction*, in *Customary Justice: Perspective in Legal Empowerment*, Jannine Ubink & Thomas McInerney Series ed. *Legal and Governance Reform: Lessons Learned*, No.3/2011, (Rome: IDLO Books, 2011) p. 7.

30 *Ibid.*

31 *Ibid.*, at p. 13.

32 This body was established within the Sarawak Chief Minister's Department through the *Majlis Adat Istiadat Ordinance 1977* for the preservation of customs and traditions.

the communities to ensure credibility and acceptability. In Sabah, customary laws have not been systematically codified in the same way but there have been some recordings by G.C Woolley of the customary practices. An equivalent body, the *Majlis Hal Ehwal Anak Negri* has also been established in Sabah. Breaches of customs and their remedies are also listed in the Sabah (Native Customary Laws) Rules 1995 which is a convenient manual for use by the staff and judges of Native Courts.

Codification and writing of customary laws made a complex system, in some cases, accessible and understood by the younger generation and the general public.³³ It has been suggested that even if successfully accomplished, codification would render customary law less customary, and more artificial, far removed from the experience and comprehension of the people. While introducing a degree of certainty in the rules, it also meant crystallization of the rules, affecting the fluid, informal and accessible nature of the original and living customary laws for once codified, the process of legislative amendment is slow. Furthermore, it is suggested that to subject customary law to premature crystalization in a time of rapid social and economic change would be a disservice to the cause of customary law and to the people who live under it.³⁴ In the process of production of codes or the incorporation of some of the customary fines list in subsidiary legislation, some alien concepts and legal terms were introduced to describe the existing norms. Be that as it may, “to make the concepts suitable for administrative and legislative purposes”³⁵ a certain common framework had to be agreed upon for the compilation of the *adat*.³⁶

33 Sarawak has codified the customary laws of the various communities into “Adat Orders” starting with the Adat Iban Order 1993. The general contents are standardized, subject to variations to accommodate the peculiarities of each community.

34 T.O Elias, *The Problem of Reducing Customary Laws to Writing*, Reprinted from British Legal Papers. Presented to the Fifth International Congress of Comparative Law, Palace of Justice, Brussels, 4th-9th August 1958 (London: Stevens & Sons, 1958) pp 57–69.

35 Introduction to the Kelabit Adat Order 2008. (Kuching: Government Printing Department, 2008) p. 1.

36 Jayl Langub, *Compiling the Adat of the Adat of the Dayak of Sarawak*, Paper presented at the Third Bicentennial Conference of the Borneo Research Council, (Pontianak, Indonesia: BRC, 1994).

Codification of customary laws facilitated the linking of State justice system and customary administration for implementation of the *adat*. This is bolstered through reporting and compilation of previous decisions of the court, which could act as a guide and precedents for the judges.³⁷ Customary laws are administered through a system of Native Courts, which is a hybrid of customary law court structure, combining the traditional leadership structure with State administrative personnel as well as the judicial officers. Although they are established through State legislation,³⁸ these courts administer a system of laws entirely different from the laws administered in the High Court and the Subordinate Courts in Sarawak.³⁹ They combine the traditional leadership and the State's administrative structure and hierarchy. The Native Court's ascending hierarchy in Sarawak is shown below:

The Court

Native Court of Appeal—



The Resident's Court



The Personnel

A judge from the High Court
two native assessors

Resident (the highest government official in a division) with two native assessors as experts on native customs. two native assessors

37 The most important compilation of native customary law cases were done by a former Chief Judge of Sabah and Sarawak, in Lee Hun Hoe, Native Customary Law Cases in Sabah, (Kuching: Government Printing Department, 1973) and Lee Hun Hoe, Native Customary Law Cases in Sarawak, (Kuching: Government Printing Department, 1973). Former Federal Court judge, Syed Ahmad Idid bin Syed Abdullah Idid, compiled other materials in Native Court and Customary Law of Sabah (With Cases and Decisions), (Sabah: Government Printing Press, 1993). The Sabah Law Association published a compilation of cases in Native Court of Appeal Law Report, 1989–2009 (Kuala Lumpur: Sabah Law Association Native Law, Culture, Customs and Rights Committee, 2010). Decisions of the Federal courts (High Court, Court of Appeal and the Federal Court) on customary land rights and related issues are published in the Malayan Law Journal, Current Law Journal, and All Malaysia Reports.

38 Sarawak Native Courts Ordinance 1992 and Rules of the Native Court, repealing the Native Courts Ordinance Cap 43, 1958; Sabah Native Courts Enactments 1993 and Native Courts (Native Customary Laws) Rules 1995.

39 Ongkong ak Salleh v David Panggau ak Sandin and Anor 1983 (1) Malayan Law Journal, 419. (Per Seah J).

District Native Court	District Officer (head of a District) with two native assessors
↑	
The Superior Chief's Court	<i>Temenggong</i> (Paramount Chief over multiple native groups) assisted by two assessors)
↑	
The Chief's Court	Pemanca (Chief of one native group)
↑	
The Penghulu's Court	<i>Penghulu</i> (Regional leader with jurisdiction over few longhouses.
↑	
The Tua Kampung's Court	<i>Tua Kampung</i> /Headman of one longhouse.

At the lowest tier, the traditional hierarchy of community leaders, namely the *Ketua Kampung* (Village Headman) and the *Penghulu* (the Chief and the *Temenggong* (Superior Chief) have only original jurisdiction to hear cases on breach of native laws and customs. Any appeals from their decision goes to the District Native Court and the Resident's Court whose personnel are drawn from the State administration. At the highest appellate level, a High Court judge from the Civil Courts sits in the Native Court of Appeal, in an appellate as well as supervisory capacity where the appellate courts may call for the records of proceedings in the lower courts.⁴⁰

Since the personnel at the appellate levels of the Native Courts may not always be an Indigenous person, or a person from the same native community as a claimant, the judge would depend on the codified customary laws, and native "assessors" to act as experts who would assist the court with regard to the applicable customs. Proceedings in these courts are inquisitorial and not adversarial and generally, no lawyers are allowed in the lower courts. Even in the courts at the appellate level, a lawyer has to apply to the court for permission to represent a client.

One advantage proffered for the linking of the customary and State administration, is that the customary dispute resolution mechanism,

40 *Supra* note 25. p. 89. See also Wan Arfah Hamzah & Ramy Bulan, Introduction to Malaysian Legal System. (Shah Alam, Malaysia: Oxford Bakti, 2002) ch. 10.

is required to adhere to certain administrative procedures. This will ensure that both substantive and procedural justice is served. Human rights standards may be maintained through the system of appeal⁴¹ or supervisory jurisdiction of the appellate courts as expressed in *Haji Laugan Tarki v Mahkamah Anak Negeri Penampang*.⁴² It may well be that this linkage would affect the accessible and informal character of the customary justice system, but that has to be balanced against the better implementation and functioning of the law. As the bulk of the work in the community is at the lower courts, there is a need to increase the jurisdiction and power at the level of the Chiefs (*Penghulu*) and Chief Superior (*Pemanca*) to hear minor offences to prevent paralysis in implementation of justice. The real impact and benefit of customary justice system is seen in its restorative justice character, which operates at the first tier of the legal system.

Customary Dispute Resolution Mechanism and Restorative Justice

With its emphasis on restoration of relationships, and social harmony, one of the most distinctive characteristics of the customary dispute mechanism is its restorative justice approach.⁴³ In conflicts between individual or family members in the community, the preferred customary approach is mediation, arbitration or conciliation. And in cases where injury is inflicted or a crime is committed, a restorative justice approach emphasizes repairing the harm done to people and relationships rather than mere punishment of the offenders.⁴⁴ With a

41 *Supra* note 29 at, p. 12.

42 *Haji Laugan Tarki v Mahkamah Anak Negeri Penampang* (1988) 2 Malayan Law Journal p. 85. The then Supreme Court (which has co-ordinate jurisdiction with the present Federal Court) ruled that Native courts are creatures of statute and the High Court can exercise control over Native Courts through prerogative orders. The Supreme Court also held that Native courts had no power to impose custodial sentences. With the passing of the Native Courts Ordinance 1993, a custodial sentence may now be imposed upon a person's refusal to pay the fines imposed by the court.

43 This paper does not pretend to explore the whole field of restorative justice. Rather it is an effort to show how there are elements of restorative justice in the native customary justice system.

44 Howard Zehr, Changing Lenses: A New Focus for Crime and Justice. (Scottsdale, PA: Herald Press, 1990).

restorative approach, crime is regarded as “violation of people and relationship,” giving rise to an “obligation to make things right.”⁴⁵ As Thomas James succinctly puts it, “an injury takes away from the personhood, the personal integrity and worth of the one injured. The one who injures another is the foremost person to restore and heal the victim by giving them back their wholeness and value.”⁴⁶

It is significant that these elements are echoed in many indigenous practices employed in cultures all over the world from Native American and First Nations in Canada to African and Asian, Hebrew and Arabic and many other cultures. Indigenous customary justice has contributed much to the practice and acceptance of restorative justice in demonstrating justice practices that reflect an intention to repair harm, to promote reconciliation and reassurance rather than simply to get retribution or to inflict equivalent harm.⁴⁷

Writing about restorative justice in relation to crimes, Galaway & Hudson identified three fundamental elements that should be present:

First the crime is viewed primarily as a conflict between individuals that results in injuries to victims, communities and the offenders themselves and only secondarily as a violation against the state. Second, the aim of the criminal justice process should be to create peace in communities by reconciling the parties and repairing the injuries caused by the dispute. Third, the criminal justice process should facilitate active participation by victims, offenders, and their communities in order to find solutions to the conflict.⁴⁸

In the modern context, restorative justice has been used as mediation and reconciliation processes between victims and offenders under victim-offender mediation and victim-offender dialogues,⁴⁹ or they take the form of family group conferences,⁵⁰ or healing or sentencing

45 *Ibid.*, at pp. 1–49.

46 *Supra* note 3, at p. 37.

47 *Supra* note 44, at p. 40.

48 B. Galaway & J Hudson (eds) Abstract, Restorative Justice: International Perspectives, National Criminal Justice Reference Service. 1996.

49 Ted Watchel, Defining Restorative. (Bethlehem Penn.: International Institute for Restorative Practices, 2012), www.iirp.edu.

50 Originated from the Maori practice of family group conferencing.

or community circles.⁵¹ All of these promote shared responsibility, with offender participation in some cases, and a focus beyond blame. It has also been called a relational justice or community justice system,⁵² reflecting the objectives of the justice system.

The following looks at contemporary examples of restorative justice as practiced by the Iban and Kelabit in Sarawak, Malaysia.

Restorative Justice and the Iban and Kelabit Customary Justice Systems

The Iban are the largest native community in Sarawak, comprising at least 30 per cent of the State population, occupying lowland areas all over Sarawak, whereas the Kelabit are a minority but a thriving community, living in the highlands of Central Borneo. Both groups generally live in longhouses, where many families live together in one longhouse with each family having its own apartment. Social cohesion and peaceful community living is vital. Like other native communities in Sarawak, the administration of their *adat* is linked with the State through Native Courts and to some extent, codification of customary laws.

Iban *adat* was the first to be codified as Adat Iban Order 1993 whereas Kelabit *adat* was codified as Kelabit Adat Order 2008. As with all codified *adat* of other native communities, the structure of the code follows the Iban, with adaptations, to accommodate specific cultural differences. The Adat Orders are codification of customs and remedies as well as ritual fines for breaches of customs. These cover areas such as construction of longhouses, rules of social behavior of the longhouse occupants, as well as their visitors, customs relating to farming, matrimonial and sexual matters, property, deaths and burials, adoption and other customs. At the core, restorative justice is the most important aspect, which is “embedded in their code of life.”⁵³

51 Drawn from First Nations practice in Canada.

52 *Supra* note 50.

53 Howard Zher & Ali Gohar, The Little Book of Restorative Justice.

(Intercourse, Penn.: Good Books Publisher, 2003) p. 9., <http://www.unicef.org/tdad/littlebookrjpakaf.pdf>

The Iban are more egalitarian compared to the Kelabit where the traditional leadership system is intact. Although the Iban use mediation to settle their disputes, it is the Kelabit that have a very well developed system of mediation and conciliatory methods for settlement of individual conflicts.⁵⁴ The hallmark of Kelabit interpersonal dealings and conflict resolution is through intermediaries. Culturally, open confrontation is considered rude. Mediation is normally undertaken by respected persons in the community. Depending on the nature of the conflict, dispute settlements incorporate elements of mediation, facilitation, negotiation, counseling and conciliation and in some instances, arbitration.

When a conflict arises, a wrong is perceived or committed, the conflict resolution process begins with *mekitang*, where a mediator is approached to act as a “go between”. A good mediator must *ngubuk*, that is, to speak gently, to persuade and positively discourage the continuance of an act or omission and counsel the parties to avert any problems or outburst of anger or any destructive behavior. Having met with both parties in turn, the mediator brings them to *petutup*, meaning, face to face meeting where he or she would exhort the parties to reconcile. If one or both parties refuse to settle the dispute, it becomes a matter for *pamung*, or public hearing before appointed elders or the village headman. There is no set procedure, although there will always be a presiding elder or village head who controls the proceedings. The meeting is open to any interested party and the public.

At each level of hearing, the facts are recounted, and both parties are given ample opportunities to be heard. The elders exhort, entreat and admonish. Alliterations and metaphors are used to drive the message and in extreme cases where parties are obstinate or obtuse, sarcasm would also be employed. It is only when these efforts fail, that the case will go to the formal court in a *besara* or *bicara*, a court hearing, where the Headman takes on the role of a judge of the Native Court. It is then a judicial proceeding conducted according to the Native Court Rules 1993.

An appeal to a *Penghulu* (Chief’s court) and further appeal to a higher court is possible. However, procedurally, appeals must be lodged at the District Office at the nearest town. As the high cost of

⁵⁴ *Supra* note 19, at p. 156.

travel is to be borne by the appellant, this discourages parties from appealing, and encourage them to settle the dispute at this local level.

Fines, Restitution and Compensatory Payment

The primary function of *adat* in all native communities in Sarawak is reconciliation and restoration of relationships. The view is taken that a breach of the *adat* threatens not only individual relationships, but also the spiritual well-being and health, as well as material prosperity of the community. To restore the “state of balance” or “equilibrium in the environment,” the wronged must be given redress and the offender must provide some form of ritual propitiation or restitution. This is called *tunggu* (Iban) or *pengebpo* (Kelabit).

A distinction is made between payment of *ukum*, or a fine that is paid to the State, and the payment of a *tunggu*, or *pengebpo* or “customary fine” or “ritual fine”,⁵⁵ the purpose of which is to restore relationship and peace in the community. Breach of customs, matrimonial or sexual offences may be dealt with by imposition of *ukum* or fine that is payable to the State. But if the case involves any injury to property, the remedy would involve restoration of the property. While the law deals only with offences against norms of social behavior and rights of individuals through payment of *ukum* or fines, the *adat* deals with offences against norms of social behavior and breaches of customs, as well as taboos or the Indigenous community’s faith and beliefs.⁵⁶ Richards, an English writer tried to capture the essence and purpose of the *tunggu* thus:

The “offence” against custom is therefore a disturbance of the balance within the community, and encroachment on its property whether tangible or not, and the significance of “payment” of a fine lies in its magical power or ritual effect of restoration and not in causing the offender to suffer punishment and loss. For this reason the western concepts

55 Writers including Richards, Heppel and Hooker had a problem finding the correct term for this form of “fine”. Richards called it a “fine”, Heppel used “ritual fine” and Hooker used “customary fine.”

56 *Supra* note 19.

of civil damages or the distinctions between degrees of criminal intent do not belong to the customs.⁵⁷

The fine or *ukum* is specified in *kati* or *pikul* where 1 *kati* is equivalent to MYR 1.00 and 1 *pikul* is equivalent to MYR100.00. When the *adat* was codified, the English term that bears the closest meaning and purpose as the *tunggu* or *pengebpo* is restitution. Befitting their purpose, all the codified *adat* in Sarawak use the term “restitution” to refer to these payments.

The payment of restitution has two parts to it. The first is the payment provided by an offender to an injured party; the second is the payment of a ritual propitiation through the slaughtering of a pig, or chicken, or provision of a piece of iron (or ceremonial sword) or a jar or other valuable. The second element had its roots in ancient customary belief systems where ritual propitiation payment had to be made to “cool” or cleanse the environment, to appease the spirits, to strengthen or to protect the souls of the injured party as well as other affected parties. This is partly grounded in the native worldview of their symbiotic relationship to the environment. This is similar to what Judith Baptist describes of the Lotud relationship to their environment and the need to keep balance and harmony. It is summed up thus:

Their belief and ritual system which is orally transmitted also prescribes a code of conduct and ethics to regulate behavior. Contravening this code or *adat* through irregular human actions inadvertently or intentionally, would disrupt this symbiosis and fracture man’s relationship with his environment including the spirits that govern it. These contraventions are considered serious offences as they upset the balance and defile the universe. Appropriate actions must therefore be taken to restore the balance as prescribed in various forms of atonement through fines, penalties and associated rituals according to the rural tradition.⁵⁸

57 *Supra* note 17.

58 Masaru Miyamoto & Judith John Baptist, *Editorial Notes Legal Culture in South East Asia and East Africa*, (2008) 11 Sabah Museum Monograph. (Kota Kinabalu: Department of Sabah Museum, 2008) p.4. See also Judith John Baptist, *Causes and Consequences: Dealing with the Unseen for Secular Restitution among the Dusun Lotud of Tuaran District*, in Miyamoto & Baptist (eds.) *ibid* at p. 1.

The fact that there is injury demands some form of redress and restitution. When there is damage or destruction of property through the action of an individual, it must be repaired or replaced. Indeed, the equitable maxim that “no wrong should go without redress or remedy” applies as *adat*.

Adat and Conciliation

The administration of *adat* is to be understood in the context of jurisdiction of the native courts under the Native Courts Ordinance 1992.⁵⁹ Under section 28 (b), the Native Courts do not have jurisdiction to try any offence that falls under the Penal Code. However, whenever a physical injury or death occurs whether by accident or otherwise, the offence requires a ritual propitiation and restitution to be provided, irrespective of whether the offender is convicted or acquitted by the criminal court. This is especially so when grievous harm is suffered and blood has been spilt. In addition to the fine and restitution payment, an additional ritual propitiation payment called *genselan*⁶⁰ (in Iban) or *Tue'd* (in Kelabit) is required.

Just like the payment of restitution in the form of *tunggu* or *pengepbo*, this is not deemed a punishment, but a form of accountability, providing an incentive to restore relationships, and to maintain peace in the community. Thus the payment of the *genselan*, or *tue'd* is not an admission of guilt but a gesture of goodwill between families and to stall any adverse effect on the community. The main forms of restitution payments as encapsulated under *Kelabit Adat Order* are as follows:

- *Pengbpo* (to pacify)
- *Pengedame* (to cool the atmosphere, to restore peace and tranquility)
- *Tu'ed* (compensation paid to the family for injury or death of a person whether by accident, negligence or otherwise)
- *Pememug iguq* (to remove disgrace and shame)

59 In Sabah, the corresponding statute is the Native Court Enactment (1993).

60 *Genselan* is an Iban term for a ritual propitiation provided for by the offender for a breach or an infringement of a custom or taboo through the slaughter of a chicken or a pig. The blood of the animals is to appease the spirits and “cool” the environment and restore a harmonious relationship that had been disturbed.

