RACISM AGAINST INDIGENOUS PEOPLES

The book documents and analyses the many forms of racism that indigenous peoples all over the world are still facing at the beginning of the new millennium. Although many national constitutions prohibit racial discrimination, indigenous peoples are facing pervasive racial discrimination in their daily lives, which has far-reaching consequences for their well-being and human rights situation. It is a major responsibility of the international community to address the extreme racial discrimination and marginalization faced by indigenous peoples the world over and to safeguard their human rights.

This book is published in connection with the UN "World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance" held in South Africa, 2001 and it contains articles by experts from throughout the world.

ASIAN INDIGENOUS AND TRIBAL PEOPLES NETWORK (AITPN)

IWGIA
INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS

IWGIA

RACISM AGAINST INDIGENOUS PEOPLES

RACISM AGAINST INDIGENOUS PEOPLES

ISBN 87-90730-46-1

RACISM AGAINST INDIGENOUS PEOPLES

Editors:
Suhas Chakma and
Marianne Jensen

IWGIA Document No. 105
Copenhagen 2001

RACISM AGAINST INDIGENOUS PEOPLES

© Copyright: The International Work Group for Indigenous Affairs (IWGIA) and Asian Indigenous and Tribal Peoples Network (AITPN) 2001 - All Rights Reserved -

Editors: Suhas Chakma and Marianne Jensen

Cover, maps and layout: Jorge Monrás

English translation: Elaine Bolton

Proofreading: Elaine Bolton and Birgit Stephenson

Prepress and Print: Eks-Skolens Trykkeri, Copenhagen, Denmark
ISSN: 0105-4503 - **ISBN:** 87-90730-46-1

ASIAN INDIGENOUS AND TRIBAL PEOPLES NETWORK (AITPN)
P.O.Box 9627, A-3 Post Office, Janakpuri, New Delhi-110058, India
Tel and fax: (+91) 11 562 0583
E-mail: aitpn@hotmail.com

INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS
Classensgade 11 E, DK 2100 - Copenhagen, Denmark
Tel: (+45) 35 27 05 00 - Fax: (+45) 35 27 05 07
E-mail: iwgia@iwgia.org - www.iwgia.org

This book has been produced with the financial support of the Norwegian Agency for Development Cooperation and the Danish Ministry of Foreign Affairs

CONTENTS

EDITORIAL
Setting the Record Straight
by Suhas Chakma 10

CHAPTER 1
The Fight Against Racism: Principles of Non-Discrimination and Equality
by William Jonas 18

CHAPTER 2
Indigenous People and Racism in Australia: Issues and International Commentary
by William Jonas 34

CHAPTER 3
Indigenous Peoples in the Pacific and the World Conference Against Racism
by Nic Maclellan 90

CHAPTER 4
Racism and Racial Discrimination Against the Indigenous People in Scandinavia and Russia – the Saami People
by Mattias Åhrén 136

CHAPTER 5
Behind the Bamboo Curtain: Racism in Asia
by Suhas Chakma 176

CHAPTER 6
The Gap Between Legality and Reality: The Case of Indigenous Women and Children in South America
by Carlos Romero Bonifaz 218

CHAPTER 7
Racism Against Indigenous Peoples in the United States and Canada
by Andrew Huff 248

CHAPTER 8
Racism Against the Indigenous Peoples of Central America and the Caribbean
by Atencio López Martinez 280

CHAPTER 9
Discrimination Against the Forest People ('Pygmies') of Central Africa
by Justin Kenrick and Jerome Lewis 312

CHAPTER 10
Recommendations: Why Affirmative Action?
by Suhas Chakma 326

BIOGRAPHIES 334

EDITORIAL

SETTING THE RECORD STRAIGHT

By Suhas Chakma

As we go to print, the Third Session of the Preparatory Committee for the World Conference Against Racism is scheduled to meet from 30 July to 9 August 2001. Little substantive progress has been made in the Second Session of the Preparatory Committee towards adoption of a Draft Declaration and Programme of Action for consideration at the final conference in Durban – a regular feature of the United Nations World Conferences. The proviso relating to "indigenous peoples" put by the United States delegation – *"The use of the term 'peoples' shall not be construed as having any implications as regards the rights that may attach to the term under international law"* – looms large over the Draft Declaration and Programme of Action. This exclusion of indigenous peoples from international law is an act of racism at international level, a violation of the principles of equality and non-discrimination.

The present Draft Declaration and Programme of Action refers to various phobias - "Islamophobia, Negrophobia, Xenophobia" - in addition to anti-Arabism and anti-Semitism. If the proviso relating to "indigenous peoples" and the debate on indigenous peoples' rights since the Vienna World Conference on Human Rights are any indication, most States - including the only superpower, the United States of America - have been suffering from "S-phobia" – the phobia of (the right of) self-determination in relation to recognition of Indigenous Peoples as Peoples within the full meaning of international law.

There is no society that can claim to be free from the scourge of racism, racial discrimination, xenophobia and related intolerance. Yet, in the periodic reports to the Committee on the Elimination of Racial Discrimination (the CERD Committee), States from all over the world deny the existence of racism in their country. Consequently, the CERD Committee's Concluding Observations are peppered with bland comments – it expresses concern that there is "*no specific legislation prohibiting racial discrimination*" or that "*racial discrimination as such is not explicitly and adequately penalised in criminal law*". If racism were indeed adequately penalised in criminal law, many governmental representatives would be prosecuted for acts of racism. After all, the worst form of racism is to deny the existence of racism.

Racism is as old as human civilization. Following the arrival of the Aryans at around 1700 BC into India, they introduced the *Varna*, which literally means "colour", system to segregate the people. In the *Varna* system, the *Adivasis*[1] – indigenous peoples - were referred as "*Atisudra*" meaning lower than the *Sudras*, the untouchables. The indigenous peoples were considered so low that they were kept outside of the *Varna* system. While the colonial British practiced racism against the Indians, many nationalists during the struggle against the British did not study anthropology as it was considered to be a subject on the so-called savages, the *Adivasis*. Indeed, there is no recorded history of the *Adivasis* between the arrival of the Aryans around 1700 BC and the beginning of British colonialism in the 18th century. The recorded history has been written by British administrators and European anthropologists. In the post decolonisation period, most studies on Adivasis or indigenous peoples have plagiarised the reports written by the British administrators and European anthropologists. Anthropology became a subject of study by the Indians only at the end of British colonialism. It comes as no surprise that millions of Adivasis continue to be victim to utterly racist laws, such as the Criminal Tribes Act of 1871, which identifies all persons belonging to a tribe as criminals. The Government of British India passed the Criminal Tribes Act to bring the rebellious aborigines in inaccessible areas under its control. The National Human Rights Commission of India has set up an Advisory Board to address the problems of these so-called criminal tribes but entrenched social customs and administrative practices are not withering away.

If anthropology was considered to be a subject on the so-called savages of the Sub-Continent, the Doctrines of Discovery and *terra nullius* have become part of the American psyche. This psyche is manifested through prohibitions against collective indigenous land ownership, acquisition of indigenous peoples land without due process of law or with no or little compensation, unilateral extinguishment of indigenous peoples' land rights and title, non-recognition of indigenous peoples rights over land and resources, non-respect for sacred sites and spirituality, discriminatory land claim processes, arbitrary termination of indigenous governments, arbitrary abrogation of treaties etc. Since the rule of law has become a part of customary international law, the violation of the rule of law, i.e. criminality with regard to indigenous peoples, has become the rule itself in the Americas.

Indigenous peoples across Asia, Africa, North America, South and Central America, the Pacific and Europe face the same situation.

Poverty and hunger affect millions of indigenous peoples. Poverty results in exploitation, illiteracy, lack of access to education and heath care, high mortality rates and all the other situations through which discrimination is ultimately expressed. While, in many situations, globalisation accelerates the impoverishment process of the indigenous, in most cases it is the national companies and local traders who exploit the indigenous peoples.

A large majority of armed conflicts relate to indigenous peoples due to the States' inability to resolve their problems. Indigenous peoples have been targeted by law enforcement personnel simply because of their indigenous origin. They have been victims of torture, rape, extra-judicial killings, militarization and extensive land alienation. Many have become internally displaced within the territory of the State and many have become refugees.

Poverty and poverty-like situations in the Internally Displaced Persons and refugee camps are the hunting grounds of traffickers. In many situations in Asia, the majority of the victims of trafficking come from indigenous communities. United Nations agencies and international organisations must see "beyond gender" on a case by case basis when considering programmes of action to combat trafficking.

International action has not been of much help in combating racism against indigenous peoples. The United Nations Voluntary Fund to combat Racism in the Third Decade has received no monetary help despite repeated resolutions of the UN bodies. The Committee on the International Convention on the Elimination of Racial Discrimination faces irresponsible attacks from member States.

In March 1999, the CERD Committee asked the Australian Government to suspend the Native Title Amendment Act and inform the Committee on any changes in policy as to Aboriginal land rights under its urgent action mechanisms. In March 2000, CERD reviewed Australia's periodic report and provided its usual "concerns and recommendations" for a State party. The Committee drew specific attention to Aboriginal rights, including concerns the Committee had about hot-button issues in Australia—(i) the government's unwillingness to apologize for the State's earlier policy of forced removal of Aboriginal children from their families and (ii) the racially discriminatory impact of mandatory sentencing laws for minor property offences[2]. Notably, during the proceedings, it was also revealed that for the past two years the Committee had requested to visit Australia but the government had refused[3].

Taking the Committee's concerns as an affront, the Australian government threatened to withdraw from the Convention and announced it would officially review its relations with the treaty system as a whole. Rejecting the Committee's conclusions, the government questioned the integrity of particular experts on the basis of their national affiliation. Foreign Minister Alexander Downer stated,

> *"People who are critical of the Australian Government need to reflect on this point; do they really think it's right for a United Nations committee, which includes people from Cuba and from China and Pakistan, to start getting involved in debate about whether the Prime Minister should say sorry or not for the stolen generation . . . . I mean, Australians aren't going to cop that."*[4]

In August 2000, the Australian government announced that the Cabinet had concluded an internal review of its relation with the treaty bodies and from now on it *"will only agree to visits to Australia by treaty committees and requests from the UN Committee [sic] on Human Rights 'mechanisms' for the provision of information and to visit where there is a compelling reason to do so"*.[5] The government also stated it would *"immediately implement a package of measures to improve our continued interaction with UN human rights treaty committees, including ... [r]eporting to and representation at treaty committees to be based on a more economical and selective approach where appropriate"*. The government's statement also declared that *"Australia's strategic engagement with the treaty committee system"* would depend on *"the extent to which effective reform occurs"*— a matter, of course, determined by Australia's vision of reform. Holding little to nothing back, the statement concluded: *"The Government believes these steps will ensure that Australia gets a better deal from the UN treaty committees."*[6]

Moreover, the CERD Committee receives few communications from the UN Special Committee of 24 on Decolonisation and other UN agencies on the situation of racial discrimination facing indigenous peoples in colonised countries. Reservations expressed in Article 15 of the CERD has made one of the key functions of the CERD Committee redundant. The Trust and non-self governing territories across the Pacific and North America remain out of the purview of the CERD Committee.

If the Australian Government refuses to say "sorry" to the Aborigines for the Stolen Generation, the debate on compensation, too, has been restricted to European colonialism and trans-Atlantic slavery. The very fact that colonisation and slavery also contributed to or accelerated the extermination and impoverishment of indigenous peoples across the Americas has not been taken into account in the proposed text on compensation in the Draft Declaration and Pro-

gramme of Action. As a consequence of colonialism and the domination of colonial institutions and their descendents, poverty afflicts millions of indigenous peoples across the world. This is starkly in evidence across the Americas. Indigenous peoples in the Americas, like the rest of the World, deserve compensation for colonialism. Compensation goes beyond colonialism and slavery - a stolen generation of indigenous peoples, violation of treaties with indigenous peoples, acts of injustice, State-sponsored terrorism, violation of international human rights and humanitarian laws, the impact of nuclear radiation etc. It is a different matter that the US Government seems to be more concerned about the lawsuits filed by indigenous peoples for the loss of billions of dollars in trust monies that were supposedly being managed by the Federal Bureau of Indian Affairs for the benefit of tribes and individual Indians than compensation for colonialism and slavery.

The right of self-determination remains a key issue for indigenous peoples. As the Mexican Government eschews meaningful negotiation with the Zapatistas, only two per cent of the 1997 Chittagong Hill Tracts Peace Accord with the indigenous Jumma peoples has reportedly been implemented by the Government of Bangladesh. As the security forces continue to violate the human rights of indigenous Jumma peoples, the calm in CHT seems to be the proverbial lull before the gathering storm. Affirmative actions are key to remedying many of the root causes of the conflicts. Rolling back of affirmative action, such as the proposed amendment of the 5th Schedule of the Constitution of India to allow transfer of lands from indigenous peoples to non-indigenous persons, will cause further dispossession, more conflicts, violence and consequent human rights abuses.

The World Conference Against Racism is as important to preserving the existing standards as to proposing future standard-setting processes. The Asian and African Governments continue to be "allergic" to indigenous peoples' issues. The Eastern European bloc is more or less indifferent. As the United States reconsiders its position on whether to commit an act of racial discrimination at international level by demanding deletion of the "S", Sweden remains the most conservative country in the North. Neither has the Brazilian delegation, which proposed deletion of the "S" from the term "peoples" along with Canada in the Vienna World Conference on Human Rights, changed its position. The Amazon has yet to be fully exploited and the Brazilian Foreign Ministry is unlikely to change its position until then. There are countries such as Bolivia, Guatemala and Ecuador, where indigenous peoples have become vocal, which want to effectively address indigenous issues. This may not be

enough. After all, most Argentinians are not aware of the existence of indigenous peoples in their own country. Awareness raising and education are as important as having effective programmes of action.

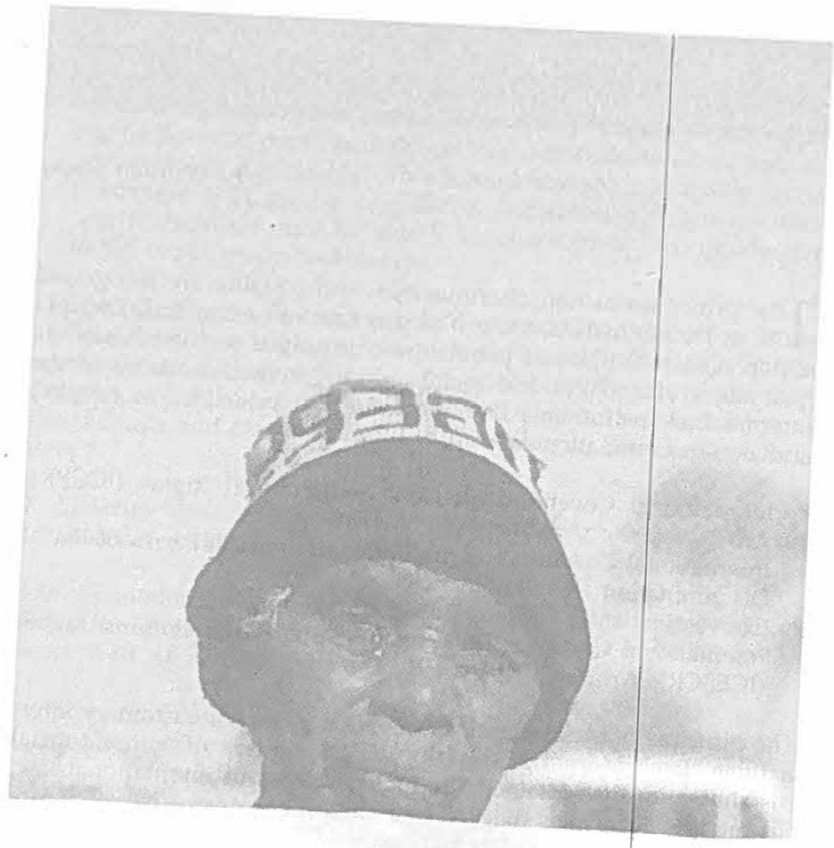
Awareness and education must focus on the shameful history of the systematic annihilation of indigenous peoples across the world – to set the record straight. But there seems to be no stop to this shameful process, as "endangered human races" often lose their habitat in order to protect "endangered animals by making national parks or development", for national development (dams, mining, logging etc), for environmental protection (afforestation programmes without consent of indigenous peoples), and national and international security (building of army camps, nuclear tests etc).

There are many indigenous peoples who are on the verge of extinction, like the Veddas in Sri Lanka, the Jarwas in Andaman and Nicobar Islands and the Yanomamis in Brazil. With the destruction of each community, human society loses another culture, language, tradition and knowledge. The World Conference Against Racism seems too "global and political" to discuss such issues. This World Conference Against Racism is not enough. The recommendations for a separate Secretariat for the Permanent Forum in order to fully operationalise the only institution created so far in the United Nations system with the representation of indigenous members and a World Conference on Indigenous Peoples must be the main highlights of the World Conference Against Racism for one of history's worst victims of abuse.

The book at hand, *Racism Against Indigenous Peoples,* analyses racism against indigenous peoples all over the world and makes recommendations for the Third World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. The various chapters, covering all the regions of the world, analyse the existence of racism and racial discrimination against indigenous peoples under national laws and policies as well as the concrete forms of racism that the indigenous peoples face in their daily lives. The Concluding Observations of the CERD Committee dealing with racism against indigenous peoples are discussed throughout the book, giving evidence to the grave situation of racial discrimination against indigenous peoples across the world. It is our hope that *Racism Against Indigenous Peoples* will contribute to the debate on racial discrimination against indigenous peoples, provide recommendations for inclusion in the Final Declaration and Programme of Action of the WCAR, and serve as a useful source of inspiration in the follow-up process.

Notes

1. The word *Adivasi* originates from the mother of Indian languages, Sanskrit. It is a conjunction of two words *Adi* meaning original and *Vasi* meaning inhabitants. *Adivasi* means original inhabitants.
2. CERD: State party periodic report — Australia. 19/04/2000. CERD/C/304/Add.101. (Concluding Observations/Comments), paras.13 & 16, as quoted in *WCAR Think Paper*, X: "State Support for CERD", a joint project of Human Rights Documentation Center (HRDC), International Service for Human Rights (ISHR) and South Asia Human Rights Documentation Centre (SAHRDC), May 2001.
3. Mann, Simon, "UN Body Wants Invitation", *Australasian Business Intelligence*, 31 Mar. 2000 as quoted in *WCAR Think Paper*, X: "State Support for CERD".
4. Inbaraj, Sonny, "Rights-Australia: Aboriginals to Protest Racism at Olympics", *Inter Press Service*, 4 Apr. 2000 as quoted in *WCAR Think Paper*, X: "State Support for CERD".
5. See Joint News Release by Minister for Foreign Affairs Alexander Downer, Attorney-General Daryl Williams and Minister for Immigration and Multicultural Affairs Philip Ruddock, "Improving the Effectiveness of United Nations Committees", 29 August 2000, available at <http://law.gov.au/aghome/agnews/2000newsag/joint14_00.htm> as quoted in WCAR Think Paper,X: "State Support for CERD".
6. *Ibid.*



CHAPTER 1

THE FIGHT AGAINST RACISM: PRINCIPLES OF NON-DISCRIMINATION AND EQUALITY

By William Jonas

The principles of non-discrimination and equality are recognised in every international law. The practices of racism and discrimination against Indigenous people must be judged on the basis of the guarantees of equality and racial non-discrimination. Some of the international instruments that recognise the principles of equality and non-discrimination are:

- International Covention on Civil and Political Rights (ICCPR), Article 2 & 26;
- International Covention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 2;
- Convention on the Rights of the Child, Article 2;
- International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2.

The principle of racial non-discrimination is part of customary international law[1]. More significantly, the prohibition of *systemic* racial discrimination has attained the highest status of international law, *jus cogens*[2]. Principles that have reached the status of *jus cogens* are "peremptory norm(s) of international law from which no derogation is permitted"[3]. The principle of racial non-discrimination thus exists independently of the obligations in instruments mentioned above, and cannot be displaced. The International Convention on the Elimination of All Forms of Racial Discrimination (hereafter "CERD") defines racial discrimination in Article 1(1) in terms of its purpose or effect:

> *"... any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."*

The international definition of racial discrimination is generally considered to have two elements.

- First, *"a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin"* is required.
- Second, the distinction based on race must nullify or impair *"the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life"*. This second element is generally taken to require that, to be considered discriminatory, any racially specific measure must be able to be characterised as detrimental to the racial group in question.

Thus it can be seen that the standard of equality protected in international law is a substantive equality standard. This substantive equality standard is recognised in the principles of equality and non-discrimination elaborated by treaty-based Committees and international courts and can be reduced to the following four key propositions.[4]

1. Equality does not necessarily mean treating everybody in an identical manner

The promotion of equality does not necessitate the rejection of difference. In the decision of the International Court of Justice in the *South West Africa Case,* Judge Tanaka stated:

> *"The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal... To treat unequal matters differently according to their inequality is not only permitted but required."*[5]

This passage identifies the salient features of the two legal models of equality – namely, formal and substantive equality.

A formal equality approach relies on the notion that all people should be treated identically regardless of such differences. However, an approach *"which relies on the notion that all people should be treated the same, denies the differences which exist between individuals and promotes the idea that the state is a neutral entity free from systemic discrimination. In reality "[t]he fact that... Aborigines... have been subjected to appalling inequalities demonstrates that formal equality is compatible with the grossest injustice".* [6]

A substantive equality model, such as that adopted by Judge Tanaka, takes into account "individual, concrete circumstances". It acknowledges that racially specific aspects of discrimination such as

cultural difference, socio-economic disadvantage and historical subordination must be taken into account in order to redress inequality in practice.

The international legal approach to equality is one of substantive rather than formal equality[7]. The Human Rights Committee, which oversees the implementation of the ICCPR, has adopted a substantive equality approach to the meaning of non-discrimination. The Human Rights Committee has indicated that equality "does not mean identical treatment in every instance", and that the Committee is concerned with "problems of discrimination in fact" not just discrimination in law[8].

2. *A differentiation of treatment will not constitute discrimination if the criteria for its adoption are objective, reasonable and pursue a legitimate aim*

Differential treatment is permitted under the principle of equality as long as the purpose of the treatment is to achieve equality between racial groups.

The Human Rights Committee and the CERD Committee have indicated that there are two types of differential treatment that are permitted under the ICCPR and CERD. These are actions that constitute a legitimate differentiation of treatment ("reasonable differentiation"), and affirmative action ("special measures"). A differentiation of treatment does not necessarily have to be characterised as a special measure for it to be permissible:

> *"[A] differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate* **or** *fall within the scope of Article 1, paragraph 4 (special measures)... In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable, disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin."* [9]

Whether a differentiation of treatment is legitimate or not will depend upon the purpose of the differentiation. Oppressive distinctions for the purpose of justifying the reduction of rights are not legitimate. Differential treatment that aims to preserve minority cultures may be legitimate. Differential treatment is only legitimate if the distinction is "appropriately adapted to the distinctive characteristics of the group or individual" and there is a reasonable,

objective and proportionate nexus between the relevant difference and the Convention's objective to achieve equality between racial groups. As the Human Rights Committee stated:

> *"... not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."* [10]

In Australia recently, the question of what constitutes permissible differential treatment under CERD was debated before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (the PJC)[11]. This debate took place in the context of the PJC's Inquiry into the sustainability of the CERD Committee's decision on 18 March 1999 that the amended *Native Title Act 1993* (Cth) (NTA) was in breach of Australia's obligations under CERD. The Australian government's interpretation of what constitutes permissible or legitimate differential treatment under CERD allowed for treatment that had a detrimental or invidious effect on Indigenous people. The PJC Report justified the invidious differential treatment of Indigenous people under the amended NTA on the following bases: [12]

- the objectives for the amendments are legitimate in the circumstances;
- the amendments are reasonable and not arbitrary;
- the amendments are designed to achieve a legitimate objective with little, or no, impact on native title;
- the amendments deal with historical acts and developing law, or attempt to balance competing interests, and therefore a margin of appreciation is allowed.[13]

The "legitimacy" of the differential treatment of Indigenous people in the native title amendments were revealed in the PJC Report to be political considerations such as the provision of certainty[14] and balancing competing interests[15], and not the achievement of the objectives of CERD.

3. *Special measures, or affirmative action, are sometimes required in order to redress inequality and to secure, for the members of disadvantaged groups, full and equal enjoyment of their human rights*

Special measures are a further type of differential treatment that is

not discriminatory but is intended to achieve the objective of CERD; the achievement of equality between racial groups. Where necessary, to ensure the adequate development and protection of certain racial groups (or individuals belonging to such groups), states may be required to implement special measures.

Article 2(2) of CERD requires that:

> *"State parties shall, when circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."*

Article 1(4) of CERD also provides for special measures:

> *"Special measures, taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."*

Section 8 of Australia's domestic legislation, the Racial Discrimination Act 1975, directly incorporates article 1(4) of CE RD.

While in some circumstances they may be required, the features of special measures are strictly defined. Their main features, as outlined in Article 1(4) of CERD, are that special measures must be for the sole purpose of securing the advancement of a particular group; such advancement must be necessary; it must not lead to the maintenance of separate rights for different racial groups; and they shall not be continued once the objective of the measure has been achieved.

Article 2(1) of the International Covenant on Economic, Social and Cultural Rights provides another basis in international law for governments to take special measures where the enjoyment of human rights is impaired:

> *"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximisation of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."*

These paragraphs show that the aim of special measures is to achieve substantive equality and to ensure the equal enjoyment of rights. The rationale for allowing "special measures" is that historical patterns of racism entrench disadvantage and more than the prohibition of racial discrimination is required to overcome the resulting racial inequality[16]. Any attempt to redress Indigenous disadvantage through special measures must acknowledge that:

- Indigenous disadvantage is the result of systemic discrimination;
- The appropriate benchmark by which to measure progress is one of equality between Indigenous and non-Indigenous peoples;
- The governments are obligated to take sufficient steps (or special measures) to achieve such equality;
- There must be adequate monitoring and evaluation of progress, including measuring effectiveness through benchmarking and standard setting; and
- Real progress requires the effective participation of Indigenous peoples in decision making.

4. Rights that recognise the distinct cultural identity of minority groups are consistent with and sometimes required, by the notion of equality

Specific rights that recognise the distinct cultural identity of minority groups are consistent with a substantive approach to equality. Indeed, it has largely been in the context of the protection of minority groups that the meaning of non-discrimination and equality has been elaborated.

The purpose of particular measures for the protection of minorities is to enable minorities to maintain basic characteristics that distinguish them from the majority of the population, and hence institute factual equality between members of the minority group and other individuals.

In 1935, the Permanent Court of International Justice produced an advisory opinion on *Minority Schools in Albania* in which they considered the aims of the Minorities Treaties adopted by the League of Nations at the end of the First World War. The Court found that the

aim of the treaties was to secure for minorities the ability to live peaceably in society, while preserving their own characteristics. In order to do this, the following factors were required:

The first was to ensure that members of racial, religious or linguistic minorities should in every respect be placed on a footing of perfect equality with the other nationals of the State.

The second was to ensure for the minority elements suitable means for the preservation of their own characteristics and traditions.

These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority[17].

Judge Tanaka in the *South West Africa Case* also commented that the protection of minority groups, as a relevant difference, would justify a differentiation in treatment:

> *"A minority group shall be guaranteed the exercise of their own religious and education activities. This guarantee is conferred on the members of a minority group, for the purpose of protection of their interests and not from the motive of discrimination itself. By reason of protection of the minority this protection cannot be imposed upon members of minority groups, and consequently they have the choice to accept it or not."* [18]

Indigenous peoples, as a special kind of minority, have the right to maintain the basic characteristics that distinguish them from non-Indigenous people. The human rights treaty committee bodies have elaborated the requirements to enable Indigenous peoples to maintain their distinctive cultures. These requirements form part of states' obligations to guarantee equality and non-discrimination before the law. The Committee on the Elimination of Racial Discrimination has confirmed that in terms of their application to Indigenous peoples, the Convention's obligations require States *inter alia* to:

(a) recognise and respect distinct Indigenous culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
(b) ensure that members of Indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
(c) provide Indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;

(d) ensure that no decisions directly relating to the rights and interests of Indigenous peoples are taken without their informed consent;
(e) ensure that Indigenous communities can exercise their rights to practise and revitalise their cultural traditions and customs, to preserve and practise their languages; and
(f) recognise and protect the rights of Indigenous peoples to own, develop, control and use their communal lands and territories and resources and, where they have been deprived of their lands and territories traditionally used or otherwise inhabited or used without their free and informed consent, to take steps to return these land and territories. Only where this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories[19].

The CERD Committee's *General Recommendation on Indigenous Peoples* includes the recommendation at (d) above that states must ensure that no decisions directly relating to the rights and interests of Indigenous peoples are taken without their informed consent. Thus substantive equality is not just about equal outcomes for Indigenous peoples but requires the effective participation of Indigenous peoples in the process of determining such outcomes.

The Human Rights Committee has provided further guidance on the application of the equality standard to the situation of Indigenous peoples under Article 27 of the ICCPR. In several cases considered by the Human Rights Committee under the First Optional Protocol to the ICCPR[20] the Committee has established the following principles:

- For it to be valid and not breach Article 27, a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole[21].
- The right of a member of a minority group to enjoy their own culture must be considered within the relevant socio-economic context. Economic activities may come within the ambit of Article 27 where they are an essential element of the culture of the group[22].
- In considering whether the economic activities of the minority group are being interfered with in such a way as to threaten the way of life and culture of the community, the Committee will take into account historical inequities in treatment[23].
- The types of economic activities of the minority group that are relevant are not limited to activities that support a traditional

means of livelihood. They may be adapted to modern practices[24].

- A countervailing consideration will be the role of the State in encouraging development and economic activity[25]. In doing so, the State is under an obligation to ensure that such activity has, at most, only a "limited impact on the way of life of persons belonging to a minority" [26]. Such a "limited impact" would not necessarily amount to a "denial" of the rights under Article 27 [27].
- The Committee will consider whether the State has weighed up the interests of the complainant with the benefits of the proposed economic activity. Large scale activities, particularly involving the exploitation of natural resources, could constitute a violation of Article 27 [28].
- In assessing activities in the light of Article 27, State parties must take into account the cumulative impact of past and current activities on the minority group in question. Whereas "different activities in themselves may not constitute a violation of this Article, such activities, taken together, may erode the rights of (a group) to enjoy their own culture" [29].
- The Committee will consider whether the State has undertaken measures to ensure the "effective participation" of members of minority communities in decisions that affect them[30].

The CERD Committee recently highlighted the connection between ensuring compliance with the non-discrimination principle and ensuring the survival of the cultural identity of Indigenous peoples:

> *"In many regions of the world Indigenous peoples have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardised."* [31]

The Committee called on State Parties to take all appropriate means to combat and eliminate discrimination against Indigenous peoples, including by recognising and protecting their cultural identity.

Participation Rights

The second set of international human rights standards relevant to Indigenous groups consists of those rights that require the participation of Indigenous peoples in decisions that affect them. These are enshrined in:

- Article 1 of the ICCPR; and
- Article 1 of the ICESCR[32].

The broad principle underlying these rights is that of self-determination. Article 1 of the ICCPR and ICESCR states:

1. 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.

2 All peoples may, for their own ends, freely dispose of their natural wealth and resources... In no case may a people be deprived of its own means of subsistence.

3. The State parties to the present Covenant... shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the Charter of the United Nations.

The right of self-determination has its origins in the process of decolonisation. It has generally been applied to effect a transfer of power from colonial powers who have existed as a minority of a population to a local majority[33]. However, based on the General Comments of both the CERD Committee and the Human Rights Committee, there is little doubt that self-determination is a right that Indigenous peoples are entitled to exercise.

The CERD Committee strengthened the notion of political participation in its General Comment on Indigenous Peoples. Noting that for Indigenous peoples, culture, historical identity and the right to their lands and resources have been, and remain, jeopardised through histories of colonisation and exploitation, the Committee has called on States parties to (among other things):

> *"...ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent."* [34]

The Human Rights Committee also elaborated on this issue of political participation in its General Comment on Article 27 of the ICCPR in relation to minority group or cultural rights. In its discussion on the need to protect the particular cultural relationship minority groups have with land resource use (particularly in the case of Indigenous peoples), the Committee stated that the enjoyment of culture may require:

"...measures to ensure the effective participation of members of minority communities in decisions which affect them." [35]

Both these Committees recently made observations about Australia's failure to accord Indigenous people their right to effective participation in the decisions that affect them. The CERD Committee's decision in March 2000 reflects its dissatisfaction with the Government's response to *Decision 2(54),* which urged the government to renew its negotiations with Indigenous people in order to rectify the erosion of rights under the amended NTA:

"Concern is expressed at the unsatisfactory response to Committee Decisions 2(54) (March 1999) and 2(55) and at the continuing risk of further impairment of the rights of Australia's Indigenous communities. The Committee reaffirms all aspects of its Decision 2(54) and 2(55) and reiterates its recommendation that the State party ensure effective participation by indigenous communities in decisions affecting their land rights, as required under article 5(c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of the ensuring the "informed consent" of indigenous peoples. The Committee recommends the State party to provide full information on this issue in the next periodic report." [36]

On 28 July 2000, the Human Rights Committee also made concluding observations, specifically on the rights of Indigenous peoples under the principle of self-determination (Article 1 of ICCPR) to control their land and their resources:

"With respect to article 1 of the Covenant, the Committee takes note of the explanation given by the delegation that rather than the term 'self-determination' the Government of the State party prefers terms such as 'self-management' and 'self-empowerment' to express domestically the principle of indigenous peoples exercising meaningful control over their affairs. The Committee is concerned that sufficient action has not been taken in that regard.
The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (article 1, para 2)." [37]

The application of the principle of self-determination to Indigenous peoples in international law challenges the notion that the non-Indigenous State has exclusive jurisdiction over traditional land; not by replacing it with exclusive Indigenous jurisdiction but by challenging the foundations on which the assertion of paramount control

by one group to the exclusion of all others rests. James Anaya criticizes the theories articulated by Vattel and Hobbes, which acknowledge and assign rights to only two entities: the State and the individual [38]. The foundation of international law in the nation state, whose social organisations are characterised by exclusive territory and centralised and hierarchical authority, means that Indigenous peoples, organised through tribal or kinship ties, decentralised political structures and overlapping territorial spheres, will never benefit from the international law of nations and its characterisation of states as "free, independent and equal":

"Vattel thus articulated the foundation for the doctrine of State sovereignty which, with its corollaries of exclusive jurisdiction, territorial integrity, and non-intervention in domestic affairs, developed into a central precept of international law." [39]

This approach to international law legitimised the subjugation of Indigenous peoples. As Erica-Irene Daes notes:

"...it is of critical importance to underscore the cultural biases that contributed to the conceptual framework constructed to legitimize colonization and the various methods used to dispossess indigenous peoples and expropriate their lands, territories and resources. It is safe to say that the attitudes, doctrines and policies developed to justify the taking of lands from indigenous peoples were and continue to be largely driven by the economic agendas of States."[40]

And later:

"International law remains primarily concerned with the rights and duties of European and similarly 'civilised' States and has its source principally in the positive, consensual acts of those States." [41]

The principle of self-determination challenges the assumptions of an international law based on exclusive territorial jurisdiction. The assertion by Indigenous peoples of this right as a collective right also challenges the notion that the only recognisable entities in international law are the State and the individual.