Pengbpo is the first restitution payment by an offender to an aggrieved party for a minor offence, to pacify the aggrieved party. But when there is an injury to the person, an additional payment of *pengedame* is to be paid, to restore peace and tranquility in the community. In some cases where the offence has affected the community, *pengedame* is paid to the Headman as a representative of the community. Where death or grievous injury occurs, a *tue'd* has to be paid to the affected person and his or her family. This is one of the highest payments, usually consisting of five *kerubau temadak* (five male buffaloes). Incest or rape, which are also crimes under the Penal Code are an affront to the community. An offender would have to pay *pememug iguq* (Kelabit) or *pemalu* (Iban), a compensation for disgrace to restore self-respect and to remove the shame and embarrassment from the victim or affected party and his or her family.⁶¹ The parties must settle these restitutionary payments immediately although in exceptional circumstances, payments may be deferred for up to a year.⁶²

There is a slight difference with regards to the forms of restitutionary payments between the Iban and Kelabit. The ritual propitiation takes greater significance for the Iban. The provision of a *kering semangat*, in the form of a piece of iron, symbolizes strength, and is important. In addition, animal sacrifices may be made to atone for the wrong. The Kelabit, on the other hand have embraced the Christian faith, and no longer practice any form of blood or animal sacrifices. Rather, the monetary value of the animal will be ascertained and paid as additional monetary compensation.

The importance and centrality of these restitutionary payments underscores the inability of modern laws to deal with breaches of the *adat* at the fundamental level of community relationships. Payment of *ukum* to the State satisfies the law but does not “heal” the relationship or effect conciliation. The restitution and propitiation, makes it

⁶¹ In comparison, among the Kadazan in Penampang, the Rungus of Pitas, Lotud of Tuaran (all in Sabah), Miyamoto records that an offence is basically settled if the offending party makes a compensation for disgrace (*komolu'an*) through a conciliation gift (*babas*), and or reimbursement (*kolugi'an*), to the offending party for causing either mental loss or a material /economic loss.

⁶² Interview of Maran Ayu', also known as Mada' Karuh, a respected mediator in the Kelabit community (January 2013).

possible for the parties to continue living in the community without the risk of revenge or reprisal from the family members of the aggrieved party. The Iban saying captures the spirit of reconciliation thus:

<i>Manuk udah disayat</i>	(The chicken has been slaughtered.)
<i>Besi udah didilat</i>	(The piece of iron has been bitten.)
<i>Nadai tau naruh dengki</i>	(No grudge should be harbored.)
<i>Naruh dendam enggau pangan agi</i>	(No more revenge to be contemplated.)

To complete the restoration of relationships, beyond the payment of *pengebpo* or other “ritual fines” the Kelabit put an emphasis on bringing the parties and their families together to settle the matter, and to be reconciled in a meeting brokered by a mediator or the headman. At these meetings the families would be advised further on how to deal with the aftermath of the offence. In times past, reconciliation was sealed over drinking of *burak* rice wine, and with shaking of hands. Today, as the Kelabit are almost all Christians, the church plays a major role in ministering forgiveness and reconciliation.

When all matters have been settled through mediation, church elders would be invited to witness and to seal their reconciliation through prayers of release and forgiveness. These church leaders are generally, also respected community leaders. The Biblical injunction to “Take heed to yourselves. If your brother trespass against you, rebuke him; and if he repent, forgive him,”⁶³ carries the same intent as the *adat*, and it is taken seriously.

Restorative Justice and Restitution as a Growing Practice

It is significant to note that the concept of restitution is reflected in other justice systems. For example, under Hebrew law, restitution

63 King James Bible. Authorized 1611 Cambridge Edition, Luke 17:3.

formed an essential part of the justice process for the reestablishment of community peace. With restitution, came the notion of vindication of the victim and the law. The justice process was through vindication and reparation to restore a community affected by crime.⁶⁴

Restitution offers an approach to punishment that is ethically, conceptually and practically superior to contemporary criminal justice.⁶⁵ Increasingly, restorative justice is being considered by courts or legislatures and the United Nations as a new approach to criminal justice. In 2002, the United Nations Economic and Social Council adopted a resolution containing a set of Basic Principles on the Use of Restorative Programs in Criminal Matters as a guide to policy makers and community organizations. This is a demonstration of the growing emphasis on restorative justice approaches.⁶⁶ The use of restorative practices is spreading worldwide in education, criminal justice, social work, counseling youth services and faith community applications.⁶⁷

Van Ness points out that customary justice systems of many Indigenous and aboriginal communities reflect some restorative values that have been part of Indigenous cultures for thousands of years and have continued to be practiced.⁶⁸ He suggests that attempts to introduce restorative approaches in schools would do well to consider the cultures of the Indigenous and aboriginal Peoples who have inspired several well-known restorative practices, and initiate cultural change

64 Daniel Van Ness & Karen Heetderks, Strong, Restoring Justice: An Introduction to Restorative Justice. 4th ed. (Philadelphia: Elsevier Reference, 2010).

65 Charles Abel & Frank Marsh, Punishment and Restitution: A Restitutionary Approach to Crime and the Criminal. (Westport, CT: Greenwood Press, 1984).

66 See United Nations Office on Drugs and Crime, Handbook on Restorative Justice Programmes. (New York: UNODC, 2006) annex II, http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf. Note also the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century which encouraged the “development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all other parties”. ECOSOC, 10th United Nations Congress on the Prevention of Crime and Treatment of Offenders, Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, UN doc. A/CONF.184/4/Rev.3 (2000) para. 29.

67 *Supra* note 50.

68 Daniel Van Ness, Restorative Justice as a World View. Retrieved on 22 January 2014. “<http://www.educ.cam.ac.uk/research/projects/restorativeapproaches/DanielWVanNess.pdf>, at p 4.

as they [schools] inaugurate restorative approaches to discipline.”⁶⁹ He states that introduction of restorative approaches must include the three conceptions of restorative justice: repair of harm, encounter of affected parties and transformation of relationships and culture.⁷⁰

Given that most customary justice systems have elements of restorative justice, what does this global development hold for Indigenous communities, themselves? Can their systems stand alone as an alternative to the State based justice system? This paper has attempted to answer that question.

Concluding Remarks

The case of the Iban and Kelabit are examples of customary justice systems that have clear elements of restorative justice to meet the needs of the native communities. They illustrate how the overall implementation of the justice system is strengthened through linking the customary and State justice systems such that the two justice systems may operate together, without diminishing the indigenous legal traditions and customary laws. Certain elements of punishment are attained through the State system whereas the restitution payments through the *adat* restores and helps the process of healing of relationships. This is augmented by the role of the church in its ministry of forgiveness and reconciliation.

One concern that has been expressed in the implementation of restitutionary payments, be they *tunggu* or *pengedame* or *tu'ed* is that, when imposed, they are often well above the jurisdictional powers conferred by the Native Courts Ordinance. For example, the *Tua Kampung* (Headman's) jurisdiction to impose fines for breach of native law and customs in the Native Courts is MYR 300 (approximately USD 90), but the imposition of a ritual fine of *pengebpo* or *tu'ed* consisting of a pig or up to five buffaloes whose value would be approximately MYR 1000 and MYR 10,000 respectively. This far exceeds the jurisdiction specified under the ordinance. Nonetheless, this is still legitimate because a Native Court

⁶⁹ *Ibid*, p1.

⁷⁰ *Ibid*, at p. 8.

is empowered to award full compensation prescribed by the various native customary laws. It is arguable that the value associated with restitution payments under *adat* are in themselves punitive. Objections have also been raised against resitutionary payments on grounds of double jeopardy—punishing the offender twice for the same offence. That argument fails to appreciate the rationale underlying the restitution payment and the *adat*.

The native customary justice system that is described here is still largely practiced at the lower levels of native courts, mainly in the interior where kinship ties as well as the traditional leadership remain strong. *Adat* continues to be their “staff,” and a source of vitality, survival and continuity. The functionality and effectiveness of this justice system depends on continued social cohesion of the community. Although many young people have moved to towns for education and employment, in the last decade, retirees from the civil service as well as the public sector have begun to return to their ancestral lands in the villages. Many of these people have now begun to take up the leadership in their villages.

There remains the need to empower and to build the capacity of the communities for them to gain better access to justice through their own informal dispute resolution mechanisms. The Native Courts system is an integral part of that and it is important that the institution be strengthened. As Simpson wrote, “A customary system of law can function only if it can preserve a considerable measure of continuity and cohesion and it can do this only if mechanisms exist for the transmission of traditional ideas...”⁷¹ However, it must be clear that the governments and the courts are supplementary and not at the center of the determination of Indigenous customs and legal traditions. It would be well to ensure that those appointed to sit as adjudicators have a knowledge or receptivity to native legal traditions so that justice is meted fairly, taking into account the Indigenous perspective. Finally, it is the communities and their leaders who should be making the judgment about how their customary justice systems

71 AWB, Simpson, *The Common Law and Legal Theory* in Oxford Essays in Jurisprudence, edited by A W B. Simpson, Second Series.(Oxford: Oxford Univ. Press, 1973) 134.

should continue to be administered. In this way, there would there be a participatory process which will be a bulwark against inflexible laws,⁷² and the positive aspects of the customary justice systems would be promoted while simultaneously addressing the shortcomings, to ensure consistency with human rights values.

⁷² *Supra* note 11, at p. 36.

INDIGENOUS APPROACHES TO JUSTICE IN THE STATE COURT SYSTEM

Erika Sasson

The deficiencies and inequities of the Western criminal justice system are well documented. Lawyers, judges, criminologists, social scientists, civil rights groups, and others have expressed mounting frustration with the system's overreliance on incarceration and the lack of social improvement for those returning from custody. State budgets have felt the financial strain of a system whose default is all too often the prison cell. In response, many local and national jurisdictions have begun searching for alternative solutions, and some are taking their cues from Indigenous cultures.

During its International Expert Seminar held in New York in February of 2013, the United Nations Expert Mechanism on the Rights of Indigenous Peoples asked the following question: “What positive examples and lessons learned can be identified regarding instances of non-custodial, inclusive, community-focused and restorative approaches to criminal justice matters?” This paper will examine two Western jurisdictions that have recognized and experimented with Indigenous approaches to justice, from the highest court to a small neighborhood pilot project.

In Canada, the Supreme Court recognized the importance of Aboriginal approaches to justice in response to the needs of Aboriginal peoples who were—and continue to be—overrepresented in the criminal justice system.¹ Over the last twenty years, national commissions and courts alike have documented the suffering of Aboriginal peoples at the hands of the criminal justice system. In 1999, in its historic decision in *R. v. Gladue*² the Supreme Court of Canada noted that overrepresentation of Aboriginal peoples is not a singular issue, but is related to widespread institutional bias,

1 Debra Parkes, et al. Gladue Handbook: A Resource for Justice System Participants in Manitoba. (University of Manitoba: Faculty of Law, 2012) p. 2.

2 *R. v. Gladue*, 1999 (1) SCR 688.

discrimination, and racism.³ The Court recognized this as a “crisis” in the Canadian criminal justice system, and it stated the need for “recognition of the magnitude and gravity of the problem, and for responses to alleviate it.”⁴

In *Gladue*, the Supreme Court was concerned with the interpretation of section 718.2(e) of the Criminal Code, which states that when sentencing an accused person, a judge must pay “particular attention to the circumstances of aboriginal offenders.”⁵ Having found that Aboriginal peoples are grossly overrepresented in the criminal justice system, the court established that when sentencing Aboriginal offenders, a judge must take into account:

- 1) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
- 2) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.⁶

The first part of the test is arguably one of the court’s most radical declarations. A system that is predicated on the primacy of the individual’s guilty actions and state of mind (*actus reus* and *mens rea*) is generally precluded from taking into account background factors that may explain or even override an individual’s moral blameworthiness. However, it is the second part of the test that is of most relevance. In its judgment, the Supreme Court of Canada explains the importance of restorative approaches to justice and how they apply to Aboriginal communities. The court discusses the overemphasis on incarceration in Canada and validates the use of community-based and restorative sanctions as alternatives. The court concludes that community-based sanctions may be more appropriate for Aboriginal offenders than incarceration and that judges may prefer the use of restorative approaches specifically for Aboriginal offenders:

3 *Ibid*, at paras. 61 & 65.

4 *Ibid*, at para. 64.

5 Criminal Code, RSC 1985, c C-46,s.718 (2) (e).

6 *Supra* note 2, at para. 66.

Rather, the point is that one of the unique circumstances of aboriginal offenders is that community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities. It is often the case that neither aboriginal offenders nor their communities *are well served by incarcerating offenders*, particularly for less serious or non-violent offences.⁷

The court's decision in *Gladue* did not have the practical impact it hoped for, and the overrepresentation of Aboriginal people in the justice system has actually increased in the last decade, as the Supreme Court recognized in its recent decision in *Ipeelee*.⁸ Nonetheless, on a philosophical level, the court granted institutional legitimacy to two important notions. First, the court took judicial notice of the benefits of a restorative approach to justice, and emphasized that a restorative approach is “not necessarily a ‘lighter’ punishment.”⁹ Secondly, the court showed that different communities have different values, which should be reflected in how they administer justice. The Supreme Court validated the use of restorative and other community-based sanctions, although in this instance they were restricted to Aboriginal communities.¹⁰

The Supreme Court of the United States has never made comparable findings about the state of Native Americans in the justice system or the need for the country to account for the historic mistreatment of its Indigenous Peoples. Nonetheless, on a much smaller scale, in a local courthouse in Red Hook, Brooklyn, the notion of restorative justice based on Indigenous principles has been taken a step further than what was proposed in Canada. In the last year, in partnership with the New York State Court System and the Kings County District Attorney,

7 *Supra* note 2, at para. 74 [emphasis added].

8 *R. v. Ipeelee*, 2012 (1) SCR 433 (CC) para. 62. In *Ipeelee*, the Supreme Court of Canada reaffirmed the *Gladue* principles and stated: “To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.” (at para. 60)

9 *Supra* note 2, at para. 72.

10 *Supra* 8.

the Center for Court Innovation launched a Peacemaking Program. Operating out of the Red Hook Community Justice Center, the court refers criminal and family matters to a group of local peacemakers.

Peacemaking is a traditional form of dispute resolution that is practiced in many Indigenous communities across the United States and Canada. The focus of peacemaking is on healing and on the restoration of the relationships underlying the crime, crisis, or dispute.¹¹ Although peacemaking varies across tribes, it generally brings together those involved in a conflict, along with family members and other members of the community who may have been affected by the problem. Peacemaking is ultimately concerned with the future of the injured relationships rather than on the disputed act or crime.¹² The paradigm underlying the Western criminal justice system is a system of laws, whereas the paradigm for peacemaking is a system of relationships.¹³

The local peacemakers in Red Hook were trained by Navajo Nation experts, who traveled to New York from New Mexico to impart their wisdom and experience with their longstanding tradition of peacemaking. Although the project is still in its infancy, the local peacemakers have resolved a number of cases using this traditional technique—cases with complicated back-stories between family members, neighbors, co-workers and friends. So far, the Red Hook peacemakers have already demonstrated the extent to which they have internalized the approach to peacemaking taught by their Navajo mentors, including listening, showing empathy, sharing personal stories, and scolding when necessary. The Red Hook peacemakers are also committed to the notion that the solution must originate with the participants—including the defendants—for it to be long lasting.

The Red Hook Peacemaking Program was not designed for disputes involving Indigenous Peoples. Neither the peacemakers nor the disputants are required to be—or even tend to be—themselves of Indigenous descent. The program is designed for anyone coming through the doors of the courthouse. In fact, in its first case, the

11 Robert V. Wolf, Center. For Court Innovation, Widening the Circle: Can Peacemaking Work Outside of Tribal Communities?. (2011) p. 8.

12 *Ibid.* at p. 4.

13 Discussion with David D. Raasch, Associate Judge, Stockbridge-Munsee Tribal Court (26 November 2013).

disputants were from Latin America, one of the peacemakers was Italian, another was Puerto Rican, and the third was African-American. By creating this program for persons of any ethnic background, the court system is going a step beyond what the courts in Canada have done. The court is not just recognizing the legitimacy of Indigenous traditions for Indigenous Peoples. Rather, the court says, this process of resolving disputes is legitimate, and for certain types of crimes, it might be more beneficial and effective than the Western system.

With their history of colonization and dispossession, Indigenous Peoples are not generally accustomed to receiving recognition from Western institutions. Nonetheless, the word is spreading about Indigenous approaches to justice that can improve communities across the United States. In Minnesota and Maryland, courts and communities are using Indigenous principles to improve relationships and resolve disputes.¹⁴ In Michigan, the State legislature recently awarded a grant to the Washtenaw County Trial Court to create a peacemaking court. This grant is “aimed at improving public service and court performance...[and will]...determine how and if tribal peacemaking principles are transferable to the state court system.”¹⁵ Similarly, the Center for Court Innovation is already planning its next peacemaking initiative. With federal funding, the Center will develop a peacemaking center in Syracuse, New York. As these initiatives continue to experiment with peacemaking, the lessons learned will inform other jurisdictions seeking alternative solutions in Indigenous and non- Indigenous communities alike.

14 See, for example, the restorative justice program in Yellow Medicine County, Minnesota, and the Community Conferencing Center in Baltimore, Maryland.

15 Lansing “Washtenaw County: Area courts receive grants for innovative projects,” *Ann Arbor Journal*. (10 November 2013), http://www.heritage.com/articles/2013/11/10/ann_arbor_journal/news/doc527d3e66c3413069181277.txt?viewmode=fullstory

**GUATEMALA: TODAY FOR THE
FIRST TIME IN 500 YEARS
WE HAVE THE OPPORTUNITY TO PUT
PERPETRATORS OF GENOCIDE ON TRIAL**

Center for Legal Action in Human Rights (CALDH)

To understand the genocide in Guatemala, it is necessary to know who the Mayan People are and what their history in the country has been. Below is a presentation of their economic, social and cultural reality, which will allow for a better understanding of the Internal Armed Conflict and the conviction for genocide of the former dictator José Efraín Ríos Montt.

The Indigenous Peoples in Guatemala: The socio-economic and political context

Guatemala is a multi-ethnic, multilingual and multicultural country, with a land mass of 108,900 square kilometers, with 12.3 million inhabitants, in which three Indigenous Peoples coexist—Maya, Xinka and Garífuna—in addition to the ladino or mestizo people. According to the National Statistical Institute (INE), the percentage of Indigenous Peoples is 40%. The World Bank indicates that this percentage is 60% and that Guatemala has the highest percentage of Indigenous population in Central America.¹ It should be noted, that the statistical information, disaggregated by ethnic variables, has been a limiting factor for data analysis, and Indigenous organizations claim that the percentage of the Indigenous population is considerably higher than the official count. This is evident in the Poverty and Development 2011 document produced by the INE. The majority of the Indigenous population is concentrated in the western part of the country—Totonicapán (97%), Sololá (96%), El Quiché (89%), Huehuetenango (57%), Quetzaltenango (52%) and Chimaltenango (78%); and in 1 Information from the World Bank 2004, cited by Okma International. August 2004, www.radio.okma.org

the North of the country—Alta Verapaz (90%) and Baja Verapaz (90%).² According to the linguistic map of Guatemala and the Human Development Report, UN Development Program (UNDP) shows that in 122 of 333 municipalities, the Indigenous population exceeds 80% and is mostly monolingual in one of the Mayan languages.³ The Mayan People comprise 23 linguistic groups: Achi', Akateco, Awakateco, Chalchiteco, Ch'orti', Chuj, Itza', Ixil, Jacalteco, Kaqchikel, K'iche', Mam, Mopan, Popti', Poqomam, Poqomchi', Q'anjob'al, Q'eqchi', Sakapulteco, Sipakapense, Tektiteko, Tz'utujil and Uspanteko.⁴ Each of the Mayan languages is different and has distinctive characteristics, but is united by the common root of the Mayan civilization.

Having sketched the ethnic composition and linguistic map, we will now review the comparative statistical data on poverty and misery, which shows how the levels of social inequality are highest among the Indigenous population. The social inequality is also apparent in the high rates of maternal mortality, child malnutrition and other problems that the Indigenous Peoples disproportionately suffer. At least 74.8% of the Indigenous population lives in poverty, and 26% live in extreme poverty; in contrast, 35% of the non-indigenous population lives in poverty, and only 8% lives in extreme poverty.⁵ Similarly, even though the global average of chronic child malnutrition is 49.3%, in some linguistic communities in the western part of Guatemala, it is 90%.⁶ The literacy rate among the Indigenous population is much lower than in the rest of the population, especially among women. In

2 Álvaro Pop, Evaluation Report on the United Nations Declaration on the Rights of Indigenous Peoples in Guatemala, (2013) , E/C.19/2013/CRP.3, p. 6, www.naleb.gt

3 United Nations Development Program for Guatemala, Ethno-Cultural Diversity: Citizenship in a Pluralistic State. National Report on Human Development, (Guatemala, 2005) p. 66.

4 Linguistic communities. According to a study of Mayan languages, currently 30 Mayan languages have been identified, but the Academy of Mayan recognizes 23 languages, plus Xinca and Garifuna, which are not Mayan. [http://www.ddl.ishlyon.cnrs.fr/AALLED/Univ_ete/3LCourseMaterial/Maya/Sis_Iboy_the Mayan Languages of Guatemala](http://www.ddl.ishlyon.cnrs.fr/AALLED/Univ_ete/3LCourseMaterial/Maya/Sis_Iboy_the_Mayan_Languages_of_Guatemala).

5 ILO, Pueblos Indígenas en Guatemala. (2011), www.iwgia.org/regiones/latin-america/guatemala

6 Indigenous Peoples Project. - OTC - Guatemala. www.aecid.org.gt/aecid/index.php. 2013

some rural communities, the illiteracy of adult Indigenous women is 90%. Indigenous children in this region attend school an average of just over two years, while girls barely receive one year of schooling. Among the population of school-age children (between 7 and 14 years of age), 26% do not attend primary school and 12% of students enrolled each year drop out of school. At least 65% of the Indigenous population does not have access to drinking water, more than 80% have no connection to sewage systems and 50% are not connected to the electrical grid.⁷

The majority of the statistical data presented is not recent, but rather is from the last census in 2002. The lack of recent data and statistical records on Indigenous Peoples is part of State institutionalized practices that render Indigenous Peoples invisible. It is indicative of the State's paltry interest in improving the living conditions of the majority of the Guatemalan population. This social inequality is not a recent phenomenon, but rather, is profoundly rooted in the Spanish invasion, the dispossession of Indigenous Peoples' territories and the subsequent founding of the nation state, which denies the rights of native peoples and institutionalizes "racial" relations under the "white or Creole" hegemony of a few families. These families of the oligarchy have always ruled and controlled the country. From this racial institutionalization stems the economy and political system, which denies the very existence of Indigenous Peoples in the country. Therefore, in order to grasp the causes of social inequality in Guatemala, it is necessary to reference this racial and racist framework. Similarly, to understand the genocide committed, it is fundamental to understand how the current capitalist globalization is part of the continuum of the colonial models that have been imposed throughout history; and how in order to achieve the accumulation of capital, these models have always used violent wars to exterminate peoples or social groups that resist domination.

⁷ *Supra* note 7.

The genocide from the standpoint of racism and dominance

When analyzing the genocide in Guatemala, it is necessary to be guided by the memory and history of the Mayan People. As mentioned above, everything began with the Spanish invasion and the foundation of the nation state, and it is based on these two historic moments that society is organized; the racial hierarchy created; and the racist ideology of who is “Indian” and who is not, established, which has been codified into law and used to organize and wield political power. The question is, “Why is this ‘Indian’ construct needed?” The hegemonic “Creole” social group “invented the ‘Indian,’ subordinated him to their interests, recognized a few of his rights which did not threaten their interests, and identified him as “‘something’ less than the invader.”⁸ Thus, they sought to homogenize into a single category all the cultures of the linguistic groups of the Mayan People, a civilization which was at its height, and supplant it with a single ideological, exclusionary and racist category.

The genocide during the Internal Armed Conflict was by no means the first genocide. Genocide has been committed numerous times in Guatemala’s history and the rest of the time has always been lying dormant to some degree. It is useful to establish the chronology of the three relevant historical periods: the first, starting in 1524 with the Spanish invasion and the subsequent governance of the colony; the second, from 1848 to 1943 during the liberal period; and the third, from 1960 to 1996 during the internal war when the state was suppressed by military governments for three decades. During these three periods of Guatemala’s political history, the worst atrocities and extermination campaigns were committed against the Mayan People. The common denominator of these genocides is the take over and control of the Mayan People’s land. The ruling class has used the army as a tool to destroy the community life of the Mayan People, instill terror and commit genocide. Therefore, it comes as no surprise that this very same strategy is being used to plunder the territories of the Maya to this day, since it continues to be necessary

8 Francisco López Bárcenas, Autonomías Indígenas. América Latina. (México: México City, 2007), p. 15.

for the accumulation of capital under the current exclusionary and racist economic model.

During the Internal Armed Conflict, the political elite feared the empowerment of Indigenous Peoples and that they would become the social base of the revolutionary movement. For this reason, the elite reactivated a key historic element of racism: “the supposed threat of ‘Indians’ to the ladino hierarchy.”

Since the consolidation of the nation state, the oligarchy in alliance with the army has kept the Mayan People in abject poverty so that the oligarchy could stay in power and continue to accumulate wealth based on the exploitation of the natural resources. Currently, the State is infamous for repressing communities that resist the invasion of mining companies and the imposition of hydroelectric projects. There is widespread criminalization of community leaders and all expressions of resistance; the situation is comparable to the period of the Internal Armed Conflict, when many Indigenous communities were treated as the enemy.

For the Mayan People, genocide is a historical sequence that is linked to the political and ideological strategies of the nation state for imposing economic models based on the control and plundering of the territories. Genocide has gone hand in hand with the creation of a systematic methodology of terror for attacking civilian populations and communities of the Mayan People. The resistance struggles have been and continue to be for the right to life in opposition to the colonial-capitalist economic model. This model denies the dignity of the Mayan People, because acknowledging dignity necessarily includes recognizing identity and, therefore, adopting a political ideological stance in defense of collective life, which poses a danger to the neo-liberal capitalist development model. This model leads to the death and destruction of all forms of communal existence.

Manifestations of racism operate and are transformed according to the needs of the dominant class and the type or nature of the aggression or domination it requires. According to Dr. Marta Casaús, between the 1970s and the mid-1980s, the racism of the State reached its maximum expression and formed part of a generated crisis: “The oligarchy was not able to legitimize its domination legally and resorted

to the military, [to] electoral fraud, and to militarization to remain in power.”⁹

In Guatemala, to speak of genocide we must understand the present as it relates to the past; that genocide is justified by racism; and that achieving justice for the victims of genocide also requires redefining the memory of the survivors as well as of those who died. To strive for justice is to walk in the opposite direction of the impunity of the past and present, against oblivion and silence.

To speak of the genocide, one must also grasp the structural problems that led to the Internal Armed Conflict, which lasted for more than three decades (36 years), which have been present in the history of our territory since the Caravels anchored, until the present day. These structural problems include racism, discrimination, huge inequalities, unjust land tenure, poverty, the pillaging of the land and the exploitation of natural resources, among others, which are still present and reflected in the current continuation of violence, the repetition of repressive patterns and ways of operating, as well as the existence of structures of organized crime in State institutions.

In Guatemala, during the military governments of 1981 to 1983, genocide was committed, as were crimes against humanity and war crimes. The Mayan population was identified as a threat to national stability and defined by the military as the enemy. With the excuse of the war against communism, hundreds of communities of the Kekchi, Achi, K’iché, Kachiquel, Ixil, Q’anjob’al, Chuj and Mam language groups, were destroyed and wiped out in the West and North of the country. The notion that “He who is not with me is against me” was applied literally and militarily.¹⁰

During this period, a policy of genocide was implemented with scorched-earth strategies in hundreds of Mayan communities; extra-judicial executions against civilians, especially community, student, trade union and religious leaders; and torture, which caused grave physical and mental scars. Systematic sexual violence against women was used as an act of domination over the enemy and caused grave

9 Cited by Roddy Ph.D Roddy Brett, in Guatemalan Racism and Genocide 1981–1983. Forum. Genocide, the highest expression of racism. CALDH. 2004: p. 21

10 Commission for Historical Clarification, Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, (Guatemala City: CHC, 1999).

physical, psychological and social wounds. Mayan women were treated as if they were the spoils of war. Indigenous Peoples were subjected to extreme conditions that led to the physical destruction of the group, and included the forced displacement of children and adults, resulting in thousands of deaths from hunger, illness, fright and inhumane living conditions.

To control and subdue the population, “model villages” (ghettos or concentration camps) were implemented whose main purpose was to “re-educate” the Indigenous population, which resulted in the imposition, once again, of other lifestyles, and the denial of the possibility of practicing their own spirituality, political organization as well as social and cultural relationships, i.e. their own worldviews. The model villages ripped asunder the communal social fabric, and helped create one of the State’s most effective repression mechanisms: the Civil Defense Patrols (PAC). Throughout all of this, violence was used as a means of control and to force the assimilation of ladino culture, which very adversely impacted the Mayan identity and culture. During the scorched-earth operations, hundreds of Mayan children who survived the massacres were transferred to the capital city and given up for adoption to families from other countries, or to the homes of the perpetrators of the violence, a very common practice of military regimes in Latin America.

The Commission for Historical Clarification concluded that during the Internal Armed Conflict more than 200,000 people were killed; more than one million were displaced; and 626 massacres were committed.

Indigenous Peoples’ walk towards justice

At the beginning of the year 2000, survivors of the Internal Armed Conflict from the regions of Ixcán and Ixil, Quiché; San Martín Jilotepeque, Chimaltenango; Nentón and Barillas, Huehuetenango; and Rabinal, Baja Verapaz, along with the Centro para la Acción Legal en Derechos Humanos (CALDH; in English the Centre for Human Rights Legal Action) came together to reflect on what had happened during the years of the conflict, and concluded that it was necessary

to seek justice for such grave crimes. Thus, it was that on April 24, 2000, the Association for Justice and Reconciliation (AJR), taking into account the recommendations of the Minutes on the Silencing of the Commission for Historical Clarification (CEH), regarding access to justice, decided to begin the quest for justice with a lawsuit against the military high command, namely Romeo Lucas García (from 1978 to the beginning of 1982), and in 2001, against José Efraín Ríos Montt (from March 23, 1982 to August 8, 1983), responsible for applying a policy of genocide against the Mayan People during the periods they were in power.

Thus, began the research that would substantiate the first trial for genocide before the national courts of Latin America in history. In the Guatemalan justice system, the Public Prosecutor is supposed to be the institutional body responsible for conducting the investigation and criminal prosecution. However, it took eight years to make that happen. Meanwhile, the research process provided an opportunity to transcend the mere search for evidence, and to reconstruct, redefine and dignify the memory and truth of the survivors.

CALDH's strategic litigation was complemented by a diversity of elements: policy, communications, legal issues, research, accompaniment of the survivors and witnesses of the case, and security. This multi-pronged approach heightened the visibility of the case, strengthened the team of lawyers, who worked closely with the Public Prosecutor's Office, and acted on the need to prosecute those intellectually responsible for the genocide who lived in Guatemala as a guarantee of non-repetition and as a contribution to the fight against the reigning impunity. Thirteen years after having filed the complaint, they managed to bring a historic trial to the courts of Guatemala: the trial for genocide against the former dictator José Efraín Ríos Montt and his intelligence officer.

Genocide trial

The genocide case focused on the Ixil Region, Department of Quiché, one of the areas where the genocidal policy hit hardest. Several survivors, men and women, who saw and endured the persecution

committed against them, participated in this process. One of the avenues used was the reconstruction of the history of each person, which, through maps, drawings and stories, were then intertwined with each other. After several years, 106 reconstructions were completed that now form part of the expert reports introduced as evidence by the Public Prosecutors in the trial. These reports go into great depth and detail about the deliberate repressive measures, displacement, psycho-social, sexual, cultural, socio-cultural and historical violence; racism and discrimination; children who disappeared during the Internal Armed Conflict; demographics, geography, patterns of exhumation, military operations, etc. Each expert report confirms the events that occurred and how, this genocidal policy ripped asunder the social fabric, and re-education strategies were imposed on the Mayan Ixil population, including forced relocation that wreaked havoc on their lifestyle.

It is noteworthy that a key part of this process was the struggle for the declassification of military documents. In the trial, the Ministry of Defense was asked to hand over four military plans that contained relevant information, such as how the army identified the Mayan Ixil People; their plans against them; as well as how they executed their plans; and the subsequent reports on what had transpired, which concur with and confirm the reconstruction of events in the Ixil region. Of the four plans: Victoria 82, 83 Firmeza, Plan Sofia and Operación Ixil, the army has handed over only two. A third plan was investigated by the National Chamber of Hearings of Spain, sent to Guatemala, and presented as evidence in the trial.

Starting in 2008, the Public Prosecutor started working on cases of human rights violations during the conflict, which had been archived during previous negotiations, and streamlining investigations, thus, demonstrating an interest in putting an end to the sealed-off impunity of the State. Substantial advances were made in the research, and that is how, on June 17, 2011, Héctor Mario López Fuentes was captured and linked to the case on genocide and crimes against humanity. The general served as Head Chief of State of the Army in the bloodiest period of the armed conflict. His capture gave a beacon of hope and justice for the survivors. Then General José Mauricio Rodríguez Sánchez, responsible for intelligence, was captured; and in January

2012, General José Efraín Ríos Montt (*de-facto* President, whose time in power was characterized as the most repressive period) was also arrested and linked to the charges for the crimes of genocide and crimes against humanity.

The genocide case is an emblematic case because it brought charges against a former retired general Efraín Ríos Montt, who at that time was the President of Guatemala, and its high military command, for having created a counterinsurgency policy; developed military plans and operations to implement such a policy; and for having knowledge of the results of the implementation of this policy. Building and litigating this emblematic case meant challenging the justice system, economic power and military of the country.

The first genocide to be brought to trial in 500 years

Thirteen years passed before the victims of the genocide got to take the stand in court. Arriving at that point was not easy. The accused military members filed over a hundred lawsuits to impede going to trial. These unfair dilatory tactics were declared not grounds for preventing the trial by various courts of justice, and constituted malicious litigation, as well as intent to obstruct justice and to grant impunity for serious human rights violations committed during the Internal Armed Conflict.

The international community followed the trial closely and hailed its importance for all civilized nations. “I welcome the launch of this historic trial and hope that it marks the beginning of justice awaited for many years by the thousands of victims of grave human rights violations and crimes against humanity committed during 36 years of violent conflict in Guatemala,” said Navy Pillay, UN High Commissioner for Human Rights. “This is the first time anywhere in the world that a former head of state’s trial for genocide by a national court has occurred... Until very recently, no one believed that a trial like this could take place in Guatemala, and the fact that it is happening there, 30 years after the alleged violations took place, should encourage victims of human rights violations around the world.”¹¹

11 Press release. Office of the High Commissioner for Human Rights. “Pillay

On March 19, 2013, the first trial for genocide in Guatemala began. It was a landmark trial where the former dictator José Efraín Ríos Montt sat on the dock. The debate was characterized by repeated attempts to halt the aggression and contempt of the trial court, as well as blatant signs of racism in the courtroom.

The Trial Court of High Risk “A” was made up of the following honorable judges: Iris Jasmin Barrios Aguilar, Patricia Isabel Bustamante García and Pablo Xitumul de Paz, and heard reports from more than ten experts (military, anthropological, sociological, psychological, etc.). Eight-five witnesses of the genocide testified on the displacement, massacres, forced disappearances, extra-judicial killings, destruction of community and culture, death of men and women, and all the different kinds of human rights violations that occurred during this period. There were also ten surviving witnesses to sexual violence and presentation of reports (including the report by the Historical Clarification Commission, sponsored by the United Nations, and the Report on the Reconciliation, which the Court gave probative value to, demonstrated that there was an intention to destroy the Ixil group, which was identified as an internal enemy: “...[The decision to carry out] violent acts against the Ixil was not a spontaneous act, but rather **the realization of previously prepared plans, which formed part of the state policy aimed at the elimination of a certain ethnic group** (...) who had proven over and over that **they were civilians** devoted to agriculture.”¹²

Sexual violence against women was a systematic State policy, which contributed to the destruction of the social fabric, and whose objective was to eliminate the Mayan Ixil ethnic group. The women suffered intentional violence and humiliation, not only as a means of inflicting physical or mental injuries to members of the group, but also as the most effective way to prevent the group’s physical and cultural reproduction. The Special Representative of the Secretary-General of the United Nations on sexual violence in conflict, Zainab Hawa Bangura, stated that: “It is difficult to conceive of the pain and

Hails Start of Genocide Trial in Guatemala,” Geneva: March 18, 2013.

12 Genocide Sentence and crimes against humanity. First Court of Penal Sentence, Narcoactivity and crimes against environment. Guatemala. 2013, p. 697.

brutality that torment the survivors of sexual violence.” “Therefore, the courage of their testimony about what they have suffered should not be underestimated. In the end, their stories will help to ensure that crimes of sexual violence do not remain hidden in silence and impunity. To confront its violent past, today Guatemala is demonstrating its commitment to the rule of law and to a future of peace. I urge the authorities to ensure a fair trial and the protection of victims, witnesses, human rights defenders and officials of the judicial system. Justice in Guatemala has been delayed for many, but must not be denied,” she added.¹³

Racism, was “**the machinery of extermination,**” the basis of the genocide. “Racism is expressed in the behavior, imagination, racist practices and ideologies that occupy different spaces and expand to the whole of society... Racism profoundly affected, caused, collaborated with and contributed to the genocide that occurred in Guatemala.” A stereotype of the “Indian” as an inferior “thug, thief, ugly and one that smells bad” has historically been constructed. Throughout history, the elites have insisted on the idea of “disposal” or the need to “improve the breed.”¹⁴ This is what was put into practice during the Genocide.

In the course of this trial, networks of impunity, which still exist in the justice system, were discovered. But what was also discovered was the persistence of groups in power who refuse to live in a full democracy with true rule of law. We have seen illegal resolutions tabled, malicious proceedings and the attempt to discredit the male and female actors of the justice system through various means. It is important to reiterate that, it is in the trial’s Oral and Public Debate where evidence reached its probative value. That is what gives strength and credibility to the rule of law and not the hundreds of appeals to delay or obstruct justice.

The surviving victims of the genocide have given a lesson to Guatemalan society. You can advance through the established

13 Statement by Zainab Hawa Bangura, United Nations Special Representative on Sexual Violence in Conflict. “Prosecuting Past Crimes Provides Hope to Survivors in Guatemala”. April 12, 2013.

14 Cited by Roddy Ph. D Roddy Brett, in Guatemalan Racism and Genocide 1981–1983. Forum. Genocide, the highest expression of racism. CALDH. 2004, p. 16, 17, 23.

democratic means to resolve your disputes. Those who resort to hatred and violence or who are afraid of democratic processes are those who have never believed in peace or democracy.

This ruling is a watershed in the history of Guatemala, because it gives us the opportunity to reconceive of ourselves as a society and decide what we want for our country in the present and in the future. Guatemala has a new chance, drawn by the long path traveled towards justice that victims and survivors embarked upon more than a decade ago. It symbolizes the vindication and the recognition of the truth, not only for the Mayan People, but also for the thousands of victims executed arbitrarily, disappeared and massacred in our territory.