"Any conception of self-determination that does not take into account the multiple patterns of human association and interdependency is at best incomplete and more likely distorted. The values of freedom and equality implicit in the concept of self-determination have meaning for the multiple and overlapping spheres of human association and politi-

cal ordering that characterize humanity. Properly understood, the principle of self-determination, commensurate in the values it incorporates, benefits groups - that is, 'peoples' in the ordinary sense of the term – throughout the spectrum of humanity's complex web of interrelationships and loyalties, and not just peoples defined by existing or perceived sovereign boundaries." [42]

Not only does the principle of self-determination challenge the assumptions on which the sovereign State relies, it is particularly confrontational to those states whose assumptions depend on the annexation of Indigenous peoples' territories without their consent. Thus in the *Western Sahara* case[43], the International Court of Justice refused to give weight to the legal theory on which the land was acquired and preferred instead to "give precedence to the present-day aspirations of aggrieved peoples over historical institutions".[44]

Acknowledging the challenge that self-determination poses to the sovereign State as the foundation of international law assists in understanding the response of governments to international criticism over their failure to accord this right to Indigenous peoples. The Australian Government's recent review of international treaties can be understood as a response to the challenge that human rights obligations, and in particular the right to self-determination pose to State power. It also casts light on the change in Australian Government's policy on Indigenous matters which resulted in the withdrawal of the term "self-determination" in relation to Indigenous policy. In its place the Australian Government prefers to use a more individualistic notion such as "self-empowerment" or "self-management". These terms do not challenge the State/individual dichotomy on which State power is based.

The right to self-determination forms the basis on which Indigenous people may share power within the existing state. It gives Aboriginal people the right to choose how they will be governed. Yet the obligation placed on the Governments in international law to accord this right to Indigenous peoples has not been effective in ensuring that Indigenous peoples have control over their land, their resources and the form of governance that determines the nature of this control.

Notes

1 McKean, W. 1983. *Equality and Discrimination under International Law*, Clarendon Press, Oxford. Pp. 271–277.

2 Brownlie, I. 1979. *Principles of Public International Law*, 3rd edition, Clarendon Press, Oxford, Pp. 596–598.

3 Triggs, G. 1998. "Australia's Indigenous Peoples: Evolving International Law", Unpublished Article. P. 3. See also Harris, D.J. 1991. *Cases and Materials on International Law*, 4th ed., Sweet and Maxwell, London. Pp. 700–702.

4 Pritchard, S. 1995. "Special Measures" in Race Discrimination Commissioner: *Racial Discrimination Act 1975 – A Review*, Human Rights and Equal Opportunity Commission, Sydney. Pp.169-190. See also Bayefsky, A. 1990. "The Principle of Equality or Non-Discrimination in international Law", 11 *Human Rights Law Journal* 1. P 27.

5 *South West Africa Case (Second Phase)*. 1966. ICJ Rep 6. Pp.303-304, p. 305.

6 Race Discrimination Commissioner. *Alcohol Report*, HREOC, Sydney. P.25, quoting Thornton, M. V. 1990. *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, Melbourne. P.16.

7 McKean, W. 1970. "The Meaning of Discrimination in International and Municipal Law", 44 *British Yearbook of International Law* 178 at 195–196; Triggs, G. 1999. "Australia's Indigenous Peoples and international Law", 23 Melbourne University Law Review 372 at 379-381; also Australian Law Reform Commission. 1986. *Recognition of Aboriginal Customary Laws*, Report No. 31, paras 150, 196.

8 Human Rights Committee. 1989. *General Comment XVIII, Non-discrimination*, paras 8, 9, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*. UN Doc. HRI\GEN\1\Rev.1. P. 26.

9 Committee on the Elimination of Racial Discrimination. 1999. *General Recommendation XIV on Article 1*, para 2, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ibid. at 67. See also: Human Rights Committee, 1989, *General Comment XVIII, Non-discrimination*, paras 10 & 13, *ibid.* P. 26.

10 Human Rights Committee. 1989. *General Comment XVIII, Non-discrimination*, para 13.

11 Note that this Committee is dominated by government members.

12 Parliament of the Commonwealth of Australia. *Sixteenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: on the sustainability of the decision of the CERD Committee on 18 March 1999*, June 2000 (the PJC Report). Pp.37-58.

13 *Ibid.* P. 37.

14 *Ibid.* Pp. 39, 45.

15 *Ibid.* P. 49.

16 Race Discrimination Commissioner. 1997. *The CDEP Scheme and Racial Discrimination*, HREOC, Sydney. P. 40.

17 *Minority Schools in Albania*. 1935. OCIJ Ser A/B No 64, p17. See the discussion of the case in Pritchard, S., "Special measures", *op. cit.* P. 185.

18 *South West Africa Case (Second Phase)*. *Op. cit.*

19 Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, adopted 18 August 1997, UN Doc CERD/C/51/Misc 13/Rev 4 (1997) paras 4–5.

20 The First Optional Protocol, which has been acceded to by Australia, allows people within nations to bring complaints before the Human Rights Committee alleging breaches of provisions of the ICCPR by the State.

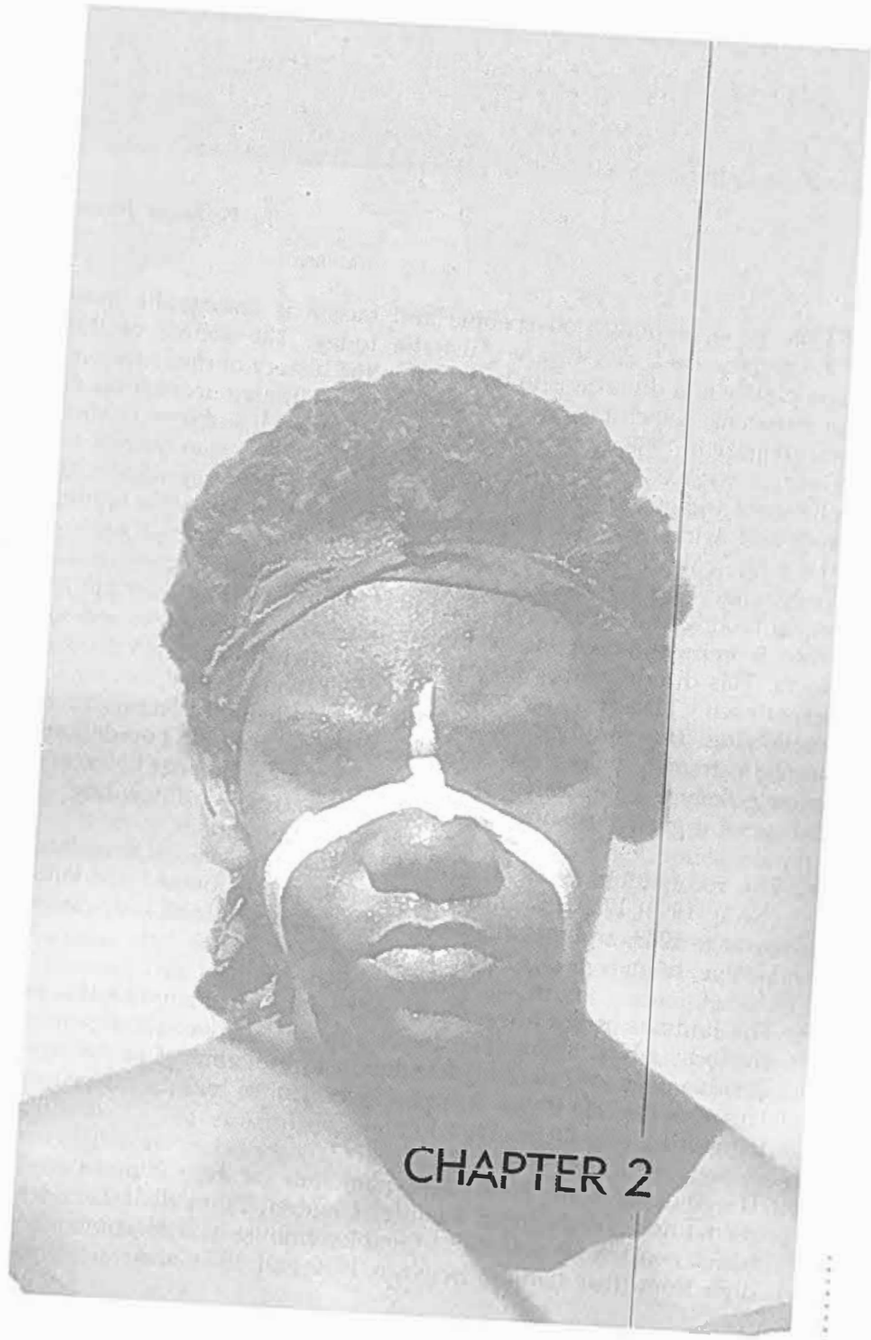
21 *Kitok v Sweden*, Communication No. 197/1985, UN Doc CCPR/C/33/D/197/1985 (1988), para 9.2.

22 *Ibid.*, para 9.3.

23 *Chief Ominayak and the Lubicon Lake Cree Band v Canada*. Communication No 167/1984, Report of the Human Rights Committee, UN Doc A/45/40 (1990).

[24] *Lansman et al v Finland* No. 1 (24 March 1994) CCPR/C/49/D/511/1992.
[25] *Ibid.*, para 9.4.
[26] *Ibid.*
[27] In this case, the Committee found that the economic activity proposed was of limited impact and did not operate as a denial of the cultural rights of the Sami.
[28] *Lansman et al. v Finland No. 2*, (25 November 1996) CCPR/C/58/D/671/1995, paras 10.5, 10.7.
[29] *Ibid.*, para 10.7.
[30] *Ibid.*
[31] CERD Committee, *General Recommendation XXIII (51). Op. cit.*, para 3.
[32] See also Article 1 of the *Charter of the United Nations* and the *Declaration on the Principles of International Law Concerning Friendly Relations and Co-Operation Among States*, United Nations General Assembly 2625 (XXV), 24 October 1970, "The principle of equal rights and self-determination of peoples".
[33] For an overview of the general legal principles of self-determination see Steiner, H., and Alston, P., 1996, *International Human Rights In Context: Law, Politics, Morality*, Clarendon Press, Oxford. Pp. 972–1020.
[34] Committee on the Elimination of Racial Discrimination *General Recommendation XXIII (51) concerning Indigenous Peoples, op. cit.*, para 5.
[35] Human Rights Committee, *General Comment 23 on the rights of minorities (Article 27) op. cit.*, para 7.
[36] Committee on the Elimination of Racial discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/304/Add.101, 19/04/2000. para 9. (Herein "CERD Committee, *Concluding Observations* 2000".)
[37] Human Rights Committee, Consideration of Reports submitted under Article 40 – Concluding Observations of the Human Rights Committee – Australia, (69th session), 28th July 2000, UN Doc CCPR/CO/69/AUS, para 9 (Herein Human Rights Committee, *Concluding Observations*)
[38] Anaya, S. J. 1996. *Indigenous Peoples in International Law*, Oxford University Press, New York. P. 13.
[39] *Ibid.* P. 15.
[40] Daes, Erica-Irene, *Final Report Indigenous Peoples and Their Relationship to Land*, UN Doc E/CN.4/Sub.2/2000/25, para 21.
[41] Daes, *op. cit.*, para 26.
[42] Anaya, *op. cit.* P. 79.
[43] *Advisory Opinion on Western Sahara* [Western Sahara Case] [1975] ICJR. P. 12.
[44] Anaya, *op. cit.* P. 84.

References to Chapter 1 are included in References at the end of Chapter 2 (page 84).



CHAPTER 2

INDIGENOUS PEOPLE AND RACISM IN AUSTRALIA: ISSUES AND INTERNATIONAL COMMENTARY

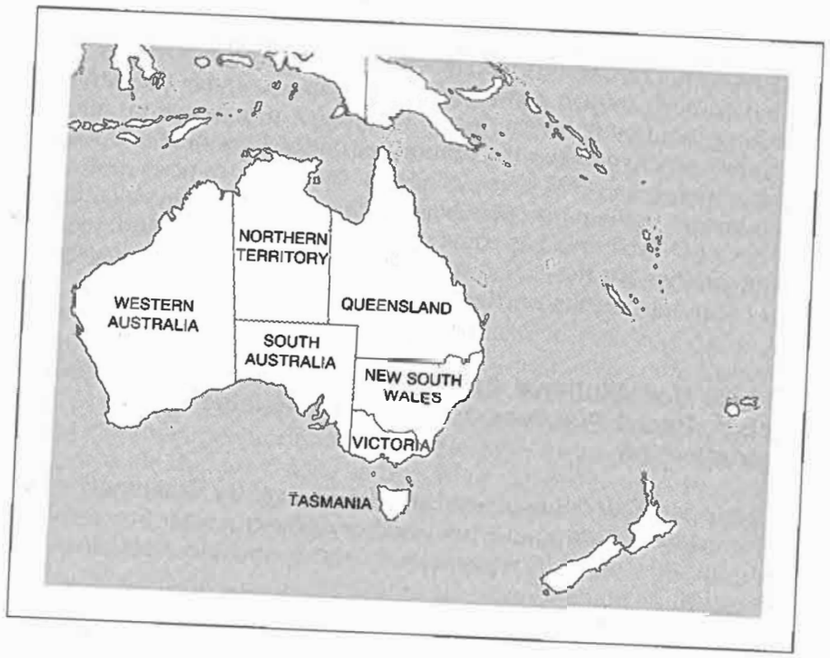
By William Jonas

The issue of Indigenous people and racism is among the most complex and divisive in Australia today. The source of this complexity and division is to be found in the history of race relations in Australia, which commenced with the illegitimate acquisition of sovereignty in 1788 under the auspices of the doctrine of *terra nullius*. Over successive generations, policies and practices have aimed to eliminate Indigenous people, to "smooth the pillow" of what was seen as a dying race, and later to assimilate Indigenous people within the white culture. It has only been since the 1960s that Indigenous people have been allowed to participate in mainstream society on an equal footing and access full citizenship rights including the right to vote, to improved access to healthcare, education and welfare and so forth. This discriminatory history now results in Indigenous people experiencing disadvantage against all indicators of socio-economic well-being. This disadvantage is profound, and due to factors such as the extremely young age structure of the Indigenous population, seems likely to continue for some time to come. The past ten years has seen a greater acknowledgement of this situation, including:

- The recognition in the 1992 *Mabo* decision (*Mabo v Queensland (No.2)* (1992) 175 CLR 1) that Indigenous people owned this land prior to 1788, and may have continuing rights to land and waters (native title);

- The findings of the Royal Commission into Aboriginal Deaths in Custody, which highlighted the relationship between Indigenous disadvantage and over-representation in the criminal justice system, and the role of the historical treatment of Indigenous people in creating this situation;

- The findings of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From their Families, which considered policies of forcible removal of Indigenous children from their families between 1910 and 1970; and



- The establishment in 1991 of the Council for Aboriginal Reconciliation – a Council of prominent leaders across all walks of Australian life aimed at promoting better relations between Indigenous and non-Indigenous people, and to consider whether a document of reconciliation would assist in the process. The Council submitted its final report to Parliament at the end of 2000.

In the past five years, there has also been a strong counter-movement to these changes, which has found expression in the rise of Pauline Hanson's One Nation Party. This party has run on a xenophobic and race-based platform, particularly focusing on Indigenous issues – for example, the belief that Indigenous people get "special treatment" through such measures as recognition of land rights and government program funding etc. This counter-movement has highlighted the division in the Australian community over Indigenous issues, in particular, with regard to the level of support for the recognition of Indigenous rights. For instance, views that Indigenous rights are "separate" rights and confer additional benefits on Indigenous people remain prominent and are occasionally advocated by the federal government in their policies.

The sensitivity of these issues is demonstrated by the Government's reaction to the recent international scrutiny of Australia before three United Nations human rights treaty committees, under the periodic reporting requirements. An "early warning / urgent action" procedure was also invoked by the Committee on the Elimination of Racial Discrimination in 1998 over concerns at inconsistencies between amendments to the native title legislation and Australia's obligations under CERD. Australia has come under much criticism of Indigenous affairs policies by the UN committees, and has responded aggressively through attacks on the treaty system.

National Constitutional Arrangements Contributing to Racism, Racist Practices and / or Race-Related Discrimination

Australia is a federation comprised of a Federal (or Commonwealth) Government, six state and two territory governments. For convenience, in this chapter references to states include References to territories.

In Australia, there is no entrenched guarantee preventing the states from enacting racially discriminatory legislation and no guarantee at all preventing the federal government from enacting racially discriminatory legislation.

Racial Discrimination and the Commonwealth Government

The Australian Constitution contains an express power that gives the Commonwealth power to enact legislation *"with respect to ... the people of any race for whom it is deemed necessary to make special laws"*.[1]

The High Court examined this power under the Constitution (the race power) in the case of *Kartinyeri v The Commonwealth [1998] HCA 22*. The question before the High Court in *Kartinyeri* was whether the race power authorised the Commonwealth legislature to enact the *Hindmarsh Island Bridge Act 1997* (Cth), a statute that sought to withdraw the protection of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* in relation to a particular site in order to facilitate the building of a bridge. The majority of the High Court held that the Commonwealth legislature did have the power under the Constitution to enact this law. The members of the bench gave differing reasons for this finding, with no clear majority deciding the point solely on the basis that the constitution authorised racially discriminatory legislation. Thus the question of whether the Australian Constitution authorises legislation that is disadvantageous to, or discriminatory of, Aboriginal people has not been finally decided.

Racial Discrimination and State and Territory Governments

The *Racial Discrimination Act 1975* (Cth) (RDA) is a Commonwealth law that implements Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination. It operates to invalidate racial discrimination[2]. Where state legislation is racially discriminatory, section 109 of the Australian Constitution ensures that the Commonwealth legislation, the RDA, overrides the discriminatory state legislation.

However, the RDA's guarantee against racial discrimination is not entrenched in Australian law. The principle of parliamentary sovereignty enables the Federal Parliament to pass legislation that overrides its own previous legislation. Consequently, the Commonwealth can override the protection of the Racial Discrimination Act (RDA) through subsequent legislation. The Commonwealth government can thus specifically authorise states to legislate in ways inconsistent with the provisions of the RDA. If the federal Parliament authorises states to act pursuant to this subsequent federal legislation, then state parliaments will not be bound by the RDA.

An example of such federal legislation is the *Native Title Act* (the NTA). The NTA contains provisions that discriminate on the basis of race. Some of these provisions also permit the states to conduct activities that are in breach of the RDA. Yet, as the High Court of Australia noted in 1995:

> *"If the* Native Title Act *contains provisions inconsistent with the* Racial Discrimination Act, *both acts emanate from the same legislature and must be construed so as to avoid absurdity and to give each of the provisions a scope for operation. The general provisions of the* Racial Discrimination Act *must yield to the specific provisions of the* Native Title Act *in order to allow those provisions a scope for operation."* [3]

Section 7 of the NTA does provide that the NTA is to be read and construed subject to the provisions of the RDA. Nevertheless, the effect of this section is limited. Section 7 will only operate where the provisions of the NTA are ambiguous. In such a case the ambiguous provision will be read, so far as possible, consistently with the RDA. Where, however, the meaning of a provision is not ambiguous, its meaning will not be changed as a result of the operation of section 7 or the operation of the RDA.

International Commentary on National Constitutional Arrangements

Commentary by the CERD Committee

In March 2000, the CERD Committee released its Concluding Observations from its consideration of Australia's tenth, eleventh and twelfth periodic reports. The CERD Committee stated:

> *"The Committee is concerned over the absence from Australian law of any entrenched guarantee against racial discrimination that would override subsequent law of the Commonwealth, states and territories."* [4]

The Committee noted the lack of any entrenched guarantee that would override the subsequent law of the Commonwealth, states and territories, particularly in relation to the amended Native Title Act. Significantly, the Country Rapporteur noted in her comments that the government could have made it unequivocal that the RDA would apply to the operation of the NTA, as they had done in relation to social security legislation under section 4 of the *Social Security Legislation Amendment (Newly arrived residents' waiting periods and other measures) Act 1997*. The Committee was fully aware that the Parliament had not adopted this option.

Several members of the Committee were clearly troubled by the government's ability to override a guarantee against racial discrimination, on the one hand, and the failure of the Commonwealth to ensure compliance of the states and territories on the other. Accordingly, they asked a series of questions about potential mechanisms for entrenching a guarantee of non-discrimination through constitutional means. In response, the government stated that Australia had the "right culture/climate for protection of rights". The Committee expressed concern, however, that the practices of the government (in relation to native title, mandatory sentencing and so forth) indicated that Australia *does not* have the right culture to protect rights. The March 2000 Concluding Observations further stated:

> *"The Committee reiterates its recommendation that the Commonwealth Government should undertake appropriate measures to ensure the consistent application of the provisions of the Convention, in accordance with article 27 of the Vienna Convention on the Law of Treaties, at all levels of government, including states and territory laws and and if necessary by calling on its power to override territory laws and using its external affairs power with regard to state laws."* [5]

The Country Rapporteur, in her introductory comments, asked the government to explain how it meets its obligations to ensure compliance with the Convention at all levels of government. She raised the issue of the "discriminatory impact of state and territory laws in matters which, at that level, have almost ... primary jurisdiction"[6], drawing particular attention to the mandatory detention laws in the Northern Territory and Western Australia. In its response to the Rapporteur, the Australian Government delegation did not at any time acknowledge its obligation under the Convention to ensure the states' and territories' compliance. Nor did it mention the power of the Commonwealth under the Constitution to ensure compliance of the states and territories with international obligations. It is unquestionably the case under section 51(xxix) of the Constitution (in relation to external affairs) and potentially under other heads of power in section 51 of the Constitution (depending on the issue), that the Commonwealth Government has the Constitutional power to require such state and territory compliance with international obligations. In relation to territory laws, section 122 offers a further alternative for ensuring compliance.

It is further worth noting that as long as state legislation is authorised by federal legislation, there is no *domestic* requirement for any subsequent state or territory legislation to comply with Australia's obligations under the RDA or CERD. This does not, however, relieve the states and territories themselves of their international obligations under the Convention.

While the power to enter into international treaties and conventions on behalf of Australia resides with the federal government, the states and territories of Australia are bound to act in compliance with Australia's international obligations. Article 27 of the Vienna Convention on the Law of Treaties, to which Australia is a party, provides that "a party may not invoke provisions of its internal law as justification for its failure to perform a treaty."

Consideration by the Human Rights Committee

The Human Rights Committee also expressed its concern at the lack of a Constitutional entrenchment of covenant rights under ICCPR, including the right to racial equality, at paragraph 13 of its Concluding Observations in relation to Australia in July 2000.

The Committee was concerned that, in the absence of a constitutional Bill of Rights or a constitutional provision giving effect to the Covenant, there remained lacunae in the protection of Covenant rights in the Australian legal system. There are still areas in which

the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated.

The State party should take measures to give effect to all Covenant rights and freedoms and to ensure that all persons whose Covenant rights and freedoms have been violated shall have an effective remedy (article 2).

And at paragraph 14 the Committee stressed the responsibility of both the States and the Commonwealth in ensuring that covenant obligations are met:

While noting the explanation by the delegation that political negotiations between the Commonwealth Government and the governments of states and territories take place in cases in which the latter have adopted legislation or policies that may involve a violation of Covenant rights, the Committee stresses that such negotiations cannot relieve the State party of its obligation that Covenant rights will be respected and ensured in all parts of its territory without any limitations or exceptions (article 50).

The Committee considers that political arrangements between the Commonwealth Government and the governments of states or territories may not condone restrictions on Covenant rights that are not permitted under the Covenant.

National Laws Contributing to Racism, Racist Practices and/or Race-Related Discrimination

Native Title

The Recognition of Native Title in Australia - Mabo, the Native Title Act 1993 (Cth) and Wik

On 3 June 1992 the High Court of Australia handed down its decision in *Mabo v Queensland (No.2)* (1992) 175 CLR 1. This decision constitutes the first recognition of indigenous property rights in common law in Australia. The Court rejected the previously existing view that Australia was *terra nullius* (or land belonging to no-one) upon settlement by Europeans in 1788. They held that the common law of Australia recognised that Aboriginal and Torres Strait Islander people had pre-existing native title rights to land and/or waters, which survived the acquisition of sovereignty by the British from 1788 and which may continue today under certain circumstances.

Native title rights and interests are defined according to the traditional laws and customs of Indigenous people. For native title to be recognised by the Australian legal system, claimants must be

able to demonstrate that they have maintained their connection with the land, and be able to trace that connection back prior to colonisation.

The *Mabo* case further held that, as the Crown had acquired sovereignty over Australia, it had the power to extinguish native title by lawful executive and legislative actions, where a clear and plain intention to do so has been indicated.

This power to extinguish has been limited since 1975 due to the operation of the Commonwealth *Racial Discrimination Act 1975* (the RDA). The effect of this Act is that State and Territory governments may not affect Indigenous property rights in ways which differ from their treatment of non-Indigenous property rights, as to do so would be racially discriminatory and in conflict with the Act. A failure to comply with this Act can result in constitutional invalidity of the State or Territory action due to the operation of section 109 of the federal Constitution, which provides that a State law must not be in conflict with a federal law. Consequently, the recognition of Indigenous property rights in *Mabo* meant that all Crown grants of interests in land after 1975 were potentially invalid for inconsistency with the RDA.

To deal with the implications of the *Mabo* decision, the Australian federal government sought to introduce a legislative scheme. After the longest debate in the history of the Senate, and a process that involved extensive consultation and negotiation with Indigenous representatives, the *Native Title Act 1993* (Cth) (NTA) passed through the federal Parliament. The Act was part of a three stage response to the *Mabo* decision, the other stages being the establishment of a land fund to purchase land for Indigenous groups whose native title had been extinguished and a social justice package. The NTA was seen at the time by Indigenous groups as a compact with the government. The purposes of the NTA were to provide for:

- Recognition of native title, through the establishment of a negotiation and adjudication process for determining whether claimed native title rights would be recognised;
- Protection of native title, by establishing a process that governments must comply with for future grants and activities to be valid. This included providing native title claimants with a right to negotiate in relation to proposed mining activities and compulsory acquisitions of land by government for the benefit of third parties, over land subject to native title claims; and
- Extinguishment of native title, through the validation of acts carried out by governments in the period from the commencement of the operation of the Racial Discrimination Act to the

commencement of the NTA. These were acts that may have been invalid for failure to comply with the provisions of the Racial Discrimination Act.

In developing the NTA, the government sought to confirm the principles in the *Mabo* decision, and not to pre-empt the courts in determining the principles of when native title can be established, and when it has been extinguished.

In 1996, the High Court delivered its decision in *Wik Peoples v Queensland*[7]. The case involved two varieties of a type of land tenure that is unique to Australia, known as a pastoral lease, and elaborated on the principles of native title established in the *Mabo* case.

It had been assumed by most during the drafting of the NTA that native title was extinguished by a pastoral lease. But in *Wik* the High Court held that the two varieties of pastoral leases at issue did not grant exclusive possession to the leaseholder and that, accordingly, native title could co-exist over land subject to a pastoral lease. To the extent that native title was inconsistent with the pastoral lease, under the principles established in *Mabo*, the pastoral leases prevailed over native title to the extent of that inconsistency.

While the *Wik* decision was consistent with the principles established in *Mabo*, it was of enormous practical significance due to two key factors. First, it greatly increased the proportion of the country that may now be subject to native title. Second, as most States and Territories had assumed that native title was extinguished by pastoral leases, they had failed to comply with the provisions of the NTA and potentially granted invalid titles.

Proposed Amendments to the NTA

The newly-elected conservative government had flagged amendments to the NTA prior to the *Wik* decision, and now sought to revise these proposals in order to deal with what they considered were the unacceptable implications of the decision.

Throughout 1997 and 1998, the government-proposed amendments to the NTA dominated the national headlines in Australia. The amendments were debated in Parliament in November and December 1997 when, in the longest debate in the Senate's history, the government's bill was substantially amended. This was deemed unacceptable by the government, which resubmitted an amended version of the bill, which was considered in April and May of 1998. The bill was again substantially amended, with the government rejecting the majority of the amendments. In July 1998, the amendments passed through Parliament. Most of the amendments came

into operation on 30 September 1998. They significantly alter the original provisions of the NTA.

A significant difference in the process leading to these amendments was the lack of consultation by the government with Indigenous representatives. Indigenous involvement was limited to a few face to face meetings with the Prime Minister and involvement in the formal Parliamentary Committee process. This consultation occurred when the principles and policy parameters of the amendments had already been decided. When the amendments finally passed through the Senate, the National Indigenous Working Group, a coalition of representatives from most Indigenous representative bodies, released a statement indicating their lack of involvement in the process and their lack of consent to the amendments.

The Amended NTA - Main Provisions

The amendments to the Native Title Act substantially alter the character of the Act. This section provides an overview of the main purposes and provisions of the amended act.

1. Authorisation of Activities by the States and Territories

A major consequence of the amendments is that they devolve a large part of the responsibility for native title issues from the national level to each of the States and Territories. The amendments authorise the States and Territories to introduce legislation that meets the minimum standards laid out in the federal amendments. Any such legislation that is introduced by the States and Territories will be constitutionally valid, as it will not be in conflict with the federal legislation. This is despite the discriminatory nature of some of the provisions. It has not been tested in the Courts, and it is currently unclear as to whether the Constitution, under s51(26) or the races power, permits the federal government to discriminate against Indigenous people in this manner.

The substance of the state and territory legislation that is now permitted by the federal amendments is to allow the States and Territories to enact validation and confirmation provisions, and to introduce provisions that alter the right to negotiate for mining acts and compulsory acquisitions (these issues are discussed further below). This has the effect of fragmenting the approach to native title across the country and makes it more difficult for concerned people or organisations, both within Australia and overseas, to evaluate the acceptability of the provisions.

2. *Racial Discrimination Act*

The amendments include a section[8] that states that native title regimes (including those of the states and territories) must be conducted in a non-discriminatory manner, and that where there is ambiguity in the meaning of any terms in the NTA, the Racial Discrimination Act must be resorted to in order to clarify the meaning.

This does not allow for any of the federal amendments to be challenged on the basis that they conflict with the Racial Discrimination Act. As explained above those provisions of the amendments that are racially discriminatory override the protection given by the Racial Discrimination Act. As noted, it is unclear whether the government has the constitutional authority to discriminate in this manner. Such discrimination is of international concern.

3. *Validation*

When the High Court rejected the doctrine of terra nullius and recognised the pre-existing "native title" of Indigenous people to land, it created an anomaly within the law of property. After the implementation of the *Racial Discrimination Act* (Cth) (RDA) in 1975, discriminatory acts that dispossessed Indigenous people (such as the grant of an inconsistent interest in land) were unlawful and, consequently, invalid. The original NTA validated these otherwise unlawful acts. The validation provisions were a response to the discontinuity that is created when injustices, for the first time, are legally recognised as such.

The 1998 amendments to the NTA created new "validation" provisions that validated racially discriminatory acts by states and territories in the period *after* the recognition of native title. These acts are "intermediate period acts" - acts that took place after the proclamation of the NTA on 1 January 1994 and before the handing down of the High Court *Wik*[9] decision on 23 December 1996[10]. An intermediate period act is an act that is invalid because the procedural or substantive rights of native title holders were not taken into account. An example is the granting of a license or mining tenement on native title land without extending to native title parties the procedural rights required by the NTA (such as proper notification). The amendments provide that such grants are valid and are deemed to have always been valid[11].

The background to these amendments is that, during the "intermediate period", governments acted on an assumption, proven false in the *Wik* decision, that the grant of a pastoral leasehold extinguished native title. Consequently, in relation to native title holders and claimants co-existing on pastoral leasehold land, state governments ignored the provisions of the original NTA, which required that, for governments intending to deal with native title land, native title holders have the same procedural rights as ordinary title holders[12]. The original NTA also provided that, in relation to the creation, extension and variation of a right to mine, native title holders and claimants had a right to negotiate with miners and governments over the project. In the intermediate period, state governments, when issuing mining tenements over native title land that co-existed with pastoral leaseholds, disregarded the rights of native title holders as stipulated in the NTA.

As a result of the validation of intermediate period acts, native title is either: extinguished (where the act is the construction of a public work or the grant of certain freehold and leasehold estates)[13]; extinguished to the extent of any inconsistency (where the act is the grant of "other" leases)[14]; or not extinguished but rendered unenforceable until the intermediate period act ceases to be in operation (where the act is the grant of a mining lease or any other act)[15].