The international community expressed its satisfaction for the progress on justice and human rights. The United Nations system considers that a major step has been taken in the development of the rule of law and in the strengthening of democracy in Guatemala. As the United Nations System expressed, “There is no doubt that the approach to cases of high impact such as this, and other events occurring at the same time, has significant relevance both for national and international justice and provides a historic opportunity to make the Guatemalan justice system demonstrate its commitment to the fight against impunity in the country.”¹⁵

Impunity and the right to justice

“I call on the judicial authorities to act responsibly and to prevent any attempted interference, obstruction of justice or manipulation of the law, which may seriously undermine the credibility of the justice system in Guatemala. . . . The victims of the atrocities committed during the civil war in Guatemala, as well as their families, have been waiting many years for justice; I hope that they do not have to keep waiting. Justice delayed is justice denied.”¹⁶ Mr. Adama Dieng, Special Adviser on the Prevention of Genocide, stated before the suspension of the

15 Press Release from United Nations System. Guatemala: April 14, 2013.

16 Statement by Mr. Adama Dieng, United Nations Special Advisor on the Prevention of Genocide, about the judicial process against former *de facto* Head of State and former Chief of Intelligence Services of Guatemala. New York: April 23, 2013.

trial of the former head of State and the former head of the intelligence services of Guatemala.

Ten days later, the technical cancellation of oral and public debate

After the historic conviction handed down by the honorable High-Risk Court “A” on May 10, 2013, which sentenced General Jose Efraim Rios Montt to 80 years in prison for genocide and crimes against humanity, the private sector of the country and the Agricultural, Commercial, Industrial and Financial Coordinating Committee (CACIF) published a paid advertisement, dated May 13, 2013, that contended that “This [*court verdict*] **does not take into account the polarized [climate] and gives a very clear impression that justice was the [result of] ideological conflict**” and that “Given the legal measures that remain to be resolved, we appeal to Constitutional Court and its history of handing down landmark rulings in favor of the rule of law and respect for the Constitution, so that all anomalies incurred during the process may be amended.”¹⁷

On May 20, 2013, ten days after the conviction and seven days after the above-mentioned publication, three judges of the Constitutional Court resolved a *de facto* complaint presented by the defense of General Ríos Montt ordering that the proceedings and the oral and public debate since April 19 be annulled. With this judgment, the Constitutional Court technically overrode the oral and public discussion of the trial for genocide.

It is important to note that the court order was decided by the votes of judges Héctor Hugo Pérez Aguilera, Roberto Molina Barreto and Alejandro Maldonado Aguirre, while Judge Gloria Patricia Porras Escobar and Judge Mauro Roderick Chacón Corado voted against it.

In her separate opinion, Judge Gloria Porras indicates: “The ruling accepts as fact claims that do not match the procedural evidence; in issuing this ruling, the court accepts the tenuous claim

17 Published notice in El Periódico newspaper. May 13, 2013, p. 27. “CACIF demands to Guatemalan Constitutional Court to preserve governability and the future of country.”

that the rejection of the motion to reconsider the judge's refusal of the request submitted by his defense attorney constituted grounds for appeal. This is not the case, since the audio recording of the relevant trial day proves that the objection was solely directed against the sentencing court's decision to expel the defendant's attorney, and not against the motion."¹⁸

She later added, "With this ruling, I maintain that the Court is issuing a resolution which affects the legality of the proceedings, and, consequently, harms the development of justice, which is a fundamental right enshrined in the political Constitution of the Republic."¹⁹

The annulment of the trial left everything accomplished in a legal limbo, and this patently illegal and unlawful resolution, made a mockery of the victims, the country and the world. This attack brought against the legal proceedings by the hawkish entrepreneurial sector is an attack against the credibility of the entire legal system. It is a crippling way of conceiving democracy, citizenship and the law.

Malicious litigation undermines the justice system

Before, during and after the trial, various legal tactics were employed to hinder, prevent or postpone the trial and a conviction in favor of the surviving victims. On different occasions, the military defendants appealed to the Constitutional Court of the country to seek the application of amnesty for alleged crimes, but **amnesty is not applicable to these cases, because the Law of National Reconciliation**, a product of the Peace Accords, in Article 8, clarifies that amnesty cannot be applied to crimes of genocide, torture and forced disappearance.

The accused have put forth nonsensical appeals in order to delay the beginning and development of the trial. Since the capture of General López Fuentes, to date, the military defense has filed **over 100 challenges**, including objections, injunctions, appeals among others, that momentarily stopped the advance of the process. However, of these, **98 were thrown out by the appropriate bodies**.

18 Separate Opinion vote Main Judge of the Guatemalan Constitutional Court.

Gloria Porras Escobar. p. 2067, dossier 1904–2013.

19 *Idem*.

For example, the defense put forth a challenge of the accused against Judge Carol Patricia Flores, to stop her from hearing the case, tried to remove a Guarantee Judge from the process. Faced with this, CALDH presented an appeal against the decision of the First Court of Appeals, and thereafter, the case was transferred to High-Risk “B” Judge, Miguel Ángel Gálvez.

The day the trial started, the defense lawyers for Ríos Montt did not appear at the hearing, despite having been seen in the Supreme Court building. The general brought another attorney as his defender, who filed nine motions that morning to try to ensure that the Court did not hear evidence. Once each motion was declared without legal grounds, the attorney challenged the Court, which decided to remove him from the court and appoint attorney César Calderón as a temporary attorney for Ríos Montt.

The defense was a **political and media-based strategy** and not a legal strategy to inspire pity and portray the accused as “General Helplessness.” This strategy was clearly expressed by attorney Danilo Rodríguez that day on a TV show: “The strategy was to replace four lawyers and hire an enemy of the Presiding Judge and friend of the Court Judge in order to force them to refuse from hearing the case.”²⁰ The strategy also made it possible subsequently to challenge all proceedings in the trial.

What the defense did not consider was that the Court is vested with authority to protect the rights of the defense; ensure the speediness of the trial; and prevent the obstruction of debate and delaying of the process.

Another illegal action during the trial was a decision from Judge Carol Patricia Flores, who tried to return the case to previous phases without grounds and violating procedure. Not only did this fail to respect the rights and guarantees of people who sought protection, but it also **constituted a new and profound offense** and humiliation against the victims and plaintiffs.

20 Television program “A las 8:45”, Antigua Guatemalan channel. March 19, 2013.

The strategy of the defense of the accused

During the trial against José Efraín Ríos Montt and José Mauricio Rodríguez Sánchez, the defense implemented a strategy which was more political than legal.

As mentioned above, the defense's legal strategy was to present a large number of frivolous and irrelevant legal objections with the aim of hindering and, indeed, stopping the judicial development of the legal proceedings. This strategy was implemented throughout the trial including up to the very last moment.

The political and communications defense strategy basically consisted of five points, which are detailed below:

- 1. Discredit the prosecution, which brought the charges of genocide, through a smear campaign against the Attorney General and Head of the Office of the Public Prosecutors.** A PR campaign was launched to accuse the Attorney General of belonging to leftist groups (and characterize the trial as political revenge); and to accuse them of not being impartial in their research. In addition, even family members were demonized in leaflets that were circulated.
- 2. Revive the concept of an Internal Enemy and generate a psychological war against human rights defenders, demonizing their actions and accusing them of being terrorists and threatening their organizations.** A PR and political campaign was launched to criminalize human rights defenders, particularly those who defend the right to truth, even using epitaphs in newspaper articles such as: "Marxists, terrorist conspirators, manipulators, missionary priests or religious Marxists, judicial assassins, foreign ideologues, infiltrators, white-collar terrorists, hawkers of human rights, etc." It is noteworthy that such demonization continues to the present.
- 3. Use Amnesty as a way to stop the spread of justice.** The idea that justice is not an indispensable requirement for the construction of a democratic State is promoted in social media. It was even stated that peace and justice are mutually exclusive.

4. **Use allegations and political lynching, and lack of due process to challenge the conviction.** In the communications strategy, they tried to create the image that General Efraín Ríos Montt was legally defenseless against a justice system that was going to lynch him.
5. **Build support from various power groups around the idea that there was no genocide in Guatemala and, therefore, Efraín Ríos Montt could not be convicted of that offense and, thus, impose the official interpretation of history.** Conservative groups of Guatemalan society argue the non-existence of the crime of genocide, which was expressed in various advertisements. Days before the start of the oral and public debate, the president of the republic was even questioned in the forum of the Association of Managers of Guatemala, about whether there was genocide in Guatemala. The President replied “no,” clarifying that his statement was made in his capacity as president of the nation.

The significance of the genocide trial in Guatemala

For the first time in Latin America, a national court managed to convict a former *de-facto* President of genocide. The existence of the five counts that constitute the crime of Genocide, and intentionality were proven with an overwhelming amount of evidence. Even a military expert, presented by the defendant, confirmed the thesis of the Office of the Public Prosecutors that José Efraín Ríos Montt was the one who gave the orders, had knowledge of everything, and received constant reports on military operations.

The trial showed that when you have public officials acting independently and objectively, the rule of law can be advanced and strengthened. The Public Prosecutor, the Judge of the Trial Court and the Court all demonstrated capacity to fulfill and perform their duties with ethics and professionalism.

The Judgment of the Court and its 718 pages reaffirm what was said by witnesses, by organizations and by the people. In Guatemala, genocide was committed. The sentence recognizes Indigenous

Peoples, their culture and their collective rights, identifies racism as a serious disease that affects our society, and hails justice as a right that it is guaranteed so that these crimes will never again be committed.

The Maya Ixil People, noncombatant civilians, spoke in their language of the horrors that they suffered during the Internal Armed Conflict. These accounts were heard by a trial court and the Palace of Justice.

For the first time, and after 30 years, women who were victims of sexual violence gave their testimony before a court, breaking a historic silence imposed by a patriarchal, racist and exclusionary State.

There was a debate on Truth, Memory and Justice. The ruling is a triumph for and affirmation of the diverse social and resistance movements composed of women, youth, social leaders, Indigenous Peoples, ancestral authorities, intellectuals, newspaper columnists and defenders of human rights and justice.

A large number of international organizations and friendly countries accompanied the entire process, showing that genocide has international significance and affects humanity.

This landmark trial revealed the structural and internalized racism in our society and its institutions. Not only were the impunity networks embedded in the justice system exposed, but so was the elite's brand of "democracy."

We emphasize that if the roots of racism are not addressed and resolved, democratic governance in general will remain fragile and the rule of law will continue to be threatened and only partially implemented.

Retrieving the Memory and Truth of the Peoples

"These processes of justice are crucial for the realization of the rights of victims, including the right to truth, justice, reconstruction of historical memory, reparations and guarantees of non-repetition; however, none of these elements may be conceived as an alternative to justice. This is a historic trial because it is the first time that a former head of State is prosecuted for the crime of genocide in a national court by national authorities and in the country where the violations

occurred. It also represents a step forward in the long process of transitional justice in Guatemala, after years of stagnation of the judicial process; and is a key step in the consolidation of the rule of law both in terms of the status of rights and the peace process,” noted Pablo de Greiff, the UN Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-repetition.²¹

“I would like to pay tribute to the courage of the survivors and witnesses who have made statements in this trial as well as the incredible work to collect and analyze the information that forms the basis for the charges...I would also like to acknowledge the important work of the Office of Public Prosecutors and the members of the judiciary who have sought to end impunity in Guatemala for crimes committed during the internal armed conflict,” stated Mr. Adama Dieng, Special Adviser on the Prevention of Genocide, before the suspension of the legal process against the former head of State and the former head of the intelligence services of Guatemala.²²

During all these years, organizations, groups and survivors, together have strived and continue to strive to recover historical memory; to raise social consciousness about the need to prosecute the grave violations of human rights in the past; as well as to reflect on the reality today and its relationship with the past. Guatemalans have been breaking down the walls of fear; overcoming the fear of speaking about what they have lived, and finding the courage to tell the truth... every day more women, more men, more youth become actors in the pursuit of justice.

In this way, we have been learning, building, coming together, to create other social and political ways of being, reaffirming that to look ahead, it is necessary to look back. Therefore, talking about genocide means looking at our present, because we are still living the consequences of the genocide’s impunity. We understand justice for the victims of the genocide and for all of us not only in terms of the incarceration of the material and intellectual authors, or the scientific

21 “Without Justice There Cannot be Just and Lasting Reconciliation,” United Nations Experts. Geneva: April 18, 2013.

22 Statement by Mr. Adama Dieng, United Nations Special Advisor on the Prevention of Genocide, about the judicial process against former *de facto* Head of State and former Chief of Intelligence Services of Guatemala. New York, April 23, 2013.

and legal proof of the facts. Justice for the victims of the genocide and for all of us goes beyond that, it necessarily includes the social and political recognition of what occurred, involves the redefinition of history and memory, represents the “Unofficial Truth,” and represents the dashed hopes and dreams of those who were massacred. It represents the hopes and dreams of those who live each day in pain from the brutality, and it means living in a democratic State ruled by law.

This is only possible when a wounded society continues to be indignant over yesterday’s violence and the violence of today. This may only be possible through the resistance, that resistance to forgetfulness, to a repressive State, to a society with amnesia, permeated by globalization and individualism. It can be realized only when the structural racism against the Mayan People is dismantled. And despite what happened with the conviction, the Mayan People continue raising their voices, using their hands to keep weaving with threads of memory and truth, the multicolored canvases of our Latin America. As expressed by the poet Kakchiquel Humberto Akabal in his poetry: “Now and then, I walk backwards. It is my way of remembering. If I only walked forward, I could tell you about forgetting.”

THE INTERNATIONAL CRIMINAL COURT AND INDIGENOUS PEOPLES: OPPORTUNITIES AND LIMITATIONS

John Washburn

The International Criminal Court (ICC) is a permanent international criminal court that tries individuals for the most serious acts, namely genocide, crimes against humanity, and war crimes. It tries only individual persons, not governments or corporations. These persons are those with the ultimate responsibility for such atrocious crimes: they have made the decision to have the crimes committed and given the orders for them to be executed.

Thus, although the Court cannot try a company, it can try its officials who decided to commit crimes which would serve the company's interests.

The creators of the Court very much had crimes against Indigenous Peoples in mind, when drafting the Court's Rome Statute. Crimes against Indigenous Peoples were frequently mentioned in the negotiations that took place. Two aspects of the Statute and the Court are especially important for Indigenous Peoples.

First, no formal complaint or procedure is necessary to bring a crime to the attention of the Court. This can be done by any person or organization in a simple letter or statement directed to the Prosecutor of the Court. It should be clearly written, provide evidence or state precisely where evidence can be found and mention that the crime was committed on the territory of a country that has ratified the Rome Statute or by one of its citizens. Many countries where Indigenous Peoples live, especially in Latin America, belong to the Court's jurisdiction. A lawyer is not needed for such a statement or letter to be submitted to the Court. If possible, it should be in English or French, the two working languages of the Court, but it may also be in Russian, Chinese or Arabic. Since many Spanish-speaking people work at the Court, Spanish may also be used if absolutely necessary. Instructions

may be found on the Court's website at the page for the Office of the Prosecutor: www.icc-cpi.int.¹

Also, the Statute requires the Court to give special attention to crimes against women and children and to take particular care and have special facilities to help and support them and other victims and witnesses to participate in its work. Indigenous women should therefore feel confident that if they work with or come to the ICC, they will be treated with understanding and respect.

Of the three categories of crimes currently in the Court's jurisdiction, genocide and crimes against humanity will best cover atrocities against Indigenous Peoples. History and current events both lead informed world public opinion to think of such atrocities as genocide. Charges of genocide are thus most likely to draw global attention and understanding. However, genocide is very often quite hard to establish and prove because it requires that the perpetrator specifically intended to "destroy in whole or in part, a national, ethnical, racial or religious group, as such..." Besides physical destruction, the intended act of genocide includes measures to make the group die out or to destroy it by causing mental harm. The Statute's definition of genocide does not include attacks on the cultural identity of a group.

Fortunately, the Statute's provisions on crimes against humanity fill many of the gaps left by its definition of genocide. These include murder, extermination, enslavement, torture, sexual violence and persecution against any identifiable group on racial, national, ethnic, cultural, religious or gender grounds. These atrocities are exactly those committed against Indigenous Peoples in the past and now. The Statute does not require any particular reason for committing these crimes against humanity.

An important limitation on the usefulness of the ICC for Indigenous Peoples is that, as already noted, it can try only the most serious crimes and the most senior leaders. This high bar is known at the Court as the "gravity threshold." The drive to create the Court came from a powerful international reaction to the continuing impunity of

1 The website also includes information about victims' participation in the Court's proceedings as well as witness protection, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/victims%20and%20witnesses.aspx

government and organizational leaders in committing vile crimes, combined with awareness that the temporary tribunals for Yugoslavia and Rwanda had shown that these leaders could effectively be tried by international tribunals. With the right evidence, a policy of deliberate indifference to atrocities, as well as direct orders to commit them, can support ICC charges against a leader.

Although the number of persons affected is often a factor in determining the seriousness of a crime, it need not always be. An act of genocide which with intent destroys all members of a small tribe or group could well be an ICC crime. The same could be true for the crime against humanity of persecution.

Within its limitations, the ICC can provide important opportunities to indigenous women to act against atrocities and at least to draw world attention to them. The Office of the Prosecutor will be receptive to communications from indigenous women since the Statute commands it to give special attention to the concerns of women, because it has a good system for vetting and responding to complaints coming to it, and because it is intent on expanding the nature and locations of the crimes it pursues.

If there is doubt about whether a crime is eligible for the Court, describe it in a letter to the Office of the Prosecutor and let it decide.

INVISIBLE LAW, VISIBLE

Kai Landow

I am invisible, understand, simply because people refuse to see me.

—Ralph Ellison, *The Invisible Man*

Are rights once established and exercised, then inalienable? Does belligerent force of foreign nations alone disenfranchise Original Peoples¹ of those rights? And can those rights be viewed differently because the people in question were classified extra-territorially as flora and fauna or Non-Christians? We have new understandings today, and yet, the foundation of western law in the lands claimed by “discovery” still asserts exclusive interest based on violent enforcement of a race-based European doctrine.

Perhaps we can take a new look at limits put upon Original Peoples by western law and how it was applied to Original Peoples in the past. We must take into account, how law was used in the age of “Discovery” to subdue the Original Peoples who inhabited the presumably “New World”. This article reviews the extra-territorial legal schematic meant to replace “savage” law by Anglo-Europeans and exercised as a Christian right to do so. I put forward that the absence of recognition of Original Nations’ own legal precedence at the point of first contact must be considered in contemporary judicial review processes; that there is a necessity to apply those practices in international law and on the

1 I have used the term “Original Peoples” instead of other common terms “Indigenous,” “Native” and “Aboriginal” Peoples because they have specific meanings in English that in practical terms limit rights. This initiative hopes to expand Original rights and to construe legal and political understandings to benefit so-called *Indigenous* Peoples. In an effort to be inclusive and not exclusive, or allow nations that practice empire to define Original People according to their own interests, I use Original to define those humans who continue to own the deciding interest in the lands in their home countries.

ground from where those rights spring. I argue for a new approach for accessing those inherent rights of Original nations by strengthening their own institutions and suggest an international basis to create legitimate standing for their own court of remedy.

Come on a journey with me; put aside prejudices that *Original Peoples* have had to contend with from other cultures, and strip away the layers of descriptions projected upon Original Peoples, and especially those self-descriptions misapplied to their own identities, communities and fundamental understandings of their arrival in this “distant land of laws,” known by its foreign control. Ask yourselves about the “Fundamental” law that governs how we have all come to understand our “rights.” What governs the responsibilities we have to each other, our environment and our inherent right to continue our traditions that has preserved peoples for thousands of years? This is not a debate between imperialism and its colonial practices; rather it is a debate between *free minds* and *colonized minds*. Original Peoples have lived under the assumption that their prison door is forever locked, I challenge that status by declaring that Original Peoples have the key to open the prison door which separates them from their traditional laws, rights, and freedom.