Native title holders are entitled to compensation as a result of the impact of the validation provisions on their title. However, access to compensation for loss or impairment of title is dependent on identifying the parcels of land on which grants have been made, state governments notifying actual or potential native title holders that their interests may be affected by acts that have been validated, and the determination by a court that native title exists on the land.

4. *Confirmation*

The original NTA left the principles of extinguishment of native title to the Courts to develop. The amendments to the NTA however, pre-empt the development of common law by authorising the States and Territories to confirm by legislation that a specified range of titles and grants (referred to as "previous exclusive possession acts") extinguish native title, and do so permanently.

The amendments include a schedule, 50 pages in length, which lists a series of interests in each State or Territory, which are deemed to be titles providing rights of exclusive possession and which consequently extinguish native title permanently.

There are doubts surrounding the true extent of some of the tenures that are confirmed as extinguishing native title. The amendments relating to confirmation may extinguish native title to an extent greater than the actual common law position. This is implicitly acknowledged in the Act itself, as the amendments provide that

compensation is only payable for extinguishment resulting from the operation of the NTA, and not payable if extinguishment would have occurred outside of the Act.

The amendments also provide that titles that are non-exclusive in nature (referred to as previous non-exclusive possession acts) permanently extinguish native title to the extent of the inconsistency. This is despite the uncertainty as to the common law position on the effect on native title of the grant of non-exclusive titles. One view of the common law position is that impairment of native title by the granting of such titles may only be temporary, with native title capable of reviving at a later date.

5. Upgrading Pastoral Leases

The government considered that the *Wik* decision created some uncertainty as to the validity of certain activities undertaken by pastoralists. While indigenous representatives were willing to support the legislative confirmation of existing pastoral rights, the government went further than this in the amendments and introduced provisions that confirmed that pastoralists could validly conduct activities in addition to those authorised by their lease. These additional activities are known as primary production activities.

Primary production is defined to include agriculture, forestry, aquaculture and farmstay tourism. These are far more intensive activities than pastoral activities such as grazing and have a far greater impact on the enjoyment of native title. Pastoralists are able to upgrade their activities to primary production levels without any requirement for consultation or negotiation with native title holders, and without compensation being payable.

Under the principles espoused in the *Wik* decision, pastoralists' rights will prevail over native title to the extent of any inconsistency. Thus, the dramatic expansion of pastoralists' rights means that native title is suppressed to a correspondingly greater extent.

Where an authorised primary production activity is conducted, the amended NTA provides that the "non-extinguishment principle" applies. This principle means that native title is suspended while these activities are current. While better than clear extinguishment, when considered alongside the requirement for native title claimants to demonstrate that they have maintained a connection with traditional country in order to claim their title, the potential for permanent erosion of native title rights becomes clear.

6. Registration Test

Registration of a native title claim provides a native title claimant with the right to negotiate and other procedural rights under the NTA. Prior to the amendments there was effectively no registration test, with claims being registered (and accordingly being able to access these rights) so long as their claim was not frivolous or vexatious.

The amendments introduced a registration test that must be met prior to being able to access these rights. The new registration test must now be applied retrospectively to all claims that have been lodged to date. This test requires, amongst other things, that claimants establish that:

- At least one of the claimants currently has a physical (as opposed to spiritual) connection to the claimed land or waters. There is an exception to this requirement, which allows a claimant's parent to have had a physical connection, in circumstances in which claimants have been forcibly removed from the land and accordingly cannot demonstrate a continuing physical connection.; and that
- Prima facie they can establish all (rather than some) of the claimed native title rights. The right to negotiate (discussed below) will be limited to those rights that have passed the prima facie test and have been registered.

While there was agreement between the government and Indigenous groups that a higher registration test must be introduced, this test is too onerous and may operate to deny worthy native title claims. Often, claims must be registered within a set notice period. It will be difficult for some claimants to provide the detail required within this period (particularly where a court order is required). Similarly, the requirement of a physical connection to the land is stricter than the common law test laid down in *Mabo*, which requires a physical or traditional connection.

7. Right to Negotiate

The original NTA provided native title claimants with a right to negotiate over mining activities and certain compulsory acquisitions that were proposed on land over which they had registered native title claims. These provisions were central to protecting native title rights. They can be seen as a loose approximation of traditional Indigenous value systems, which often require negotiation and consent in order to access traditional lands. The right to negotiate

provisions was also seen by Indigenous representatives at the time as a trade-off against the extensive extinguishment of native title provided for in the original act.

The amendments significantly alter the right to negotiate provisions by providing for a number of exceptions and alternatives to the right to negotiate provisions.

8. Exceptions to the Right to Negotiate

The amendments provide that native title claimants will no longer be entitled to a right to negotiate in relation to the creation of a mining right under the following circumstances:

- A mining right for the sole purpose of building an infrastructure facility. An infrastructure facility is broadly defined to include roads, railways, bridges, transport facilities, jetties and ports, airports, electricity facilities, oil, gas or coal facilities, dams, pipelines, and other such facilities;
- A creation of a mining right at the exploration stage. Formerly, a right to negotiate would apply at the exploration and the production stages;
- The renewal, re-granting, re-making or extension of a right to mine.

The right to negotiate will also no longer apply in relation to the compulsory acquisition of land for an infrastructure facility, for either a private or public purpose. These exemptions have the potential to impact significantly on native title rights and interests, particularly in relation to areas of cultural significance and sacred sites, and maintained indigenous access to the land.

9. Alternatives to the Right to Negotiate

In addition to these exemptions to the right to negotiate, the amendments provide that the States and Territories may establish two types of alternative provisions to the right to negotiate. The first is a state-based right to negotiate, which replaces the scheme in the federal legislation. This will result in a further devolution of native title issues from the national arena should any of the States take up this option.

The second set of provisions allows the States or Territories to establish an alternative procedure (under s43A of the NTA), which replaces native title claimants' right to negotiate with a reduced set of rights. This alternative provision can only apply in what is called an "alternative provision area", which covers specified areas of

leasehold land (including pastoral leases), reservations, freehold land and areas within towns and cities. Lands classifiable as "alternative provision areas" cover large proportions of the land in some states.

Where this provision applies, native title claimants are provided with a right to object about the undertaking of the act and a right to be consulted about ways of minimising the impact of the undertaking of the act. Unlike the right to negotiate, the right to be consulted does not require the government to negotiate in good faith, nor does the validity of the grant being sought depend on proper consultation having taken place.

Previously, the NTA did not make distinctions between the rights afforded to claimants on the basis of the history of previous tenures over the land at issue. The distinctions drawn by the amendments treat native title rights on land where there may be co-existence (such as on pastoral leases) differently to native title rights on other land. Accordingly, they provide reduced and inadequate protection to native title rights covered by the alternative provisions, and do not respect the essence of the principle of co-existence in the High Court's decision in *Wik*.

International Commentary on the Amended NTA

1. The CERD Committee's Decision of 18 March 1999

In August 1998, the CERD Committee became concerned that the amendments to the NTA were inconsistent with Australia's obligations under CERD. Members of the CERD Committee voiced the concern that the situation in Australia "was clearly deteriorating" since Australia's previous appearance before the Committee in 1994[16]. The CERD Committee decided to act under its early warning and urgent action procedure and requested that Australia provide it with information relating to the amendments to the NTA, any changes of policy in relation to Aboriginal land rights, and the functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner[17].

On 18 March 1999, the Committee found that significant amendments to the NTA were contrary to Australia's obligations under CERD. The Committee further found that the amended NTA, taken as a whole, was incompatible with Australia's international obligations. An important consideration in making this finding was that the amendments were enacted without obtaining the informed consent of Indigenous people[18]. In summary, the 18 March 1999 decision expressed concern that:

- Amendments to the NTA favour non-Indigenous interests at the expense of Indigenous title and, consequently, do not strike an appropriate balance between Indigenous and non-Indigenous rights;
- The validation, confirmation, and primary production upgrade provisions, and restrictions and exceptions to the right to negotiate, discriminate against native titleholders. In doing so, these provisions raise concerns that Australia is not acting in compliance with its obligations under Articles 2 and 5 of the CERD;
- The lack of "effective participation" of Indigenous people in the formulation of the amendments raised concerns that Australia had breached its obligations under Article 5(c) of the Convention and had not acted in accordance with the Committee's General Recommendation XXIII on Indigenous People.

The Committee urged the Australian Government to immediately suspend implementation of the amendments to the NTA and re-open discussions with Indigenous representatives with a view to finding solutions acceptable to the Indigenous peoples and which would comply with Australia's obligations under the Convention.

The Committee decided to keep Australia under the early warning procedure, to be reviewed at the fifty-fifth session of the Committee in August 1999 "in light of the urgency and fundamental importance of these matters." [19]

2. The CERD Committee's Concluding Observations of March 2000 on Australia

The CERD Committee reconsidered the NTA amendments when Australia's periodic report was considered in Geneva on 21 and 22 March 2000[20].

The CERD Committee was dissatisfied with the government's response to the CERD Committee's concerns as expressed in *Decision 2(54)* and to the government's failure to respond to its recommendationt hat the government renew negotiations with Indigenous people in order to rectify the situation. The CERD Committee restated its two major concerns: first, that the amended NTA fails to meet the standard of equality required under the Convention, and second, that the requirement under article 5(c) of the Convention, emphasised in *Decision 2(54)*, that Indigenous people give their informed consent to decisions that affect them, was disputed and ignored by the Australian government in relation to the enactment of the amended NTA. The CERD Committee stated[21]:

"Concern is expressed at the unsatisfactory response to decisions 2 (54) (March 1999) and 2 (55) (August 1999) of the Committee and at the continuing risk of further impairment of the rights of Australia's indigenous communities. The Committee reaffirms all aspects of its decisions 2 (54) and 2 (55) and reiterates its recommendation that the State party should ensure effective participation by indigenous communities in decisions affecting their land rights, as required under article 5 (c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of securing the 'informed consent' of indigenous peoples. The Committee recommends to the State party to provide full information on this issue in the next periodic report."

The CERD Committee reiterated the finding that the amended NTA is discriminatory:

"The Committee notes that, after its renewed examination in August 1999 of the provisions of the NTA as amended in 1998, the devolution of power to legislate on the 'future acts' regime has resulted in the drafting of state and territory legislation to establish detailed 'future acts' regimes which contain provisions further reducing the protection of the rights of native title claimants that is available under Commonwealth legislation. Noting that the Commonwealth Senate on 31 August 1999 rejected one such regime, the Committee recommends that similarly close scrutiny continue to be given to any other proposed state and territory legislation to ensure that protection of the rights of indigenous peoples will not be reduced further."

3. The Concluding Observations by the Human Rights Committee in July 2000 on Native Title

The Human Rights Committee considered that the amendments to the NTA were a breach of ICCPR and stated in its Concluding Observations:

"The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (art. 1, para. 2).

The Committee is concerned, despite positive developments towards recognizing the land rights of the Aboriginals and Torres Strait Islanders through judicial decisions (Mabo, 1992; Wik, 1996) and enactment of the Native Title Act of 1993, as well as actual demarcation of considerable areas of land, that in many areas native title

rights and interests remain unresolved and that the Native Title Amendments of 1998 in some respects limit the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands."

4. The Concluding Observations by the Committee on Economic, Social and Cultural Rights in September 2000 on Native Title

The Economic Social and Cultural Rights Committee, in considering Australia's performance under the International Convention on Economic, Social and Cultural Rights (ICESCR) in September 2000 was concerned at the impact of the amendments to the NTA and stated in its Concluding Observations:

"The Committee notes with regret that the amendments to the 1993 Native Title Act have affected the reconciliation process between the State party and the indigenous populations, who view these amendments as regressive."

Indigenous Heritage Laws

The religious and cultural practices of Indigenous people are inextricably linked to land and water. However, the various land rights laws, including native title laws and state and territory land rights acts, do not adequately protect Indigenous heritage. Consequently, State and Commonwealth heritage legislation that addresses the preservation of Indigenous religious, cultural and ancestral areas and objects remains the most significant form of heritage protection available to Indigenous people.

There are major problems with the heritage protection legislation in Australia. There is little co-ordination between Commonwealth, State and Territory legislative regimes. There is no uniformity between different state and territory laws and legislation in a number of states is incompatible and inadequate[22]. The Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (The Commonwealth Heritage Act) was enacted as "an interim measure"[23] originally intended to provide only "last resort" protection where state or territory legislation failed. However, because state and territory protection is inadequate, the Commonwealth Heritage Act is often required to provide primary site protection. Problems with the Commonwealth Heritage Act include:

- Extensive delay at all stages of the protection process.
- Confidential information is not protected from disclosure.
- The Act fails to cover all aspects of Indigenous heritage important to Aboriginal people, such as intellectual property and the regulation of the use and sale of significant Indigenous objects.
- The Act does not sufficiently include Indigenous people in decisions regarding heritage protection.
- The Commonwealth Minister considering a heritage application is not *obliged* to act, even if an area is of significance to Aboriginal people.

In recognition of the inadequacies of the Commonwealth Heritage Act, the *Aboriginal and Torres Strait Islander Heritage Protection Bill* 1998 was introduced in the Commonwealth parliament in 1998 and has recently been the subject of a series of amendments. As it now stands, the Bill substantially weakens even the inadequate protection currently available from the Commonwealth for areas and objects of significance to indigenous people. State and territory legislation remains the primary source of heritage legislation, subject to accreditation by the Commonwealth. Yet the standard for accreditation is inadequate and indigenous peoples must exhaust all remedies at this level before accessing the Commonwealth scheme. The Commonwealth will intervene only in the case of matters that affect the "national interest".

International Commentary on Indigenous Heritage Protection

Protection of Indigenous heritage is one of the priorities of the UN Standard setting processes on the rights of indigenous peoples. Chairperson-Rapporteur Erica-Irene Daes, in the *Report of the seminar on the draft principles and guidelines for the protection of the heritage of Indigenous people*[24] developed a number of key recommendations. Australian governments' legislative protection of Indigenous heritage should implement those fundamental guidelines, not relegate protection to inadequate targeted legislation that conceives of Aboriginal heritage as a relic of a dying civilisation.

The Human Rights Committee considered Australia's compliance with international obligations relating to heritage protection in its consideration of Australia's periodic report under the ICCPR in July 2000. The Committee commented in particular upon the decision by the Minister for the Environment and Heritage, Senator Hill, to defer a protection order over Boobera Lagoon[25] for a further two years in order to allow water skiers to find an alternative recreational site. The decision struck the Human Rights Committee as a particularly worrying illustration of land management practices that prioritise non-Indigenous culture over Indigenous culture.

During an oral intervention before the Committee, Mr Lahlah, the

committee member from Mauritius, commented on the lack of judicial remedies for breaches of the Covenant. Regarding the Government's decision in relation to Boobera Lagoon, Mr Lahlah stated:

> *"As I understand, the water skiing is going to continue until alternative sites are found. I would have thought that since this is a Covenant right and water skiing is not as such a Covenant right, then maybe the reverse should have happened. I'm not taking this as a light matter. It may very well be that water skiing is related to property rights guaranteed under the constitution. It may very well be. I do not know. But in this case, the court would have had the opportunity of deciding on these priorities, cultural rights of certain minorities guaranteed under the Covenant and property rights not guaranteed under the Covenant but guaranteed elsewhere."*[26]

At paragraph 11 of its Concluding Observations, the Committee commented generally on Australia's compliance with its obligation to protect minority cultures under article 27 of ICCPR:

> *"The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, that must be protected under article 27, are not always a major factor in determining land use.*
>
> *The Committee recommends that in the finalization of the pending Bill intended to replace the Aboriginal and Torres Strait Islander Heritage Protection Act (1984), the State party should give sufficient weight to the above values."*

The Committee's observations and recommendations were in response to the priority given by successive Australian governments to non-Indigenous land use over the human rights of Indigenous people.

Criminal Justice System

Over-Representation in the Criminal Justice System and Deaths in Custody

Indigenous Australians are grossly over-represented in the criminal justice systems of the states and territories.

In 1987, a Royal Commission into Aboriginal Deaths in Custody initiated its investigation into the deaths of 99 Aboriginal people between January 1980 and the end of 1990. Amongst other findings, the Royal Commission found that the disproportionate number of Aboriginal deaths in custody occurred, "not because Aboriginal people in custody are more likely to die than others in custody"[27], but because of "the grossly disproportionate rates at which Aboriginal people are taken into custody"[28].

The degree of over-representation in police custody, as measured by the Commission's study of police cell custody in August 1988, was twenty-nine times[29]. A large number of Aboriginal people in police custody were detained in police lockups, detained in "protective custody" or arrested for the offence of public drunkenness or other non-serious offences[30].

The Royal Commission made 179 recommendations concerning law reform, changes in policing strategies, the criminal justice and coronial systems. The Royal Commission also warned that such changes, in themselves, would not be sufficient. Issues "underlying the alienation of Aboriginal people and their continuing conflict with the law" [31] required more fundamental changes, including redressing the disadvantage of Aboriginal people in relation to their economic position, health factors including substance abuse, access to an economic base including land and employment, and in relation to education[32]. The report made further recommendations in relation to these wide-ranging causes of Indigenous over-representation in custody.

Despite the recommendations of the Royal Commission into Aboriginal Deaths in Custody in 1991, the rate at which indigenous peoples come into contact with the criminal justice system has not improved in the past decade:

- From 1988 to 1998, the Indigenous prisoner population (across all age groups) more than doubled. It has grown faster than non-Indigenous prisoner rates in all jurisdictions. Nationally, Indigenous prison populations have increased by an average of 6.9% per year over the decade. This is 1.7 times the average annual growth rate of the non-Indigenous prison population[33].
- Figures for the June 1999 quarter indicate that 76% of all prisoners in the Northern Territory (NT) and 34% of all prisoners in Western Australia (WA) were Indigenous. The rate of imprisonment of Indigenous people in Western Australia was 21.7 times higher than that of the non-Indigenous population. The rates in the other states for which statistics are available are also unacceptably high - 15.7 times higher in South Australia, 12.2 times higher in Victo-

ria, 11.3 times higher in Queensland, 9.9 times higher in the Northern Territory and 5.1 times higher in Tasmania[34].

- The number of Indigenous deaths in custody in the decade since the Royal Commission into Aboriginal Deaths in Custody has also increased:
  - o Up to September 1999, there had been 147 deaths in custody, compared to the 99 inthe decade preceding the Royal Commission;
  - o In the 9 months since September 1999 there have been a further 8 Indigenous deaths in custody in Western Australia alone; and
  - o 17.2% of all prison deaths in the 1990s have been of indigenous people compared to 12.1% in the 1980s.

The situation in respect of Indigenous peoples' deaths in custody and over representation in the prison system represents a major failure of criminal justice in Australia. No levels of government have responded adequately to the recommendations of the Royal Commission into Aboriginal Deaths in Custody. In fact, these problems have been exacerbated by "law and order" legislative changes, such as mandatory sentencing which, despite its apparent neutrality in terms of racial effect, continues to impact disproportionately on Indigenous Australians.

Lack of Interpreter Services in Court

A further related issue is the lack of availability of interpreter services in Aboriginal languages for services, especially health and legal services.

In 1998 and 1999, the Northern Territory Anti-Discrimination Commissioner conducted an inquiry into:

- Whether there was a need for an interpreter service;
- The effect of a lack of interpreter service on access to government services for Indigenous people;
- The extent of disadvantage suffered by Indigenous people as a result of the lack of interpreter services in the delivery of legal and medical services;
- The feasibility of establishing a permanent service, as well as how such a service might work (including cost, number of languages, training and access and availability due to geographical issues etc); and
- Alternative approaches to ensure equal access to services and facilities.

In July 1999, the then Northern Territory Anti-Discrimination Commissioner published her report[35]. The report found as follows:

- Aboriginal people represent 27% of the population in the Northern Territory, of which 74.5% speak an Indigenous language and have a poor understanding of English;
- Aboriginal people are not provided with interpreter services to assist with language difficulties in accessing community services, particularly health and legal services;
- By comparison, all other people of non-English speaking background (who comprise 8% of the Territory's population) are able to access free interpreter services in over 150 languages;
- Aboriginal people represent in excess of 50% of clients utilising the legal and medical services and facilities in the Northern Territory. However, they are unable to properly access and utilise those services due to cultural and language barriers that inhibit communication between themselves and service providers and result in extreme difficulties and cause inappropriate, inefficient and non-cost effective delivery of services.

The consequences of this are that many indigenous people are unable to provide their informed consent to invasive medical procedures or to understand court procedures. The inquiry heard numerous horror stories of medical procedures performed without consent, as well as widespread concern from the judiciary and members of the legal profession with regard to the need for interpreter services in legal processes.

An Aboriginal Interpreter Service was initiated in April 2000 and now has 176 interpreters covering 104 languages.

The governments' recognition of the need for an Indigenous interpreter service is a very positive development. The development of an effective interpreter service is a long-term goal that will require considerable resources and funding. It is important to note that the quality of interpreting of Indigenous languages will be affected by a number of factors, including:

- Interpreting Indigenous languages in a legal setting may be more difficult because Indigenous languages will not have equivalent concepts for the legal concepts of Western cultures and languages. The development of Indigenous interpreter services is further complicated by the fact that Indigenous languages are not traditionally written languages.
- The development of Indigenous interpreter services needs to take place in conjunction with the development of training programs

for the training of Indigenous interpreters. In Australia, there is currently no training available at the "professional" level for Indigenous language interpreters. Consequently, Indigenous interpreters are accredited at only the "para-professional" level.

A long-term commitment is needed to ensure high quality interpreter services. Funding arrangements must recognise that the requirements for establishing an Indigenous interpreter service will be significantly higher than the costs of maintaining existing non-Indigenous interpreter services in European and Asian languages.

The Royal Commission into Aboriginal Deaths in Custody recommended (recommendation 99) that legislation in all jurisdictions should provide that the court must be satisfied that an Aboriginal defendant has the ability to fully express himself or herself in the English language. If they cannot, then the Court should not proceed until a competent interpreter is provided without cost to that person.

The failure of governments to date to provide adequate interpreter services breaches international requirements under the CERD and the ICCPR, including:

- Article 26 of the ICCPR: Equality before the law.
- Articles 9(2) of the ICCPR: The right of a person who is arrested to be promptly informed of the reason for arrest and of any charges to be made;
- Article 14(3)(f) of the ICCPR: The right of a person charged with a criminal offence, in full equality and as a minimum guarantee, to have the free assistance of an interpreter in court; and
- Articles 1(4), 2 and 5 of the CERD: which guarantee non-discrimination and equality before the law. The provision of court interpreters, where required, is fundamental to a fair trial and equal treatment in legal proceedings.

International Commentary on Indigenous People in the Criminal Justice System

The over-representation of Indigenous people in custody and the lack of interpreter services in the criminal process have been the subject of recent comment by the CERD Committee:

> *"The Committee notes with grave concern that the rate of incarceration of indigenous people is disproportionately high compared with the general population. Concern is also expressed that the provision of appropriate interpretation services is not always fully guaranteed to indigenous people in the criminal process. The Committee recommends that the State party increase its efforts to seek effective measures to address socio-economic marginalisation, the discriminatory approach to law enforcement and the lack of sufficient diversionary programmes."* [36]

The Committee also raised the issue of the provision of interpreters in court proceedings:

> *"I'd also like to hear you talk, we've talked about equal access to law, a little bit about interpreter services. That's been raised with me that in courts, while there is a program to guarantee interpretation services to non-English speakers, that the service is not extended to, in general, to the Aboriginal community, or that it's not available or it's not able to be used successfully, and so I would like to hear your comments there."* [37]

Mandatory Sentencing

Protection of basic human rights has been further eroded in Australia's criminal justice systems by the enactment of racially discriminatory mandatory detention laws in Western Australia (WA) and the Northern Territory (NT) in 1996 and 1997 respectively. These laws remove judicial sentencing discretion by requiring courts to impose minimum sentences of detention or imprisonment on people convicted of certain offences and discriminate against Indigenous people by targeting non-serious offences more likely to be committed by Indigenous people.

The WA laws came into effect on 14 November 1996 through amendments to the *Criminal Code 1913* (WA). These amendments provide that, when convicted for a third time or more for a home burglary, adult and juvenile offenders must be sentenced to a minimum of 12 months imprisonment or detention (the "three strikes and you're in" legislation)[38]. The provisions contain some allowance for both adults and juveniles to be released under supervision.

The NT laws came into effect on 8 March 1997 through amendments to the NT *Sentencing Act 1995* and the *Juvenile Justice Act 1983*. The *Sentencing Act* provisions apply only to persons aged 17 years or over[39]. Under Section 78A of the *Sentencing Act* persons found guilty of certain property offences shall be subject to a mandatory minimum term of imprisonment of 14 days for a first offence. For a second property offence the mandatory minimum sentence is 90 days. For a third property offence the period of imprisonment is one year.

The NT *Sentencing Act* was recently amended again to provide

that courts are not required to impose a sentence of detention under these provisions in certain "exceptional circumstances". However, this applies to adults only and not to juveniles.

Unlike the laws relating to adults, which can be invoked at the first conviction, the mandatory detention provisions relating to juveniles in the NT require at least one prior conviction. Under section 53AE of the NT *Juvenile Justice Act*, a person aged 15 or 16 years who has been convicted of a relevant property offence and has had at least one prior conviction for such an offence must be subject to detention for at least 28 days. Furthermore, the court may impose an additional "punitive work order" provided its effect is not to release the child from the requirement to serve the mandatory sentence[40].

The NT criminal justice system treats people as adults once they attain the age of 17 years. This means that 17 year olds will be subject to the adult mandatory detention provisions in the *Sentencing Act*. As indicated above, those provisions are not limited to repeat offenders and can be invoked on a first conviction. In addition, under the *Juvenile Justice Act* a person who turns 17 while serving a term in a juvenile detention facility is required to be transferred to an adult prison to serve out the remainder of the sentence.

For the purpose of the NT mandatory detention provisions, relevant property offences include:

- Theft (irrespective of the value of the property, and excluding theft when the offender was lawfully on the premises);
- criminal damage;
- unlawful entry to buildings;
- unlawful use of vessel, motor vehicle, caravan or trailer (whether as a passenger or driver);
- receiving stolen goods (regardless of value);
- receiving after change of ownership;
- taking reward for the recovery of property obtained by criminal means;
- assault with intent to steal; or
- robbery (armed or unarmed).[41]

Mandatory sentencing for minor property offences has a disproportionate impact on Indigenous Australians. Indigenous offenders more commonly commit the offences targeted for mandatory sentencing than non-Indigenous offenders. The arbitrariness of the distinction between property offences and other types of theft, the latter not being subjected to mandatory sentencing, is demonstrated by the following example. Whereas the theft of petrol from a bowser will attract a mandatory sentence, the theft of a tank full of petrol through the use of a fraudulent credit card does not[42]. Indigenous

peoples do not commonly commit the latter type of "white collar" crimes. The mandatory sentencing provisions also affect Indigenous children disproportionately. Indigenous children are more often charged with the offences targeted for mandatory sentencing than non-Indigenous children.

Where a pattern of sentencing, such as this, reveals that certain groups are more likely to receive the harshest penalties, sentencing is discriminatory[43]. Such discrimination is prohibited under numerous international conventions to which Australia is a party, including the guarantee of equality and non-discrimination under Articles 2 and 26 of the ICCPR[44].

In response to the public backlash against the introduction of mandatory sentencing laws in Australia, the Commonwealth government and the Northern Territory government reached an agreement that provides for the diversion of juveniles from custody by giving Northern Territory police discretion to divert juveniles at the pre-charge stage.

However, this agreement does not confer any greater discretion upon the courts. Instead discretion is vested in police officers to decide whether to pursue a matter through diversionary programs or through the courts, in which case mandatory sentencing will apply. Furthermore, mandatory detention laws in the Northern Territory and Western Australia do not allow for a right of appeal against the sentence if the sentence equates with the minimum permitted. The legislation is therefore also in breach of Article 14(5) of the ICCPR, which provides for the right to appeal a sentence, and Article 14(5) of the ICCPR, which provides that the sentence be reviewable by a higher tribunal according to law. The HRC has interpreted the phrase "according to law" in Article 14.5 of the ICCPR as "not intended to leave the very existence of the right to review to the discretion of the States parties" [45].

In addition, the resulting changes to the mandatory sentencing regimes in relation to youth offenders are insufficient. Under the Western Australian system, no inherent concession is given to juveniles apart from the possibility of detaining such people in a prescribed "detention centre" rather than a prison. Some concessions are given to children under the Northern Territory regime, although the NT regime is harsher than the WA regime. Under the Northern Territory mandatory sentencing regime, a juvenile can possibly be sentenced to 28 days' imprisonment whereas an adult would be sentenced to 14 days' imprisonment for the same crime under the NT regime[46].

Article 14(4) of the ICCPR provides that in the case of juveniles the procedure shall take account of their age and promote their

rehabilitation. Mandatory detention removes the court's discretion to take these factors into account. The recent amendments to the NT regime do not redress this situation.

Article 24 of the ICCPR recognises the right of every child, without any discrimination, to receive from his family, society and the State the protection required by his status as a minor. This also entails the adoption of special measures to protect children[47]. Article 24: Rights of the Child: Mandatory sentencing is also inconsistent with several Articles of the Convention on the Rights of the Child (CROC), namely Article 3.1, 37(b), 40.2(b) and 40.4. Violations of these Articles of CROC constitute persuasive evidence of violations of Article 24 of the ICCPR.

International Commentary on Mandatory Sentencing

1. Consideration of Mandatory Sentencing by the CERD Committee in March 2000

In its consideration of Australia in March 2000, the CERD Committee was particularly concerned by the following aspects of the mandatory sentencing or detention laws in the Northern Territory and Western Australia:

- the unwillingness of the federal government to ensure compliance of the states and territories with Australia's obligations under the Convention;
- the (lack of) effectiveness of government programs to reduce the over-representation of Indigenous people in the criminal justice system;
- the related problem of the lack of interpreter services in court proceedings; and
- the inadequate response of government to the historically derived disadvantage faced by Indigenous people.

The Committee also noted that mandatory detention laws may be discriminatory in their impact and, accordingly, breach the obligations in Articles 2 and 5 of the Convention. The Country Rapporteur expressed her concern as follows:

> *"My question is this, that first of all does the state party share the view that these mandatory sentencing regimes are inconsistent with its obligations under our Convention and perhaps under others? And I also wonder, I understand that there has been a legal committee of the government that has studied and concluded that quote, 'that the weight of the evidence of the committee was that the mandatory sentencing laws have a discriminatory impact on indigenous peoples and that is contrary to the provisions of CERD', and they named Articles 2 and 5 particularly. So I would want to know whether or not the state party fully agrees with that."* [48]

The Country Rapporteur's questions reflect the recognition in CERD that discrimination may be indirect as well as direct. The definition of racial discrimination in CERD clearly incorporates indirect discrimination in Article 1.1, which includes discrimination "in purpose or effect". The Australian government responded to these issues as follows:

> *"I'm not offering it to defend it because my Prime Minister has said he personally does not favour mandatory sentencing provisions... [But] mandatory sentencing only occurs where there has been a breach of law, primarily in relation to property offences – in the case of Western Australia, home burglary – which were seen as very significant issues in those jurisdictions, so it only operates there. It requires a conviction for an offence. It also requires conviction under our law where the burden of proof is beyond reasonable doubt. It's not a low order burden of proof that operates in relation to these matters. And the fact is that under our criminal justice system, the responsibility for those questions rests with the states.*
>
> *Now, the Commonwealth has expressed its concern about the impact of these laws on young people in particular, and in relation to the impact on indigenous peoples. Now I think the impact can be quite variable, because convictions are required, I'd suspect that it's probably, in many cases, going to be more difficult for convictions to occur, because I think it's a natural reaction that those who are involved in the proceedings work harder to make sure that if a mandatory sentence is likely, that it is resisted, if there is any possible doubt. And one of the points that's been made to me is that while Aborigines are over-represented in our criminal justice statistics – and that is something that we have been concerned about, it's something that's been addressed by Royal Commissions, it's something in which we are putting a lot of work with the states to try to redress – but the fact is that mandatory sentencing is likely to produce an outcome where indigenous people, if the offences related to these matters, would be less represented in the statistics, rather than more represented. And it is certainly the case that it cannot be established that mandatory sentencing has significantly led to, or contributed to, over-representation in our criminal justice system.*

Now that doesn't justify it. I simply put it before you as material that has been in the public arena. We are a democracy, where these issues are discussed and debated, and debated very vigorously. The Commonwealth Attorney-General, my ministerial colleague, has written to his counterparts in both Western Australia and the Northern Territory, asking them to review their laws, particularly as they impact upon young people... The Commonwealth is very conscious of looking for other ways through this issue, and we are seeking, from a committee of members of parliament, advice on further diversionary programs, and looking at the interpreter issue to see whether there are ways forward, progressively, to address these questions, which can help in alleviating some of the concerns about the mandatory sentencing question...[49]

The government considers that it is better to address the problem of repeat offenders through programs aimed at prevention, rehabilitation and diversion... The government's main priority is to address the causes underpinning the over-representation of Indigenous people in prison. We believe we're meeting our obligations under CERD." [50]

These explanations are deeply unsatisfactory. There is no evidence to support the claim that it will be more difficult to get a conviction under mandatory sentencing because of the standard of proof required. There is also no evidence that "mandatory sentencing is likely to produce an outcome where Indigenous people... would be less represented in the statistics".

A common misconception about the arguments relating to the discriminatory nature of mandatory sentencing is the suggestion that mandatory sentencing depends on it having "significantly led to, or contributed to, over-representation in our criminal justice system" for it to be discriminatory. There is no clear evidence that it has led to over-representation, but this is not the point. The issue is that mandatory detention is diametrically opposed to the accepted goals of the Royal Commission into Aboriginal Deaths in Custody of preventing incarceration wherever possible. It militates against efforts to reduce levels of over-representation in custody.

The CERD Committee expressed concern at mandatory sentencing in its Concluding Observations in March 2000 as follows:

"The Committee expresses its concern about the minimum mandatory sentencing schemes with regard to minor property offences enacted in Western Australia, and in particular in the Northern Territory. The mandatory sentencing schemes appear to target offences that are committed disproportionately by indigenous Australians, especially juveniles,

leading to a racially discriminatory impact on their rate of incarceration. The Committee seriously questions the compatibility of these laws with the State party's obligations under the Convention and recommends to the State party to review all laws and practices in this field." [51]

2. *Consideration of Mandatory Sentencing by the Human Rights Committee in July 2000*

In the dialogue with the Human Rights Committee, the Australian government provided more expansive answers on why it considered that mandatory sentencing laws were not racially discriminatory[52]:

"In relation to Articles 24 and 26 (of the ICCPR), the Government submits that mandatory detention laws do not discriminate against any group of people in ways that are prescribed by these Articles. The Government notes that these laws apply to all citizens equally, irrespective of race. This is consistent with the approach to discrimination adopted by the Committee. There is no distinction made in the legislation as to its application to various groups of people. For this reason, the Western Australian and Northern Territory legislation cannot be considered discriminatory... [52]

Mandatory detention laws are laws of general application... they apply without any distinction as to race or other characteristics... In the Government's view, the fact that the detention laws apply only to selected offences does not mean that the laws discriminate against indigenous people or any other group. This Committee in its general comment on non-discrimination has said that not every differentiation will constitute discrimination if the criteria for such differentiation are reasonable and objective.

The Northern Territory and Western Australian Governments have identified particular offences as being of significant concern to their communities. For example, Western Australia has the highest rate of home burglary in Australia and the Western Australian Government has stated that people who are the victims of home burglary suffer not only the loss of valuable possessions but also the feeling that the sanctity of their homes has been violated...

The relevant State and Territory Governments have identified the basis for the selection of particular offences as appropriate for mandatory detention in cases of repeat offending as being their seriousness in terms of community impact. This is a reasonable and legitimate objective of criminal law.

The Governments in question have determined that mandatory minimum sentences for serious property offences and home burglary are not unreasonable, unjust or non proportional when taking into account the nature of the crimes in question, their repeat nature and the level of community concern about them." [54]

This answer does not acknowledge that the prevention of discrimination clearly includes discrimination that may be unintentional but which nevertheless still has a disparate impact. It also misrepresents the circumstances in which a differentiation of treatment is "reasonable and objective". As noted above in relation to the margin of appreciation argument under CERD, the circumstances in which a "differentiation of treatment" is justifiable do not extend to permitting invidious discrimination.

But even were such a balancing exercise allowable under the ICCPR, it is patently false to suggest that the mandatory sentencing laws, particularly those in the Northern Territory, relate only to "serious property offences". The mandatory sentencing laws apply to petty or minor property offences and it is inconceivable that such harsh laws could be seen as proportionate, reasonable or just in these circumstances.

A final concern about the government's justifications of mandatory sentencing is the stated commitment to diversionary and non-custodial options to address the underlying causes of over-representation. There is no logical connection between such a commitment and the existence of mandatory sentencing.

Lord Colville, a member of the Human Rights Committee, explained this issue well in relation to the funding agreement between the Northern Territory and federal governments:

"I was extremely interested in hearing from Ms Leon that $5 million [AUDollars] per year are being devoted to diversionary programs, orders for the police to avoid bringing charges provided that somebody will comply with some other diversionary program or possibly the powers of the Magistrates, limited though they may be, to pass what I believe are conditional release orders instead of using the mandatory sentence.

Now, there is a dilemma here I think for the delegation. Either these are palliatives which indicate that there is a recognition that mandatory sentencing is unfair in itself in which case my point is proved, or alternatively, there is no particular reason to spend $5 million per year in the Northern Territories and Western Australia to provide these diversionary programs which are not available or are not funded in other parts of the Australian Territory.

Now, I don't think the delegation can have it both ways, and therefore, this is another aspect of discrimination which I would bring to their attention and I would ask them to reflect upon it." [55]

The Human Rights Committee expressed its concern at mandatory sentencing in its Concluding Observations in July 2000:

"Legislation regarding mandatory imprisonment in Western Australia and the Northern Territory, which leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies adopted by the State party to reduce the over-representation of indigenous persons in the criminal justice system, raises serious issues of compliance with various Articles in the Covenant.
The State party is urged to reassess the legislation regarding mandatory imprisonment so as to ensure that all Covenant rights are respected." [56]

3. Consideration of Mandatory Sentencing by the Committee Against Torture in November 2000

The Committee Against Torture has also expressed its concern that the mandatory sentencing legislation breaches the Convention Against Torture to which Australia is a signatory. In November 2000 the Committee stated:

"Legislation imposing mandatory minimum sentences, which has allegedly had a discriminatory effect regarding the indigenous population (including women and juveniles), who are over-represented in statistics for the criminal justice system."

The Committee Recommended:

"The State party keep under careful review legislation imposing mandatory minimum sentences, to ensure that it does not raise questions of compliance with its international obligations under the Convention and other relevant international instruments, particularly with regard to the possible adverse effect upon disadvantaged groups."

Failure to Provide Adequate Protection of Indigenous Rights

Failure to Implement the Genocide Convention

While Australia is a signatory to the 1949 *Convention on the Prevention and Punishment of the Crime of Genocide*, successive governments have not enshrined this law domestically. *Bringing Them Home* recommended that the Commonwealth Government legislate to implement the Genocide Convention with full domestic effect as part of official recognition that removal policies of the past are over and will not be repeated. In response, the Commonwealth Government claimed that no genocide occurred in Australia, so therefore there was no need to implement the Convention.

In October 1999, the Senate referred an Anti-Genocide Bill put forward by the Australian Democrats Party to the Legal and Constitutional References Committee for investigation and review by June 2000[57]. On 3 April 2001, both the major parties voted down a proposal by the Australian Democrats Party to debate an Anti-genocide Bill aimed at, amongst other things, deterring crimes against humanity.

Education and the Abolition of Bi-lingual Education in the Northern Territory

The rate of Aboriginal students' participation in education is vastly disproportionate to non-Indigenous students.

A significant number of Indigenous students do not complete the compulsory years of schooling[58]. In 1994, over one-third of Indigenous 15 to 24 year olds had not completed Year 10[59]. The school retention rate to Year 12 for Indigenous students is around 33% compared to almost 73% for all students[60]. The level of Aboriginal students' participation in education in rural and remote locations is even less[61]. Further, attendance by those enrolled is also low, sometimes falling to an estimated 20% attendance (for example, during ceremony times)[62].

In addition, 43% of Indigenous primary school students in rural and remote locations have significantly lower literacy and numeracy achievement[63]. In 1996, a Northern Territory Public Accounts Committee found that students in remote Aboriginal schools perform 3 to 7 years behind urban students of the same age in literacy and numeracy tests.

The poor performance of Aboriginal students from remote Aboriginal Schools in literacy and numeracy tests may well be attributable to English being a second language for many of them. In the 1996 Census, it was found that, as a proportion of the total population aged five years and over, the Northern Territory recorded the highest percentage of people speaking a language other than English at home (22.5%). Over 70% of those people spoke an Indigenous

language. Up to one-third of Indigenous students living in rural and remote Australia speak a language other than English as their *first* language.

Despite this, Aboriginal students are not recognised by the Commonwealth as requiring ESL funding and support. Furthermore, the Northern Territory government announced in December 1998 that it was phasing out bilingual education programs in government schools in Aboriginal communities, and replacing them with "English as a Second Language" programs because of the low standards of English literacy among Aboriginal students.

The right to education on a basis of equality is a right guaranteed by international law:

- Article 28 of the *Convention on the Rights of the Child* (CROC) provides for state parties to recognise the right of the child to education, with a view to achieving this right on the basis of equal opportunity.
- The *International Convention on the Elimination of All Forms of Racial Discrimination* (the CERD) provides that education shall be available to all without discrimination on the basis of race [Articles 1(1) & 5(1)(e)(v)].
- Article 26 of the *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention 169) requires states to take measures to ensure equality of opportunity to members of Indigenous peoples in acquiring education.

International law further requires that states ensure that Indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs and to preserve and practice their languages:

- CERD Committee, *General Recommendation XXIII – on Indigenous Peoples*[64].
- Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) states that minorities and persons belonging to minorities shall not be denied the right to "enjoy their own culture, to profess and practise their own religion, or to use their own language." This right is also protected by Article 30 of CROC in relation to children.
- Article 28(3) of the *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention 169) requires states to take measures to preserve and promote the development and practice of the indigenous language of the peoples concerned.

Following from these requirements, a number of international instruments recognise that the right to education on a basis of equality requires that that education encompass the special educational issues of minority and indigenous groups regarding the maintenance of their cultures, religions and languages:

- Article 29(1) of CROC states that the education of the child shall be directed to (amongst other things) ... (c) The development of respect for the child's parents, his or her own cultural identity, language and values...
- Article 2(b) of the *Convention against Discrimination in Education* excludes from its definition of discrimination in education, the establishment or maintenance for religious or *linguistic* reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.
- Article 28(1) of the *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention 169) states that, "Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective."

The integration of Aboriginal languages into the formal education system through bilingual programs is consistent with international human rights standards. It makes schooling more accessible to Aboriginal students and it recognises cultural difference in a manner that is non-discriminatory in international law. Bilingual education programs value Aboriginal educators and knowledge. Aboriginal communities state that the success of the education of their children should be measured both by standards of English literacy, and also by respect for their rights to education, language, culture and land. For many Indigenous people, the decision of the Northern Territory government to phase out bilingual education programs in government schools in Aboriginal communities amounted to a denial of their right to choose the mode of education for their children and threatens the viability of remaining languages.

International human rights standards also require states to ensure

that Indigenous people themselves are able to effectively participate in decisions regarding the provision of education and the kind of education provided:

- Article 27 of the *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention 169) states that "Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations."
- The CERD Committee *General Recommendation XXIII* requires that states "[E]nsure that members of indigenous groups have equal rights in respect of effective participation... and that no decisions directly relating to their rights and interests are taken without their informed consent." [64]

Many Aboriginal communities who currently have bilingual education programs have stated that the decision of the Northern Territory government was made without appropriate consultation. The lack of appropriate Indigenous participation in the Northern Territory decision to abandon bilingual education breaches Australia's obligations to respect the self-determination rights of its Indigenous peoples under Article 1 of the ICESCR and the right of indigenous people to effective participation in decisions that affect them. It is also inconsistent with the consistently expressed desires of Indigenous people in the Northern Territory for greater community control over educational processes[65].

Redressing Indigenous Disadvantage

Across every measurement of socio-economic status and well-being, and across all age groups, geographical circumstances and genders, Australia's Indigenous people are severely disadvantaged, and disproportionately so when compared to the rest of Australian society. In addition, the Indigenous population has a young age structure. The disadvantage faced by Indigenous young people today has the potential to increase and further entrench the disparity between Indigenous and non-Indigenous Australians over the coming decades unless greater effort is made now to reduce the inequality that they face.

The systemic, grossly disproportionate rate of disadvantage faced by Indigenous youth indicates that they do not enjoy the full spectrum of human rights in a non-discriminatory manner. The achievement of the non-discriminatory enjoyment of the full spec-

trum of human rights for all people is the core obligation undertaken by States parties to ICESCR, CERD and the ICCPR.

Under Article 2(2) of CERD, the consequence of this disadvantage and discrimination is that Australia is required to take action "to ensure the adequate development and protection" of Indigenous people, "for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."

Under ICESCR, this discrimination raises concerns that Australian governments may not be meeting their "core minimum obligations" under the Convention towards Indigenous people across the full range of services that are routinely provided to non-Indigenous Australians. Australian governments[67] must be able to demonstrate that they are providing Indigenous people with "minimum essential levels of each of the rights" and that they are making every effort to use all resources at their disposition to satisfy, as a matter of priority, those minimum obligations.

International Commentary

1. Consideration of Indigenous Disadvantage by the CERD Committee in March 2000

The issue to which the CERD Committee members returned time and again was the extent of Indigenous disadvantage, and the adequacy of government measures to redress this. In their comments the Committee members raise a number of complex issues of significance to attempts to redress Indigenous disadvantage. They acknowledge that:

- Indigenous disadvantage is the result of systemic discrimination;
- the appropriate benchmark by which to measure progress is one of equality between Indigenous and non-Indigenous Australians;
- the government is obligated to take sufficient steps (or special measures) to achieve such equality;
- there must be adequate monitoring and evaluation of progress, including measuring effectiveness through benchmarking and standard setting; and
- real progress requires the effective participation of Indigenous people in decision-making (including through the representative voice of ATSIC).

The Government responded in a number of ways. They emphasised the importance of recognising progress to date:

> *"If we cannot acknowledge that there has been some progress then the support for the efforts, which are considerable, to address these issues in the community as a whole will not be there. And so we have seen some beneficial improvements, they're outlined in the report before you, but we don't see those improvements as enough..."* [68]

There is also clear evidence that progress is being made:

- Rising levels of educational attainment;
- improvements in health and housing (eg a 90% reduction in aboriginal infant mortality since the 1970s);
- and the fact that 15% of the continent has been returned to aboriginal ownership and control. [69]

The Government emphasised its commitment to redressing disadvantage through "practical" measures:

> *"Now it is impossible to undo the wrongs of the past, but the Australian Government has committed itself firmly to address what it sees as today's unacceptable level of disadvantage suffered by Australia's indigenous peoples. And the fact is that indigenous disadvantage in Australia has been long-standing and it will not be corrected overnight..."*

They emphasised the increased funding in Indigenous-specific programs:

> *"Now despite some claims to the contrary, the fact is that government funding, total funding on indigenous support programs has increased. In this financial year the Government's indigenous-specific funding across all portfolios including health, housing, education and employment will be 2.2 billion Australian dollars... that's a significant increase on the figure of 1.8 billion that is referred to in the report. So you can see that increased commitment by that simple demonstration."* [70]

They also emphasised the government's policies of empowerment and responsibility/mutual obligation:

> *"Now I must stress that disadvantage will not be solved or remedied by money alone. We recognise that communities and individuals need to take some responsibility for their personal well-being as well. And they need to have the chance to claim success or to learn from failure, and we have therefore been involving and empowering Aboriginal and Torres Strait Islander people to overcome the legacy of our past, to*

eliminate need for welfare support, and we're improving indigenous Australians' access to health, housing, education, employment economic wealth of our country in addition. In fact I would say that one of the tangible demonstrations of that empowerment is the very presence of such a large number of Australian indigenous people before your Committee in the audience today and making efforts to be heard in other ways, as I know they have... The government support for services remain but our aim of course is to create opportunities for indigenous Australians to be able to create their own future." [71]

And they acknowledged the historically derived nature of the disadvantage. Notable in these responses is the absence of any recognition of the importance of a rights-based approach to redressing disadvantage. There is no confirmation of the centrality of Indigenous participation and self-determination to achieving lasting improvements in the enjoyment of economic, social and cultural rights[72].

Similarly, there is no reference to a commitment to adopting special measures to redress Indigenous disadvantage as expeditiously as possible, through the adoption of targeted plans. Indeed, while the government affirms the importance of performance measures and benchmarks, the only examples they are able to give of benchmarks that have been adopted are socio-economic indicators and statistics collated as part of the Commonwealth's access and equity strategy[73].

A further aspect of the government's response that is of concern is the reference to $2.2 billion expenditure on "special programs". As a study on public expenditure on services for Indigenous people noted last year:

> *"A focus on special programs for Indigenous people alone will provide a misleading picture of the distribution of public expenditure between Indigenous and non-Indigenous people. While Indigenous people benefit substantially more than other Australians from specific programs, they benefit substantially less from many, much bigger, general programs."* [74]

Such a focus does not acknowledge, in relation to health for example, that Indigenous people access the large general schemes such as Medicare and the Prescribed Pharmaceutical Benefits scheme at substantially lower rates than non-Indigenous people. Nor does it identify that a large number of unemployed Indigenous people are "hidden" within the Community Development Employment Projects Scheme rather than accessing Jobstart allowance. Put differently, much of the expenditure through programs that are identified as

"special programs" is, in fact, expenditure that would otherwise be spent through mainstream programs. It is not additional, as characterisation as a "special program" implies.

The Committee reached the following conclusions on the issue of Indigenous disadvantage:

> *"The Committee acknowledges the efforts being made to increase spending on health, housing, employment and education programmes for indigenous Australians. Serious concern remains at the extent of the continuing discrimination faced by indigenous Australians in the enjoyment of their economic, social and cultural rights. The Committee remains seriously concerned about the extent of the dramatic inequality still experienced by an indigenous population that represents only 2.1 per cent of the total population of a highly developed industrialized State. The Committee recommends that the State party ensure, within the shortest time possible, that sufficient resources are allocated to eradicate these disparities."*

2. Consideration of Indigenous Disadvantage by the Human Rights Committee in July 2000

The Human Rights Committee's concern for the comparative disadvantage of Indigenous people in Australia was based on the failure of Australia to meet its obligations under Article 27 of ICCPR, which requires that the culture of minority people be protected.

> *"The Committee recommends that the State party take further steps in order to secure the rights of its indigenous population under article 27 of the Covenant. The high level of exclusion and poverty facing indigenous persons is indicative of the urgent nature of these concerns. In particular, the Committee recommends that the necessary steps be taken to restore and protect the titles and interests of indigenous persons in their native lands, including by considering amending anew the Native Title Act, taking into account these concerns."*

3. Consideration of Indigenous Disadvantage by the Committee on Economic, Social and Cultural Rights in September 2000

The disadvantage of Indigenous people in Australia raises concerns about whether the governments of Australia are taking sufficient steps, as required under ICESCR, towards the progressive realization of the enjoyment of economic, social and cultural rights by Indigenous people. As noted above, the Committee on Economic,

Social and Cultural Rights has interpreted the principle of "progressive realization over time" in a way that "should not be misinterpreted as depriving the obligation of all meaningful content." [75]

One of the main ways that the Committee on Economic, Social and Cultural Rights considers whether the principle of progressive realization has been "deprived of meaningful content" in relation to Indigenous Australians is through examining Australia's periodic reports to the Committee[76]. In considering Australia's periodic report in September 2000, the Committee stated at paragraphs 9, 10 and 15 respectively:

> *"The Committee notes that the State party has allocated 2.3 billion Australian dollars for giving priority to indigenous programmes.*
> *The Committee welcomes the partnership between the State party and indigenous communities in initiatives aimed at providing greater access for indigenous peoples to culturally appropriate health services and allocating significant resources for the improvement of indigenous health in general.*
> *The Committee expresses its deep concern that, despite the efforts and achievements of the State party, the indigenous populations of Australia continue to be at a comparative disadvantage in the enjoyment of economic, social and cultural rights, particularly in the field of employment, housing, health and education."*

4. Consideration of Indigenous Disadvantage by the Committee Against Torture in November 2000

The Committee Against Torture also considered the socio-economic disadvantage suffered by Indigenous people in Australia under its convention and made the following recommendations:

> *"That the State party continue its efforts to address the socio-economic disadvantage that* inter alia *leads indigenous Australians to come disproportionately into contact with the criminal justice system."*

Indigenous Children as Victims of Racism

Forced Removal of Children

In the period 1910 to 1970, between 1 in 3 and 1 in 10 Indigenous children were forcibly removed from their families. The effects of such removal were, for most victims, negative, multiple and profoundly disabling. The policies and practices underlying the removal of Aboriginal children from their families were discriminatory and

genocidal in intent. Further, the treatment of many removed children after their removal involved breaches of fiduciary duty and duty of care, as well as criminal actions. The profound problems suffered by Indigenous people and communities as a result of removal policies are ongoing.

In 1995-1996, the Human Rights and Equal Opportunity Commission conducted an inquiry into the forcible removal of Aboriginal and Torres Strait Islander children from their families. The findings of the inquiry were reported in *The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and Their Families, Bringing Them Home* [*Bringing Them Home*] in May 1997. *Bringing Them Home* made a number of recommendations, including:

- that the Commonwealth government provide reparations for the injury suffered by Indigenous people affected by removal policies. The report adopted the van Boven principles for reparation for gross violations of human rights as the basis of recommendations for addressing the harm caused;
- that the Commonwealth Government legislate to implement the 1949 *Convention on the Prevention and Punishment of the Crime of Genocide* with full domestic effect as part of official recognition that removal policies of the past are over and will not be repeated.
- that self-determination for Indigenous children and young people be implemented through national framework legislation for juvenile justice and care and protection systems.

The report also considered contemporary forms of separation, and recommended the introduction of national standards and framework legislation incorporating international human rights standards for the treatment of Indigenous children.

The government responded to the report in 1997 with a $43 million package that included measures taken to facilitate family reunion and to improve counselling and family support services for the victims.

However, the government has denied that the forcible removal of children was a gross violation of human rights or was genocidal. Instead, the Government has emphasised the idea that the removal of Indigenous children was often perpetrated by people of "goodwill" and that it was consistent with the "standards of the day". The Government has criticised the *Bringing Them Home* report on the basis that the number of children forcibly removed was significantly less than *Bringing Them Home* suggested, saying that there was no "stolen generation" and that the methodology of the report was

flawed. The Government has rejected recommendations for financial compensation and other forms of reparation and has stated that there is no basis for making reparations as the van Boven principles are not binding in international law. The government also rejected recommendations for national framework legislation for juvenile justice and care and protection systems.

The government's response to *Bringing Them Home* is racist and based on flawed reasoning. Contrary to the Government's stated position:

- Several international instruments require governments to redress the effects of past discrimination. The guarantee of non-discrimination and equality before the law under Articles 2 and 5 of the CERD creates an obligation to redress past discrimination and to provide effective remedies through competent authorities for any person whose rights or freedoms have been violated. The Government's refusal to acknowledge and provide redress for past discrimination raises further issues of compliance with Australia's obligations under the ICESCR, in particular in respect of Article 1, self-determination, and Article 2, non-discrimination. The van Boven principles, on which *Bringing Them Home* based its reparations recommendations, are a synthesis of international law and practice, which incorporates obligations across a range of such international instruments;
- Forcible removal policies may constitute "genocide": the definition of genocide in the *Genocide Convention* extends to situations where there are mixed motives, some of which may be perceived as beneficial. Furthermore, genocide may also describe the destruction of a people or culture where it is achieved through means other than physical killing and where it does not cause the complete destruction of the group.

A failure to address the problems caused by forcible removals and to implement the recommendations of *Bringing Them Home* impacts upon the present and future generations of Indigenous people.

International Commentary

In its March 2000 decision, the CERD Committee expressed concern regarding the Government's failure to take responsibility for past government actions, particularly in relation to forcible removal policies:

> *"The Committee notes the conclusions of the 'National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families' and acknowledges the measures taken to facilitate family reunion and to improve counselling and family support services for the victims. Concern is expressed that the Commonwealth Government does not support a formal national apology and that it considers inappropriate the provision of monetary compensation for those forcibly and unjustifiably separated from their families, on the grounds that such practices were sanctioned by law at the time and were intended to 'assist the people whom they affected'. The Committee recommends that the State party consider the need to address appropriately the extraordinary harm inflicted by these racially discriminatory practices."*

In response, the government referred to the Motion of Reconciliation that was resolved upon by both houses of federal Parliament in August 1999. However, the Motion of Reconciliation does not contain the necessary elements of an apology identified in recommendation 5a of *Bringing them home*, and is "generic" in the sense that it does not specifically mention forcible removal policies at all[77].

The Human Rights Committee, in July 2000, also expressed concern at the ongoing impact of the policy of removing children from their families.

> *"While noting the efforts by the State party to address the tragedies resulting from the previous policy of removing indigenous children from their families, the Committee remained concerned about the continuing effects of this policy.*
> *The Committee recommended that the State party intensify these efforts so that the victims themselves and their families would consider that they had been afforded a proper remedy (arts 2, 17 and 24)."*

Conclusion

The issue of whether Australia's "treatment" of Indigenous people meets its international human rights obligations was the subject of an ongoing dialogue taking place between Australia, Non-Government Organisations and UN treaty committees throughout 1999 and 2000.

While this discourse has elevated the overall level of understanding within the community and within government of the meaning of equality in relation to Indigenous people, it has not resulted in fundamental changes to the way in which Indigenous issues are approached within the domestic political process. The old paternal patterns, enshrined in the welfare model, have not given way to a rights-based approach to Indigenous issues. The inevitable conse-

quences of these patterns continue to take effect. The Native Title Act continues to privilege non-Indigenous interests over Indigenous interests. Aboriginal people continue to live on the margins of society occupying the lowest socio-economic echelon.

Yet, despite this persisting discrimination, it is my conviction that over time the dialogue on equality and human rights will produce tangible results for Indigenous peoples. The upcoming World Conference Against Racism in Durban this year will bring international focus upon the issue of racism and the various ways in which it manifests itself throughout the world. The right to racial equality, while universal in character, takes on particular forms and the dialogue generated by treaty committees around these universal standards recognises the specific historical forces that underlie discrimination against Indigenous peoples. Overcoming these forces liberates not only Indigenous peoples but has an enduring impact on all humanity.

Notes

1 Australian Constitution s51(xxvi).
2 The RDA is Australia's domestic implementation of its obligations under CERD. It binds both state and federal governments.
3 *Western Australia v Commonwealth* (1995) 183 CLR 373 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, p. 484.
4 CERD Committee, *Concluding Observations*, 2000, *op. cit.*, para 8.
5 *Ibid.*
6 Ms McDougall in FAIRA, *CERD Transcript – 21-22 March 2000*, 1393rd meeting, Part II, p.3.
7 (1996) 187 CLR 1.
8 Section 7 NTA.
9 *Wik v Queensland* (1996) 187 CLR 1 *("Wik")*.
10 NTA, Division 2A, Part 2. S22F provides that states and territories may validate intermediate acts attributable to the state and territory.
11 NTA, s22A, 22F.
12 NTA, s23(6).
13 NTA, s229.
14 NTA, s230.
15 NTA, s231, 232.
16 Committee member Mr Wulfrum, in the Committee on the Elimination of Racial Discrimination, *Summary record of the 1287th meeting (53rd session)*, 14 August 1998, UN Doc CERD/C/SR.1287, para 32. See also comments by Mr Van Boven, Ms McDougall and Mr Garvalov at paras 29, 38 and 42 respectively.
17 Committee on the Elimination of Racial Discrimination, *Decision 1(53) concerning Australia*, 11 August 1998. UN Doc CERD/C/53/Misc.17/Rev.2.
18 Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia – Concluding observations/ comments*, 18 March 1999. UN Doc CERD/C/54/Misc.40/Rev.2. Herein CERD Decision.
19 *Ibid.*, at para 12.
20 The oral intervention of the Australian government delegation before the CERD Committee is documented in two ways:
   (1) the unofficial, complete transcript of the dialogue by the Foundation for Islander Research Action (FAIRA), Transcript of Australia's hearing before the CERD Committee – 1393rd, 1394th and 1395th meetings, 21-22 March 2000, FAIRA, Brisbane 2000, (FAIRA, CERD Transcript,– 21-22 March 2000), see also www.faira.org.au/cerd/; and
   (2) the official United Nations summary records: Committee on the Elimination of Racial Discrimination, *Summary record – 1393rd meeting*, UN Doc CERD/C/SR.1393; Committee on the Elimination of Racial Discrimination, *Summary record – 1394th meeting*, UN Doc CERD/C/SR.1394 (Transcript only available in French); Committee on the Elimination of Racial Discrimination, *Summary record – 1395th meeting*, UN Doc CERD/C/SR.1395; Committee on the Elimination of Racial Discrimination, *Summary record – 1398th meeting*, UN Doc CERD/C/SR.1398 (Transcript only available in French).
   Reference is also made to the written answers provided by the Australian delegation to the Committee. Copies of the written answers supplied by the government are available from the Secretariat of the CERD or by contacting the office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC.
21 CERD Committee, *Concluding Observations*, 2000, *op. cit.*, para 8.
22 *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Report by Elizabeth Evatt AC, 21 June 1996, para 2.30. http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/evatt
23 Hansard, Reps 9 May 1984, 2130. "The original title of the Act was the Aboriginal and Torres Strait Islander Heritage (interim Protection) Act 1984. Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, Report by Elizabeth Evatt AC, 21 June 1996. http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/evatt
24 The report on the protection of the heritage of Indigenous people by Erica-Irene Daes is the most comprehensive statement from an international organisation of the appropriate standards for the protection of Indigenous peoples' heritage. The principles and guidelines are widely endorsed by indigenous peoples and reflect the position of the Working Group on Indigenous Populations, the most expert group on Indigenous issues in the United Nations system. The principles were elaborated in accordance with the Working Group's mandate to develop standards regarding the rights of Indigenous peoples.
25 Hill, Senator Robert, Press Release: Decision on the Future of Boobera Lagoon, 28 June 2000, <www.environment.gov.au/minister/env/2000/mr28jun00.html>, (27 November 2000).
26 Mr Lahlah, Transcript of Human Rights Committee's examination of Australia, 21 July 2000, <www.faira.org.au > (27 November 2000).
27 *Report, Royal Commission into Aboriginal Deaths in Custody*, National Report, Volume 1, 1991, 1.3 "The Disproportionate numbers of Aboriginal People in Custody" (Herein *RCIADC Report*).
28 *RCIADC Report, ibid.*, Preface.

29 *RCIADC Report, ibid.*, 1.3 "The Disproportionate numbers of Aboriginal People in Custody" at 1.3.2.
30 *RCIADC Report, ibid.*, 1.6 "Reducing the Number of Aboriginal People in Custody – The Criminal Justice System" at 1.6.2.
31 *RCIADC Report, ibid.*, Preface.
32 *RCIADC Report, ibid.*, 1.3 "The Disproportionate numbers of Aboriginal People in Custody".
33 Carcach, C., Grant, A. and Conroy, R., *Australian corrections: The imprisonment of Indigenous people* Australian Institute of Criminology (AIC), *Trends and Issues in Crime and criminal justice: No. 137*, AIC, Canberra, 1999, p. 2.
34 Australian Bureau of Statistics, *Corrective Services*, June Quarter 1999, Ref: 4512.0, pp. 5, 21-22.
35 Office of the Northern Territory Anti-discrimination Commissioner. 1999. *Report: Inquiry into the provision of an interpreter service in Aboriginal languages by the Northern Territory government.*
36 CERD Committee, *Concluding Observations*, 2000, op.cit., at para 15.
37 Ms McDougall in FAIRA, *CERD Transcript – 21-22 March 2000*, 1393rd meeting, Part II, p. 5.
38 *Criminal Code* (WA), s401(4).
39 *Sentencing Act 1995* (NT), s4.
40 *Juvenile Justice Act 1983*, s53AF.
41 *Sentencing Act 1995* (NT), Schedule 1.
42 Martin, G, Seminar on Mandatory Sentencing, at Indigenous Human Rights Conference, Byron Bay, February 2000.
43 Human Rights and Equal Opportunity Commission *Human rights brief no.2: Sentencing juvenile offenders*, p. 5.
44 See also Human Rights Committee, *General Comment 18, Non-discrimination*. 10/11/89. (Thirty-seventh session, 1989), paragraph 7.
45 *Salgar de Montejo v Colombia* (64/79), paragraph 10.4.
46 See Bayes, H., "Justice is blind: Mandatory sentencing of children in Western Australia and the Northern Territory", (1999) 22(1) *University of New South Wales Law Journal* 286, p. 286.
47 Human Rights Committee, *General Comment 17, Rights of the Child (Article 24)*. 07/04/89. (Thirty-fifth session, 1989), at paragraph 1.
48 Ms McDougall in FAIRA, *CERD Transcript – 21-22 March 2000*, 1393rd meeting, Part II, p5.
49 Minister Ruddock in FAIRA, *CERD Transcript – 21-22 March 2000*, 1394th meeting, Part III, pp6-7.
50 Commonwealth of Australia, *Written answers to the Committee on the Elimination of Racial Discrimination. Issue: Mandatory sentencing laws.*
51 CERD Committee, *Concluding Observations*, 2000, op.cit. at para 15
52 Note: the government presented a range of arguments in relation to how mandatory sentencing provisions are consistent with article 9, 10, 14 and so forth: See further Ms Leon in FAIRA, *Human Rights Committee Transcript*, 20 July 2000, pp27-30. These arguments are not addressed here. Note, however, the extensive and persuasive response of Lord Colville, in *ibid*, 21 July 2000, pp. 32-42.
53 Ms Leon in FAIRA, *Human Rights Committee Transcript*, 20 July 2000, pp.27-30.
54 *ibid*, 21 July 2000, pp. 15-16. Emphasis added.
55 Lord Colville, in *ibid*, 21 July 2000, pp. 32-42.