Where do Original Peoples go to fix what is wrong with their communities? Why do they found themselves alienated from their own lands and environment? To whom do they turn? The courts, laid out for Original Peoples and explained to them as “impartial,” have been anything but balance in their rulings. Why did Original Peoples find themselves mischaracterized as “backwards”?² Who constructed these courts and on what basis have they been empaneled? Original Peoples are invisible people in these courts, not because their rights do not qualify, but because the courts refuse to see them. There is no substantive difference between the Original institutions of civil society that

2 “...for example, the characterization of non-European societies as backward and primitive legitimized European conquest of these societies and justified the measures colonial powers used to control and transform them.” Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 2004

functioned in the Pacific, the “New World” before European contact, and the new courts of imperialism which were installed by force. The inability or unwillingness of western people to credit “savages” with functioning civil governments does not remove their existence. The difference between Anglo European legal systems and that of Original Peoples may not be so exotic. Precedence created by Papal Bulls and doctrines favoring one kind of title over another, or one kind of right over another, has been largely based on European creations of race.

If we look at the question of Original Peoples’ land tenure, does the Original land title look so different from western instruments, or does the *human* possessing the title appear somehow strange to the viewer? I posit it is the human that is *strange* to western claimants who wished to dispose of or claim property free of costs from the actual owners. For example, Hawai’i’s title history, which predates its occupation, reveals a notable difference in its formation and standing. Hawaiian title was formed under an Allodial³ mandate specifically intended to protect against seizure of its title grants by one of the many military powers coveting the Hawaiian Islands. Hawaiians held a convention to quiet land title⁴ in 1848, known as the Great Mahele⁵. The Mahele should have adequately preserved title interest in courts of nations

3 "All lands within the state are declared to be allodial, and feudal tenures are prohibited. On this point counsel contended, first, that one of the principal elements of feudal tenures was, that the feudatory could not independently alien or dispose of his fee; and secondly, that the term allodial describes free and absolute ownership, ... independent ownership, in like manner as personal property is held; the entire right and dominion; that it applies to lands held of no superior to whom the owner owes homage or fealty or military service, and describes an estate subservient to the purposes of commerce, and alienable at the will of the owner; the most ample and perfect interest which can be owned in land." *Barker v Dayton 28 Wisconsin 367 (1871)*.

4 Quiet Title Action -A proceeding to establish an individual's right to ownership of real property against one or more adverse claimants.

5 The Great Mahele was several conventions that assigned land title or Royal Patent grants. The land was secured in Allodium or inalienable title. All title was subject to a tenant farmer right derived from traditional understandings and explained with mosaic law. Known in Hawaiian as *Ua koe ke kuleana o na kanaka*, That right was the paramount law of Hawaiian land tenure and afforded any Hawaiian subject the right to cultivate any lands left fallow. As long as the “kuleana” or right was being used, no one, not even the King could remove the Kanaka [person].

with whom the Hawaiian Kingdom had Treaties⁶ and which accepted Hawaiian Royal Patent Land Grants.

As demonstrated in the defendant's filing⁷ in *Damon v. Hawaii 1904*, the Royal Patent Grants of the Hawaiians were: “*something anomalous or monstrous.*” This is the concept that was applied to Original title and we could assert is now translated into the term “Native title”. This new version of a *defective* title has been very successful in continuing the alienation of Original Peoples' lands. Yet, the language that is applied by imperialism, as in “Native title”, does not have to be accepted by Original Peoples.

In a number of early Hawaiian occupation cases, the adoption of Hawaiian Kingdom statutes by the territory of Hawaii were challenged. For example in *Damon v. Hawaii*, 194 U.S. 154 (1904) the Supreme Court of the United States found, that the Great Mahele of 1848, where the Hawaiian government quieted land titles and established vested rights such as basic title, fishing, common access, was upheld. In that case, title established by the Hawaiian Kingdom was not effectively dissolved by occupation. The plaintiff's claim was to the fishing rights to the reef attached to his land grant and contained within his deed. American Supreme Court Justice Oliver Wendell Holmes, who delivered the opinion of the Court, wrote,

“A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested

6 In addition to establishing formal diplomatic relations with other States, the Hawaiian Kingdom entered into an extensive range of Treaty relations with those States. Treaties were concluded with the United States (Dec. 23rd, 1826, Dec. 20th, 1849, May 4th, 1870, Jan. 30th, 1875, Sept. 11th, 1883, and Dec. 6th, 1884), Britain (Nov. 16th, 1836 and July 10th, 1851), the Free Cities of Bremen (Aug. 7th, 1851) and Hamburg (Jan. 8th, 1848), France (July 17th, 1839), Austria-Hungary (June 18th, 1875), Belgium (Oct. 4th, 1862), Denmark (Oct. 19th, 1846), Germany (March 25th, 1879), France (Oct. 29th, 1857), Japan (Aug. 19th, 1871), Portugal (May 5th, 1882), Italy (July 22nd, 1863), the Netherlands (Oct. 16th, 1862), Russia (June 19th, 1869), Samoa (March 20th, 1887), Switzerland (July 20th, 1864), Spain (Oct. 29th, 1863), and Sweden and Norway (July 1st, 1852). Furthermore, the Hawaiian Kingdom became a full member of the Universal Postal Union on January 1st, 1882.

7 *Damon v. Hawai'i*, 194 U.S. 154 (1904) The defendant was represented by Attorney General of the territory of Hawai'i.

right...The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right."

This right, this Hawaiian right, stands up and is no different in substance to any other Original title source coming from the beginning of time. Paper becomes just an obstacle to illegal seizures of land in this era of "Discovery".

It is hard to find a comparable case to the American usurpation of Hawaiian vested interests, but looking into the history of the United States, we see examples that can speak to the prior rights issues. We see the U.S. legal precedence that French and Spanish law governed land grants in Louisiana after the 1803 purchase by America. Yet, all efforts of the new Louisiana legislature to repeal the "ancient" laws have failed, even to this day. How then do we assess the presence of the ancient laws of the Original Peoples that were also in practice in Louisiana?⁸ Were these ancient laws successfully repealed?

When we look at the fundamental laws that created the U.S. courts, do we see an impartial view of the Original Peoples of North America? No. What we find is the American acceptance of rulings based on racism, theories of superiority or manifest destiny. In fact, in the recent *United States v. Jicarilla Apache Nation* 88 Fed. Cl. 1,4 (2009), the decision is firmly built upon doctrines of Discovery to aid American imperialism. This case decided that all Tribal nations' rights were subject to the plenary powers of Congress and non-reviewable by the Supreme Court.

The decision in *Jicarilla* is actually liberating for Original People because now the people can begin to assemble, create new precedence in law through our jurisdictions. This ruling may be construed to mean that Original Peoples of North America have exhausted all remedy

8 The Chitimacha law was the law of the land before European arrival and is still active today. The renaming of Chitimacha country to Louisiana was an attempt to abolish law to establish colonial control.

within United States. What I mean by “exhausted all remedy” is that the U.S. Supreme court made clear that in the case of “Indian Law,” those who have placed themselves under that federal jurisdiction are subject to the whim of the ever changing U.S. Congress. Yet, the American Congress, by its history, can only be described as acting out a policy of genocide toward their *Indian wards*. Many Original People reject this control. The late Russell Means, when taking a position on the breach of the Lakota/U.S. Treaty, literally tore up the treaty and declared that the Lakota People returned to full sovereignty of their nation.

In an effort to further mislead Original People, they are often persuaded that “special” descriptions would be more advantageous and powerful to them for maintaining their identity and compensating them for their injuries; that this separation would lead to swift and more effective change in their status. Original People do not realize that these “special descriptions,” such as “indigenous” or “Indians” may prevent them from possessing and activating their rights by asserting “ancient laws,” which were/are well known to the world.

Original nations know their people and their borders. There is no legal basis for extra-territorial jurisdiction. Kal Raustiala *Professor, UCLA School of Law and UCLA International Institute writes, in the Geography of Justice*, “Why is geographic location thought to be determinative of the constitutional rights of aliens abroad? The supposition that law and legal remedies are connected to, or limited by, territorial location—a concept I term “legal spatiality”—is commonplace and intuitive.”⁹ Professor Raustiala continues, “that the soil itself is critical to determining what constitutional rights a person holds”. I interpret this also to infer what Constitution governs those rights of humans living in a certain place.

Who makes the determination of spatial sovereignty? Original Peoples can themselves exercise the universal understanding of the limits of legal reach of others imposing foreign laws upon them. In the case of Hawai’i, its Constitution was well known to America prior to and at the time of occupation. After occupation, the Americans adopted the Fundamental Laws of the Hawaiian Kingdom as the legal basis

9 “The Geography of Justice,” Kal Raustiala, University of California, Los Angeles (UCLA)—School of Law, *Fordham Law Review*, 2005, page no. 4

for their provisional government and “state.” Yet, Hawaiians cannot easily recognize or access the very rights they have always held.

In the wider Pacific, various imperialistic constructions of rights were imposed and applied to Pacific Peoples, all of which contain limitations. In Aotearoa, the interpretation of the Treaty of Waitangi is enforced and implemented by non-Maori people. Although this Treaty “appears” to be more favorable to Maori rights than the legal situation in Australia with Aboriginal peoples, land grabs continue in a never ending attempt to squash real sovereignty. In the case of sovereign Nauru, its history contains an almost total destruction of its *Pleasant Island* by its literal removal as a result of phosphate mining begun during German possession and continued under Australian trusteeship¹⁰. The continued degrading treatment of the Nauruan People is still controlled by Australia and her hold on the islands’ economics.

Our Sovereignty

“Referendum?! Constitution?! That mob that handed the paper to the government do not represent me, my family or my community. I am an Aboriginal man of five nations and I have never ceded any degree of my national sovereignty to the British crown. My lands were invaded and then occupied by force of arms. The British have carried out a horrific war of genocide against our peoples since 1788. I will never surrender to the enemy and I will continue to fight for justice until the day I die. Onetime !!”¹¹

What is the articulation of sovereignty? Western thinkers appear to believe that the definition of sovereignty is still up for debate, which may create a vacuum we can fill with a straight forward approach. The idea of sovereignty is that of rights given by the creator and the creator placed certain peoples in certain lands we can know as the “owners.” These are the Original People of those lands who hold the

10 The trusteeship of Nauru was mandated by the United Nations in 1947 to the original trust administrators of England, New Zealand and Australia. New Zealand and England have long since accepted the Australians as taking sole responsibility for the rehabilitation of the island.

11 Sam Watson, Aboriginal community worker & activist, FaceBook January 15, 2012

Allodium Absolute or inalienable rights to care for the land. History shows that belligerent military invasion does not erase sovereignty, and the countries subscribing to the “Law of Nations” doctrine have limited their ability to make legal claims of colonization.¹² As such, sovereignty can be an effective tool that articulates a level playing field when determining who owns what right.

“Furthermore, if sovereignty is so intimately connected with the problem of cultural difference, and if it is explicitly shaped in such a manner as to empower certain cultures while suppressing others, vital questions must arise as to whether and how sovereignty may be utilized by these suppressed cultures for their own purposes.”¹³

The misapplication of identity and rights:

How do we define “allegiance,” “protection” and “reciprocity” as it applies to Original Peoples? Taken from common law, these concepts easily fit Original Peoples’ understanding of their own identity and rights. The defining and use of allegiance, protection and reciprocity existed in the nearly three hundred year relationship with settlers from Europe in North America. However, in 1823, this completely changed with a ruling in one case that has singularly effected legal jurisprudence in common law, as applied to land title of Original People...*Johnson v. McIntosh*¹⁴.

Decided in 1823, the implications of the ruling in *Johnson v. McIntosh* reach far beyond American shores and are cited to legitimize imperialism by all common law colonial powers. The decision, however, was rendered without due process or notice to the essential

12 Emer de Vattel (25 April 1714 – 28 December 1767) Law of Nations, 1758.”The Law of Nations is the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights.”

13 Antony Anghie, Laws of the Postcolonial-edited by Eve Darian-Smith, Peter Fitzpatrick, University of Michigan Press 1999, p. 104

14 *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) From Chief Justice Marshall's opinion "that discovery gave title to the government by whose subjects it was made, against all other European governments [which] necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives."

party, the original land owners themselves, who, as a result, were not represented in the case. The dispute was between two land claimants who claimed to have acquired title from individual Indian¹⁵ sellers prior to the American Revolution. Each claimant sought U.S. recognition of their title purchased from the Piankeshaw¹⁶ tribe under the British domain in 1773 and 1775. The U.S. Supreme Court, led by Chief Justice Marshall found that Indian land title is subject to the Doctrine of Discovery and therefore, alienable by acts of U.S. legislation. Yet, the Court further ruled that individual Indians did not hold land title, but rather only tribes, as an “entity,” could hold title. The court ruled that possession of land was with limited sovereignty, only.

One question not often articulated is, “Who is the Supreme Court of the United States in *Johnson v. McIntosh*?” In the absence of the original land owners’ participation in this case, we can only conclude that the Supreme Court, in a practical sense, represents McIntosh and then rules in the state’s interest. The ruling effectively opened up huge tracks of land for uncompensated alienation. The seizure of Indian land rested on the ability of the United States to be the sole interpreter of law. The disenfranchisement of the Indians’ vested rights did not affect colonial titles; in effect, the Supreme Court ruled that rights could be recognized as per race. This was a clear violation of U.S. Fourteenth amendment of equal protection under the law of 1863, which should have annulled the 1823 *Johnson v. McIntosh* ruling, but did not.

The United States’ intentional separation of peoples’ legal status, when under a claim of U.S. jurisdiction, resulted in an unequal application of rights so as to complete the U.S. policy of land seizure by discovery. Today, “special” descriptions are the modern day enforcement and continuation of the *Johnson v. McIntosh* ruling.

15 The use of the word “Indian” reflects colonial context. Original Peoples’ self-description is by traditional application and by many other real names. Thus, when referenced as *Indians* it is to be taken as “so-called.”

16 The Piankeshaw (or Piankashaw) *Indians* were Original Peoples, and members of the Miami tribe who lived apart from the rest of the Miami nation. They lived in an area that now includes western Indiana and Ohio.

According to the late Edward Wadie Saïd,¹⁷ a Palestinian Arab born in the city of Jerusalem, a professor of English and Comparative Literature at Columbia University and advocate for the political and the human rights of the Palestinian people,

“All knowledge that is about human society, and not about the natural world, is historical knowledge, and therefore rests upon judgment and interpretation. This is not to say that facts or data are nonexistent, but that facts get their importance from what is made of them in interpretation... for interpretations depend very much on who the interpreter is, who he or she is addressing, what his or her purpose is, at what historical moment the interpretation takes place.”

“...The dense fabric of secular life is what can't be herded under the rubric of national identity or can't be made entirely to respond to this phony idea of a paranoid frontier separating “us” from “them.”¹⁸

Johnson V Mc'Intosh appears to be the first example of an extra-territorial decision of an American court that confirms the policy of genocide still practiced today by the American government. The meaning and intent of the court decision are clear, as history attests, as the decision reduced human rights and became a judicial tool of piracy. The Americans violated their own tenants of law, because they held the superior military power and felt no need to honor treaties with “savages nations”.

I suggest that the single purpose that the United States has continued to pursue in terms of Tribal Nation policies is to effectively subdue legal challenges by Indian nations aimed at exercising their sovereign rights. This ability to interpret statutes to the advantage of the United

17 Edward Wadie Saïd Arabic: إدوارد وديع سعيد; (1 November 1935–25 September 2003) was a Palestinian-American, literary theorist and advocate for Palestinian rights. He was University Professor of English and Comparative Literature at Columbia University and a founding figure in post-colonialism.

18 *The Pre-occupation of Postcolonial Studies- Covering Islam*, (pp. 154–155) edited by Fawzia Afzal-Khan, Kalpana Seshadri-Crooks, Duke University Press, 2000

States has worked so well for America because the sovereign Indian nations have accepted the very tools of their dismantling by submitting to U.S. jurisdiction. Instead of the rights of sovereigns or even the American constitutional rights of citizens, Indian citizens enjoy neither to a full extent.

Johnson v. McIntosh was decided in the common law arena and seized upon by members of the club of colonial countries as a way to create limitations on the land rights of indigenous nations of which these countries intended to take possession. But, in the case of *Dred Scott v. Sandford*, 60 U.S. 393 (1857), it was determined that African Americans “were not protected by the Constitution and could never be U.S. Citizens,” which confirmed and *continued the policies of imperialism*. This decision had devastating consequences for its victims and yet, found a basis in American law for decades. Today, African Americans would no more subject themselves to the *Dred Scott* decision, than to a separate but equal assertion.

So why then do Original Peoples apply *Johnson V Mc’Intosh* to themselves today? In other words, when accepting the American description as in, Indigenous or Native, terms which are federally defined to limit claims to lands, sovereignty and self-determination, you accept a less than human status. Yet, these terms and descriptions are actively marketed to Original People as a method by which they may “legally” access and exercise their language, culture and rights.

The *Johnson* discovery rule has not only diminished native rights in the United States, but has also influenced the definition of indigenous land rights in Australia, Canada, and New Zealand. In 1836, British lawyer William Burge cited *Johnson v. McIntosh* in support of his conclusion that a private purchase of some 600,000 acres from the Australian Aborigines was invalid as it was against the Crown. British land speculators, settlers, and government officials quoted American jurists in disputes concerning the annexation of New Zealand in the 1840s, and Johnson figured prominently in the colony’s first judicial decision regarding Maori property rights. Likewise, when the

existence and scope of aboriginal title was finally litigated in Canada in the 1880s, the *Johnson* decision played a major role in its ruling.¹⁹

Professor Watson points out how seamlessly the courts in New Zealand, Australia and Canada latched on to *Johnson v. McIntosh* as a basis for state land policy. It becomes a very convenient legal excuse to remove Treaty obligations, as the United States has claimed to have successfully done. The seediness of this process of outrageous greed cannot dictate any human being's acceptance of its artifice. Implying that Original Peoples all over the world must continue to be subjected to such legal absurdities, is beyond contempt. Original Peoples have the fundamental right to reject slavery in any form and the persons described in the case were not the original owners of the land.

So, one must ask, when considering a self-description, or description to the original society: "Exactly what rights are being accessed when Original Peoples describe themselves as Indian, Indigenous or Native?" An "*Indigenous*," "*Native*," or "*Indian*" self-description is designed to appeal to one's pride in one's heritage, but it is dangerous when applied to a legal process because these labels affect rights which are limited to the American interpretation as opposed to sovereign rights that come with independence. The reason the U.S. encourages Original Peoples to adopt these "titles" is tied to whatever American "entitlements" or "rights" a person can access in a claim as a ward of the State. The western use of chauvinism and ethnic pride is designed and utilized to confuse people, to steal one's very language and allows them to be corralled into a misapplication of identity. The power is not in "special" rights or classifications defined by the U.S., but in the "same" rights, the rights that imperialists keep for themselves. The distraction of "us" and "them" prevents Original People from taking a seat at the same table as equals with the rest of the world. It dehumanizes the Original population.

"For the Hawaiian sovereignty movement, therefore, acceding to their identification as an indigenous people would be

¹⁹ Blake A. Watson, *The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand* . April 1, 2011 *Seattle University Law Review*, Vol. 34, No. 2, p. 507, 2011

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to implicitly accede not only to the reality, but also to the legitimacy, of occupation and political marginalization.”²⁰

Dehumanization and Violence

Dehumanization and violence are the two factors that dominate the experience of many Original nations today, which no amount of analysis of western jurisprudence will fix. The action of Original Peoples taking control of their lives, including the creation of their own judiciary, will make a difference for Original People today.