56 Human Rights Committee. *Concluding Observations, op. cit.*, para 17.
57 The terms of reference can be found at http://www.aph.gov.au/senate/committee/advert/Antigenocide.htm
58 Human Rights and Equal Opportunity Commission, *"Emerging Themes"* National Inquiry into Rural and Remote Education, March 2000
59 *Ibid.*
60 DETYA submission to the National Inquiry into Rural and Remote Education, page 89.
61 David Curtis, ATSIC Commissioner, Melbourne hearing, National Inquiry into Rural and Remote Education.
62 ATSIC submission to National Inquiry into Rural and Remote Education, page 26.
63 *DETYA submission* to the National Inquiry into Rural and Remote Education, page 48.
64 CERD Committee, *General Recommendation XXIII, op. cit.*, para 3.
65 *Ibid.*
66 There has been government recognition of the benefits of increased community involvement and control in redressing Indigenous disadvantage: For example, the *Desert schools report: An investigation of English language and literacy among young Aboriginal people in seven communities*, AIATSIS, Canberra, 1996, was a Commonwealth-funded extensive study, of which the principal recommendations focused on strengthening the involvement of communities in the education process.
67 While the power to enter into international treaties and conventions on behalf of Australia resides with the federal government, the states and territories of Australia are bound to act in compliance with Australia's international obligations. Article 27 of the Vienna Convention on the Law of Treaties, to which Australia is a party, provides that "a party may not invoke provisions of its internal law as justification for its failure to perform a treaty".
68 Minister Ruddock in FAIRA, *CERD Transcript – 21-22 March 2000*, 1393rd meeting, Part I, p. 3.
69 Commonwealth of Australia, *Written answers to the Committee on the Elimination of Racial Discrimination. Issue: Wealthy Australia has not solved the problems of 2% of its population.*
70 *Ibid.*
71 *Ibid*, p. 4. Note: I critique this concept of responsibilities in chapter 2 of this report, and the introduction of the *Social Justice Report 1999*.
72 In this regard, note the Human Rights Committee, *Concluding Observations*, which states in paragraph 9 that:
"with respect to article 1 of the (ICCPR), the Committee takes note of the explanation given by the delegation that rather than the term 'self-determination' the Government... prefers terms such as 'self-management' and 'self-empowerment' to express domestically the principles of indigenous peoples exercising meaningful control over their affairs. The Committee is concerned that sufficient action has not been taken in that regard. The State Party should take the necessary steps in order to secure for the Indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources."
73 Commonwealth of Australia, *Written answers to the Committee on the Elimination of Racial Discrimination. Issue: Benchmarking / Measuring reconciliation.*

[74] Neutze, M, Sanders, W, Jones, G, *Public expenditure on services for Indigenous people – Education, employment, health and housing*,Discussion paper 24, The Australia Institute, Canberra, 1999, p. xiii.

[75] Committee on Economic, Social and Cultural Rights, *General comment 3: The nature of States parties obligations (Article 2, para 1)*, *op.cit*, para 9.

[76] Australia's third periodic report was lodged with the Committee on 15 June 1998: Committee on Economic, Social and Cultural Rights, *Periodic Report: Australia*, UN Doc: E/1994/104/Add.22 (State Party Report), 23 July 1998.

[77] Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission to the stolen generation inquiry, HREOC Sydney 2000, p14. The submission is available at www.hreoc.gov.au.

References

Aboriginal and Torres Strait Islander Social Justice Commissioner. 2000. *Submission to the stolen generation inquiry*, Human Rights and Equal Opportunity Commission, Sydney. [The submission is available at www.hreoc.gov.au]

Aboriginal and Torres Strait Islander Social Justice Commissioner. 2000. *Native Title Report 2000*. Human Rights and Equal Opportunity Commission, Sydney.

Aboriginal and Torres Strait Islander Social Justice Commissioner. 1999. *Native Title Report 1999*. Human Rights and Equal Opportunity Commission, Sydney.

Aboriginal and Torres Strait Islander Social Justice Commissioner. 2000. *Social Justice Report 2000*. Human Rights and Equal Opportunity Commission, Sydney.

Aboriginal and Torres Strait Islander Social Justice Commissioner. 1999. *Social Justice Report 1999*. Human Rights and Equal Opportunity Commission, Sydney.

Acting Aboriginal and Torres Strait Islander Social Justice Commissioner. 1998. *Social Justice Report 1998*. Human Rights and Equal Opportunity Commission, Sydney.

Acting Aboriginal and Torres Strait Islander Social Justice Commissioner. 1998. *Native Title Report 1998*. Human Rights and Equal Opportunity Commission, Sydney.

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

Australian Bureau of Statistics. 1999. *Corrective Services*, June Quarter 1999, Ref: 4512.0.

Australian Institute of Aboriginal and Torres Strait Islander Studies. 1996. *Desert schools report: An investigation of English language and literacy among young Aboriginal people in seven communities*, Canberra.

Australian Law Reform Commission. 1986. *Recognition of Aboriginal Customary Laws*, Report No 31(1986).

Bayefsky, A. 1990. "The Principle of Equality or Non-Discrimination in international Law" (1990) 11 *Human Rights Law Journal* 1, p. 27.

Bayes, H. 1999. "Justice is blind: Mandatory sentencing of children in Western Australia and the Northern Territory", (1999) 22(1) *University of New South Wales Law Journal* 286.

Brownlie, I. 1979. *Principles of Public International Law*, 3rd edition, Clarendon Press,Oxford.

Carcach, C. Grant, A. and Conroy, R. 1999. *Australian corrections: The imprisonment of Indigenous people* Australian Institute of Criminology (AIC), *Trends and Issues in Crime and criminal justice: No. 137*, AIC, Canberra.

Daes, Erica-Irene. 2000. *Final Report Indigenous Peoples and Their Relationship to Land*, UN Doc E/CN.4/Sub.2/2000/25.

Evatt, E. 1996. *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/evatt

Harris, DJ. 1991. *Cases and Materials on International Law.* 4th edition, Sweet and Maxwell, London.

Human Rights and Equal Opportunity Commission. *Human rights brief no.2: Sentencing juvenile offenders*, p. 5.

Human Rights and Equal Opportunity Commission. 2000. *"Emerging Themes"* National Inquiry into Rural and Remote Education.

Martin, G. 2000. Seminar on Mandatory Sentencing, at Indigenous Human Rights Conference, Byron Bay, February 2000.

McKean, W. 1983. *Equality and Discrimination under International Law*. Clarendon Press, Oxford.

McKean, W. 1970. "The Meaning of Discrimination in International and Municipal Law" (1970) 44 *British Yearbook of International Law* 178 at 185–186.

Neutze, M. Sanders, W. Jones, G. 1999. *Public expenditure on services for Indigenous people – Education, employment, health and housing*, Discussion paper 24, The Australia Institute, Canberra.

Office of the Northern Territory Anti-discrimination Commissioner. 1999. *Report: Inquiry into the provision of an interpreter service in Aboriginal languages by the Northern Territory government.*

Parliament of the Commonwealth of Australia. 2000. *Sixteenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund:* on the sustainability of the decision of the CERD Committee on 18 March 1999.

Pritchard, S. 1995. "Special Measures" in **Race Discrimination Commissioner** *Racial Discrimination Act 1975 – A Review*, Human Rights and Equal Opportunity Commission, Sydney.

Race Discrimination Commissioner. 1997. *The CDEP Scheme and Racial Discrimination*, Human Rights and Equal Opportunity Commission, Sydney.

Race Discrimination Commissioner. 1990. *Alcohol Report*, Human Rights and Equal Opportunity Commission, Sydney.

Royal Commission into Aboriginal Deaths in Custody. 1991. National Report, Volume 1, 1991, 1.3 "The Disproportionate numbers of Aboriginal People in Custody".

Steiner, H. and Alston, P. 1996. *International Human Rights In Context: Law, Politics, Morality*, Clarendon Press, Oxford.

Thornton, M.1990. *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, Melbourne.

Triggs, G. 1998. *"Australia's Indigenous Peoples: Evolving International Law"*. Unpublished Article.

Triggs, G. 1999. "Australia's Indigenous Peoples and International Law" (1999) 23 *Melbourne University Law Review*372 at 379-381.

International Commentary

Committee on the Elimination of Racial Discrimination. 1993. *General Recommendation XIV on Article 1* (1993). In: *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,* UN Doc. HRI\GEN\1\Rev.1.

Committee on the Elimination of Racial Discrimination. 1997. *General Recommendation XXIII (51) concerning Indigenous Peoples,* adopted 18 August 1997, UN Doc CERD/C/51/Misc 13/Rev 4 (1997).

Committee on the Elimination of Racial Discrimination. 1998. *Decision 1(53) concerning Australia,* 11 August 1998. UN Doc CERD/C/53/Misc.17/Rev.2.

Committee on the Elimination of Racial Discrimination. 1998. *Summary record of the 1287th meeting (53rd session),* 14 August 1998, UN Doc CERD/C/SR.1287.

Committee on the Elimination of Racial Discrimination. 1999. *Decision (2)54 on Australia – Concluding observations/ comments,* 18 March 1999. UN Doc CERD/C/54/Misc.40/Rev.2.

Committee on the Elimination of Racial Discrimination. 2000. *Summary record – 1393rd meeting,* UN Doc CERD/C/SR.1393.

Committee on the Elimination of Racial Discrimination. 2000. *Summary record – 1394th meeting,* UN Doc CERD/C/SR.1394 (Transcript only available in French).

Committee on the Elimination of Racial Discrimination. 2000. *Summary record – 1395th meeting,* UN Doc CERD/C/SR.1395.

Committee on the Elimination of Racial Discrimination. 2000. *Summary record – 1398th meeting,* UN Doc CERD/C/SR.1398 (Transcript only available in French).

Committee on the Elimination of Racial discrimination. 2000. *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia,* UN Doc CERD/C/304/Add.101, 19/04/2000.

Foundation for Islander Research Action (FAIRA). 2000. *Transcript of Australia's hearing before the CERD Committee – 1393rd, 1394th and 1395th meetings,* 21-22 March 2000, FAIRA, Brisbane, see also www.faira.org.au/cerd/

Human Rights Committee, 1989. *General Comment 17, Rights of the Child (Article 24).* 07/04/89. (Thirty-fifth session, 1989).

Human Rights Committee. 1989. *General Comment XVIII, Non-discrimination (1989).* In: *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,* UN Doc. HRI\GEN\1\Rev.1.

Human Rights Committee. *General Comment 23 on the rights of minorities (Article 27).*

Human Rights Committee. 2000. *Consideration of Reports submitted under Article 40 – Concluding Observations of the Human Rights Committee – Australia,* (69th session), 28th July 2000, UN Doc CCPR/CO/69/AUS,

Committee on Economic, Social and Cultural Rights, 1990. *General comment 3: The nature of States parties obligations (Article 2, para 1).*

Committee on Economic, Social and Cultural Rights. 1998. *Periodic Report: Australia,* UN Doc: E/1994/104/Add.22 (State Party Report), 23 July 1998.

Australian Cases

Mabo &Ors v Queensland (No.2) (1992) 175 CLR 1.

Western Australia v Commonwealth (1995) 183 CLR 373.

Western Australia and Ors v Ward and Ors (2000) 170 ALR 159 (the *"Miriuwung Gagerrong* case").

Wik v Queensland (1996) 187 CLR 1.

International Cases

Advisory Opinion on Western Sahara [Western Sahara Case] [1975] ICJR p12.

Chief Ominayak and the Lubicon Lake Cree Band v Canada. Communication No 167/1984, Report of the Human Rights Committee, UN Doc A/45/40 (1990).

Kitok v. Sweden, Communication No. 197/1985, UN Doc CCPR/C/33/D/197/1985 (1988).

Lansman et al v Finland No. 1 (24 March 1994) CCPR/C/49/D/511/1992.

Lansman et al v Finland No. 2, (25 November 1996) CCPR/C/58/D/671/1995, paras 10.5, 10.7.

Minority Schools in Albania (1935) OCIJ Ser A/B No 64, p. 17.

Salgar de Montejo v Colombia (64/79), paragraph 10.4.

South West Africa Case (Second Phase) {1966} ICJ Rep 6.

CHAPTER 3

INDIGENOUS PEOPLES IN THE PACIFIC AND THE WORLD CONFERENCE AGAINST RACISM

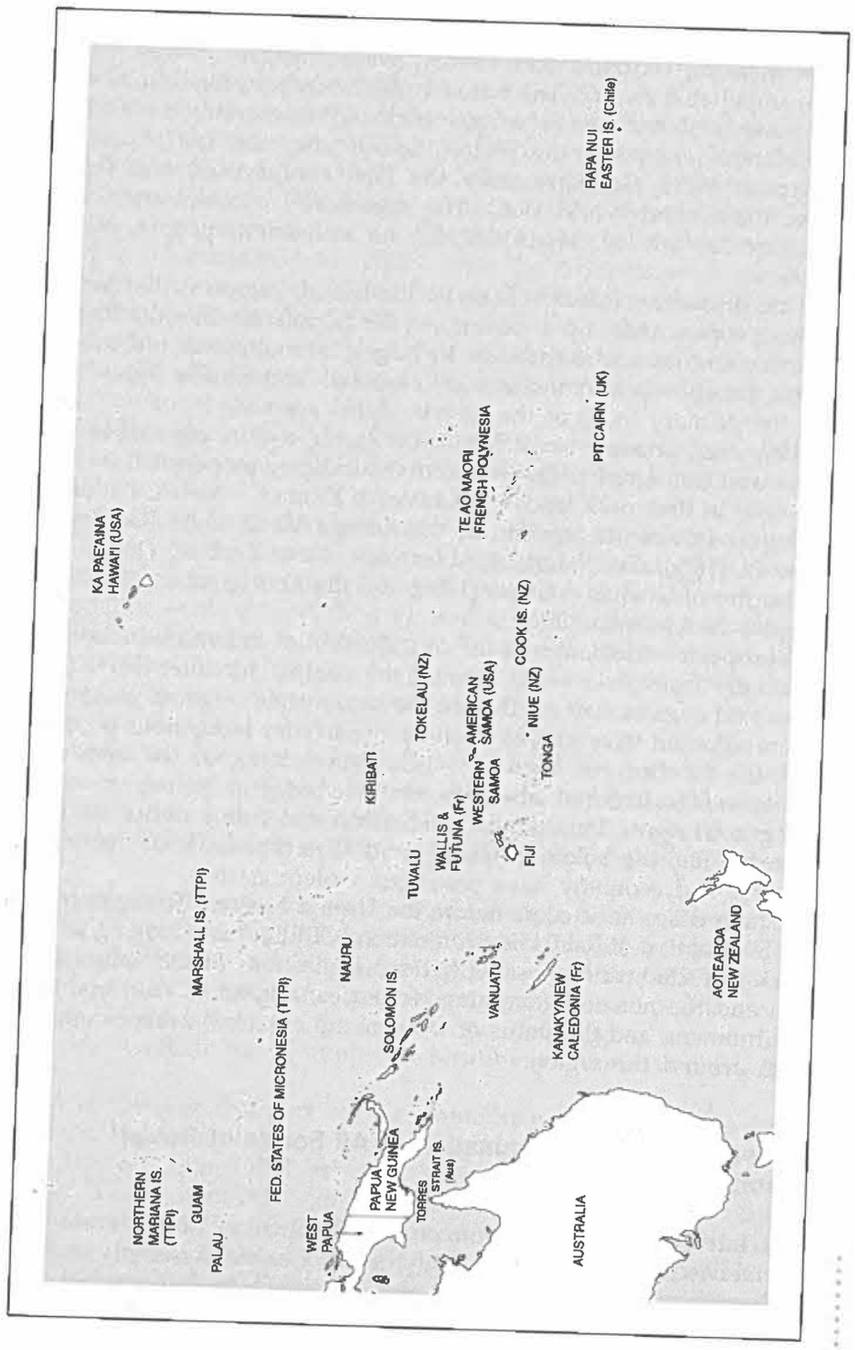
By Nic Maclellan[1]

The Pacific Islands are home to a diverse range of indigenous peoples, speaking 19 percent of the world's estimated 5,000 languages. Indigenous peoples in the Pacific Islands are still linked to their communal land, indigenous belief systems, spirituality and custom law, which form the social, economic and political basis for peaceful co-existence. With the settlement of European and Asian immigrants over past centuries, the Pacific Islands' population is now estimated at over 8 million people[2].

Because of the diversity of the Pacific countries and territories, there are significant variations in the social, political and economic situations of indigenous peoples around the region. The Pacific Islands, as small island developing States, face specific environmental, social and economic challenges that have significant impacts on human rights and racial discrimination. A forum in Aotearoa/New Zealand in preparation for the UN Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance noted:

> *"As in the rest of the world, racism, xenophobia and related intolerance continue to thrive in the Asia Pacific region...The effects of globalisation, economic hardship, migration, ethnic conflict and the situation of indigenous people affect many, if not all, countries in our region. While the specific roots and understandings of racism and situations are complex and country-specific, issues relating to education, access to services, disparate economic status, autonomy and problems arising from migration are among the manifestations of racism and xenophobia in this region."* [3]

Racism in the Pacific must be addressed within the context of colonisation that began in the 15th century and is still continuing. Indigenous Pacific nations responded to the invasion of Western civilisation and capitalism, the sword and the cross, through a mixture of accommodation and resistance. Colonisation took place between the 15th and 19th centuries by a range of European powers (Spain, Portugal, Britain, France, Germany, the Netherlands) who were joined over the last century by the United States, Japan, Australia, New



Zealand, Chile and Indonesia. The indigenous peoples of the region, with their own culture and history, were engaged in this global inter-imperialist rivalry. The transfer of islands between administering powers often came following armed conflict, marking the decline of colonial powers in the region: Spain (after the 1889 Spanish-American War); Germany (after the First World War) and Japan (after the Second World War). The experience of colonisation and conquest has left legacies to this day for indigenous peoples in the Pacific.

One distinctive feature of the Pacific Islands region is that indigenous peoples make up a *majority* of the population in most Pacific Island countries and territories. In largely monolingual and mono-ethnic societies in Micronesia and Polynesia, "indigenous rights" are not the primary focus of the human rights agenda.

However, in some countries in the Pacific region, colonial settlement and immigration has reduced the indigenous population to a minority in their own land: the Kanaks of Kanaky / New Caledonia, make up 44% of the population; the Kanaka Maoli of Ka Pae'aina / Hawai'i (18%); the Maori of Aotearoa / New Zealand (15%); the Chamorro of Guahan / Guam (14%); and the Aboriginal and Islander peoples of Australia (2%).

European settlement and the introduction of indentured labour – especially from Asia – has created the context for inter-racial tensions and even violent conflict. In these countries, ongoing programs of immigration have provoked sharp debates for indigenous peoples and the "victims of history" – the descendants of the convicts, settlers and indentured labourers who live today in the region - over indigenous rights, land tenure, citizenship and voting rights[4]. In Fiji, Bougainville, the Solomon Islands and West Papua, issues of land, identity and economy have provoked violent clashes.

These crises have come before the United Nations Committee for the Elimination of Racial Discrimination (CERD). After looking at the work of CERD, this paper will address questions of self-determination and the non-self-governing territories, migration, land and the environment, and the status of women and children, using examples from around the region.

Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly in 1965 and entering into force in 1969, provides a major international human rights instrument dealing with racism. Parties to the Convention must ban discriminatory practices and, if necessary, give protection to particular groups who may need it.

Of the sixteen members of the Pacific Islands Forum, only six are parties to the Convention: 0Tonga (1972) and Papua New Guinea (1982) by accession; Fiji (1973) and Solomon Islands (1982) by succession; New Zealand (1972) and Australia (1975) by ratification[5].

The UN Committee on the Elimination of Racial Discrimination (CERD) is mandated to ensure that the Convention is properly applied by examining periodic reports which member states are required to submit. The CERD has serious limitations in that it relies on the co-operation of State parties, in submitting reports every two years and allowing individuals to lodge complaints about racial discrimination with the Committee.

Pacific states have also entered significant reservations against certain provisions of the Convention. Fiji has placed major reservations on Articles 4, 5, 6, 15 and 20 of the Convention. Fiji has specifically reserved the right not to implement provisions on: political rights "on the basis of universal and equal suffrage" (5 c); civil rights, such as "the right to own property alone as well as in association with others" (5 d v); and economic social and cultural rights on education and training (2, 3 and 5e). At its 1996 meeting, the CERD Country Rapporteur noted: "those reservations were incompatible with the goal and purpose of the Convention, but at the time no other State party had made an objection to them."[6]

Australia, Tonga and Papua New Guinea have placed reservations on Article 4 (which require action to legislate against racial discrimination and race hatred). Like Fiji, Tonga has placed a reservation on Article 5 (dv) protecting the rights of indigenous landowners[7].

Many Pacific states are way behind schedule in submitting reports to the Committee, highlighting the pressures placed on small island developing states to fulfil all the legislative and reporting requirements of UN Conventions and international human rights instruments. Beyond the costs, however, some Pacific governments have actively avoided the Committee's scrutiny of human rights violations.

After an initial report to the Committee in 1984, Papua New Guinea has submitted no further reports to CERD (though nine reports were scheduled between 1985 and 2001). Throughout the 1990s, CERD members expressed regret that Papua New Guinea would not report to the Committee and respond to its concerns over human rights violations on the island of Bougainville (where the Papua New Guinea Defence Force was engaged in armed conflict

with militants of the Bougainville Revolutionary Army, in a conflict which led to more than 12,000 deaths). In 1996, CERD noted:

> *"The Committee was faced with a very unusual situation. The Government of Papua New Guinea had sent it neither a report nor a letter. It quite obviously had no desire to resume its dialogue with the Committee. However, the Committee could not work without cooperation from the State party concerned. From talks with a staff member of the Centre for Human Rights, he had learned that the Secretary-General had appointed a special representative to study the situation in Bougainville but that the representative had not even been able to travel to Papua New Guinea, not to mention Bougainville, and had only recently begun a dialogue with the Government of Papua New Guinea."* [8]

For CERD's recent sessions, Papua New Guinea was listed under the Committee's urgent procedures list (which allows the Committee to take early warning measures aimed at preventing problems escalating into conflicts). On Bougainville, however, the Committee played a limited role, paralysed by the refusal of the PNG government to participate in proceedings and sidelined by the involvement of other UN structures, including the UN Commission on Human Rights, the Secretary General's office and the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions[9].

Fiji submitted five reports to CERD between 1974 and 1982, but no report has been submitted to the Committee since that time. In 1996 members of the CERD Committee wanted to "convey to Fiji that it was disturbed by the latter's lack of cooperation," and expressed concern over "the absence of a report, the persistence of an alarming situation and the State party's failure to cooperate."[10] On 12 December 2000, the CERD Committee listed Fiji as one of eight countries whose report was "seriously overdue" (indeed, nine reports are overdue for the years between 1984 and 2001).

Like Papua New Guinea and Fiji, the Solomon Islands has also failed to submit any reports to CERD since its initial report in 1984 (though nine reports were due between 1985 and 2001).

In contrast, Tonga has submitted twelwe reports to CERD between 1973-2001 (although the costs involved meant that a Tongan delegation could not attend recent CERD meetings for face to face discussion with the Committee). Tonga's report to CERD in 1997 detailed the range of Constitutional provisions which limited racial discrimination, stating that: "The Act of the Constitution of Tonga as passed by the Legislative Assembly expressly prohibits the practice of racial discrimination and racial discrimination is practically non-existent." [11]

Noting this assertion that there is no racial discrimination as defined in article 1 of the Convention: *"the Committee underlines, however, that the obligation of States parties to enact explicit legislation in accordance with article 4 of the Convention should not be seen merely as a means to ensure protection against existing violations of the Convention, but as a preventive measure. The Committee is of the opinion that the absence of complaints and legal action by victims of racial discrimination could possibly be an indication of a lack of awareness of available legal remedies, or a result of the absence of relevant specific legislation."* [12] The Committee also noted that the Convention has not been incorporated into domestic law and cannot be invoked before the national courts.

As well as receiving reports from State parties, the CERD Committee can also examine individual and collective complaints forwarded to it under article 14 of the Convention (which allows the Committee to receive complaints from individuals or groups claiming to be victims of a violation of any of the rights set forth in the Convention)[13]. This provision creates an additional tool for individual citizens and groups to appeal and to advocate for redress when they have exhausted all other domestic remedies – but only when a State Party has made the necessary declaration that they recognise the competence of the Committee to hear such complaints. However, only 32 State parties to the Convention have accepted the procedure under article 14 that allows for individual complaints - of Pacific Islands Forum members, only Australia has deposited a declaration in support of Article 14.

As well as reports from State parties, the CERD Committee can receive communications from the UN Special Committee of 24 on Decolonisation and other UN agencies on situation of racial discrimination facing indigenous peoples in colonised countries. But reservations by colonial powers restrict the rights of indigenous peoples in the non-self-governing territories in the Pacific. For example, France has placed reservations on the Convention's Article 15, highlighting its refusal to accept provisions of UN General Assembly Resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples and the work of the UN Decolonisation Committee[14].

Indigenous activists have focussed their energies on UN structures such as the Working Group on Indigenous Populations (WGIP), but there is scope for greater involvement in the CERD process by Pacific peoples - in spite of the name, focussing on "racial" discrimination, the CERD has received complaints relating to culturally distinct religious groups, linguistic and other national minorities.

Colonialism and Self-Determination

The legacies of colonialism are a significant feature in the Pacific, especially as most Pacific Island nations achieved political independence much later than developing nations in Africa and Asia. Memories of racism and discrimination by colonial administrations are still strong in countries that achieved self-government and independence in the 1970s and 1980s: within living memory, people recall the housing advertisements in Fiji saying "Indians only to apply"; laws in Papua New Guinea to prevent "miscegenation" with white women; racially divided job classifications at mining projects in Fiji, Papua New Guinea and Nauru; the *indigénat* which created restrictions on movement, voting and civil rights for indigenous Kanaks in New Caledonia. Many countries are still seeking to overcome the administrative, legal and constitutional legacies of European and North American colonisation.

High Commissioner for Human Rights Mary Robinson has highlighted issues of concern to be raised at the Durban World Conference Against Racism, noting that: "*Past* exploitations, such as slavery and the impact of colonialism in certain regions, would also dominate upcoming preparatory discussions."[15] The draft agenda suggests that the Conference will look at "the *aftermath* of colonialism and slavery."

But for the Pacific, colonialism is a matter of contemporary reality, not ancient history. The long and persistent history of racism against indigenous peoples under colonial administration continues as a powerful force in the contemporary Pacific. The extension of the United Nations Decade for the Eradication of Colonialism (1990-2000) is a welcome. There are still many colonised peoples in the Pacific asserting their right of self-determination in line with UN principles and practice on decolonisation. Still other struggles involve indigenous peoples seeking self-determination within the boundaries of post-colonial independent states.

In some cases, political parties or indigenous sovereignty movements are calling for greater autonomy within the nation state – in others, the demand is for full political independence. This issue affects many territories and administering powers in the Pacific, under a range of political and constitutional arrangements: Kanaky / New Caledonia, Te Ao Maohi / French Polynesia and Wallis and Futuna (France); Guam, American Samoa, Commonwealth of the Northern Marianas Islands, and Ka Pae'aina / Hawai'i (USA); Tokelau (New Zealand); Pitcairn (United Kingdom); Rapanui (Chile); East Timor and West Papua (Indonesia); Torres Strait Islands (Australia); and Bougainville (Papua New Guinea)[16].

Of the 17 territories still listed as non-self-governing territories with the United Nations Special Committee on Decolonisation, six are in the Pacific region: New Caledonia; Guam; American Samoa; Tokelau; Pitcairn and East Timor. Other islands with sovereignty, self-determination and independence movements – such as French Polynesia and Hawai'i – were originally listed with the Committee in 1946, but later unilaterally removed from the list of non-self-governing territories by their administering powers. West Papua is also in ferment, as the indigenous Melanesian peoples seek a United Nations review of the 1969 "Act of Free Choice", which purported to ratify Indonesia's takeover in 1962-3, in spite of the West Papuan raising of the Morning Star flag on 1 December 1961 (in UN General Assembly resolution 2504 on 19 November 1969, the United Nations simply "took note" of the Act of Free Choice by 1,025 handpicked delegates).

The strength of movements for autonomy or independence varies from place to place, and some non-self-governing territories are so small as to question the viability of political independence (Pitcairn, listed with the UN Decolonisation Committee, has a population of less than 50 people, descendants of the Bounty mutineers). In spite of their small size, however, Pacific Island peoples are still asserting their right to self-determination. One example is the non-self-governing territory of Tokelau, with a population of just 1,500 people on three low-lying atolls. Tokelauan customary leaders are currently negotiating with the administering power - New Zealand - to develop a new Constitution as a self-governing nation and to hold an act of self-determination, under a process known as "the Modern House of Tokelau".[17] Through the *Taupulega* (Village Council of Elders) and the customary leader *Ulu o Tokelau*, Tokelauans are calling for the return of Swain's Island, currently under US administration, to expand their agricultural base and utilise the maritime resources of the vast 200-mile Exclusive Economic Zone.

In spite of waning international attention to the eradication of colonialism since most African nations achieved their independence, the issue of self-determination for indigenous peoples is still a vital issue for Pacific peoples. While there are other UN institutions addressing decolonisation issues, it is important that the World Conference on Racism reaffirm the right to self-determination for indigenous peoples and independence for the remaining non-self-governing territories.

The UN Draft Declaration on the Rights of Indigenous Peoples (UNDDRIP) provides an important affirmation of these rights, with the right to self-determination expressed in Articles 3 and 31, including the right to identity, territory, land and resources. There has

been extensive opposition to Article 3 and the right to self-determination over the long process of drafting the Declaration[18]. The World Conference Against Racism should support and endorse the UNDDRIP, and encourage States to support and develop the Permanent Forum for Indigenous Peoples as a structure within the United Nations system to address these concerns.

Rights in Non-Self-Governing Territories

Colonial powers in the Pacific continue to utilise political, legislative and judicial functions that discriminate against the rights of indigenous peoples.

One example is the non-self-governing territory of French Polynesia, known as Maohi Nui or Te Ao Maohi to the indigenous Maohi people. In the face of a growing independence movement, France has introduced a series of autonomy statutes since 1984, which devolve increased power to the local Territorial Assembly and administration. However, the French State still retains ultimate control over crucial sectors such as: foreign relations, defence, immigration, justice, law and order and police, property rights and other areas[19].

Until reforms in 1992, territorial laws could be amended or annulled at any time by the French government, if they conflicted with French law. Even today, territorial laws can be changed or overridden with the approval of the French Parliament and *Conseil Constitutionnel* (Constitutional Court – the Court that evaluates whether laws passed by the French Parliament are in accordance with the French Constitution or not). French judges intervene regularly to overturn decisions by local administrative authorities.

Intervention by the *Conseil Constitutionnel* in Paris can discriminate against the political rights of local populations, as shown with the debate over voting rights in Kanaky / New Caledonia.

The mid-1980s was marked by violent clashes between the French State, local European settlers and the independence movement *Front de Libération Nationale Kanak et Socialiste* (FLNKS), which gains most of its support from the indigenous Kanak population. The signing of the 1988 Matignon and Oudinot agreements and the 1998 Noumea Accord opened the way to devolution of powers, leading to a vote on self-determination in 15-20 years time[20]. However, French courts have overruled key elements of this political settlement.

The creation of New Caledonian "citizenship" (as distinct from French "nationality") was a legal mechanism to allow discrimination between French public servants and soldiers (who traditionally vote against independence) and people with a long-term commitment to

the Pacific nation. Only New Caledonian citizens can vote for Provincial Assemblies and the new Congress created under the Noumea Accord - effectively freezing the electoral body in 1998, as only those people resident for ten years after 1988, and their descendants of voting age, can participate in future electoral contests. Independence leaders argue that demographic change and limits on immigration from France will create a basis for a solid vote in favour of independence at the end of the 15-year transition period.

But on 15 March 1999, the *Conseil Constitutionnel* (Constitutional Court) in Paris ruled that all French citizens residing in New Caledonia for at least 10 years – whatever their date of arrival - would be able to participate in provincial elections. Angered by the removal of a key plank of the Accord, the FLNKS leadership threatened a boycott of the May 1999 elections. The boycott call was only reversed when the French government agreed to amend the Constitution again. While the French National Assembly and Senate passed changes in 1999, they have not been ratified by the Congress (a joint sitting of both houses of Parliament). A planned meeting of the Congress was postponed indefinitely in January 2000, leaving these important political changes in abeyance.

The question of voting rights takes on political importance in Pacific countries with small populations. Under French law, people from France and other European Union countries can vote for local mayors in Te Ao Maohi / French Polynesia, by registering at the local *commun* (municipality) after six months residency in the territory.

The Micronesian nation of Guam is also listed as a non-self-governing territory with the UN Special Committee on Decolonisation. Racial discrimination is evident in the way that some US federal laws apply only to Guam as a territory of the United States. Under the Treaty of Paris (1898), when Spain ceded Guam to the United States after its defeat in the Spanish-American War, the US Congress was granted responsibility for the "native inhabitants". Chamorro activist Rufo Lujan notes:

> *"From 1898 to 1950, the Chamorros were not citizens of the United States of America. They were citizens of Guam and the military government assigned a civilian identification number to each Chamorro on the island. In August 1950, the Chamorro became 'qualified" citizens of the United States under the enactment of the Organic Act of Guam of 1950 – "qualified" in that not all provisions of the US Constitution apply to Guam. Chamorros on Guahan have less rights than those citizens residing in the states of the United States of America…The Organic Act provided that the US Congress has authority to amend or repeal any law passed by the Guam Congress."* [21]

Under Section 3 of the US Organic Act of Guam (1950), the US declared Guam to be an "unincorporated territory". As the US congress debated the Organic Act, Congressmen made clear their attitude to Guam's status: "Guam is appurtenant to the United States and belongs to the United States but is not part of the United States".[22] As such, Guam is subject to US federal law, with US courts repeatedly asserting the applicability of US legal standards to Guam: *"Guam marches squarely to the beat of the federal drummer; the federal government bestows on Guam its powers and unlike the states, which retain their sovereignty by virtue of the Constitution, Guam's sovereignty is entirely a creation of federal statute."* [23]

This Congressional control has meant discrimination for Guam in comparison to other US possessions. For example, the Jones Act is a law passed to protect businessmen from the continental US who are doing business in the Territory of Alaska. The law requires that all goods shipped to Alaska from any US port must be carried on US registered vessels. This law was subsequently made applicable to Guam (while all other US territories and commonwealth are exempted from the law).

Conflicts in Post-Independence Countries

Beyond the remaining colonies in the Pacific, the peace of the region has been marred by the denial of human rights in some independent states. While many Pacific constitutions have explicit provisions on human rights, equality for women and non-discrimination, the region has been wracked by conflict in recent years. Ethnic and racial discrimination has occurred within the context of rapid change in increasingly globalised economies and societies, as a new neo-liberal orthodoxy promotes programs of structural adjustment and "reform" in countries such as Fiji, Vanuatu, the Marshall Islands, Federated States of Micronesia, Cook Islands, Samoa and Papua New Guinea.

Independent Pacific nations are also seeking to transcend the legacies of colonial administration. For example, in Vanuatu, the two former colonial regimes established three systems of government (British, French and Condominium) as well as three courts of law and two health and education systems. Since independence in 1980, the Vanuatu government had sought to create only one system and is still struggling (in some areas such as education, the two official languages used - English and French - are second languages to indigenous ni-Vanuatu). The struggle to meld customary systems of governance with Western parliamentary and public service traditions has created major political crises in most developing countries in the Pacific.

Conflict erupted in 1988 between the Bougainvillean nationalist movement and the PNG State. Clashes between the Papua New Guinea police and military forces and the Bougainville Revolutionary Army (BRA) arose from a number of sources, including longstanding nationalist sentiment on Bougainville and local anger about the social and environmental destruction caused by the Panguna copper mine. The mine, managed by a subsidiary of the transnational corporation, Rio Tinto, was established under the Australian colonial administration. It generated 40% of export earnings for post-independence Papua New Guinea before its closure in 1989. The clash was marked by cultural tension between the "redskins" from the mainland and some Bougainvilleans who are ethnically and culturally closer to the Western Province of the neighbouring Solomon Islands. PNG Defence Force soldiers taunted darker-skinned Bougainvilleans as *"as blong sospan"* (the blackened bottom of a cooking pot)[24].

The issue of racism and human rights abuses in Bougainville came before the CERD following the outbreak of conflict in Bougainville. In its concluding remarks in 1993, the CERD Committee *"was concerned at reports of serious human rights violations in Bougainville, including summary executions and population transfers. The Committee was also concerned about large-scale mining operations in Bougainville without due regard to the rights of the population and the adverse effects of environmental degradation. Members of the Committee also expressed concern over statements by the self-proclaimed [interim] government of Bougainville that numerous human rights violations, including the torture of civilians, had been committed by the forces of Papua New Guinea stationed in Bougainville. In that regard, there had been reports that those forces had abused unarmed Bougainvilleans during the emergency which had been declared by the Government, and that there had been indiscriminate killings of civilians by members of the defence force, beatings of suspected rebel sympathisers and search and destroy operations in villages near the copper mine which had turned thousands of villagers into refugees. Members of the Committee also noted with concern reports that there had been large-scale human rights violations by members of BRA."* [25]

Since the signing of peace agreements in 1998-9, armed conflict has currently ceased on Bougainville. Bougainvillean leaders and the Papua New Guinea government are currently negotiating proposals for a process of autonomy leading to a referendum on independence in 15 years, combined with programs for disarmament and reconstruction.

These concerns are also sharply posed in Fiji, where the status and

rights of indigenous Fijians and the descendants of Indian indentured labourers have been at the heart of debate following *coups d'etat* and military takeovers in May 1987, September 1987 and May 2000[26].

Gaining independence from Britain in 1970, Fiji established a parliamentary system based on a mixture of communal and open seats, reflecting the different ethnic communities of Fiji Islanders: indigenous Fijian, Indo-Fijian and "general" voters (European, Chinese, Islander and others). Since the initial Constitution of 1970, Fiji has seen three coups, and major changes in Constitution, parliamentary and economic regimes. Significant differences in the 1970, 1990 and 1997 constitutions have changed communal representation in Parliament, affirmative action programs, and preferences in the public service, business and education.

Fijian nationalists have expressed concern about threats to Fijian identity, arising from a range of sources. There is concern over the erosion of the land tenure system that has granted indigenous Fijians title of over 83% of land in the country, through the Native Land Trust Board (NLTB). Fijian culture and language is perceived as under threat, in the face of media, film and TV programming from Hollywood and Bollywood in English and Hindi. There are calls for greater Fijian involvement in the business and commerce sector, in the face of perceived Indian domination of business (perceived, in that key sectors of the economy such as banking, tourism and mining, are owned and controlled by transitional corporations). Above all, there is a concern to maintain Fijian political paramountcy, with an indigenous Fijian as President and Prime Minister.

These nationalist fears have crystallised around opposition to the coalition governments elected in 1987 and 1999, led by members of the multiracial, social democratic Fiji Labour Party (a party created in 1985 which broke the mould of communal politics in Fiji, dominated since independence by the National Federation Party, supported by the Indo-Fijian community, and the Alliance Party and SVT, which gained the support of the majority of Fijian and general voters). After the coups, military-backed interim administrations moved to assert Fijian paramountcy, introducing changes to the Constitution to preserve elite Fijian dominance.

The imposition of the 1990 Constitution was widely critiqued as racist. In his 1996 report, the CERD Country Rapporteur noted that:

> *"The Fiji Constitution of 1990 had made changes in the electoral system, education, land ownership and the appointment of government officials that had jeopardised the equality of rights between the two communities. It must, therefore be determined whether those changes were intended to eliminate inequalities inherited from the colonial period and to introduce acceptable positive discrimination within the meaning of article 1 (4) of the Convention, or whether they constituted actual discrimination. However, the scope of those changes, particularly with regard to the electoral process and land ownership, was so broad that it was difficult to view them as positive discrimination."*

In its concluding observations, the Committee *"expressed concern at reports of institutionalised forms of racial discrimination and of the potential for an increase in ethnic tension on the territory of the State Party".* [27]

The 1990 Constitution was reviewed in 1995 by the Reeves Commission, leading to a new Constitution in 1997. When elections in May 1999 led to an overwhelming victory for the Labour-led People's Coalition, the government was again overthrown a year later, with the Cabinet and other politicians held hostage for 56 days.

Many commentators have noted that during the attempted coup in May 2000 and its aftermath, the language of "indigenous rights" was used to cover more base motives of political power and self-enrichment. Fijian academic Sitiveni Ratuva notes:

> *"While it is important to address the outstanding grievances of indigenous Fijians, it is also important to guard against attempts by individuals and groups with a commercial and political agenda who use the notion of 'indigenous Fijian cause' as an ideology with which to mobilise political support to serve their own parochial interests."* [28]

Addressing the crises in Fiji and Bougainville has meant reviewing the independence era constitutions. But a focus on constitutional change and civil and political rights downplays the larger question of addressing the underlying causes of conflict, often relating to issues of land, cultural identity, and social and economic rights. As one Pacific activist has noted:

> *"There is a limit to legislative justice. You cannot legislate away racial discrimination or for peaceful co-existence. Enlightened constitutions and legislation must be supplemented by social engineering initiatives that are aimed at social cohesion and human security in a multi-ethnic milieu. These must include educational curricula that promote multi-ethnic tolerance and unity. It must include affirmative action or social justice programs that are geared towards rebalancing the inequities in access to educational, commercial opportunities and State services (health, water, electricity) and resources that were inherited from the colonial government. It must include national dialogue between the*

different racial and ethnic groups to address the 'problems of history' relating to the alienation of land and natural resources during the colonial era, and also the place of indigenous peoples in the scheme of democratic governance." [29]

Equality and Affirmative Action

Developing human rights standards have fostered a general acceptance by governments of a formal obligation to treat people fairly and equally without regard to race, gender and religion. For indigenous peoples of the Pacific, their rights as first peoples of the land have sometimes been counterposed against "equality of rights" for all indigenous and non-indigenous citizens. However, the meaning of equality can be undermined by a failure to recognise the distinct collective rights of indigenous peoples as part of the human rights regime[30].

The existence of a notion of superficial equality combined with underlying racism has been argued by the former Aboriginal and Torres Strait Islander Social Justice Commissioner in Australia, Mick Dodson:

"In my view there has been an insidious, sometimes even unconscious, process of appeal to a notion of equality which denies any rights which attach to cultural differences and, particularly, the identity of Aboriginal and Torres Strait Islander peoples as the indigenous peoples of this country. The claim to human rights that attach to such identity are regarded, ironically, as racist and discriminatory. Hence we arrive at a situation where 'equality' and 'non-discrimination' are converted into instruments to strip Aboriginal and Torres Strait Islander peoples of appropriate recognition and protection of our rights. In the process grossly racist attitudes find apparent shelter." [31]

The most recent example of indigenous rights being labelled as racist and discriminatory is the *Rice v. Cayetano* case in Ka Pae'aina/Hawai'i[32]. On 23 February 2000, the US Supreme Court struck down Hawaii's practice of letting only indigenous Kanaka Maoli vote for trustees of the Office of Hawaiian Affairs (OHA), a body that administers state funds and proceeds of public land to aid descendants of indigenous Hawaiians. The US Supreme Court majority, voting 7-2, stated that Mr. Harold Rice's constitutional rights under the Fifteenth Amendment of the US Constitution had been violated since he was prohibited, under certain provisions of the Hawai'i State Constitution and State law, to vote for the officers of the OHA.

Rice is from a family that came to Hawai'i as missionaries in the mid-1800s. The Rice family participated in the overthrow of the Hawaiian monarchy in 1893-8 and, through the generations, has transformed into a wealthy clan of politicians, businessmen and ranchers. Rice claimed that allowing only Hawaiians to vote in OHA elections violates the 14th amendment of the US Constitution, which provides equal protection for all citizens under the law, and the 15th amendment, which states: *"The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, colour, or previous condition of servitude."* A number of other court cases are now pending to remove all specific entitlements provided by the state government to indigenous Kanaka Maoli (for example, lawsuits are pending to stop the YMCA donating space for Hawaiian languages classes, and to prevent Hawaiian education at the Kamehameha Schools.[33])

In response, the US Democratic Senators for Hawai'i proposed legislation that would give indigenous Kanaka Maoli federal recognition similar to that of 500 Native Americans nations. The bill would allow Kanaka Maoli to establish their own government within the state of Hawai'i, much like Native American nations, which have government-to-government relations with the United States. The measure passed through the US House of Representatives in September 2000 but was blocked in the Senate and was delayed with the incoming Republican Bush administration. Even this measure was criticised by some members of the Hawaiian sovereignty movement, which saw the proposed legislation as a denial of the right to self-determination and independence: *"Kanaka Maoli would become wards within a 'domestic dependant nation', with the US Government as trustee. They would become subject to the 'plenary power of Congress', with the US holding title to all Kanaka Maoli lands."* [34] Calling instead for the return of ceded Kanaka Maoli lands, sovereignty movement activists are seeking regional and international support for their campaign for self-determination.

In Fiji, the interim government installed by the military after the attempted coup of May 2000 created a blueprint for affirmative action. The blueprint sets out policies in each sector to promote indigenous involvement in education, commerce and political life. There has been extensive debate, however, as to whether the policies constitute affirmative action or extend to racial discrimination, and whether they benefit grassroots villagers and rural farmers, or a wealthy urban elite[35].

Article 27 of the International Covenant on Civil and Political Rights addresses the issue of the State's responsibility for minority rights:

"In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

However, the indigenous peoples of Kanaky / New Caledonia and Te Ao Maohi / French Polynesia have no redress to the UN Human Rights Commission under such provisions, as France has placed reservations on the Convention, arguing that "Article 27 is not applicable as far as the Republic is concerned", refusing to recognise minority rights (including indigenous rights)[36]. The republican tradition in France and the United States, celebrating the rights of the individual, gives little recognition to the collective rights of indigenous peoples or the right to self-determination.

International human rights instruments are increasingly looking at group rights, as well as individual rights. As well as individual complaints of racial discrimination, it is important that indigenous peoples' communal and collective rights are protected. Effective remedies should be made available for violations of the collective as well as the individual rights of indigenous peoples, in line with the provisions contained in ILO Convention (No. 169) on Tribal and Indigenous Peoples in independent countries. Indigenous peoples and minorities should participate both in the establishment and in the operation of remedial mechanisms for their special protection.

When addressing breaches of collective rights, it is important that indigenous peoples have the right to access UN structures. However, the UN Committee on Economic, Social and Cultural Rights has not received the mandate to examine individual complaints. A draft optional protocol to the International Covenant on Economic, Social and Cultural rights, drawn up by the Committee and supported by numerous bodies and NGOs, has come up against resistance from the states. The World Conference Against Racism must look to create and strengthen suitable avenues for action by indigenous peoples.

Land

In its General Recommendation on the Rights of Indigenous Peoples, the CERD Committee has called on States parties to:

"recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands and territories and resources and, where they have been deprived of their lands and territories traditionally used or otherwise inhabited or used without their free and informed consent, to take steps to return these land and territories."

For indigenous peoples in the Pacific, land is a central issue in identity, culture, sustenance, wealth and community. Around the region, there are significant variations in land tenure systems, ranging from land rights for indigenous customary landholders in Papua New Guinea or the Solomon Islands, to the situation in Tonga, where all land is the property of the King and he may at pleasure grant one or more estates to the nobles and titular chiefs to become their hereditary estates. Under Article 73 of the Vanuatu Constitution, all lands in the Republic belong to ni-Vanuatu or traditional owners; in Fiji, 83% of land is under native title, managed by the Native Lands Trust Board for customary landowners[37].

In pre-colonial times, land helped determine the social and political order in Pacific societies, and the recent alienation of customary landowners as a result of the process of modernisation has led to discontent. Issues of land ownership, usage and tenure are at the heart of many conflicts that are presented as racial or ethnic clashes in the Pacific, including the recent conflict in the Solomon Islands, the coups in Fiji or ongoing self-determination struggles around the region. Throughout much of the Pacific, customary landowners continue to resist the alienation of land, especially for large-scale development projects in mining, forestry, tourism and other industries.

Land has also been taken for military bases in Guam, CNMI, Hawai'i, the Marshall Islands and French Polynesia, as part of a regional network of US and French military installations that extends across a third of the world's surface[38]. The US National Defence Act (NDA) permits the federal government to seize private property for national defence purposes. The US exercised its authority under this law in Guam from 1946 - 1949 and condemned thousands of acres from indigenous Chamorros who were not even citizens of the United States. Chamorros continue to fight for the return of their lands to this very day. The NDA permits the US to militarise Guam without consulting the civil authorities in the territory. The US is building up its military presence on Guam again, with the redeployment of nuclear submarines from Pearl Harbour, Hawai'i to Apra Harbour in Guam scheduled for 2002. This is a violation of US obligations as an administering power (UN General Assembly resolutions state that military activities and the presence of military bases and installations in non-self-governing territories are detrimental to the rights and interests of the colonised population, with colonial powers urged to terminate the activity and remove military facilities)[39].

Environmental Racism

The links between racism and environmental degradation, particularly in low-income communities, is an issue of concern in the Pacific.

Environmental racism can be seen as a contemporary manifestation of racial discrimination. It is an example of the historical double standard as to what is acceptable in certain communities or locations and not in others. In parts of the Pacific, the living spaces, land and waters of indigenous peoples are targeted by industrialised nations for the dumping of toxic or radioactive wastes from industrial or military operations – and some Pacific government officials have been willing to contemplate schemes without public assent or approval. Often community residents are not informed of these activities, nor of the dangers they pose.

The ways in which natural resources are extracted can also devastate ecosystems and destroy indigenous cultures and livelihoods, as shown by the major mining and logging projects in countries throughout the Pacific islands. From phosphate mining in Nauru, Banaba and Makatea islands, to copper and gold extraction at Ok Tedi, Panguna, Freeport or Vatukoula, there have been major environmental consequences that have devastated local ecosystems, economies and cultural practices.

The starkest example of this environmental colonialism is the testing of nuclear weapons. From the beginning of the nuclear age, the peoples of the Pacific have born the brunt of nuclear testing. France, Britain and the United States, seeking "empty" spaces, chose to conduct their Cold War programs of nuclear testing for fifty years in the Pacific. From 1946-1996, over 315 atmospheric and underground tests were conducted at ten different sites, in the deserts of Australia and the islands of the central and south Pacific. From 1946, the United States conducted 67 atomic and hydrogen bomb tests at Bikini and Enewetak atolls in the Marshall Islands, with 25 further tests at Christmas (Kiritimati) Island and nine more at Johnston (Kalama) Atoll. Britain tested nuclear weapons in the 1950s in Australia, with 13 tests in the Monte Bello Islands and on the lands of the Pitjantjatjara and Yankunytjatjara Aboriginal peoples at Maralinga and Emu Field. Nine further atomic and hydrogen bomb tests were held at Christmas (Kiritimati) Island and Malden Island in the central Pacific in 1957-8. For thirty years, France conducted 193 atmospheric and underground tests at Moruroa and Fangataufa atolls in French Polynesia, with indigenous Maohi employed as labourers at the test sites from 1966 to 1996[40].

Although there were thousands of people located in areas directly affected by radioactive fallout, racist attitudes allowed the nuclear tests to go ahead. For the British tests at Malden and Christmas islands, UK military and civilian officials determined safety standards noting that "independent authorities agree that...only a very slight health hazard to people would arise, and that only to primitive people."[41] British documents show that, in determining "safe" radiation doses, authorities accepted different dosages of radiation for British military personnel than for the islanders who lived on Christmas (Kiritimati) Island and on neighbouring inhabited atolls such as Fanning Island, Jarvis Island or Penrhyn (Tongarava) in the Cook Islands:

> *"For civilised populations, assumed to wear boots and clothing and to wash, the amount of activity necessary to produce this dosage is more than is necessary to give an equivalent dosage to primitive peoples who are assumed not to possess these habits. It is assumed that in the possible regions of fall-out at Grapple there may be scantily clad people in boats to whom the criteria of primitive peoples should apply... The dosage at this level is about 15 times higher (for primitive peoples) than that which would be permitted by the International Commission on Radiological Protection."* [42]

Although nuclear testing in the Pacific has ended, there are still other nuclear threats to the region. Indigenous peoples in the Marshall Islands, Te Ao Maohi, Australia, Kiribati and Fiji are still campaigning for appropriate reparations from France, Britain and the United States to compensate for health effects to former test site workers, civilian and military personnel at the sites, and neighbouring communities. They are seeking long-term funding for the necessary programs of monitoring, clean up and rehabilitation.

This environmental racism is not a thing of the past, as isolated Pacific islands are still seen as a dumping ground for toxic and hazardous wastes. Transnational corporations have used, dumped or sold pesticides, PCBs and other carcinogenic materials in the islands that have already been banned for use in industrialised nations.

Pacific communities are campaigning to strengthen the 1985 Rarotonga Treaty for a South Pacific Nuclear Free Zone (SPNFZ) and the 1995 Waigani Convention on the Transboundary Shipment of Radioactive and Hazardous Wastes, to halt other manifestations of toxic and radioactive pollution. These include the shipment of plutonium, MOX fuel and high-level nuclear wastes through Pacific fishing grounds and Exclusive Economic Zones; proposals to dump nuclear waste on isolated atolls, and uranium mining on indigenous peoples' land.

Aboriginal women in central Australia are campaigning against a proposal to dump nuclear wastes dump in the deserts of South Australia. The women of the *Iranti Wati* (The Poison – Leave it) campaign state:

> *"We are the Aboriginal women Yankunytjatjara, Antikarinya and Kokatha. We know the country. The poison the Government is talking about will poison the land. We say 'NO radioactive dump in our ngura - in our country.'...It's strictly poison we don't want it. Never mind our country is the desert, that's where we belong. And we love where we belong, the whole land. We know the stories for the land...Listen to us! The desert lands are not as dry as you think! Can't the Government plainly see there is water here? Nothing can live without water. There's a big underground river underneath. We know the poison from the radioactive dump will go down under the ground and leak into the water. We drink from this water. Only the Government and people like that have tanks. The animals drink from this water malu kangaroo, kalaya emu, porcupine, ngintaka perentie, goanna and all the others. We eat these animals, that's our meat. We're worried that any of these animals will become poisoned and we'll become poisoned in our turn."*[43]

Pacific NGOs are campaigning for an end to military toxins, including the pollution of islands such as Johnston (Kalama) Atoll and Wake Island. Johnston was used by the US military for nuclear testing in the 1960s and as a dumpsite for Agent Orange and other chemical weapons following the Vietnam War. The island is still polluted by plutonium from three failed nuclear rocket launches in 1962 and the leaching of dioxin into the soil and water. Throughout the 1990s, the island was also the site for the Johnston Atoll Chemical Agents Disposal System (JACADS) an incineration plant for chemical weapons removed from Okinawa and Germany following the end of the Cold War[44]. In March 2000, the US military started using Wake Island as a temporary storage site for wastes contaminated with PCBs that were refused entry into Canada and the United States, after removal from US military bases in Japan.

The use of the "vast empty spaces" of the Pacific ignores the importance of land and waters throughout the region as a source both of sustenance and identity for indigenous peoples. The environment should be discussed at the World Conference in the context of racial discrimination, just as migration, employment, housing and other subjects will be discussed.

Uprooted Peoples: Migration, Refugees and Human Rights

The phenomenon of large-scale migration has grown dramatically in recent years. Today, around the world, some 150 million people live temporarily outside their countries of origin. Migration and the movement of people both within and across national borders are directly related to racial discrimination and related intolerance. There is a need for states to sign and ratify the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families as a measure of protection against discriminatory treatment.

The issue of migration is central to Pacific life – indeed, the population of the Pacific islands was born of a succession of migrations as canoes travelled vast distances over the Pacific Ocean to settle islands.

The movement of peoples in the colonial era has had a massive impact on the Pacific. The economy in sectors like sugar in Fiji and pineapples in Hawai'i was largely built on migrant and indentured labour and the alienation of indigenous land. The "blackbirding" that robbed many islands of their young men between 1860 and 1900 helped build the sugar industry in Queensland (the descendants of blackbirded labourers in Australia have organised as South Sea Islanders to claim political, social and economic rights – although many South Sea Islanders have intermarried with Aboriginal and Islander peoples in Queensland and northern New South Wales, they are not eligible for affirmative action programs won by indigenous peoples in Australia).

Today, international migration affects large numbers in the South Pacific through emigration or out-migration from the Pacific Islands to the Rim countries; trans-Pacific migration that still continues; and immigration into the Pacific area.

A high percentage of Pacific islanders now live overseas, especially in Pacific Rim countries such as Australia, Aotearoa / New Zealand, Canada and the United States. In the face of growing populations, migration has become an outlet for many Polynesian and Micronesian nations such as Tonga, Samoa, Niue, the Cook Islands, the Marshall Islands, Federated States of Micronesia, Commonwealth of the Northern Marianas Islands and Palau. Some freely associated states and territories have immigration rights to their former colonial power. In smaller islands such as Niue, Cook Islands, Wallis and Futuna and Rotuma, the number of people living overseas is greater than the numbers who remain - there are more Cook Islanders in New Zealand than in the Cook Islands, more American Samoans in the USA than in their home islands. This migration has

caused significant social problems (as well as benefits such as the transfer of remittances, increased skills and education, promotion of tourism and small business etc.[45])

Urban drift, with people seeking employment, education, health services or good times has increased the population of towns and cities in the Pacific, creating peri-urban settlements or squatter camps around capital cities such as Noumea, Honiara, Port Moresby and Port Vila. Crowding on small atolls like Tarawa in Kiribati is creating significant social tensions and discrimination in the availability of services and housing.

In the Solomon Islands, the migration of people from outlying islands to the capital Honiara, contributed to a major social crisis in 1998-2000, leading to armed conflict between rival militias from the islands of Guadalcanal and Malaita. Clashes between the Isatabu Freedom Movement of Guadalcanal and the Malaita Eagles Force, the overthrow of the government and the collapse of policing led to more than 100 dead, with tens of thousands left homeless, many fleeing from the main island, Guadalcanal, for their home islands. Armed clashes between rival militias led to this exodus from Guadalcanal, with an estimated 15-20,000 people evacuated in 1999 (mainly to Malaita), and at least 3,000 more hiding away from their villages by July 2000[46]. The crisis, often presented simply as an ethnic clash, took place in a broader context of economic change affected by globalisation, corruption and the failure of a development model based on exploitation of natural resources such as logging and fisheries[47].

The status of Indo-Fijians in Fiji has been the starkest legacy of British colonisation, after British administrators promoted the use of Indians in Fiji as indentured labourers under the *girmitya* between 1879 and 1916[48]. In recent years, extremist Fijian nationalists have mobilised against perceived Indian "political and economic control" and loss of land, culture and identity. Since the 1987 and 2000 coups in Fiji, there have been thousands of emigrants from the Indo-Fijian community and also those indigenous Fijians with the necessary professional and trade skills to gain residency or citizenship in Australia, New Zealand, Canada and the United States (In 1998, 3,798 people migrated, in 1999, 3,981 and in the first ten months of 2000, 4,665 people left the country)[49]. Hundreds of displaced Indo-Fijians from Muaniweni affected by racist attacks in June and July 2000 fled to a camp near Lautoka on the west coast of the main island of Viti Levu.

Although refugee numbers in the Pacific are not as large as in Asia or Africa, this has become an issue in recent decades. The conflict in Bougainville from 1988-1998 meant that thousands of

Bougainvilleans were internally displaced by force, and many fled as refugees to the neighbouring Solomon Islands. Helen Hakena, of the Leitana Nehan Women's Development Agency in Bougainville reported:

> *"Our people are being torn from their communities and homes by violence. Many people have either left their homes and communities to settle in peaceful areas or have been herded together like sheep and put in so-called 'care centres'. We are becoming migrants and refugees – people uprooted from their own backyards. The loss of human dignity is an overpowering consequence of displacement, regardless of clan or gender. Uprooted people experience multiple losses: of families, friends and community; of familiar spiritual, religious and cultural structures that nurture and define basic human identity; of social status; of property, employment and economic resources."* [50]

There are also thousands of West Papuan refugees in Papua New Guinea who have fled Indonesian military operations against the independence movement *Organisasi Papua Merdeka* (OPM). West Papuans in Papua New Guinea often had difficulty in being recognised as refugees by the UN High Commission for Refugees and the PNG Government (due in part to a tradition of border crossing for indigenous communities that have land on both sides of a frontier that is simply a line drawn on the map). West Papuan refugees have sought rights to services, housing and education, after fleeing from West Papua in 1984 and being housed for years in camps along the border at Vanimo, Iowara (East Awin) and other locations[51]. A new wave of refugees and temporarily displaced people arrived in late 2000, as Indonesia increased military operations against the newly mobilised nationalist movement.

In recent years, internal displacement and migration has been related to the vulnerability of small island developing states to climatic and environmental disasters: taro blight in Samoa, volcanic eruptions in Rabaul, famine in the PNG Highlands. The refusal of industrialised nations to seriously address greenhouse gas emissions that cause sea level rise and climatic change will have a fundamental impact on indigenous peoples in the Pacific, provoking migration and displacement. For people living on low-lying atolls in Tuvalu, Kiribati, Tokelau and other countries, only metres above sea level at their highest point, this is a matter of life and death. Entire nations risk being "uprooted" through: coastal erosion; pollution of limited water supplies; sea surges that flood agricultural land and climatic change involving cyclones and droughts.

The environmental and social consequences of resource develop-

ment such as mining and logging have also led to forced movements of island peoples. Banaba (Ocean Island) is one tragic case, with 1,080 acres of a 1,500 acre island being mined for phosphate: "between 1900 and 1980, 20 million tons dug up, loaded onto ships and carried away."[52] The Banabans, exploited by the British Phosphate Company with the connivance of the British administration, were inveigled to move to Rabi Island in Fiji in 1945 (removing obstacles to new mining of phosphate on Banaba in the 1950s).

A similar move of islanders from Vaitupu in Tuvalu to Kioa in Fiji took place in 1946. Fiji also has significant populations of Melanesians, including Solomon Islanders settled in areas such as Wailoku on the outskirts of the capital Suva. The status of Banabans, Kioa and Melanesians is of importance for voting rights under Fiji's communal electoral system, and in accessing government services. Under the 1970 Constitution and early legislation, Banabans and Melanesians were classified as Fijians under the communal voting system, while the small Tuvaluan population was registered under the heading of "General voters". However under the 1990 Constitution, all were reclassified as "General voters" (together with Europeans, Chinese and others) and are restricted from accessing affirmative action programs for indigenous Fijians and Rotumans. During the constitutional review that led to the 1997 Constitutional Amendment Act, Rabi islanders sought to redefine their status under Fijian law[53].

Rotuman migration to Fiji (about 9,000 in the 1996 census) has also been significant. Ethnically, Rotumans are Polynesian but have been politically part of Fiji in modern times and are regarded as indigenous in Fijian law, voting under a Rotuman communal roll and accessing government affirmative action programs.

Immigration and Pacific Non-Self-Governing Territories

The issue of free movement of migrants and the granting of rights for minority populations and migrant workers takes on particular importance in non-self-governing territories.

In Guam, New Caledonia and West Papua, indigenous activists are concerned that the right of self-determination is being undermined by programs of immigration and transmigration, in breach of UN resolutions, which state that:

> *"Member states should adopt the necessary measures to discourage or prevent a systematic influx of immigrants or settlers to the territory under colonial domination. This immigration inflow can overturn the demographic composition of the territories, and would constitute a major obstacle in the free exercise of the right to self-determination and independence by the inhabitants of those territories."* [54]

Indigenous Chamorro activists in Guam have expressed concern that migrants from neighbouring Micronesian states and Asia are affecting the political and economic balance of the territory, as they seek to hold a referendum on the future political status of the island. US federal law, including the US Immigration and Nationality Act, governs immigration. This law conflicts with the United States' obligations under UN Conventions to protect indigenous inhabitants of a non-self-governing territory from becoming a minority in their own land.

The French territories are also a site for trans-Pacific migrations. Some 17,000 Wallisians and Futunians now reside in Kanaky / New Caledonia, many having arrived in the nickel boom of the 1970s (more than the 14,166 Wallisians at home!). Some thousands of *Ni-Vanuatu* also live in Noumea.

After the violent clashes of the 1980s, the FLNKS leadership compromised its vision of "Kanak independence" to build links with the "victims of history" - the descendants of convicts, settlers, and indentured labourers brought to the country through the colonial period – but immigration is still a sensitive issue. As a result of ongoing immigration, indigenous Kanaks have become a minority in their own land. The Kanak population actually declined during the decade following the 1988 Matignon Accords (from 44.8% to 44.1% of the population), in spite of the high birth rate in the indigenous community[55]. The European population increased by over 10,000 over the same period – even though Prime Minister Michel Rocard promised Jean-Marie Tjibaou in 1988 that France would repatriate thousands of French public servants.

The reversal of this immigration was a crucial element of the Noumea Accord negotiations, with vital implications for political rights, cultural values and local employment. Immigration has an important impact on employment, with young New Caledonians often losing jobs to expatriates from France. The *"400 cadres"* program established under the Matignon Accords increased the number of Kanaks employed in the local administration but senior management levels are dominated by French public servants (1,277 Europeans to only 188 Kanaks). Between 1989 and 1996, the number of French public servants in Noumea doubled[56].

Some Kanak union leaders are concerned that the transfer of powers from Paris to Noumea after 2000 will create new pressures for expatriate employment, due to the limited numbers of Kanaks

with professional and technical skills. The 1996 census shows that in the "liberal professions" there are 551 Europeans, seven Wallisians, three Tahitians but only two Kanaks! [57] The imbalance will continue, as the conservative settler party, the RPCR, has taken control of key responsibilities in the government relating to economic affairs, finance, budget, employment, public service, training and education, in new institutions created following the 1998 Noumea Accord.

During the 1980s, the minority Wallisian population had largely supported the conservative settler party, the RPCR. Young Wallisians were often at the front line of Right-wing militias that attacked independence supporters in street fighting between 1984-8. But after the signing of the Matignon and Noumea Accords, Wallisians, Tahitians and ni-Vanuatu in Noumea were sidelined and had to define their own place in the country's future. On 12 February 1994, members of the islander community formed the *Rassemblement Démocratique Océanien* (RDO). The RDO formally joined the FLNKS in 1998, and has declared support for indigenous Kanaks seeking restitution of their sovereignty, calling for an independent, democratic and multiracial state. Working class co-operation through unions such as the USTKE has also strengthened links between the Kanak and islander communities.

Law and Justice

The high numbers of young indigenous people in prison arise from factors such as poverty, mandatory sentences for drug convictions, lack of education and poor job prospects. They are also the result of prejudice against indigenous people, lack of effective legal representation and the tendency to give them longer and more frequent prison sentences.

Ohana Ho'opakele reports that indigenous Kanaka Maoli have the worst incarceration rate of any ethnic group in Ka Pae'aina / Hawai'i. Figures from the Office of Hawaiian Affairs (OHA) Data Book show that nearly 46% of those incarcerated in prisons in Hawai'i are Kanaka Maoli (who make up less than 20% of the general population). For juveniles, the figures are even higher (51%). Hawaii's Public Safety Director has stated that 80-90% of Hawai'i prisoners have substance abuse problems and that 25% of the people who entered prison in 1999 did not commit new crimes but failed substance abuse urine tests while on probation or parole.

Indigenous activists argue that programs of restorative justice already exists in Hawai'i - the use of *Ho'oponopono* and wellness centres on each island (*Ho'oponopono* is a process to make right

broken relations and requires the positive support of family members). Members of the sovereignty movement say that Hawai'i is not the USA and that *po'e Hawai'i* should not be sent away to prisons in the United States. Some methods that should be carefully considered are systematic use of alternatives to prison sentences such as suspended sentences, alternative measures for minors, abolishing imprisonment for non-payment of fines, and changing attitudes towards drug abuse (which should be regarded as a health problem, rather than a crime).

In Fiji, young indigenous Fijian men make up the majority of the prison population, often imprisoned for crimes against property, defaulting on payment of fines, acts of violence or mandatory 3 month sentences for possession of marijuana. Fiji's prison population is overwhelmingly young, male, unemployed, working class or poor, and with limited formal education.

Women

The UN CERD Committee has noted that racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Racism against women can be both structural and individual. Structural racism is generated by the way economic, political and social institutions operate. Structural and individual racism denies people equal access to land, jobs, education, medical facilities, family planning, and housing[58].

Land legislation in most Pacific countries does not directly discriminate against indigenous women and, in some parts of the Pacific, there are matrilineal systems of land tenure, which give increased rights to women landowners. However, in practice, women often face discrimination with development agencies, donors and government agencies consulting with men rather than women in the community.