Do guns take precedence over clearly defined rights? The truth is that occupiers have no legal basis to impose a foreign constitution within the borders of an established nation. However, this does not prevent the enslavement of native populations within the occupied territories. Currently, the demand for and exercise of original rights is often met with violence and imprisonment.

A simple remedy would be the removal of all legal applications that view Original Peoples as less than human and the end to applications based on doctrines, such as the doctrine of discovery. It is the western colonial assertion of dehumanization, combined with the willingness to employ violence that aids the continuation of western title in the world today. Today, the relations between Original Peoples and the militarized powers are undermined by threat and use of violence against the Original People. Violent threats should be exposed in Original communities and brought to the fore by organizations such as the United Nations with an insistence that they be rejected. Insisting on the unconditional removal of threats of violence by the military presence in the world, must be a mandate of the international community and may be the only way to begin positive change to the Original Peoples’ nations. International Law, including universal human rights norms, demands changes to policies of dehumanization and requires an immediate repudiation of any doctrine of violence and threat of violence, including unlawful imprisonment, by the global community.

20 “Hawai’I, History and International Law,” *Mathew Craven*, *Hawaiian Journal of Law and Politics*, page 2, Vol.1 (Summer 2004).

Jus Heredes

The Aboriginal tent embassy in Canberra, Australia, founded in the early 1970's, proposed that permission was not needed to assert Original Peoples' rights. In Hawaii, the constitutional monarchy was established at the beginning of her relationship with Europeans and functioned successfully for many years. Hawaiians (Kanaka Maoli) are waking up to the ability to return to their own self-governance by using their original constitutionally established institutions. Why hasn't this been restored yet? The Hawaiian model is unique and can, in theory, pave the way for many other Original sovereigns to breathe the fresh air of equality and sovereign rights again. I encourage the planting of the Original flag back in their own lands and insisting on the rights that were (and are) well known for their quality of justice.

It seems appropriate to offer a Latin phrase to propose a new doctrine rooted in geography and traditions: *Jus Heredes* or Law of the Heirs. For so long we have struggled with ideas of race, blood quantum and ethnic identities, which creates confusion. The main purpose of such ideas is to lead Original peoples away from the source of their rights by persuading an entire original people to accept descriptions and mis-characterizations to legitimize the policies of Manifest Destiny and its accompanying imperialism.

My Winnemem Wintu [Middle River Tribe] friend told me he was part "white," but he could not prove it. That was, of course, a joke, but inside a real sorrow. The only reason to attach rights to race is to remove all claims sooner or later. The only choice for Original People is to fully reject race- based laws. Such laws create havoc in communities around the world and have no connection on the whole with traditions of Original People. Original People simply have the right to ownership, not unlike the first world, in terms of heirs and successors.

Jus Heredes can create legal equality today. The doctrine requires the legal examination of "title", so that we ascertain the "break in title" in order to access a just remedy. Contrary to *Johnson v. McIntosh*, the court would have to artfully recognize the origin of peoples' rights, not by foreign claimants, but by the owners themselves. *Jus Heredes*

solidifies the absurdity that lands rights in Aotearoa originated in Britain, or land rights in Hawai'i originated in the United States. Without *Jus Heredes*, a tremendous injustice is done to Original People who, themselves may be misled into believing that officers of State courts are knowledgeable about Original rights, or that there is a legal mandate that Courts recognize these rights.

Jus Heredes also asserts that no person should be subject to doctrines that do not share rights equally among all peoples. Original Peoples have seen the concepts of western land ownership used against them. Europeans latched onto the idea "Indians" cannot own land, conveniently leaving the land "open for the taking." Often Original peoples find themselves confined by the past, reviewing first contact, arguing against horrible genocidal acts from Columbus in the Caribbean to the English massacres in Tasmania. Too often, Original People define themselves by the injuries suffered and not by the rights that sustain them—rights that have always been in the possession of Original People and which can be applied by them today.

Remedy After Realization

Original Peoples have gone to the foreign and imperial courts in their own lands in an attempt to preserve their rights and status. Original Peoples have not forgotten their traditional basis for adjudicating their own matters, and can easily assemble the necessary agreement on fundamental principles that will guide creation of their own court.

The Universal Declaration of Human Rights states that everyone has duties to the community in which alone the free and full development of his personality is possible (Article 29(a)). This backdrop provides a basis for an Original Court of Remedy, exactly the same as European-based courts. The Original Peoples' court would be a court that would address conflicts involving human rights violated by the government.

Such a court could be modeled after the International Court of Justice (ICJ) or the American Alien Tort Claims Court. It could review nation-to-nation disputes, violation of human rights and injuries created by cross-border complaints. The process would be

fluid and several types of courts might be formed: a human rights court, a court of claims, a court of criminal justice and an alien tort claims court. What would be actionable? Violations of sovereignty of nations, violation of human rights by any country against a person, violation of rights of countries, individuals or communities by corporations would come under their jurisdiction. Such a court could act as a higher court when basic rights have been violated and persons have exhausted remedies in their own country. The court would be established by the founding member nations in consultation with and full participation of their citizens. A convention of members to empanel the court and determine the elements of its charter would be a necessary step to begin. The constitution of the court would include the description of rights, guaranteeing non-discrimination among all human beings.

Although some countries may question the validity of such courts, or want to dismiss the process as ineffective, they would be wrong. Original Peoples' courts could easily equal the legitimacy of the ICJ and perhaps surpass its enforcement capacity. Member Nations could consider sanctions on defendants that do not comply with rulings. It could create a venue to address issues not settled, promoting peace out of chaos. It could fill a vacuum of law that cries out to be filled.

The court could promote a more sustainable environment for the benefit of the whole world. It could specify that all peoples have a legitimate legal interest in their lands, an interest preserved for the world's benefit, accessible to them in the condition charged to them by the Creator and inherited by their forefathers. What is law, if not an agreement on what is right? It is a way to preserve what is right and to preserve peace, including the peace of the land. Original Peoples would know what their position, identity, and responsibilities are, and what needs to be done to correct and preserve the future of their beloved countries.

Original Peoples possess their own sovereignty, they already have it. Original People need to utilize it regardless of the response from States. Original Peoples can mitigate negative reaction by being professional in their approach, but strong in their resolve: the more

they are opposed, the more steadfast they must become. After all, this is a matter of the very survival of Original People on this earth. Sovereignty cannot live inside a prison structure. It will only flourish with free people who exercise sovereign rights.

“Let the echo of our song be heard around the world.”²¹

21 The Echo of Our Song: Chants and Poems of the Hawaiians by Mary Kawena Pukui (Editor, Translator), Alfons L. Korn (Editor) University of Hawaii Press, 1979

INTRODUCING THE LIVING CONVENTION AND A LANDSCAPE APPROACH TO LEGAL EMPOWERMENT

Harry Jonas, Holly Jonas, Jael Eli Makagon¹

Introduction

Indigenous Peoples have fought hard for the rights they have secured at the international level.² Decades of commitment, tenacity, personal sacrifices, and well-executed negotiating strategies have led to important rights gains and legal recognition, perhaps most significantly in the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) in 2007.³ In addition to this landmark instrument, Indigenous Peoples have also obtained greater recognition at the international level, in particular with the establishment in 2000 of the United Nations Permanent Forum on Indigenous Issues.⁴

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2 For an overview of this process, *see* International Law Association, *The Hague Conference (2010), Rights of Indigenous Peoples, Interim Report*. (2010), pp. 1–6.

3 United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49. Article 40 of the UN Declaration states that “Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.”

4 United Nations Economic and Social Council, *Establishment of a Permanent Forum on Indigenous Issues*, ECOSOC E/RES/2000/22, (2000).

Local communities have also successfully advocated for the development of a significant body of rights relating to their role in protecting and conserving biological diversity.⁵ Of particular importance are the UN Convention on Biological Diversity (CBD), the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya Protocol),⁶ and decisions issued by the CBD Conference of the Parties (COP).⁷ Today, Indigenous Peoples' and local communities' rights are enshrined in a wide range of international instruments. This distinct body of rights continues to grow as new international instruments are negotiated and adopted, as progressive jurisprudence is developed through tribunals at all levels, and as countries enact laws that respect the rights of Indigenous Peoples and local communities.

However, despite the proliferation of provisions in international law that supports the rights of Indigenous Peoples and local communities, their ability to exercise these rights in many cases remains a distant goal. Although the reasons for this are complex, this paper focuses on two in particular. The first fundamental cause is the fact that international law is largely inaccessible to those in less developed countries.⁸ This factor amounts to at least a procedural injustice, denying Indigenous

5 "Local communities" as used in this article refers to "local communities embodying traditional lifestyles" as referenced in Article 8(j) of the *Convention on Biological Diversity*, 1760 UNTS 79. For more information on local communities, including identification of some of their common characteristics, see Report of the Expert Group Meeting of Local Community Representatives Within the Context of Article 8(j) and Related Provisions of the Convention on Biological Diversity, UNEP/CBD/WG8J/7/8/Add.1*, (2011).

6 The Secretariat of the Convention on Biological Diversity, *The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, (2011): Montreal.

7 These include, for example, the Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities, CBD COP Decision X/42, (2010), Annex, and the Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by Indigenous and local communities, CBD COP Decision VII/16 F, (2004), Annex.

8 See Jay Milbrandt & Mark Reinhardt, *Access Denied: Does Inaccessible Law Violate Human Rights?* (2012), 9 Regent J. Int'l L. pp. 55, 57–58

Peoples and local communities an understanding of their rights and responsibilities, as well as those of other actors, under international law.⁹ Second, the law fragments local landscapes, undermining more holistic approaches to social-ecological systems.¹⁰ For example, laws have a tendency to compartmentalise otherwise interdependent aspects of biological and cultural diversity. While communities manage integrated territories and areas, sometimes spanning entire landscapes and seascapes, States tend to see humans and nature in isolation from each other. States frequently view individual resources through a narrow lens, drawing legislative borders around land, natural resources, and traditional knowledge. This often leads to the exclusion of peoples and communities from areas in which they have lived for generations. It can also encourage policies and plans that privilege a singular view of the landscape's or seascape's value and purpose, for example, for 'agricultural use' or 'conservation purposes.'

Recognizing this, Natural Justice is actively rethinking international law and legal empowerment to better enable Indigenous Peoples and local communities to assert their international rights and local responsibilities. This article critiques the current approach to law making and implementation from a landscape perspective. Next it provides background on the integrated rights approach that greatly

9 “[N]umerous international bodies with responsibility for promoting and protecting human rights have authoritatively recognised the fundamental human right to access information held by public bodies, as well as the need for effective legislation to secure respect for that right in practice.” Toby Mendel, Freedom of Information: A Comparative Legal Survey. (New York: UNESCO, 2008), p. 7.

However, “[i]n many cases, those who have the greatest need for knowledge of their human rights—those living in the developing world—have no way to access them.” Millbrandt & Reinhardt, *supra* note 8, at p. 60.

10 Scholars have used the theory of social-ecological systems to emphasise the integrated concept of humans in nature and to stress that the delineation between social systems and ecological systems is artificial and arbitrary. See Fikret Berkes, Johan Colding & Carl Folke, Navigating Social-Ecological Systems: Building Resilience for Complexity and Change. (Cambridge: Cambridge University Press, 2003) pp. 1, 3. Social-ecological resilience is measured by the amount or magnitude of disturbance a system can absorb without having its fundamental behavioural structure redefined, a property known as resistance. J.B. Ruhl, Adaptation and Resiliency in Legal Systems: General Design Principles for Resilience and Adaptive Capacity in Legal Systems-With Applications to Climate Change Adaptation (2011), 89 N.C.L. Rev. 1373, pp. 1376–77.

influenced the development of a resource—entitled the Living Convention: A Compendium of Internationally Recognized Rights That Support the Integrity and Resilience of Indigenous Peoples’ and Local Communities’ Territories and Other Social-Ecological Systems (The Living Convention)—designed to increase the accessibility of international law.¹¹ It then provides an overview of both The Living Convention and the landscape approach to legal empowerment as innovative forms of the larger global movement to improve access to justice for Indigenous Peoples and local communities. We argue that deep changes are required in the implementation of legal empowerment that reflect the broad array of interrelated social and cultural dynamics in communities.

Social, ecological landscapes and the law

John Muir said “When we try to pick out anything by itself, we find it hitched to everything else in the Universe.”¹² In other words, everything is connected. Communities whose lives depend very directly on natural resources are acutely aware that a disturbance or change to one aspect of the system will have an effect on others. Their ways of life, customs, and laws, knowledge of the seasons, wild plants, and animals, and crops and domesticated livestock all interact as a living system. They protect against upstream forest clearance to prevent over-sedimentation that diminishes fish stocks; wise use of fire leads to the regeneration of savannah grasslands; and they engage in many other practices that help ensure the long-term sustainability of their cultures. Over generations, these kinds of human-ecological interactions have produced an extraordinary variety of social-ecological systems around the world, systems that have led to landscapes marked by a mega-diversity of peoples, communities, and ecosystems.

In contrast, the typically Western state- and market-centric approach to the environment is to compartmentalize and maximize the

11 The Living Convention is available online at <http://naturaljustice.org/library/our-publications/legal-research-resources/the-living-convention>.

12 John Muir, *My First Summer in the Sierra*. (Boston and New York: Houghton Mifflin Company, 1911) p. 211.

use of individual elements of an otherwise connected landscape. This approach is crystallized by systems of law making that disrupt and deny local realities.¹³ Laws that regulate agricultural production and genetic resources exclude the very livestock keepers and farmers who created the breeds and varieties so essential for food security. Forests are governed by legislation that turns a blind eye to the communities who shaped their very composition. Nomadic communities are criminalized and the waters and migratory species upon which they depend are divided by state borders. Landscapes, and the myriad of complex and endemic relations that define them, become fragmented by incoherent laws and disconnected institutions mandated to implement them.

The deeper rhythm of the landscape is subsequently lost in the cacophony of concurrent and often-contradictory targets, priority action plans, and programmes of work. Individuals and their communities, their relationships with their territories, and the broader integrity of those territories are effectively deconstructed locally and reconstructed remotely. Grandparents' knowledge becomes *intellectual property*, forests become *carbon sinks*, and rivers become contributors to *ecosystem services*. Communities are forced to understand and engage with externally imposed definitions of their cultural heritage, natural resources, and territories. Failure to do so can further marginalize them from the mainstream, while conforming to these norms can have significant consequences for who they are as individuals and their sense of belonging as a people or a community.¹⁴

13 Harry Jonas, Holly Shrumm & Ashish Kothari, Legal and Institutional Aspects of Recognizing and Supporting Conservation by Indigenous Peoples and Local Communities: An Analysis of International Law, National Legislation, Judgments Institutions as the Interrelate with Territories and Areas Covered by Indigenous Peoples and Local Communities. (Malaysia: Natural Justice & Kalpavriksh, 2012) (hereinafter The Legal Review).

14 Harry Jonas, Holly Jonas & Suneetha Subramanian, The Right to Responsibility: Resisting and Engaging Development, Conservation and the Law in Asia. (Malaysia: Natural Justice and United Nations University–Institute of Advanced Studies: 2013).

New approaches to International Law

A. Reengaging traditional resource rights

In the 1990s, Darrel Posey, together with Graham Dutfield, Alejandro Argumedo, and many others who were cognizant of these dynamics, drew on a range of Indigenous concepts and movements to develop the theory of traditional resource rights (TRRs) as a way to more accurately reflect Indigenous Peoples' views and concerns in law.¹⁵ Dr. Posey described TRRs as constituting “bundles of rights” already widely recognized by legally and non-legally binding international agreements, which include individual and collective human rights, and land and territorial rights.¹⁶ TRRs take into account the spiritual, aesthetic, cultural, and economic values of traditional resources, knowledge and technologies, and accordingly recognize the rights of Indigenous Peoples and local communities to control their use. Implicit in the concept of TRRs is an acknowledgment of the “inextricable link between cultural and biological diversity [that] sees no contradiction between the human rights of Indigenous and local communities, including the right to development, and environmental conservation.”¹⁷

TRRs focus on integrating otherwise disparate legal regimes, instruments and provisions. The framework is founded on four processes:

1. Identifying bundles of rights expressed in existing moral and ethical principles;
2. Recognizing rapidly evolving soft law influenced by the customary practice of states and non-binding agreements;

15 See, e.g., Darrel Posey & Graham Dutfield, Beyond Intellectual Property Rights: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities. (Ottawa: IDRC, 1996). For an overview of the full literature on traditional resource rights, see Harry Jonas & Holly Shrumm, Recalling Traditional Resource Rights: An Integrated Rights Approach to Biocultural Diversity. (Malaysia: Natural Justice, 2012).

16 Darrel Posey, Indigenous Peoples and Traditional Resource Rights: A Basis for Equitable Relationships?, (1995) http://www.ubcic.bc.ca/files/PDF/Posey_Indigenous.pdf, p. 20.

17 Posey & Dutfield, *supra* note 15, at p. 95.

3. Harmonizing existing legally binding international agreements signed by States, whereby areas of conflict between different agreements should be resolved, giving priority to human rights concerns; and
4. “Equitizing” the law to provide marginalized Indigenous Peoples and traditional and local communities with favorable conditions to influence all levels and aspects of policy planning and implementation.¹⁸

The first two processes required what might be referred to as *legal mapping*, where international instruments are surveyed and relevant provisions are identified, followed by what is referred to as *bundling*, where instruments are organized under relevant rights headings. By finding individual provisions that support Indigenous Peoples’ and local communities’ rights from across a range of international instruments and reordering them in a locally relevant and comprehensive manner, TRRs integrate an otherwise fragmented international framework of rights relating to the links between biological and cultural diversity.¹⁹ Using this methodology, Dr. Posey set out a range of relevant binding and non-binding instruments²⁰ from across a broad spectrum, bundled under the basic principles upon which TRRs are based.²¹ In effect, this approach attempts to

18 Darrel Posey, Traditional Resource Rights: International Instruments for Protection and Compensation for Indigenous Peoples and Local Communities. (Switzerland: IUCN, 1996) pp. 16–18.

19 For a comprehensive discussion of the fragmentation of international law and its implications, see Study Group of the International Law Commission entitled *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, G.A./CN.4/L.682 (New York: United Nations, April 13, 2006).

20 As Dr. Posey explains, non-binding instruments “lack legal status.” “In practice, soft law refers to a great variety of instruments: declarations of principles, codes of practice, recommendations, guidelines, standards, charters, resolutions, etc. Although all these kinds of documents lack legal status (are not legally binding), there is a strong expectation that their provisions will be respected and followed by the international community.” Posey & Dutfield, *supra* note 15, at p. 120. Determining the binding nature of a particular instrument is one of the major difficulties that arises in the bundling of its provisions.

21 These bundles of rights and their location within international agreements, identified by the Working Group on Traditional Intellectual, Cultural and Scientific

counter the abovementioned inherent challenges that international law poses for Indigenous Peoples and local communities. By reading and effectively reordering the legal landscape in an innovative way, Dr. Posey and his contemporaries reveal a novel formulation of an existing internal structure.

Looking at existing laws from a new integrated perspective enables a paradigm shift toward more comprehensive assertions of Indigenous Peoples' and local communities' rights. An integrated view allows a better understanding of what rights have actually been enshrined in existing instruments. Further, it provides a conceptual framework for proposing systemic changes to the way laws are developed and implemented. Dr. Posey also felt that TRRs could serve a useful purpose at the local level. Specifically, he argued that “[b]y prioritizing Indigenous peoples’ rights to say NO to exploitation” and “by acknowledging communities’ rights to control access to traditional resources and territories,”²² TRRs could guide negotiations and legal processes toward new partnerships based on increased respect for traditional communities. TRRs could also guide governments in more effectively implementing their international obligations and responsibilities relating to human rights, trade, environment, and development.

When looking into the future in the late 1990s, Dr. Posey surmised that proper development of TRRs would require “a process of dialogue” between Indigenous Peoples, local communities and governmental and non-governmental institutions on a wide range of issues, including local economic interests, accountability, human rights, and Resource Rights (Working Group on Resource Rights) of the Global Coalition for Bio-Cultural Diversity, include: basic human rights; right to development; rights to environmental integrity; religious freedom; land and territorial rights; right to privacy; prior informed consent and full disclosure; farmers’ rights; intellectual property rights; neighboring rights; cultural property rights; cultural heritage recognition; and rights of customary law and practice. Posey, *supra* note 16, at p. 36 (Appendix 6). Notably, the Working Group on Resource Rights also carried out a survey of 63 statements and declarations made by Indigenous Peoples from which they identified 80 common demands. From these, they elaborated six main topic areas, namely: self-determination; territory; free, prior and informed consent; human rights; cultural rights; and treaties. Posey, *supra* note 18 at p. 16.

22 Darrel Posey, National Laws and International Agreements Affecting Indigenous and Local Knowledge: Conflict or Conciliation?, 15 (APFT Working Paper, 1997). (Capitalization in original.)

environmental concerns for long-term sustainability.²³ That mantle has been carried by a number of organizations²⁴ and by practitioners and academics in various settings.²⁵ The approach has not, however, been applied to the international instruments that have been adopted in the meantime, including the watershed UN Declaration on the Rights of Indigenous Peoples. The Living Convention undertakes that task, applying the TRR methodology to the full spectrum of contemporary international law of relevance to the protection of Indigenous peoples' territories and other social-ecological systems.

B. Reimagining International Law: The Living Convention

One of the basic obstacles standing in the way of Indigenous Peoples and local communities exercising their rights under international law²⁶ is a lack of knowledge of those rights.²⁷ A lack of knowledge of rights impedes the capacity to access justice at both the national and

23 Posey, *supra* note 16 at pp. 2–3.

24 See, e.g., Alejandro Argumedo & Michel Pimbert, Traditional Resource Rights and Indigenous Peoples in the Andes. (London: IIED, 2005); Alejandro Argumedo & Michel Pimbert, Protecting Indigenous Knowledge Against Biopiracy in the Andes (London: IIED, 2007).

25 See, e.g., Fernando Villalba, *Un-discovering Wilderness: Protecting Traditional Resource Rights in U.S. National Parks*, (2010) 17 IUCN-CEESP Policy Matters. p. 126; Union of BC Indian Chiefs, Protecting Knowledge: Traditional Resource Rights in the New Millennium. (2000). Session outlines available online at: <http://www.ubcic.bc.ca/Resources/conferences/PK.htm#axzz11IKtrnCl>.

26 The term “international law” is far from precise, but its formally recognized sources are set forth in article 38(1) of the Statute of the International Court of Justice: international conventions; international custom; general principles of law recognized by civilized nations; and judicial decisions and the teachings of the most highly qualified publicists of the various nations. See James Crawford, Brownlie’s Principles of Public International Law, 8th ed. (United Kingdom: Oxford University Press, 2012). In developing The Living Convention, Natural Justice focused on “international conventions” and other international instruments setting forth rights and duties in written form.

27 The United Nations Development Programme (UNDP) has identified “legal awareness,” as the “[d]egree of people’s knowledge of the possibility of seeking redress through the justice system, whom to demand it from, and how to start a formal or traditional justice process,” as a principal area of support on access to justice. UNDP, Programming for Justice: Access for All. (New York: UNDP, 2005), p. 7.

international levels.²⁸ Remediating this problem is difficult for at least three reasons:

1. The sources of the rights are diffuse, and “rights” are codified in provisions contained in a wide range of international instruments that are themselves located within distinct categories of laws such as human rights, the environment, intellectual property, and culture;
2. An individual’s or a group’s specific rights will depend on, among other things: a) whether they are Indigenous Peoples or from other marginalized or minority groups; b) whether their lifestyles are relevant for the conservation and sustainable use of biodiversity; c) the uniqueness of their ways of life, for example, whether they are farmers, livestock keepers, forest-dependent, or fisher folk; and d) the nature of their self-defined territories and areas on which they depend, for example, whether these are coastal or marine areas, mountains; and whether they are living in or near externally-defined protected areas; and
3. International instruments are of differing legal weight and each is adopted, signed, ratified, or otherwise agreed to by a different list of countries, which has a direct bearing on the value of the instrument for enforcing rights at the national and local levels.

These issues, which are by no means exhaustive, make it difficult for those who lack an understanding of multilateral instruments to access international law. For example, an individual or a community who would like to understand and exercise their rights to free, prior and informed consent (FPIC) over activities relating to their lands, would have to review a variety of different instruments to gain a complete picture of what FPIC means and how it is applied.²⁹ Provisions

28 See *Ibid.* at 6 (noting that part of capacity development for access to justice involves “key skills people need to seek remedies through formal and informal systems, including legal awareness, legal aid, and other legal empowerment capacities.”)

29 There are now several resources that address FPIC to help make it accessible and understandable to non-experts. See, e.g., Abbi Buxton & Emma Wilson, *FPIC and the Extractive Industries: A Guide to Applying the Spirit of Free, Prior and Informed Consent in Industrial Projects*, (London: IIED, 2013), <http://pubs.iied.org/16530IIED.html>. FPIC is used in this instance as an illustrative example

relevant to FPIC are contained in at least the following international instruments: the UN Declaration; ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (commonly referred to as ILO Convention 169); FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security; Nagoya Protocol; Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities; and the Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities.

The wide range of different instruments that often address the same rights (such as FPIC), and the different contexts under which those instruments are drafted, hinders the accessibility of the information to the very individuals, communities and peoples it is intended to support. To address this issue, and with the TRR concept in mind, the authors produced and continue to develop a resource entitled *The Living Convention*.³⁰ Forty years after the 1972 UN Conference on the Human Environment, and in the wake of the 2012 Rio+ 20 Conference on Sustainable Development, *The Living Convention* takes stock of the breadth and depth of the provisions at the international level that support Indigenous Peoples' and local communities' rights to maintain the integrity and resilience of their territories and social-ecological systems. *The Living Convention* is directed primarily toward Indigenous peoples and local communities, as well as their supporting organizations and other stakeholders and interested parties. It constitutes an easily accessible resource for exploring the full range of provisions in international law that address the interrelationships among: individuals, communities and peoples; livelihoods, culture and spirituality;

of the fact that certain principles and rights can be addressed in a wide range of instruments.

30 This process is ongoing, and it is anticipated that *The Living Convention*, in its second edition as of 2013, will continue to be revised and updated to be more comprehensive and reflect changes in existing law.

territories, landscapes and seascapes; and many other categories relevant to the rights of Indigenous Peoples and local communities.³¹

Facilitating legal environment

A. Landscape approaches to legal empowerment

While the production of useful resources is an important process, deeper changes are required in the way practitioners think about legal empowerment if structural barriers to justice are to be overcome. Legal empowerment aims to enable Indigenous Peoples and local communities to engage with such laws and legal processes. There is a wide range of legal empowerment models and corresponding analysis, including on legal empowerment generally;³² regional approaches;³³ sectoral or issue-based approaches;³⁴ particular

31 The Living Convention contains provisions copied verbatim from a wide range of international instruments that support the integrity and resilience of Indigenous Peoples' and local communities' territories and other social-ecological systems. These provisions have been reorganized under headings chosen to reflect rights as expressed and deployed in practice at local, national and international levels. As an example, all provisions that deal with FPIC, regardless of whether they are located in human rights instruments or multilateral environmental agreements, are grouped under the heading "Free, Prior and Informed Consent." For a more detailed discussion on the issues touched upon in this section, see Part I of The Living Convention, available online at <http://naturaljustice.org/wp-content/uploads/pdf/The-Living-Convention-second-edition.pdf>.

32 Tiernnan Mennen, The Legal Empowerment Approach to International Development. (Haki Legal Empowerment Network, 2011), <http://www.hakinetwork.org/wp-content/uploads/2011/06/Haki-Legal-Empowerment-White-Paper.pdf>; Legal Empowerment: Practitioners' Perspectives. Stephen Golub & Thomas McInerney eds. (Rome: IDLO, 2010); Commission on Legal Empowerment of the Poor, Making the Law Work for Everyone. (New York: UNDP, 2008), http://www.unrol.org/doc.aspx?n=Making_the_Law_Work_for_Everyone.pdf

33 Legal Empowerment in Practice: Using Legal Tools to Secure Land Rights in Africa. Lorenzo Cotula & Paul Mathieu eds. (London: IIED, 2008).

34 Rachael Knight et al., Protecting Community Lands and Resources: Evidence from Liberia, Mozambique and Uganda. (Washington, DC: Namati, 2012); Lorenzo Cotula, Legal Empowerment for Local Resource Control: Securing Local Resource Rights within Foreign Investment Projects in Africa. (London: IIED, 2007).

projects;³⁵ paralegals;³⁶ and participatory methods as means for realizing procedural rights.³⁷

One of the most recent project publications in this lineage is on land documenting in Africa.³⁸ The three-year study (2009–2011) detailed in the publication sought to better understand both the type and level of support that communities require to successfully complete community land documentation processes. Importantly, it also explored the intra-community dynamics inherent in the processes and provided guidance on the kinds of approaches that can enhance the overall outcome. Its findings included the following:

- A community-led land documentation process was a valuable opportunity to resolve local land conflicts;
- The process of drafting community by-laws or constitutions was a very useful participatory methodology for the community members involved. Community land documentation processes structured to proactively address intra-community governance led to changes in women's substantive and procedural rights, as well as improved intra-community governance and leadership accountability;
- Paralegals were the most effective form of legal support. Paralegals possess skills relating to successfully navigating intra-community tensions or obstacles that others (such as outside professionals) do not; their beneficial influence may also have broader impacts throughout the region in which they are based; and
- Notwithstanding the above, administrative or bureaucratic inefficiencies linked to lack of necessary staffing and state resources, lack of political will, and other institutional

35 Vivek Maru, *Between Law and Society: Paralegals and the Provision of Primary Justice Services in Sierra Leone and Worldwide*, (2006) 31 *Yale Int'l L.*, p. 426; Sanjay Upadhyay, *Law for the People: Interactive Approaches to Legal Literacy in India*. (2005) 53 *Participatory Learning and Action*, p. 23.

36 Open Society Foundations, *Community-Based Paralegals: A Practitioner's Guide*. Felisa Tibbitts ed. (New York: Open Society Institute, 2010).

37 Manjula Amerasinghe, et al., *Enabling Environmental Justice: Assessment of Participatory Tools* (Cambridge, MA: MIT, 2008).

38 Knight et al., supra note 34.

obstacles were the greatest impediments to successful land documentation.

While the report's findings underscored the transformative nature of participatory legal empowerment and the uniquely important role played by local paralegals in this regard, securing rights to land is only the first step in increasing legal empowerment and access to justice. Communities also need tools to help ensure that rights to land are respected, and mechanisms for redress are available when their rights are violated. Additionally, as discussed above, part of ensuring respect for rights and redress requires communities to understand their rights and possess the capacity to seek remedies in the proper forum when those rights are violated.³⁹

Natural Justice's work⁴⁰ highlights some interesting points regarding land documentation. Especially in Africa, it is evident that while appropriate land reform offers one of the most direct means to improve the lives of millions of rural people,⁴¹ a range of other laws are also important sites of struggle toward the same aim of securing the resources necessary for people to live with dignity and according to their customs. These include laws that address, for example:

- **Indigenous Peoples' rights:** Laws relating to the rights of Indigenous Peoples (such as in Bolivia, Panama, and the Philippines) lead to significant advances in a range of important rights relating to Indigenous territories and waters;
- **Environment:** Specific environmental laws can have profound effects on communities (both positive and negative). In India, the Forest Rights Act has been hailed as a progressive piece of legislation that could improve the lives of millions of forest dwellers, but has so far suffered from ineffective or non-existent implementation;⁴²

39 The report's authors are now working with the communities to ensure that they are empowered to negotiate with investors and to increase conservation.

40 See, e.g., *The Legal Review*, *supra* note 13.

41 Fred Nelson, *An Analysis of International Law, National Legislation, Judgments, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 2: Africa Regional*. (Malaysia: Natural Justice & Kalpavriksh 2012), <http://naturaljustice.org/wp-content/uploads/pdf/ICCALegalReviewAFRICAREGIONAL.pdf>

42 This Act has been inadequately used by communities to claim rights to and

- **Protected areas:** While conservation has moved beyond the ‘fines and fences’ approach to what is hailed as the ‘new conservation paradigm’ or ‘rights-based approaches to conservation,’ practice lags behind. Some countries’ protected areas programmes (such as Australia’s support for Indigenous Protected Areas) offer new spaces for communities in which to retain the integrity of their cultures;
- **Wildlife:** Namibia provides Africa’s leading example of a formalized, government-crafted process of devolving clearly delineated rights over wildlife to rural communities. Communal Conservancies⁴³ provide for rural communities to form conservancies and gain use rights over wildlife and tourism within the conservancies;
- **Traditional knowledge:** Since the Nagoya Protocol was adopted in 2010, State parties have been drafting laws relating to genetic resources and associated traditional knowledge. Such laws have enormous potential to either support or undermine communities at the local level; and
- **Climate change:** Policies and projects relating to reducing emissions from deforestation and forest degradation (REDD) are heavily contested due to the impact they can have on communities’ forests and lives (both positive and negative).

governance of forests. There are several reasons for this, including: lack of awareness about the Act or how to make claims, lack of proactive assistance from government departments, deliberate obstruction by some government agencies or officials, difficulties in finding evidence to file with the claims, and superimposition of top-down boundaries related to government schemes rather than acceptance of customary boundaries of the community. See Tushar Dash & Ashish Kothari, *Forest Rights and Conservation in India*, in The Right to Responsibility, *supra* note 14, at p. 150.

43 Policy on Wildlife, Management, Utilisation and Tourism in Communal Areas (1995) and the subsequently enacted Nature Conservation Amendment Act (1996). See Brian Jones, An Analysis of International Law, National Legislation, Judgments, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 4: Namibia. (Malaysia: Natural Justice & Kalpavriksh: 2012), <http://naturaljustice.org/wp-content/uploads/pdf/ICCALegalReviewNAMIBIA.pdf>.

In addition to the bearing that the above areas of law have on communities and their territories and ways of life, it is important to note that a potentially supportive law can be severely undermined by a) other laws that contravene their provisions (such as those that facilitate extractive industries or industrial agriculture), or b) implementing agencies that deny the intent of supportive laws, either wilfully or by neglect.⁴⁴

B. Integrated legal empowerment for landscapes

In this context, a critical lesson for legal practitioners relates to the social-ecological interrelationships that exist at the local level, such as between traditional knowledge, management of natural resources, land tenure, and resilience of crop varieties and livestock. When communities want to protect their ways of life and foster new phases in their growth, they are compelled to engage with a range of laws and institutions. Livestock keepers, for example,⁴⁵ have to engage at least with the laws and institutions addressing land, biodiversity, agriculture, protected areas, and potentially access and benefit sharing. Legal empowerment efforts should therefore adopt an integrated approach, connecting the full extent of the respective communities' social-ecological existence with an equally holistic approach to the myriad laws that support them.

Legal empowerment that focuses too narrowly on one issue or area of law ("implementing REDD," for example) without also looking at related issues such as land rights or the protection of traditional knowledge and adaptation strategies further compounds the tendency of the law to fragment otherwise connected localities. Similarly, engaging with only one level of laws (such as international, bilateral, state, or

44 See, e.g., Dash and Kothari, *supra* note 42; Samson Pedragosa, An Analysis of International Law, National Legislation, Judgments, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 16: The Philippines. (Malaysia: Natural Justice and Kalpavriksh, 2012), <http://naturaljustice.org/wp-content/uploads/pdf/ICCALegalReviewTHEPHILIPPINES.pdf>.

45 See Ilse Köhler-Rollefson, *Livestock Keepers' Rights in South Asia* in The Right to Responsibility, *supra* note 14, at 135.

customary) leads to a one-dimensional and limited understanding of communities' and other actors' rights and responsibilities.

In sum, the current focus on rights-based approaches can be improved by a) exploring hybrid legal empowerment and participatory methodologies more deeply, and b) adopting an integrated approach to supporting peoples and communities within their territories and areas. This also necessitates focusing on rights and responsibilities. In this light, there is a clear need to cultivate a new generation of legal empowerment that strives to reconnect social-ecological systems and that places as much emphasis on affirming responsibilities as asserting rights.⁴⁶

Conclusion

The fragmentation of law and related institutional arrangements continue to undermine Indigenous Peoples and local communities intent on self-determining their futures and retaining the social and ecological integrity of their territories and other areas. In this light, new approaches to understanding the law and to using the law are required. *The Living Convention* attempts to employ a new approach in order to make international law more accessible to Indigenous peoples and local communities. In doing so, it helps increase access to justice by democratizing the law and allowing a range of non-lawyers to identify and to utilize provisions in international law that are relevant to their needs. *The Living Convention* and the concept of 'legal empowerment for landscapes' are modest contributions to this ongoing and multi-stakeholder endeavor. It is the authors' sincere hope that these ideas contribute to the on-going work in this area and, by promoting an unorthodox reading of an existing legal landscape, helps Indigenous Peoples, local communities and their supporters to identify "space to place new steps of change."⁴⁷

46 This approach is the focus of an African regional symposium being hosted by Namati and Natural Justice in Cape Town in November 2013.

47 Maya Angelou, *Inaugural Poem*, January 20, 1993.

APPENDIX NOTES ON CONTRIBUTORS

Paige Arthur

Paige Arthur is a consultant working in the field of international human rights, whose recent work has focused on effective strategy development and program evaluation. She is the Principal of Public Action Research LLC, which she founded in 2011. Her clients have included the Ford Foundation, UN Women, the UN Department of Political Affairs, the International Center for Transitional Justice, the Counterterrorism and Humanitarian Engagement Project at Harvard Law School, and the U.S. State Department, among others. An established researcher in the field of human rights and transitional justice, Ms. Arthur is the editor of Identities in Transition: Challenges for Transitional Justice in Divided Societies (Cambridge University Press, 2011), and she has specialized knowledge of transitional justice's connections with ethnic conflict, democratic transitions, and gender. She holds a PhD from the University of California, Berkeley (2004).

Asia Indigenous Peoples Pact

The Asia Indigenous Peoples Pact (AIPP) is a regional organization founded in 1988 by the Indigenous Peoples' movement as a platform for solidarity and cooperation. AIPP is actively promoting and defending Indigenous Peoples' rights and human rights; sustainable development and management of resources and environmental protection. Through the years, AIPP has developed its expertise on grassroots capacity building, advocacy and networking from local to global levels as well as strengthening partnerships with Indigenous organizations, support NGOs, UN agencies and other institutions. At present, AIPP has 47 members from 14 countries in Asia with 14 National Formations, 15 Sub-national Formations and 18 Local Formations. Of this number, 6 are Indigenous Women's Organizations and 4 are Indigenous Youth Organizations.