Women may also be hindered by a lack of access to legal remedies for racial and sexual discrimination because of gender-related restrictions, such as bias in the legal system. A recent analysis of indigenous women's access to the legal system in land disputes notes:

> *"Most Pacific island countries have special constitutionally-recognised land courts that adjudicate arguments over land. These land courts usually have male judges and women rarely give evidence as*

expert witnesses despite being regarded as primary caretakers of tradition...land rights are affected both by sex and social class. Usually neither indigenous or non-indigenous women have the money to challenge decisions by taking cases to the formal land courts or on appeal to the higher courts of law." [59]

Even when affirmative action programs are in place to assist indigenous peoples, they may discriminate against women (e.g. housing loans from the Fiji government Housing Authority prevent the majority of women from being land and home owners, as they require people to be in full-time employment with a certain minimum income, effectively ruling out many women who work in the home.[60])

Article 5 (d) (iv) of the CERD Convention affirms the "right to marriage and choice of spouse". Pacific women have contested legal provisions relating to marriage, child welfare and sexual rights, which discriminate between rights granted to men and women marrying non-indigenous spouses. For example, section 10 (2) (c) of the Immigration Act of the Laws of Tonga, states that the right to marriage between a Tongan and a non-Tongan is conditional upon the written consent of the Principal Immigration Officer. The CERD Committee has noted that such legislation might constitute a breach of article 5(d) of the Convention[61].

Another example is the discrimination between men and women marrying non-citizens introduced under the 1990 Fiji Constitution and the Constitution and Citizenship Act, Ch.87[62]. Until reforms in 1997, foreign women married to Fiji men were eligible to apply for registration as a citizen, but foreign men married to Fiji women were not eligible. An overseas female married to a Fiji citizen could usually gain registration as a citizen very quickly, but for overseas men married to a female Fiji citizen the process was more stringent and lengthy (connected to their right to hold employment with a valid work permit over a lengthy period of time; obtain police clearance etc). There were also differences for children: a child born overseas to a foreign woman married to a Fijian man was given full rights of citizenship, but if a Fijian woman married to a foreign male gave birth to her child while overseas, the child had no automatic citizenship rights. In the 1990 Constitution, children born overseas of male Fiji citizens could become a citizen by registration, but this opportunity was not available to children born overseas of female Fiji citizens.

The 1990 Constitution also contained provisions determining that ethnic status was inherited through the father irrespective of maternal ancestry. If an indigenous Fijian woman married a non-indigenous man, their children could not be registered in the *Vola ni Kawa Bula* (the official register that identifies people as indigenous for access to land, scholarships and affirmative action programs). Children of Fijian males were recorded on this roll regardless of the nationality of the mother[63].

These anomalies in the 1990 Constitution introduced after the 1987 coups were challenged by women's groups in Fiji, who successfully lobbied for equality of rights in the new 1997 Constitution. Under the 1997 Fiji Constitution (Amendment) Act, the grounds for approving citizenship applications are gender neutral, and children born overseas to any Fiji citizen, man or woman, have the right to become citizens. The attempted coup in May 2000 and the purported abrogation of the 1997 Constitution by the Fiji military again raised questions about women's status under the new interim administration.

Indigenous women have organised to challenge racist images of Polynesian eroticism and Melanesian savagery, cultural stereotypes created by early European explorers and traders but perpetuated by the modern tourism industry. At a time when much of the mass media in the Pacific is foreign-owned, women have criticised racist imagery in the media: *"Emphasis on foreign women is clearly seen in advertising, where the idea of beauty is equated with foreign concepts of beauty. Most of the beauty products advertised use art from overseas ads."* [64]

Women experience some forms of racism specifically because of their gender, such as sexual violence against women of particular racial or ethnic groups, especially during times of conflict. Violence against women in situations of armed conflict is a growing concern in the Pacific region. In Bougainville, women have reported that rape and sexual violence were used against them during the armed conflict with Papua New Guinea from 1988-98:

"It is clear that the PNG military used repeated raping of Bougainville women and girls as a weapon of war. These women are still suffering deep wounds from such human rights violations and inhuman treatment. Hundreds of children have been born by Bougainville women from calculated acts of war rapes. Whilst our women will always love these babies, the Papua New Guinea State stands accused by such acts of their soldiers." [65]

The blockade of Bougainville by the PNG Defence Force in the early 1990s had a disproportionate impact on women. The destruction and closure of hospitals and health clinics, and limits on medical supplies and anti-malarial drugs, led to significant problems in mother and child health. One Bougainvillean health worker has reported:

"Mothers have also been repeated victims of the blockade. Due to the lack of hospital facilities, drugs and clean environments, the lives of many mothers have been lost after contracting problems like puerperal sepsis, post-partum haemorrhage, anaemia and infections such as malaria." [66]

The Indonesian armed forces and militia have systematically used violence against the Maubere women of Timor Lorosae (East Timor) and Melanesian women in West Papua during counter-insurgency operations. Following Indonesia's 1975 invasion, women's groups reported cases of rape, forced sterilisation, forced marriage and sexual violence against Timorese women[67]. From the late 1980s until 1999 in East Timor *"there are numerous allegations of coercive and coerced contraceptive use, as well as allegations of violations of the rights to information, contraceptive choice and health"*. [68] The East Timor Women's Forum has reported the use of rape in retaliation against women believed to have supported the vote for independence from Indonesia in August 1999.

Such racist violence in the Pacific is not only directed against indigenous women. In the aftermath of the May 2000 crisis in Fiji, there have been cases of rape and other sexual violence against Indo-Fijian women, as people from rural communities were forced from their homes into camps for internally displaced peoples. A report to the 3rd Regional Workshop on Violence Against Women says that the violence during the May 2000 coup was a well-planned, systematic reign of terror, as indicated by actions and words spoken during the incidents. The report notes that the people inflicting violence and terror did not reflect the views of the majority of the indigenous population and said that many indigenous Fijians gave shelter and provided security for the Indo-Fijians affected[69].

The issue of violence against women and the sexual abuse of women and children is of growing concern around the region, being challenged by NGOs such as the *Mapusaga o Aiga* in Samoa, the Fiji Women's Crisis Centre and the Vanuatu Women's Centre. Women at the 3rd Regional Meeting on Violence Against Women in February 2001 noted that:

"Many Pacific countries still retain their customary methods of resolving conflicts or arguments, in the form of village or custom courts. However, many of these customary courts discriminate against women. Customary ways of resolving conflicts often include some sort of compensation or atonement, which is symbolised by the giving of gifts. These customary forms of compensation are often used when there has been a rape, or some other form of violence against women. However, the woman herself is not consulted on whether she wants to reconcile with her attacker. The decision of whether or not they accept the compensation is made by her family." [70]

Indigenous women in the Pacific have struggled to define the rights of women, both against colonial values and within "custom" and "tradition" – as one activist notes: "to be doubly colonised as a woman and as an indigenous nationalist means to struggle twice as hard, twice as long."[71] Colonial administrations and missionaries purported to "free" Pacific women from states of "savagery" – in reality, "against such Christian and colonialist constructs, the powers and controls women exercised in many indigenous societies were either not seen or were erased by the colonising practices of travellers, missionaries, traders, planters and colonial officials."[72]

Globalisation has resulted in increasing numbers of migrant workers who move from depressed economies to more wealthy countries to find work. A recent phenomenon affecting women and creating racial tension in the Pacific is the spread of export processing zones (EPZs) and tax-free factories. Transnational corporations have expanded factories - especially in the garment industry - using women's labour. Such industries do not always rely on local labour, subcontracting overseas and benefiting from intra-regional racial hierarchies to guarantee low labour costs.

In Fiji, American Samoa and the Commonwealth of the Northern Marianas, garment companies have brought in women from Asia as guestworkers, leading to breaches of labour laws and ILO conventions on the rights of migrant workers. In Fiji, tax-free garment factories established after the 1987 coups were allowed to set wages for women at lower levels that minimum wage rates in other parts of the manufacturing sector.

Migrant women guest workers have been involved in disputes with local communities and clashes with employers over working conditions and wages. For example, American Samoa moved to tighten regulations governing the importation of foreign workers for the territory's garment industry following a series of labour problems associated with garment-maker Daewoosa Samoa. The foreign-controlled corporation, which imported workers from Vietnam and China, closed following labour disputes, leaving some Asian women stranded in the country. Vietnamese guestworkers sought repatriation to Hanoi after a clash between Samoan and Vietnamese workers, including a melee in November 2000 in which one woman lost her eye. Others converted to Christianity in the vain hope that they would gain immigration rights to the United States, following the collapse of the company in early 2001[73].

Pacific women are working to define women's rights in the context of Pacific culture and tradition. At a time when feminism is often criticised as a "western" import: *"women need to indigenise the language of human rights so that it becomes a language of local resonance and not one that can be dismissed as a foreign voice."* [74] Women are working to strengthen their governments' adherence to international human rights conventions. In February 2001, women from around the region met in Noumea to discuss how to push ahead with ratification of the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), and to use its provisions.

Some independent Pacific Island countries have ratified CEDAW (Samoa, Fiji Islands, Papua New Guinea, Tuvalu and Vanuatu) and some Pacific territories are covered by the ratification of the treaty by their foreign administration (Cook Islands, Niue, Tokelau, New Caledonia, French Polynesia, and Wallis and Futuna). Other countries have signed CEDAW but have yet to ratify the treaty: American Samoa, the Federated States of Micronesia, Guam, Kiribati, the Northern Mariana Islands, Palau, Marshall Islands, Solomon Islands, and Tonga.

As well as ratifying the CEDAW Convention, discrimination against women could be limited by Pacific Island states ratifying or acceding to the optional protocol of the convention. The optional protocol allows individuals or groups to lodge formal complaints with the UN against nations who may be in breach of their commitments under CEDAW.

Children and Young People

The International Convention on the Rights of the Child (CRC) has been the most widely accepted human rights instrument in the region - all sixteen members of the Pacific Islands Forum are party to the Convention.

The CRC has reaffirmed the right of persons belonging to a minority or of indigenous origin to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language in respect of children (Article 30). In order to realise this right, States parties to the CRC have agreed that education shall be directed towards respect for a child's cultural identity and for civilisations different from his or her own in a spirit of "friendship among all peoples, ethnic, national and religious groups and *persons of indigenous origin"* (Article 29).

Education and access to all levels of schooling are a key element in improving the overall standard of living of indigenous children,

especially as over 40% of the population of the Pacific is less than 15 years of age. This young and growing population faces significant pressures, as Pacific governments are stretched to find the necessary financial and staffing resources to provide health, education and welfare services, especially in rural areas and outlying islands. Rates of access to education vary significantly around the region but, *"fewer than half of Pacific islands youth complete secondary school...and only 1 - 5% of Pacific youth complete some form of tertiary education".* [75]

Another problem is that education institutions are often located far from home. At senior levels, Pacific students often have to study in a different language, far away from their people, and can be estranged from their cultural identity.

The status of children is affected by changing patterns of development, as noted in an FSM submission to the UN Convention on the Rights of the Child Committee: *"Many of the traditional values and social systems are deteriorating as the nation moves away from a subsistence economy and towards a cash-based economy. The extended family, once the most effective social and community network operating, is now being eroded as the influence of changing social and economic conditions continues."* [76]

In the non-self-governing territories of the Pacific, some Governments have denied indigenous peoples the right to speak their language, to practise their culture and to study their history. As a result of discriminatory national policies, indigenous children were losing and forgetting their heritage. As well as a lack of educational services and facilities for their children, national educational systems were often ignorant of indigenous peoples and their culture, considering them to be backward and uncivilised. As a consequence, the knowledge of indigenous children and young people about their culture faded and their cultural identity was weakened. In Hawai'i for example, Ku Kahakalau notes:

> *"The process of westernising all areas of Hawaiian life has been so thorough that today, only few Hawaiians know how to speak their native language, to practise their native religion, to survive by means of a traditional self-sufficient subsistence lifestyle or to carry on their cultural art forms, conflict management techniques and social customs. Yet while Western educators, ministers, politicians and businessmen were very effective in alienating Hawaiians from their traditional knowledge and way of life, Hawaiian assimilation into Western culture has been a massive failure. Native Hawaiians today have the lowest educational status (not even half our students graduate with a high school diploma), the worst health statistics, the highest amount of suicides, convicted felons, unwed mothers and welfare recipients in the islands."* [77]

A growing concern is the pattern of suicides amongst Pacific youth in the Federated States of Micronesia, the Marshall Islands, Palau, Guam and Samoa, with the Pacific having the highest youth suicide rates in the world[78]. In the Federated States of Micronesia, for example: "Suicide among FSM citizens, including children, adolescents and young adults, has reached epidemic proportions."[79] Some Pacific Church and NGO leaders have highlighted the effects of globalisation as one of the many elements in this crisis, as customary and family mechanisms for conflict resolution have been shattered by migration overseas. While extended families often provided a tight authority system, they also provided older people with whom young men and women could talk to about their problems[80].

Lack of accessible services has meant serious health problems for many Pacific children[81]. As in other parts of the world, young people in the Pacific are also facing the HIV / AIDS pandemic. Papua New Guinea has the largest number of reported cases of people living with HIV and AIDS but the islands with the highest reported rates of infection per capita in the region are the non-self-governing territories of French Polynesia, New Caledonia and Guam[82]. These colonies have a model of development based on tourism, military bases and the denial of indigenous culture. Kanak, Chamorro and Maohi activists have highlighted the need for culturally appropriate responses for indigenous communities to address the spread of HIV and STDs, even though the US and French territories provide access to drug treatments, insurance and health services that independent Pacific nations cannot afford[83]. Groups like ADSPPK in Kanaky have been involved in preparing educational posters, leaflets and videos in different Kanak languages, to reach out to young people in indigenous communities.

Throughout the Pacific region, there have been important initiatives to provide language classes for indigenous children, to preserve and enhance their vibrancy of cultures. From the *Ecoles Populaires Kanaks* (Kanak Popular Schools) in Kanaky / New Caledonia, to the *Kukulu Kumuhana* cultural immersion programs in Ka Pae'aina / Hawai'i, cultural centres in Noumea, Port Vila and beyond, there are creative attempts to develop education programs appropriate for Pacific youth[84].

In Papua New Guinea, a program of *Tok Ples* education, which began in Bougainville during the 1970s, is being promoted as the model for preschool and primary education in the local language. In Vanuatu, the Melanesian Institute of Philosophy and Technology was established by the Turaga indigenous nation in 1997. The Institute is responsible for formal coordination of six levels of the indigenous education system, using its own language as a medium of

instruction, script writing and the lunar calendar. Children are educated in their natural environment for their roles in society and their responsibilities at different stages of human development. The teachers include the people that surround them, including their parents, older peers, clan members, community chiefs, indigenous philosophers, scientists, economists, healers, engineers, technologists, farmers, traders, artists and sculptors. Thirty-six areas of development covered by the naturals laws and the collective ownership of peaceful coexistence are being taught at the Institute. Foreign languages, technologies, knowledge and skills are taught at the fourth level of the indigenous system[85].

In Aotearoa/New Zealand, there are over 50 *kura kaupapa* (Maori immersion schools) for indigenous students, as explained by educator Hilda Halkyard Harawira:

> *"Maori language is an important tool for our decolonisation. Our language is our spirit, our wairua. Ko te reo te mauri o te mana Maori. If we lose our language we lose some of our identity. In a recent survey it was found that only 8% of Maori are fluent in Maori language. Maori language has only recently been recognised as an official language.... A government review found that 85% of Maori children in the Far North community are failing in schools. As a principal of a Kura Kaupapa, our 68 children learn the local histories and dialect of our area because they are nearly lost. The whanau (families) define what are the curriculum priorities for Maori children in a modern world.*
>
> *My task is to ensure that the curriculum will liberate our children and not enslave them. We do not copy the mainstream schools. We teach academic subjects but also Maori values and practices. Technology is important but learning how to cope if the power fails is also important. We teach our children it is normal to be Maori. We are preparing our children to govern and manage our tribes and our communities. We have just won approval to run a college, and we are now working to establish a Whare Wananga – a Maori University. All our subjects will be taught in Te Reo Maori. We organise parent education because it is an unfair burden to expect our children to shoulder the responsibility of our language and culture."* [86]

Action Proposals

The lead up to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance provides a focal

point for reflection and action on these issues. The World Conference can enhance human rights in the region by:

- Allowing full and active participation of indigenous representatives in the World Conference and its preparatory process, with a view to ensuring that the concerns of indigenous peoples are given due exposure.
- Extending the involvement of non-government and community organisations in the World Conference and its preparatory process.
- Reaffirming the right to self-determination for indigenous peoples and independence for the remaining non-self-governing territories.
- Supporting the UN Draft Declaration on the Rights of Indigenous Peoples, and encouraging states to implement the Permanent Forum for Indigenous Peoples as a structure within the United Nations system to address these concerns.

Some suggestions for further activity in the Pacific include:

- Pacific Island governments should be encouraged to sign and ratify the International Convention on the Elimination of All Forms of Racial Discrimination, and to allow individual applications to CERD. They should also avail themselves of the technical and financial support provided by the CERD to prepare periodic reports. Other relevant human rights instruments (e.g. CEDAW) should be ratified, together with optional protocols.
- Work towards the creation of human rights institutions, such as National Human Rights Commissions or a regional Pacific Centre for Human Rights, which would provide a mechanism for Pacific peoples to take action within a context that understood the range of rights from a Pacific perspective[87].
- In line with Article 4 of the CERD Convention, all Pacific states should examine their laws, legal systems and policies in order to identify and eradicate both explicit and inherent racism or bias.
- Independent Pacific governments should actively support the right to self-determination of non-self-governing territories listed with the United Nations Special Committee on Decolonisation, but also support the listing or re-listing of countries currently not on the list (e.g. Te Ao Maohi / French Polynesia, Wallis and Futuna, West Papua, Ka Pae'aina / Hawai'i, Bougainville, Rapanui, Maluku).
- Develop a capacity-building program for indigenous peoples and other victims of racism aimed at increasing effective participation in the United Nations and other international bodies, using indigenous experts as well as others. This program should be designed to disseminate information regarding UN procedures and other international bodies and to facilitate maximum indigenous access to international bodies. Workshops on how to participate effectively at the international level should be held in indigenous communities and other communities affected by racism.
- Convene a Pacific regional workshop to discuss the UN Permanent Forum for Indigenous Peoples, and the Forum's introduction within the UN system with all necessary funding.

Notes

1 This article was written by Nic Maclellan on behalf of the Pacific Concerns Resource Centre (PCRC) in Suva, Fiji. Nic Maclellan worked as Educational Resource Developer with the PCRC between 1997-2000. PCRC is the Secretariat of the Nuclear Free and Independent Pacific (NFIP) movement, and has General Consultative Status with the United Nations Economic and Social Council (ECOSOC). Thanks to Rufo Lujan, Kekuni Blaisdell, and Jim Albertini for information and Motarilavoa Hilda Lini, Nancy Atkin, Stanley Simpson and Jimmy Nâunââ for comments on an earlier draft.

2 The Secretariat of the Pacific Community (SPC) reports 5,870,300 people in Melanesia, 495,000 in Micronesia and 599,600 in Polynesia as at 1997 - *Pacific Island Populations Data Sheet* (SPC, Noumea, 1999) - but this does not count Pacific peoples outside the SPC membership, such as the Kanaka Maoli of Ka Pae'aina or Melanesian peoples in West Papua. On percentage of Pacific languages, see *UNEP News Release*, Nairobi, 8 February 2001

3 Report of Fifth annual meeting of the Asia-Pacific Forum of National Human Rights Institutions, Rotorua, Aotearoa, 7-9 August 2000.

4 The late Kanak leader Jean-Marie Tjibaou and the Kanak independence movement the FLNKS have used the term "victims of history" when forging the pact between indigenous and non-indigenous people in Kanaky / New Caledonia. Jean-Marie Tjibaou: *Cibau Cibau – Kamo pa kavaac* (ADCK, Noumea, 1998).

5 *Status of ratifications of the principal international human rights treaties*, Office of the UN High Commissioner for Human Rights, as at 21 February 2001. Of the colonial powers in the region, Indonesia and France have acceded to CERD; Chile, the United Kingdom and the United States have ratified the Convention.

6 "To the extent, if any, that any law relating to elections in Fiji may not fulfil the obligations referred to in article 5 (c), that any law relating to land in Fiji which prohibits or restricts the alienation of land by the indigenous inhabitants may not fulfil the obligations referred to in article 5 (d) (v), or that the school system of Fiji may not fulfil the obligations referred to in articles 2, 3, or 5 (e) (v), the Government of Fiji reserves the right not to implement the aforementioned provisions of the Convention." *Fiji – Reservations to CERD Convention*, http://www.unhchr.ch/html/menu3/b/treaty2_asp.htm.

7 "To the extent, [...], that any law relating to land in Tonga which prohibits or restricts the alienation of land by the indigenous inhabitants may not fulfil the obligations referred to in article 5 (d) (v), [...], the Kingdom of Tonga reserves the right not to apply the Convention to Tonga." *Tonga – Reservations to CERD Convention*, http://www.unhchr.ch/html/menu3/b/treaty2_asp.htm.

8 Summary record of the 1060th meeting: Papua New Guinea. 27 September 1996. CERD/C/SR.1060. (Summary Record), para30.

9 See, for example, the report of the Secretary-General of the United Nations on human rights violations in the Papua New Guinea island of Bougainville (E/CN.4/1996/58); the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Bougainville from 23 to 28 October 1995 (E/CN.4/1996/4/Add.2); the report prepared by the same Special Rapporteur pursuant to Commission on Human Rights resolution 1996/74 (E/CN.4/1997/60/Add.1).

10 Concluding Observations of the Committee on the Elimination of Racial Discrimination: Fiji. 30 September 1996. A/51/18,paras.427-430. (Concluding Observations/Comments).

11 Thirteenth periodic report of States parties to CERD: Tonga. 29 April 1997, CERD/C/319/Add.3. (State Party Report).

12 Concluding Observations by the Committee on the Elimination of Racial Discrimination: Tonga. 19 April 2000. CERD/C/304/Add.96. (Concluding Observations/Comments).

13 O'Flaherty, Michael: "Individual Communications – the Convention on Torture and the Convention on the Elimination of All Forms of Racial Discrimination". In Pritchard, Sarah (ed.): *Indigenous Peoples, the United Nations and Human Rights*, Zed, London, 1998. P. 116.

14 "With regard to article 15, France's accession to the Convention may not be interpreted as implying any change in its position regarding the resolution mentioned in that provision." France – Reservations to CERD Convention, www.unhchr.ch/html/menu3/b/treaty2_asp.htm. Tonga and Fiji have stated "this article is discriminatory in that it establishes a procedure for the receipt of petitions relating to dependent territories while making no comparable provision for States without such territories."

15 Press briefing on 6 February 2001: http://www.un.org/News/briefings/docs/2001/robinson.htm (our emphasis).

16 A detailed study of the role of the UN Decolonisation Committee can be found in Corbin, Carlyle: "What future for the United Nations' decolonisation process?", *Indigenous Affairs*, No.1, 2000.

17 O'Brien, Aliki Faipule Kolouei:"The Modern House of Tokelau", *Pacific News Bulletin*, June 2000.

18 Under the conservative Howard government, Australia has suggested replacing "self-determination" with "self-management", while the United States started to review its long-held opposition to self-determination. For the applicability of this draft declaration to the Pacific, see the *Report of the Inaugural Indigenous Peoples of the Pacific Workshop on the UN Draft Declaration of the Rights of Indigenous Peoples, Suva, Fiji, 1996* (Government of the Republic of Fiji / PCRC, Suva, 1997).

19 For details, see *Tavini Huiraatira: Independence and Sovereignty for Te Ao Maohi / French Polynesia* (Tavini Huiraatira, Papeete, 1997); and Maclellan, Nic and Jean Chesneaux: *After Moruroa – France in the South Pacific*. Ocean Press, New York and Melbourne, 1998.

20 Maclellan, Nic: "The Noumea Accord and decolonisation in New Caledonia", *Journal of Pacific History*, Volume 34, No.3, 1999.

21 Lujan, Rufo: "Guam - an island seeking justice, truth and self-determination", in *No Te Parau Tia, No Te Parau Mau, No Te Tiamaraa*. PCRC, Suva, 2000, p. 45.

22 HR No.1365, 81st Congress, 1st session. 8, 1949, quoted in Guam Commission on Decolonisation: *Decolonisation through the Self-determination of a people – an overview of Guam's status and options*. Government of Guam, Hatgana, 1999.

23 *Ngiraingas v. Sanchez*, 858 F.2nd 1368, CA9, 1988. This is a Court of Appeals ruling, as the 9th Circuit Court of appeals – rather than the US Supreme Court - has appellate jurisdiction over the US District Court of Guam.

24 Examples of racism in Bougainville under colonial administration and in post-independence Papua New Guinea are documented in Denoon, Donald: *Getting under the skin*. Melbourne University Press, Melbourne, 2000; and Oliver, Douglas: *Black Islanders*. Hyland House, Melbourne, 1991. Attitudes of PNGDF soldiers are reported in Yauka Aluambo Liria: *Bougainville Campaign Diary*. Indra, Eltham, 1993.

25 Concluding observations of the Committee on the Elimination of Racial Discrimination: Papua New Guinea. 15 September 1993. A/48/18,paras.560-573 (Concluding Observations/Comments).

26 From the vast literature on Fiji's crises, there are many sources: Ratu Sir Kamisese Mara: *The Pacific Way – a memoir*, University of Hawaii, Honolulu, 1997; Sharpham, John: *Rabuka of Fiji*, Central Queensland University, Rockhampton, 2000; Atu Bain and Tupeni Baba (eds): *Bavadra – Prime Minister, Statesman, Man of the people*, Sunrise, Nadi, 1990. For an overview of Fiji's Constitution and communal voting, see Brij Lal: *Broken Waves*, University of Hawaii, Honolulu, 1992; and Robertson, Robbie: *Multiculturalism and reconciliation in an indulgent republic – Fiji after the coups 1987-1998*, Fiji Institute of Applied Studies, Suva, 1998.

27 Concluding Observations of the Committee on the Elimination of Racial Discrimination: Fiji. 30 September 1996. A/51/18,paras.427-430. (Concluding Observations/Comments). A critique of the 1990 Constitution and its breaches of the CERD Convention and other human rights instruments can be found in a report by the then Labour / NFP Coalition: *A fraud on the nation – the Fiji Constitution of 1990*. Sunrise Press, Nadi, 1991.

28 Ratuva, Sitiveni: "The Fiji coup of May 2000 and the indigenous question", *Indigenous Affairs*, No.3, 2000.

29 Senituli, Lopeti: "Indigenous peoples in the Pacific context", paper to the United Nations Development Program, July 1999.

30 Falk, Richard: "Group claims within the UN system – the rights of indigenous peoples", Chapter 7 in *Human Rights Horizons*. Routledge, New York, 2000.

31 Presentation to a conference of National Human Rights institutions in the Asia-Pacific http://www.hri.ca/racism/Submitted/Author/ATSIC.htm

32 Rice v. Cayetano, Governor of Hawai'i, US Supreme Court No.98-818, Argued 6 October 1999, decided 23 February 2000.

33 "Rice v. Cayetano" in *The Native Voice* newsletter, Ka Leo a Ka Lahui Hawai'i, Fall 1999.

34 Blaisdell, Kekuni: "Native Hawaiian 'Recognition Bill' Stalled", *Pacific News Bulletin*, November 2000.

35 "Some of the most important players in the coup were members of the emerging Fijian bureaucratic middle class, which was consolidated after the 1987 military coup and the subsequent affirmative action policies. The primary

beneficiaries of affirmative action and the privatisation drive by the Rabuka regime were indigenous Fijian middle class individuals who had links with the State bureaucracy and financial institutions...to this group, nationalism was the ideological and political means by which they could legitimise and protect their economic privileges" - Sitiveni Ratuva: *op.cit.*, p.56.

36 G. Robertson: *Crimes Against Humanity* (Penguin, London, 1999), p146.

37 "Land, labour and independent development", Chapter 5 in *The Cambridge History of the Pacific Islanders* (Cambridge University Press, Cambridge, 1995).

38 For discussion of militarisation in the Pacific, see Corazon Fabros: "The new arms race in the Pacific", *Indigenous Affairs*, No.1, January-March 2000.

39 UN General Assembly resolution 35/118 of 11 December 1980.

40 For introductions to the vast literature on Pacific nuclear tests, see Firth, Stewart: *Nuclear Playground*, Allen and Unwin, Sydney, 1987; Symons, J.L.: *A History of British Atomic Tests in Australia*, Australian Government Publishing Service, Canberra, 1985; Weisgall, Jonathan: *Operation Crossroads - the atomic tests at Bikini*, Naval Institute Press, Annapolis, 1994; Barrillot, Bruno: *Les essais nucléaires français 1960-1996*, Centre de Documentation et de Recherche sur la Paix et les Conflits, Lyon, 1990.

41 Minutes of meeting on 27 November 1956, marked "Top Secret – UK Eyes Only" XY/181/ 024. For discussion of the Christmas Islands tests on indigenous Fijians and i-Kiribati, see Losena Tubanavau-Salabula, Josua Namoce and Nic Maclellan: *Kirisimasi*, PCRC, Suva, 1999.

42 "Danger Area" - paper from Air Vice Marshall W.E. Oulton marked "Top Secret - Guard", 19 November 1956, Number GRA/TS.1008/1/Air

43 Declaration of Opposition from the women of the *Iranti Wati* (The Poison – Leave it) (www.iratiwanti.org).

44 Maclellan, Nic: "Radiation on Johnston Atoll – cleaning up the Cold War", *Pacific News Bulletin*, August 2000.

45 Brown, Richard and Adrian Walker: *Migrants and their remittances*, Pacific Studies Monograph No.17, Centre for Pacific Studies, University of New South Wales, 1995.

46 Amnesty International: *Solomon Islands – a forgotten conflict*, ASA 43/005/2000 7 September 2000.

47 Kabutaulaka, Tarcisius Tara: "Beyond ethnicity – understanding the crisis in the Solomon Islands", *Pacific News Bulletin*, May 2000

48 Lal, Brij (ed): *Crossing the Kala Pani – a documentary history of Indian indenture in Fiji*, Fiji Museum / ANU, Suva and Canberra, 1998.

49 The vast majority of emigrants after the May 2000 takeover have been Indo-Fijians: in September 2000, 341 Indo-Fijians, 21 Fijians and 52 others migrated; in October 2000, 439 people migrated: 352 Indians, 34 Fijians and 50 others. Fiji Bureau of Statistics, cited in *The Review* (Suva), February 2001.

50 Hakena, Helen: "War leads to human rights abuses", *Pacific Women Against Violence* newsletter, Vol.4. No.4, April 1999.

51 Rumakiek, Rex: "Human Rights violations in West Papua" in *No Te Parau Tia, No Te Parau Mau, No Te Tiamaraa* (PCRC, Suva, 2000) p40; Ondawame, John Otto: "Self-determination in West Papua (Irian Jaya)", *Indigenous Affairs*, No.1, 2000.

52 Teaiwa, Katerina: "Banaba Island: Paying the price for other peoples' development", *Indigenous Affairs*, No.1, 2000.

53 Teaiwa, Teresia: "Rabi and Kioa – peripheral minority communities in Fiji" in Brij Lal and Tomasi Vakatora (eds): *Fiji in Transition – Research papers of the Fiji Constitutional Review Commission*, USP, Suva, 1997, Volume 1, p. 130.

54 UN General Assembly resolution 35/118 of 11 December 1980.

55 Institut Territorial de la Statistique et des Etudes Economiques: "Note sur les chiffres de la population en Nouvelle-Calédonie", ITSEE, Noumea, August 1996.

56 Analysis of the *400 cadres* program and the economic results of the Matignon Accord are found in David, Gilbert, Dominique Guillaud and Patrick Pillon, *La Nouvelle-Calédonie à la croisée des chemins 1989-1997*, Société des Océanistes, ORSTOM, 1999.

57 Institut Territorial de la Statistique et des Etudes Economiques: *New Caledonia – Facts and Figures*, ITSEE, Noumea, December 1997, Section 8.3 - "Employed Population", p.107. Europeans outnumber Kanaks in virtually all professional and trade categories with the exception of farmers and unskilled labourers. The only exception in the "intermediate professions" is clergy and religious workers, where Kanaks nearly double the number of Europeans!

58 *Prepared Background Paper for UN Expert group meeting on Integrating Women's Human Rights within the UN human rights system*, ECOSOC Document; UN Centre for Human Rights, Geneva: *Gender related dimensions of racial discrimination*: 20 March 2000. CERD; General recom. 25. (General Comments) *General Recommendation XXV- Gender Related Dimensions of Racial Discrimination* (Fifty-sixth session, 2000); Integrating Gender into the Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance", UNIFEM Background Paper, http://www.unifem.undp.org/hr_racism.html

59 Jalal, Imrana: *Law for Pacific Women*, Fiji Women's Rights Movement, Suva, 1998.

60 Jalal, Imrana: *ibid.*, p. 68.

61 Concluding Observations by the Committee on the Elimination of Racial Discrimination: Tonga. 19 April 2000. CERD/C/304/Add.96. (Concluding Observations/Comments.)

62 These and other anomalies are detailed in Jalal, Imrana: "The status of women and the Fiji Constitution" in Lal, Brij and Tomasi Vakatora (eds): *Fiji in transition – Research papers of the Fiji Constitutional Review Commission*, USP, Suva, 1997, Volume 1, p. 80.

63 Prominent businessman and politician Jim Ah Koy, who was born to a Fijian mother and Chinese father, successfully challenged these provisions in a court case in 1991. Ah Koy applied to be registered on the Fijian communal roll as a voter for the Fijian Urban constituency in Suva. An objection was lodged that he was not a Fijian within the meaning of the 1990 Constitution. Ah Koy challenged the decision and won the landmark case in August 1993 reaffirming his right to vote.