Ramy Bulan

LLB (Hons) Malaya, LLM (Bristol, England), PhD (ANU, Australia). Advocate and Solicitor. Dr. Bulan, a Kelabit woman from Sarawak, is an Advocate and Solicitor of the High Court (Sabah and Sarawak). She is an associate professor at the Faculty of Law, University Malaya, where she teaches Equity and Trust and taught Jurisprudence and Malaysian Legal System. She co-authored The Introduction to the Malaysian Legal System (Shah Alam, Oxford Bakti, 2002). At postgraduate level, she teaches International Human Rights Law, with an emphasis on Issues Relating to Minorities and Indigenous Peoples. Ramy heads the University's Centre of Malaysian Indigenous Studies (CMIS) an interdisciplinary research center. She has published widely on Indigenous Peoples' land rights, native title, native laws and customs, customary justice, indigenous institutions and governance, and works on forestry and environmental justice issues. Ramy is a lead researcher and consultant to the Malaysian Human Rights Commission for the National Inquiry on Land Rights of Indigenous Peoples in Malaysia as well as member of committees monitoring timber-related standards.

Andrea Carmen

Andrea Carmen, Yaqui Nation, has been a staff member of the International Indian Treaty Council (IITC) since 1983 and IITC's Executive Director since 1992. Andrea has many years of experience working with Indigenous communities from North, Central and South America and the Pacific. She was a founding member of the Indigenous Initiative for Peace with Nobel Laureate Rigoberta Menchu and has participated as a human rights observer and mediator in crises situations in the US, Mexico, Canada, New Zealand and Ecuador. Andrea has participated at many United Nations bodies addressing human rights, sustainable development, environmental justice and Indigenous Peoples, and was IITC's team leader for the UN Declaration on the Rights of Indigenous Peoples.

Center for Human Rights Legal Action (CALDH), Guatemala

CALDH enjoys a high level of international prestige among human rights organizations in Latin America. Since its founding in 1985 in the U.S., and in 1994 in Guatemala, it has become renowned for its commitment, transparency, and bold actions to fight impunity and build a more just Guatemala. Just as important as CALDH's achievements in defending human rights are the challenges it faces on a daily basis. CALDH promotes the exercise and defense of human rights, access to and application of justice, historic memory, and the struggle against discrimination, racism, and all forms of oppression. Its website, www.caldh.org, is visited daily by thousands of human rights activists and organizations from around the world that are interested in the struggle for justice.

Antonio M. Cisneros De Alencar

Antonio Cisneros De Alencar is the Programme Coordinator of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Guatemala. He has served in the United Nations for over 15 years, assisting in the integration of international human rights norms, including those related to Indigenous Peoples' rights, into national plans and programmes in countries as diverse as Brazil, Guatemala, Guyana, Mexico, Nicaragua, Suriname, the United States of America, and Venezuela. He holds a Master's degree in development studies from the *Facultad Latinoamericana de Ciencias Sociales (FLACSO)* in Mexico, and Bachelor's degrees in Communication and Latin American Studies from the University of Florida, in the USA. Mr Cisneros has taught courses on human rights and on journalism in various countries, including his native Bolivia.

Bennett Collins

Bennett Collins is a researcher based at the School of International Relations at the University of St Andrews, Scotland with a concentration on Indigenous/First Peoples rights and activism in the contexts of North America and Central Africa. His other research interests include genocide studies, inter-generational trauma, transitional justice structures, and truth and reconciliation processes. He received a first class MA (Hons) in International Relations from the University of St Andrews and is completing an MSc in African Studies at the University of Oxford, where his specific research focus is on the rights of the Batwa People in the Great Lakes region of Africa.

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Marcia Esparza

Marcia Esparza is an Associate Professor of the Department of Criminal Justice at John Jay College of Criminal Justice of the City University of New York (CUNY). Her commitment to the humanities dates back to her experience growing up under military rule in Chile. Her field research includes interviewing war survivors for the United Nations' Historical Clarification Commission in Guatemala (1997–1999), and post-doctoral research in Chile examining human rights court files. She has published in the *Journal of Genocide Research*, *Antipoda*, *Contenciosa* and the *Observatorio Latinoamericano* and is the co-editor of State Violence and Genocide in Latin American: The Cold War Years (Routledge, 2009) with Henry R. Huttenbach and Daniel Feierstein. She is completing her second book, Silenced Communities: Legacies and Resistance to Militarization in Postwar Santo Tomas Chichicastenango, Guatemala (1997–2004), discussing the long term legacy of military control upon poverty-ridden indigenous communities from a postcolonial approach. She is co-editing, Rescuers of Mass Atrocities in Latin America during the Cold War and Transitional Justice and Legacies of State Violence, War and Genocide in Latin America: A “Double-Edged Sword” Paradigm?. In 2002, she founded the Historical Memory Project (HMP) www.historicalmemoryproject.com

Harry Jonas

Harry Jonas is a founder of Natural Justice: Lawyers for Communities and the Environment. The organization derives its name from the legal principle that people should have a voice in decisions that affect them. Natural Justice works at the local level to support Indigenous Peoples and local communities as they engage with positive legal systems. It also provides advice to national governments and engages in ongoing processes at the international level, including those of multilateral environmental agreements and human rights fora. Harry is an Ashoka Fellow.

Holly Jonas

Holly Jonas (née Shrumm) has a background in zoology and anthropology and is currently taking an LLM in Public International Law. She joined Natural Justice in 2009 after working with Indigenous Peoples, local communities and NGOs on development and environmental issues in the USA, Tajikistan, and the South African Kalahari. She is based in Sabah, Malaysia, focusing on the organization's work in Asia-Pacific and more generally on community protocols, participatory methodologies for legal empowerment and strategic advocacy, and community stewardship and governance of territories and ecosystems. She is also serving on Natural Justice's Coordinating Committee and as the International Policy Assistant for the ICCA Consortium.

Katie Kiss

Katie Kiss is a Kaanju woman from Cape York Peninsula in far north-east Australia. Katie has a Bachelor of Arts from Deakin University majoring in International Politics. She has been involved in Aboriginal and Torres Strait Islander affairs at the local, community, state, national and international level for the past twenty years across a range of issues, including native title and land management; community development; education, training and employment, and human rights more broadly. She has worked in the public and NGO sector holding positions at the Nulloo Yumba Centre at Central Queensland

University, Cape York Land Council, Cape York Partnerships, the Native Title Studies Centre at James Cook University, the Department of Aboriginal and Torres Strait Islander Policy in the Queensland Government, the National Native Title Tribunal, and the Australian Human Rights Commission as the Principal Adviser to the Aboriginal and Torres Strait Islander Social Justice Commissioner. Katie is currently the Director of Strategic Projects at the National Congress of Australia's First Peoples.

Denise K. Lajimodiere

Citizen of the Turtle Mountain Band of Chippewa, Belcourt, North Dakota. Involved in education for 36 years as an Elementary teacher and Principal as well as Assistant Professor. Dr Lajimodiere received her Bachelor's, Master's, and Doctorate degrees from the University of North Dakota. She currently works as an Assistant Professor in the Educational Leadership program, North Dakota State University, Fargo. She is the President of the National Native American Boarding School Healing Coalition (N-NABS-HC). She is a scholar, poet, traditional dancer and tribal artist.

Kai Landow

Kai Landow is a long-time activist in the Hawaiian independence movement. As the co-founder of the Hawaiian Embassy in New York he works to educate people about the rights of all Hawaiian People. Mr. Landow served as co-chair of the Pacific Caucus of the UN Permanent Forum on Indigenous Issues 2010–2011 and continues his global community work in the Pacific. He serves as director of Aupuni Hawai'i (IPO/NGO) and formed the International Original Peoples Alliance (IOPA) to advocate at the Sustainable Development Goals process for sustainable partnerships with Original Peoples. Currently he is working to create a court of remedy for Original Peoples to repudiate the Doctrine of Discovery and create a unique venue to address the injuries of imperialism.

Nekane Lavin

Nekane Lavin is a Human Rights Officer at the United Nations Office of the High Commissioner for Human Rights (OHCHR), who has worked on transitional justice issues. She has a background in international human rights law and international criminal law. Before joining OHCHR she served as Legal Investigator at the UN-backed International Commission against Impunity in Guatemala (CICIG). Prior to that, she worked as an Investigator at the Office of the Prosecutor of the International Criminal Court (ICC) and as an Evidence Analyst in the forensic programme of the International Criminal Tribunal for the former Yugoslavia (ICTY). Nekane has also conducted human rights monitoring, reporting and advocacy activities in the UN Peace Mission in the DRC (former MONUC).

Florescia Librizzi

Florescia Librizzi is a consultant at the International Center for Transitional Justice (ICTJ). She graduated magna cum laude from the Universidad Nacional de Cordoba (UNC) School of Law, Argentina, and received her Masters of Law from New York University's School of Law (Dean's Award and Transitional Justice Scholar). She has served as Graduate Editor for the NYU Journal of International Law and Politics. Florescia is a doctoral candidate at UNC and her research project has been supported with SECYT and CONICET fellowships. Florescia taught several courses at Universidad Empresarial Siglo 21 and UNC. Florescia has practiced law since 2006, including litigation on human rights.

Wilton Littlechild

International Chief Wilton Littlechild had the distinction of being the first Treaty First Nation person to acquire his law degree from the University of Alberta in 1976. He received his Bachelor of Physical Education Degree in 1967 and his Master's Degree in Physical Education in 1975. In June of 2007, the University of Alberta bestowed the Doctor of Laws Degree on Chief Littlechild for his outstanding achievements. Chief Littlechild is a respected lawyer and operates the law firm of J. Wilton Littlechild, Barrister

and Solicitor. He served as the Chairperson for the Commission on First Nations and Métis Peoples and Justice Reform and served as a Member of Parliament from 1988–1993 for the riding of Wetaskiwin-Rimby. Chief Littlechild organized a coalition of Indigenous Nations that sought and gained consultative status with the Economic and Social Council of the United Nations. He was re-appointed by the ECOSOC President to represent North America and has completed his second and final term as the North American representative to the UN Permanent Forum on Indigenous Issues. He served as a Commissioner for the Truth and Reconciliation Commission of Canada.

Siobhan McEvoy-Levy

Siobhan McEnvoy-Levy, Ph.D., is Associate Professor of Political Science, and Chair of Department, at Butler University in Indianapolis, Indiana where she teaches courses on Peace and Conflict Studies. Her research focuses on political violence, peace-building, justice and reconciliation, youth, and popular culture. A lot of her work has involved interviews and focus groups with young people, community activists, teachers, youth-workers, and public officials, primarily in the United States, Northern Ireland, and Israel/Palestine. Her publications include *American Exceptionalism and US Foreign Policy* (Palgrave 2001), *Troublemakers or Peacemakers? Youth and Post-Accord Peacebuilding* (Notre Dame UP, 2006), and *Violence, Truth and Youth*, coauthored with Borer and Darby (Notre Dame UP, 2006). McEvoy-Levy received her master's and PhD degrees from the University of Cambridge (UK) and a BA Honors degree from the Queen's University, Belfast.

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Jael Eli Makagon

Jael Eli Makagon is a lawyer from Hawai'i who brings his background in civil litigation and interest in environmental law to bear on the issues addressed by Natural Justice. After law school he clerked at the Hawai'i Supreme Court and worked at a commercial law firm before joining Natural Justice in the beginning of 2012. Jael is conducting legal research on the rights of Indigenous Peoples and local communities (as set forth in international instruments and other sources) to conserve and sustain their biological diversity and cultural heritage and assisting with connecting Natural Justice's work in the different regions to international decision-making processes. Jael, who is currently based in New York City and is exploring United States-based opportunities for Natural Justice to achieve its mission.

Carol Pollack

Carol Pollack is a Social Affairs Officer with the Secretariat for the Convention on the Rights of Persons with Disabilities and has served at the Secretariat for the United Nations Permanent Forum on Indigenous Issues, both located within UN DESA. She has also served as a Human Rights Officer with the Indigenous Peoples and Minorities Section at the United Nations Office of the High Commissioner for Human Rights. Prior to joining the UN, Ms. Pollack worked as a researcher for Amnesty International and as an Associate in the human rights division of the Ford Foundation. Ms. Pollack has a law degree from New York University School of Law, with a specialization in public international law.

Dalee Sambo Dorough

Dr. Dalee Sambo Dorough (Inuit-Alaska) holds a Ph.D. from the University of British Columbia, Faculty of Law (2002) and a Master of Arts in Law & Diplomacy from The Fletcher School at Tufts University (1991). She is currently an Associate Professor responsible for the sub-field of International Relations at the Department of Political Science, University of Alaska Anchorage; Expert Member of the UN Permanent Forum on Indigenous Issues; Alaska Member of the Inuit Circumpolar Council Advisory

Committee on UN Issues; and Member of the International Law Association Committee on Rights of Indigenous Peoples. In addition to 18 years of experience as the principal of Yellowknife Construction, Inc., she has over 35 years of experience in the field of Indigenous human rights standard-setting at the UN, ILO, OAS, and other international fora.

Erika Sasson

Erika Sasson is the peacemaking program director for the Center of Court Innovation, responsible for the planning and implementation of a peacemaking pilot project in the Red Hook Community Justice Center. Ms. Sasson also provides planning and technical assistance about problem-solving practices to tribal courts and communities across the United States. She previously worked in Toronto as a federal prosecutor, where she handled drug, gun, and gang cases. Ms. Sasson received her civil and common law degrees from McGill University, and completed an L.L.M. in criminal justice at New York University in 2010.

Korir Sing'Oei

Korir Sing'Oei is a human rights attorney and an advocate of the High Court of Kenya. He co-founded the Centre for Minority Rights Development (CEMIRIDE) in Kenya and for the past decade has studied and advocated for land rights and minority rights in Kenya and East Africa, specifically through regional human rights bodies including the African Commission on Human and Peoples' Rights. Mr. Sing'Oei was lead counsel for the Endorois and Nubian communities in Kenya, representing them in their landmark cases at the African Commission on Human and Peoples' Rights and African Committee of Experts on the Rights and Welfare of the Child. Mr. Sing'Oei also currently represents other minority groups in ongoing strategic litigation and was a leading actor in the development and drafting of Kenya's constitutional provisions on minority groups and marginalization.

Tammy Therese Solonec

Tammy Solonec is a Nyikina woman from Derby in the Kimberley of Western Australia and mother of two children. She is currently a Director of the National Congress of Australia's First Peoples, the Executive Assistant for NAIDOC Perth, and a Board member of Amnesty International Australia and the WA Aboriginal Lawyers Committee. Tammy was awarded Young Female Lawyer and Lawyer of the Year (with less than 5 years experience) for WA in 2012. She studied law at the University of WA, and completed her legal qualifications through the Aboriginal Legal Service of WA, where she worked for four years including as Managing Solicitor of the Law and Advocacy Unit. Throughout her career, Tammy has been involved in advocating for Indigenous Peoples on local, state, national and international levels, including at the United Nations. As a writer and editor, she has published legal articles and social columns on a variety of topics. Throughout the years, she has spoken at conferences and forums all around the country. Through NAIDOC, she has been heavily involved in developing and running an incorporated association, event management, campaigning and media coordination. Further information about Tammy can be sourced from her virtual CV at <http://nyikinayorga.wix.com/nyikina-yorga>.

Elsa Stamatopoulou

Elsa Stamatopoulou is the Director of Columbia University's Indigenous Peoples' Rights Program of the Institute for the Study of Human Rights (ISHR); and Adjunct Professor at Columbia's Center for the Study of Ethnicity and Race, the Department of Anthropology and ISHR. She devoted 21 years of her UN work to human rights and served in various positions at the UN offices in Vienna, Geneva and New York. She was the first Chief of the Secretariat of the UN Permanent Forum on Indigenous Issues. She has written extensively on human rights, including Indigenous Peoples' rights. She authored Cultural Rights in International Law (2007, Martinus Nijhoff), and has co-edited books and written numerous articles. She is member of human rights NGOs in her native Greece, has received grass-roots human rights awards and co-chairs the International Commission on the Chittagong Hill Tracts.

Valmaine Toki

Valmaine Toki is an academic in the field of law with TePiringa, Faculty of Law, University of Waikato. She is also a Vice Chair on the United Nations Permanent Forum on Indigenous Issues. Her areas of research and writing lie within the area of indigenous issues focusing on the implementation of indigenous legal systems/tikanga Māori to reduce the disproportionate number of Māori criminal offenders. This envisages a specialist indigenous court that embraces Māori customs, ethics, values, and norms.

John Washburn

John Washburn is Convener of the American NGO Coalition for the International Criminal Court (AMICC). He has been a US Foreign Service officer and a senior official of the United Nations. He was an NGO representative in almost all of the negotiations to create the Rome Statute of the International Criminal Court. He is a member of the bars of the District of Columbia and of the federal District Court and Court of Appeals there.

Alison Watson

Alison Watson is Professor of International Relations at the University of St Andrews in Scotland where her primary research interest lies in examining grassroots perspectives and marginalized actors within the international system, and in particular in considering how their incorporation into the International Relations discourse may change the questions raised within the discipline itself, as well as in its sub-fields. This has included a body of work on the place of children and youth, as well as her current work on issues surrounding the rights and representations of Indigenous Peoples, in North America and in East Africa.

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Marie Wilson

Marie Wilson has more than 30 years of professional experience as an award-winning journalist, trainer, and senior executive manager. She has also been a university lecturer, a high school teacher in Africa, a senior executive manager in both federal and territorial Crown Corporations, and an independent contractor and consultant in journalism, program evaluation, and project management. She has lived, studied and worked in cross-cultural environments for almost forty years, including Europe, Africa, and various parts of Canada. As a Regional Director for the Canadian Broadcasting Corporation, she launched the first Daily Television News service for northern Canada, against a back-drop of four time zones and ten languages: English, French and eight Indigenous. She developed the Arctic Winter Games and True North Concert series, to showcase northern performing artists and traditional indigenous sports for audiences across southern Canada. She delivered training through the South African Broadcasting Corporation as part of that country's transition to democracy, which coincided with the start-up of South Africa's own Truth and Reconciliation Commission. Ms Wilson is the recipient of a CBC North Award for Lifetime Achievement, the Northerner of the Year Award and in May 2012, she was awarded an honorary Doctor of Laws degree by St. Thomas University of Fredricton, New Brunswick, in recognition of a professional career "marked by public service and social justice."

Laura A. Young

Laura Young is an attorney with several years of experience working on human rights issues in Africa, specifically focused on countries in transition. She has worked with both the Liberian and Kenyan transitional justice processes, with a particular focus on how transitional justice processes impact marginalized groups such as minorities and refugees, as well as how victims can enhance their engagement with transitional justice processes. Ms. Young also brings experience on gender and women's rights. Her most recent publication focused on human rights challenges facing indigenous and minority women in Kenya. She also holds a master of public health.

Alexandra Xanthaki

Alexandra Xanthaki is a Reader in Law. A minority and indigenous expert, Alexandra's work has focused on Indigenous rights and, more recently, on the concept of multiculturalism in international law. Among her several publications, her monograph Indigenous Rights and United Nations Standards: Self-determination, Culture and Land (Cambridge University Press, 2007) has been called an 'impressive book' (MLR) which has 'a thoughtful, authoritative and elegantly written analysis' (AJIL), is 'extremely well-argued' (EJIL) and makes 'an important contribution' (ICLQ); and is now considered one of the reference books on Indigenous rights. Her 2011 co-edited collection on Reflections on the Declaration on the Rights of Indigenous Peoples (with Stephen Allen) has also been received very positively. She has given keynote speeches on Indigenous rights and aspects of multiculturalism in international law. She is currently an elected member of the ILA - Indigenous Rights Committee. In addition to her academic research, Alexandra enjoys links with NGOs and IGOs: she is a member of the Legal Cases Advisory Committee of Minority Rights Group International and has co-operated in the past with the former UN Special Rapporteur on Indigenous Issues, and the ILO on Indigenous issues.