64 Tuivaga, S.: *Women in the Fiji Press*, Fiji Centre, USP, Suva, 1996.

65 *The National* (Port Moresby), 12 February 2000.

66 Mirinka, Ruby: "Our mothers and children are dying – military offensives against the island of Bougainville" in Emberson-Bain, Atu: *Sustainable development or malignant growth? Perspectives of Pacific Island women*, Marama, Suva 1994, p. 230.

67 Brites, Ceu: "East Timor's time is here" in Ishtar, Zohl de (ed): *Pacific Women Speak Out*, WILPF, Christchurch, 1998; *Violence by the state against women in East Timor*, East Timor Human Rights Centre, Melbourne; 1998; "Violence against East Timor Women", *Pacific Women Against Violence* newsletter, Vol.5. No.2, March 2000.

68 Sissons, Melinda: *From one day to another – violations of women's reproductive and sexual rights in East Timor*, East Timor Human Rights Centre, Melbourne; 1998.

[69] "Political crisis in Fiji hits women and children most", 20 February 2001, press statement from 3rd Regional Meeting on Violence Against Women, in Fiji. Information on www.fijiwomen.com.

[70] "Women's rights degraded by cultural practices", 26 February 2001, www.fijiwomen.com.

[71] Trask, Haunani Kay: "Fighting the battle of double colonisation – the view of a Hawaiian feminist" in *Ethnies*, Numbers 8-10, Spring 1989. See also Trask: "Women's *mana* and Hawaiian Sovereignty" in *From a native daughter – colonialism and sovereignty in Hawai'i*, University of Hawaii Press, Honolulu, 1999.

[72] Jolly, Margaret: "Women-nation-state in Vanuatu" in Tom Otto and Nicholas Thomas: *Narratives of Nation in the South Pacific*, Harwood, 1996.

[73] "American Samoa tightens labour regulations", Radio Australia, 2 January 2000; Fiji Sagapolutele: "American Samoa High Court intervenes in Daewoosa Samoa case", PIDP/CPIS, 16 January 2001.

[74] Jolly, *op. cit.* pp. 23-24. On feminism, see Griffin, Vanessa: *Women, development and empowerment – a Pacific feminist perspective*, APDC, Kuala Lumpur, 1989; Jalal, Imrana: "Can Pacific women be feminists" in Jalal: *op. cit.*, ,1998, p. 20; "Feminism – what it means to you", *Pacific Women Against Violence* newsletter, Vol.5. No.1, July 1999.

[75] *State of Pacific Youth Report 1998*, UNICEF Pacific, Suva, 1998, p. 8.

[76] State Party Report to CRC from Federated States of Micronesia. 17 June 1996. CRC/C/28/Add.5.

[77] Kahakalau, Ku: "Preferred education – learning from the past to survive in the future" in *Hawai'i: Return to nationhood*, IWGIA, Copenhagen, 1994, p. 218.

[78] *State of Pacific Youth Report 1998*, UNICEF Pacific, Suva, 1998, p. 28.

[79] State Party Report to CRC from Federated States of Micronesia. 17 June 1996. CRC/C/28/Add.5. Para 205.

[80] See for example: Hezel, F. X.: "Suicide and the Micronesian Family". *The Contemporary Pacific*, Vol. 1, No. 1, 1989, pp. 43-74. Hezel et al., eds: *Culture, Youth and Suicide in the Pacific: Papers from an East-West Center Conference*, Working Papers Series, Pacific Islands Studies Program, University of Hawaii, Honolulu, 1985.

[81] For an example, see Blaisdell, Kekuni: "The Health Status of Kānaka Maoli (Indigenous Hawaiians)", *Asian American and Pacific Islander Journal of Health*, Vol 1, No 2, Autumn 1993.

[82] *Regional Strategy for the Prevention of AIDS and STD in Pacific Islands Countries and Territories*, South Pacific Commission, Noumea, 1997, p. 4.

[83] Dr. Clement Malau, National AIDS Director in Papua New Guinea, notes that: "those countries and territories that have a more Western influence appear to have a Western mode of transmission. This is particularly obvious for New Caledonia, French Polynesia and Guam where 34%, 44% and 59% of the known transmission takes place amongst men who have sex with men. Intravenous drug use is also a more common mode of transmission in the same territories where it was noted to be 14%, 8% and 8% respectively." In contrast 100% of reported transmissions in the Marshall Islands, 85% in Papua New Guinea and 73% in Fiji are through heterosexual transmission. Secretariat of the Pacific Community: *Conference proceedings - First Pacific Regional HIV / AIDS and STD Conference*, SPC, Noumea, 2000, p. 26.

[84] Gauthier, Jacques: *Les Ecoles Populaires Kanak – une révolution pédagogique?* L'Harmattan, Paris, 1996; Kahakalau, Ku: *ibid.*

[85] Lini, Motarilavoa Hilda: "Vanuatu's indigenous movement *TuVanuatu Komuniti* – reasserting Melanesian values", *Pacific News Bulletin*, December 1998.

[86] Harawira, Hilda Halkyard: "He Korero no Aotearoa" in *No Te Parau Tia, No Te Parau Mau, No Te Tiamaraa*, PCRC, Suva, 2000, p. 70.

[87] CCF and IJALS: *The Importance of National Human Rights Institutions*, CCF, Suva, 1998; Wilson, Margaret and Paul Hunt (eds.): *Culture, Rights and Cultural Rights – perspectives from the South Pacific*, Huai, Wellington, 2000.

References

Amnesty International. 2000. *Solomon Islands – a forgotten conflict*, ASA 43/005/2000 7 September

Corbin, C. 2000. "What future for the United Nations' decolonisation process?", *Indigenous Affairs*, No.1/2000.

Denoon, D. 1995. *The Cambridge History of the Pacific Islanders*, Cambridge University Press, Cambridge.

East Timor Human Rights Centre. 1998. *Violence by the state against women in East Timor*, ETHRC, Melbourne.

Emberson-Bain, A. 1994: *Sustainable development or malignant growth? Perspectives of Pacific Island women*, Marama, Suva.

Guam Commission on Decolonisation. 1999. *Decolonisation through the Self-determination of a people – an overview of Guam's status and options*, Government of Guam, Hatgana.

Ishtar, Z. de (ed.). 1998: *Pacific Women Speak Out*, WILPF, Christchurch.

Lal, B. (ed.). 1998. *Crossing the Kala Pani – a documentary history of Indian indenture in Fiji*, Fiji Museum / ANU, Suva and Canberra.

Lal, B. and Vakatora, T. (eds.). 1997. *Fiji in transition – Research papers of the Fiji Constitutional Review Commission*, USP, Suva Volume 1.

Maclellan, N. 1999. "The Noumea Accord and decolonisation in New Caledonia", *Journal of Pacific History*, Volume 34, No.3.

Maclellan, N. and Chesneaux, J. 1998. *After Moruroa – France in the South Pacific*, Ocean Press, New York and Melbourne

O'Brien, K. 2000: "The Modern House of Tokelau", *Pacific News Bulletin*, June, 4.

Ondawame, J. 2000. "Self-determination in West Papua (Irian Jaya)", *Indigenous Affairs*, No.1/2000.

Pacific Concerns Resource Centre. 1996. *Proceedings of the Indigenous People's Knowledge and Intellectual Properiy Rights Consultation*, PCRC, Suva.

Pacific Concerns Resource Centre. 1997. *Report of the inaugural Indigenous Peoples of the Pacific Workshop on the UN Draft Declaration of the Rights of Indigenous Peoples, Suva, Fiji, 1996*, Government of the Republic of Fiji / PCRC, Suva.

Pritchard, S. (ed.). 1998. *Indigenous Peoples, the United Nations and Human Rights*, Zed, London.

Ratuva, S. 2000. "The Fiji coup of May 2000 and the indigenous question", *Indigenous Affairs*, No.3/2000.

Rex Rumakiek, R. 2000. "Human Rights violations in West Papua" in *No Te Parau Tia, No Te Parau Mau, No Te Tiamaraa*, PCRC, Suva. 40.

Tavini Huiraatira. 1997. *Independence and Sovereignty for Te Ao Maohi / French Polynesia*, Tavini Huiraatira, Papeete

Teaiwa, K. 2000. "Banaba Island: Paying the price for other peoples' development", *Indigenous Affairs*, No.1/2000.
Tjibaou, J-M. 1998. *Cibau Cibau – Kamo pa kavaac*, ADCK, Noumea.
Tomas, N. (ed.). 1999: *Collective Human Rights of Pacific Peoples*, University of Auckland, Auckland.
Trask, H. 1999. *From a native daughter – colonialism and sovereignty in Hawai'i*, University of Hawaii Press, Honolulu.
Wilson, M. and Hunt, P (eds.). 2000. *Culture, Rights and Cultural Rights – perspectives from the South Pacific*, Huai, Wellington.

CHAPTER 4

RACISM AND RACIAL DISCRIMINATION AGAINST THE INDIGENOUS PEOPLE IN SCANDINAVIA AND RUSSIA – THE SAAMI PEOPLE

By Mattias Åhrén[1]

This article aims to analyze the problems faced by the indigenous people of northern Scandinavia[2] and the Kola Peninsula in Russia - the Saami People - in terms of racism and racial discrimination. The Saami people is one people with one culture. The Saami people's problems with regard to racism and racial discrimination are to a large extent the same, regardless of in which Scandinavian country they happen to live. Consequently, even though this article might highlight a particular problem or issue by an example from only one of the Scandinavian countries, it is likely that the problem or issue discussed is relevant in the other countries as well.

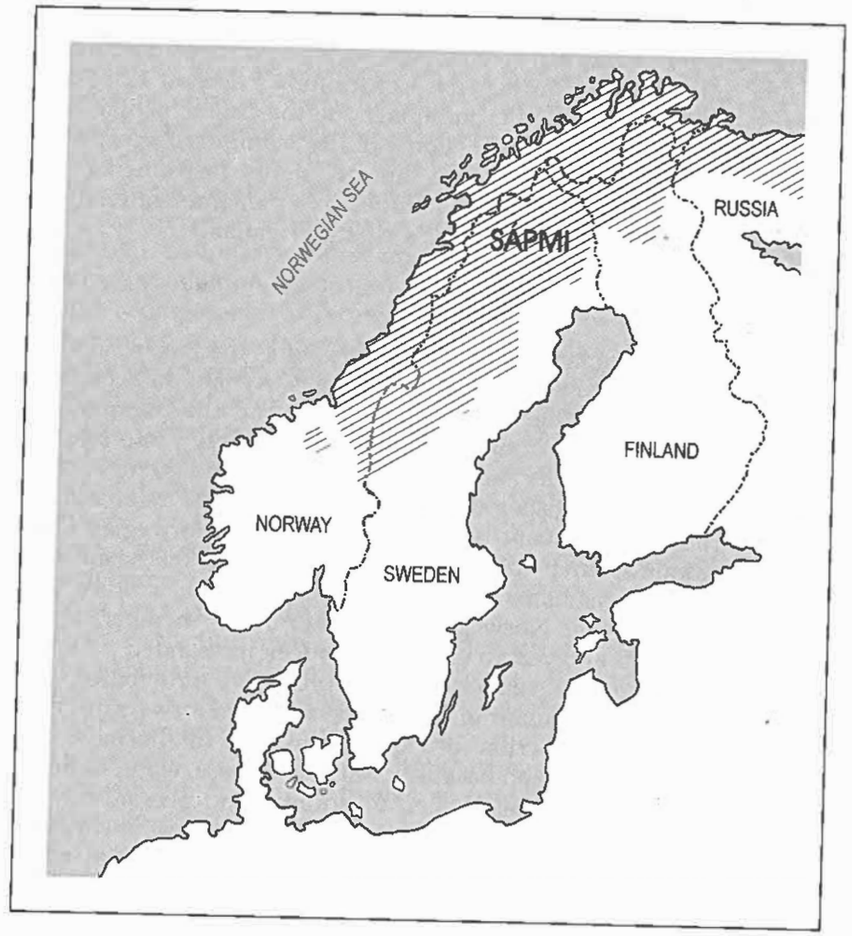
The situation of the members of the Saami people inhabiting the Kola Peninsula in Russia is somewhat different from the situation in Scandinavia. Unfortunately, the author has had access to considerably less information regarding racism and racial discrimination in the Russian part of the traditional Saami territory. Consequently, the Article is only of limited relevance to the situation of the Saami people in Russia. More research about the Saami people's situation in the Kola Peninsula is necessary.

Overall Analysis of Racism and Racial Discrimination - as Defined in the International Convention on the Elimination of All Forms of Racial Discrimination[3] (the "CERD Convention") - Affecting the Saami People

Legislation Designed to Combat Racism and Racial Discrimination

Finland

Pursuant to Section 22 of the Finnish Constitution, the government and administrative authorities shall guarantee that Finland complies with human rights and fundamental freedoms established under international law. International legal instruments ratified by Finland have status as law in the country. It is the government's duty to make sure that national legislation conforms with such international



legal instruments. Pursuant to Section 6 of the Constitution, all Finnish citizens are equal before the law. No person may be disadvantaged because of his or her gender, age, religion, belief, ethnic descent, language or disability.

In order to achieve true equality and thus effectively combat discrimination, the Finnish Constitution contains a number of provisions that positively discriminate on behalf of, for example, the Saami people. Pursuant to Section 17 of the Constitution, the Saami people is Finland's only indigenous people. As such, the Saami people has the right to maintain and develop its language and culture. It follows from the bill through which these provisions were

submitted to the parliament, that the term "culture" encompasses the Saami people's traditional livelihoods, such as reindeer husbandry, hunting and fishing[4]. Further, the Constitution's Section 121 establishes cultural and linguistic autonomy for the Saami people in a geographical area defined by Section 4 of the Saami Parliament Act[5]. In conjunction with international human rights instruments, the Finnish Constitution constitutes - if adhered to - an eminent platform for protection of the Saami people's rights in Finland.

Norway

The Norwegian Human Rights Act[6] incorporates the European Convention on Human Rights[7], the International Covenant on Economic, Social and Cultural Rights[8] (the "ICESCR") and the International Covenant on Civil and Political Rights[9] (the "ICCPR") into Norwegian domestic law. As in Finland, the Norwegian government shall guarantee domestic legislation's conformity with these international legal instruments. Pursuant to Section 110a of the Norwegian Constitution, administrative authorities shall ensure that the Saami ethnic group[10] can maintain and develop its language, culture and community. Under the Norwegian Saami Act[11], only members of the Saami people are allowed to exercise reindeer husbandry.

Norwegian penal legislation contains provisions prohibiting ethnic discrimination. Pursuant to Section 349a of the Norwegian Penal Code[12], it is deemed a crime if a businessman in his business discriminates against a person because of his or her race, color, national or ethnic origin or religious belief. In addition, no person may be denied access to public gatherings because of the just mentioned criteria. Pursuant to Section 135a, dissemination in public of racist statements or other expressions of racist attitudes or beliefs is prohibited.

Section 55a of the Norwegian Work Environment Act[13] prohibits discrimination in the recruitment process due to race, color, or national or ethnic origin. Norway is about to appoint a committee with the task of elaborating a proposal for an all-embracing act designed to protect individuals against ethnic discrimination.

Sweden

Contrary to its Finnish and Norwegian counterparts, the Swedish Constitution does not recognize the unique position of the Saami people[14]. As in Norway, the Swedish Reindeer Herding Act[15] makes it a sole right of the Saami people to exercise reindeer husbandry. The Swedish Constitution is made up of four separate parts, of which

Regeringsformen[16] is the most central. *Regeringsformen* is the main fount of legal protection against ethnic or racial discrimination in Sweden. Pursuant to *Regeringsformen's* Chapter 2, Section 15, laws or other regulations must not entail that any citizen is disadvantaged because of race, color, ethnic descent or minority membership.

As in Norway, Swedish penal legislation offers protection against ethnic discrimination. The Penal Code contains two provisions directly concerned with contempt or discrimination on the ground of race, color, national or ethnic origin or religious creed, namely those relating to agitation against an ethnic group and unlawful discrimination. Comparable to Norway, dissemination in public of racist statements or other expressions of racist attitudes or beliefs is thus prohibited. In addition, pursuant to Chapter 29, Section 2, of the Swedish Penal Code[17], it is deemed an aggravating circumstance if a crime is committed with the motive of aggrieving a person or a national or ethnic group by reason of race, color, national or ethnic origin, religious belief or any similar circumstance. Pursuant to Chapter 1, Section 3, of the Tort Liability Act[18], a person subject to unlawful discrimination may - in addition to other damages suffered - claim compensation for the degrading treatment or injustice he or she has been subjected to.

Rules protecting individuals against discrimination are also found in the Countering Ethnic Discrimination in Working Life Act[19] (the "CEDWLA") and the Ethnic Discrimination Ombudsman Act[20]. CEDWLA prohibits discrimination in working life, direct or indirect, and regardless of whether an employer has acted with discriminatory intent. Employers are further required to take active measures to promote ethnic diversity in the workplace. CEDWLA provides protection against ethnic discrimination throughout the entire recruitment process and contains provisions regulating the way in which employees are treated.

Russia

The author has been unable to obtain relevant information on legislation and regulations in Russia designed to combat acts of racism and racial discrimination.

Conclusion

There is no evidence of any legislation in force that explicitly excludes or restricts the Saami people's rights or freedoms compared to members of the non-Saami population[21]. Furthermore, all Scandinavian countries have enacted quite comprehensive legislation designed to combat

racism and racial discrimination in general. Obviously, such legislation applies also to acts of racism and racial discrimination directed towards the Saami people. In addition, Norwegian, and in particular Finnish, legislation contain a number of provisions specifically acknowledging and protecting the rights of the Saami people. It remains to investigate, however, whether the letter and spirit of the Finnish and/or Norwegian legislation designed to protect specifically the rights of the Saami people are adhered to in practice.

Furthermore, there is a widespread sentiment within the Saami community that the legislation designed to combat acts of racism and racial discrimination in general is not as vigorously enforced when such acts are directed at the Saami people as when directed at other targeted groups. The sections "Acts of Racism and Racial Discrimination Directed Towards the Saami People" and "The Saami People's Frustration" investigate whether the sentiment of the Saami people is correct. If so, it is obviously unsettling. Perhaps of greater importance, however, is the fact that the absence of explicit discrimination does not necessarily imply that no discrimination exists in practice. The sections "Land Rights", "Cultural Rights", "The Right of Self-Determination", "Saami Women as Victims of Racism and Racial Discrimination" and "Analysis of Saami Children as Victims of Racism and Racial Discrimination" examine whether the Scandinavian countries and Russia do in fact violate the Saami people's human rights and freedoms. As will be further outlined below, should such be the case, such violations also constitute race-based discrimination of the Saami people.

Discrimination under the CERD Convention and other International Legal Instruments

The Meaning of the Term "Discrimination" in International Law

When reflecting over the meaning of the concept "discrimination", most individuals presumably relate the term to how different human beings are treated in comparison with each other. It constitutes discrimination if a person is treated less favorably than someone else, even though there exists no objective reason for the difference in treatment.

If one examines some of the most central international legal instruments outlawing discrimination, international law's definition of the term appears to be slightly different. For example, Article 1.1 of the CERD Convention defines discrimination as follows:

> *"In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."*

Further, pursuant to Article 2.2 of the ICESCR:

> *"The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status";*

and similarly, Article 2 of the Universal Declaration of Human Rights[22] (the "UDHR") holds that:

> *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

All three articles relate "discrimination" to the rights and freedoms contained in the applicable legal instrument. Thus, it appears that when determining what constitutes discrimination under international law, it is not sufficient only to examine how certain individuals are treated relative to each other. One must also investigate how the individuals in question are treated relative to the objective standard of human rights and freedoms established under international law. International law "objectifies" the term discrimination. Under international law, if an individual's human rights and freedoms are violated, he or she is also discriminated.

It has been widely discussed whether human rights and freedoms can be enjoyed, not only by individuals but by peoples or other collective groups as well. The intensity with which this subject has been debated could come across as somewhat surprising, considering that some of the most highly endorsed international human rights instruments acknowledge rights and freedoms which, at least by appearance, can only be enjoyed collectively.

For instance, the cardinal right of self-determination[23], as enshrined in the common Article 1 of the ICESCR and the ICCPR (below, jointly referred to as the "1966 Covenants") can reasonably only be exercised within a group[24]. Another example of a human

right that logically can only be enjoyed collectively is the right not to be subject to genocide. Not surprisingly therefore, few legal scholars today argue against the existence of collective human rights and freedoms. In this context, one can note that the Saami people's right to develop its culture and language, granted by the Finnish Constitution, is referred to by the Finnish government as a collective right[25].

Notwithstanding what has just been said, a few governments, most probably through historic reasons, remain firm on the position that human rights and freedoms can only be enjoyed individually. The countries denying the existence of collective human rights and freedoms are, however, increasingly cornered. For instance, during the sixth session of the Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples[26] (the "DRIP"), only the United States and Sweden objected to a wording of Article 1 that acknowledges that the rights and freedoms protected under DRIP apply to both indigenous individuals and peoples. Since international law's position with regard to collective human rights appears to have been reasonably clarified, this Article will not deal further with the subject.

In conclusion, international law grants to both individuals and peoples certain rights and freedoms. Should an individual or a people be denied any of these rights or freedoms, this constitutes discrimination.

The Right not to be Subject to Discrimination and Indigenous Peoples

Indigenous peoples have their own historical, political and cultural identity. They are united by their distinct societies, by their languages, laws and traditions. In every legal, political, social, cultural and ethnological meaning of the term, indigenous peoples are peoples. They do not differ from other peoples in this regard. Neither does international law distinguish between indigenous and non-indigenous peoples in this context. No international legal instrument evinces that indigenous peoples should not be entitled to the human rights and freedoms established under international law. On the contrary, a number of international legal standards specifically recognize indigenous peoples' human rights. For instance, Article 27 of the ICCPR declares that:

> *"In those states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."*

Introducing his paper before the Expert Seminar on Remedies Available to the Victims of Racial Discrimination, Xenophobia and Related Intolerance[27], Mr. Asbjörn Eide, member of the Sub-Commission, interpreted Article 27 in the context of indigenous peoples. He thus declared that:

> *"Under Article 27 of the [ICCPR, indigenous peoples] were entitled to all the rights established under international law."*

Several other international legal instruments reiterate the cardinal principle of people's equal value. For instance, Article 3.1, of the International Labour Organization ("ILO") Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries[28] (the "ILO Convention No 169") holds that:

> *"Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination."*

Similarly, the DRIP preamble declares that indigenous peoples are equal in dignity and rights to all peoples, and pursuant to Article 1:

> *"Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."*

Professor Erica-Irene A. Daes, the Chairperson-Rapporteur of the UN Working Group on Indigenous Populations, has said that she is not persuaded that there is any distinction between indigenous and non-indigenous peoples, save that indigenous peoples have not been able to exercise the right of self-determination[29].

Thus, Indigenous peoples are entitled to the rights and freedoms conferred on non-indigenous peoples. Indigenous peoples' lack of political influence is hardly reason enough to deprive them of their legal rights. Neither does it give the majority a right to depreciate or discriminate against them, or to denominate them as anything less than peoples. If indigenous peoples are denied the human rights and freedoms established under international law, this constitutes race-based discrimination.

All Peoples Have the Right to Preserve and Develop their Particularities

A people's right to be treated equally with other peoples is not necessarily guaranteed by treating that people in exactly the same way as other peoples. Several human rights and freedoms are protected precisely by recognizing the differences between different cultures. Reasonably, protection of a particular people's human rights and freedoms implies protection of the applicable people's culture, history and way of life. International law endorses the right not to be subject to assimilation. When evaluating the CERD Convention's – and other international legal instruments' - understanding of discrimination, it is not sufficient only to consider Article 1.1 of the CERD Convention. Article 1.1 must be read in the context of Article 1.4, pursuant to which:

> *"Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, ..."*

The CERD Convention recognizes positive discrimination as a mean of guaranteeing marginalized peoples' and other collective groups' full enjoyment of the human rights and freedoms endowed by international law. Other international legal instruments go further, requiring that special measures be adopted should it be necessary to safeguard marginalized peoples' human rights and freedoms. For instance, Article 4 of the ILO Convention 169 states that:

> *"Special measures shall be adopted as appropriate for safeguarding the ... cultures and environment of the peoples concerned";*

and further, pursuant to Article 2,

> *"Governments shall have the responsibility for ... promoting the full realisation of the social, economic and cultural rights of [indigenous] peoples..."*

A more concrete example of special measures that international law requires states to take is found in Articles 22.2 and 27.1 of ILO Convention No 169. Pursuant to these provisions, it is not sufficient to provide indigenous peoples with the same education as the rest of the population. If required, the education must be tailored to meet indigenous peoples' special needs [30].

Consequently, human rights and freedoms can be enjoyed both individually and collectively. Indigenous peoples and individuals are entitled to the human rights and freedoms awarded under international law. If any of these human rights or freedoms is violated, indigenous peoples or individuals are discriminated against. Indigenous peoples have the right to be proud in, preserve and nourish the history, culture and other particularities that distinguish them from their surrounding environment. Should it be necessary, states are obliged to adopt special measures to safeguard the possibility of indigenous peoples to maintain and develop their particularities, that is, the same opportunity as the majority to enjoy the human rights and freedoms conferred by international law.

The Saami people has its own historical, political and cultural identity, its own languages, laws and traditions. As a people, the Saami people is entitled to the human rights and freedoms guaranteed to other peoples inhabiting northern Scandinavia and the Kola Peninsula. Among these rights, some of the most cardinal are the right to land, culture and the rights of self-determination.

Land Rights

Land Rights and the Connection with Cultural Rights[31]

Owing to their attachment to and priority in time as regards their ancestral land, the situation of indigenous peoples is unique. Still, even though indigenous peoples are the original inhabitants of their respective territories, they only occasionally own or control their traditional land. In most cases, the land has been colonized. Seeking to reclaim the land that was once theirs, indigenous peoples are often told that they have not cultivated or otherwise utilized the land in a sufficiently intensive manner to claim any legal right thereto. One of the most distinct features of indigenous cultures - the aspiration to live in harmony with the land, and to leave no traces thereupon – has become a burden for indigenous peoples trying to reclaim the right to their traditional territories.

Indigenous peoples' reluctance to leave scars on the landscape springs from a profound social, cultural and spiritual connection with their land. Indigenous peoples' cultures are connected with the land in a way that non-indigenous cultures are not. Indigenous peoples' main livelihoods and cultural traditions are almost without exception linked to the land they traditionally inhabit[32]. Separated from their land, indigenous peoples are therefore prevented from maintaining and pursuing their culture.

The international community has recognized the inseparable link

between indigenous peoples' land and their possibility of maintaining and pursuing their culture. Both the First and Second World Conferences Against Racism, Racial Discrimination, Xenophobia and Related Intolerance recognized indigenous peoples' special relationship with their land and natural resources and stated that the land should not be taken away from them. Further, according to the United Nations Expert Seminar on Practical Experience Regarding Indigenous Land Rights and Claims:

> *"Indigenous peoples have a distinctive spiritual and material relationship with their lands..."*[33]

The inseparable link between indigenous peoples' land and culture renders it particularly important to recognize indigenous peoples' land rights. Pursuant to Article 14 of ILO Convention No 169:

> *"The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized."*

Further, Article 26 of the DRIP clearly highlights the connection between indigenous peoples' land and cultural rights:

> *"Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions, and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by the States to prevent any interference with, alienation of or encroachment upon these rights."*

And pursuant to Article 27:

> *"Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent."*

CERD, too, has underlined the importance of recognizing and protecting the rights of indigenous peoples to own, develop and control their land and resources. In addition, CERD has stated that land already taken shall be returned[34].

States are required to pay special attention to indigenous peoples'

land rights. They are required specifically to acknowledge the connection between indigenous peoples' land and culture.

The Saami People's Land Rights

Governments and administrative authorities in the Scandinavian countries appear never to have considered that the Saami people could actually have legal rights to the land that they traditionally occupy. The Scandinavian countries' policies towards the Saami people's traditional land have always been based on a presumption that the legal rights are vested solely in the applicable state. The attitude could be considered somewhat surprising. The states are not registered as owners of the land in the applicable countries' land tenure systems[35], nor have the governments presented any evidence in support of their rigid positions.

Only once have Scandinavian courts ruled on the ownership of land in the Saami people's territory. In the so-called *Taxed Lapp Mountain Case*[36], a couple of *Samebys*[37] on the Swedish side of the southern part of the Saami territory claimed that they had acquired title to their traditional territory by utilizing the land since time immemorial[38]. The *Taxed Lapp Mountain Case* only concerned a small part of the Saami people's territory. Moreover, the outcome of the case seems to contradict the rigid position of the Swedish authorities. True, the Supreme Court in part ruled in favor of the government, finding that the Saami parties had not managed to show that they had used the land to an extent necessary to acquire title thereto. The Supreme Court declared, however, that by having utilized their land since time immemorial, the *Sameby* had acquired a right to pursue reindeer husbandry on the area in question. Furthermore – and in this context more importantly - the Supreme Court expressly stated that the outcome as to ownership could have been different had the case concerned some other part of the Saami people's territory. The Supreme Court confirmed that it is possible to acquire title to land by pursuing a nomadic way of life thereupon.

In September 1989, Ms. Kaisa Korpijakko, an esteemed Finnish legal history scholar, published a doctoral dissertation[39] concerning the legal rights to Saami land in parts of Finland and Sweden[40]. In her dissertation, Ms. Korpijakko concludes that, as late as the 1750s, the Finnish/Swedish government regarded the members of the Saami people living in the areas investigated as owner of their land. The Saami ownership was incorporated into the Crown's land tenure system. Ms. Korpijakko bases her conclusion on surveys of taxation records among other documents. Her studies are particularly interesting, since in the *Taxed Lapp Mountain Case*, the Supreme Court

found that the Saami parties had not managed to show that the Crown regarded them as owners of their land in the eighteenth century.

Today, legal scholars – including the reporting judge in the *Taxed Lapp Mountain Case*, Mr. Bertil Bengtsson - claim that it is possible, or even likely, that the Saami people has indeed acquired title to at least parts of the land that they traditionally occupy. Moreover, during the last couple of years, biologists and anthropologists have uncovered further proof of the Saami people's priority in time relative to the land areas in question. Due to lack of financial resources, however, the Saami people is effectively prevented from trying its legal right to its traditional land before a court of law.

Disregarding the recent developments, governments, administrative authorities and other entities in the Scandinavian countries continue to act as if it were established that the Saami people has no legal right to their traditional land. Notwithstanding the studies of Ms. Korpijakko and the outcome in the *Taxed Lapp Mountain Case*, Finnish officials still deem it impossible to acquire title to land through occupation if not cultivating the soil as a farmer. Perhaps the best example of the attitude towards the Saami people's land rights is the policy towards the Saami people's hunting and fishing rights, investigated below. Other examples include the lack of protection against public and private companies exploiting traditional Saami territory.

For instance, the Swedish public power plant company, *Vattenfall*, claiming to derive its right from the state, has filed an application to become registered owner of three separate land areas within the traditional Saami territory. The *Samebys* concerned have challenged the application, holding that *Vattenfall* cannot be registered as owner to the land in question, since *Vattenfall* has not demonstrated that the land belonged to the state in the first place. Indeed, the *Samebys* regard themselves as owners of the land. In the first of the three cases, the Court of First Instance decided in favor of the *Sameby*, stating that it was not sufficiently clear that *Vattenfall* actually owned the land. The Court of Appeal overturned the decision. The case is currently pending in the Supreme Court. Should the Supreme Court concur with the Court of Appeal, the *Sameby* will have to initiate full-scale court proceedings over ownership of the land in question. If not, *Vattenfall* will be the registered owner of a part of the *Sameby's* traditional land.

Privatization of previously publicly held forest and hydroelectric entities has further eroded the Saami people's land rights during the last couple of years. The transfer of land held by such bodies into the private sector, without clarification of the legal status of the land, has

resulted in forest and hydroelectric companies expanding their businesses further into the Saami people's summer and winter pasture areas.

National and international bodies have recognized the problem that privatization constitutes for the Saami people. In 1996, the Finnish Supreme Administrative Court annulled a decision by the Ministry of Trade and Industry regarding twelve claims to work a mine, because the government had not evaluated the effects of the claims on the reindeer industry[41]. Moreover, as will be further outlined under section "Concluding Observations by CERD and the HRC", below, CERD has expressed concern over the effect mining and other economic interests may have on the land rights of the Saami people.

Land Rights - Hunting and Fishing Rights

Historically, the hunting and fishing rights were vested in the Saami people alone. For instance, in Sweden, they were only regulated in 1886 when Sweden's first Reindeer Grazing Act was enacted. The Reindeer Grazing Act transferred the right to administer the hunting and fishing rights from the Saami communities to governmental administrative bodies. The reason for the transfer, expressed in the Bill proposing the Reindeer Grazing Act, was not that the government considered itself to be the owner of the hunting and fishing rights. Rather, the Saami people was deemed incapable of administrating its own hunting and fishing rights. The Bill stated:

> *"Should one consider how poorly suited a Lapp association is to hold deliberations and to make decisions as well as to utilize for the collective good incoming funds, it is probably best to hand over duties of this type to country administration."*

More than 100 years later, Swedish authorities are still administering the Saami people's hunting and fishing rights. No other group has to sustain a comparable guardianship with regard to its property. In the *Taxed Lapp Mountain Case*, the Saami parties argued that this system constituted race-based discrimination. The Supreme Court disagreed. The Supreme Court held that even though perhaps discriminatory as such, the imposed guardianship was not illegitimate, since the Reindeer Grazing Act also granted to the Saami people the exclusive right to pursue reindeer husbandry. In the Supreme Court's opinion, this privilege compensated for the loss of control over hunting and fishing rights[42].

In the *Taxed Lapp Mountain Case*, the government did not claim

ownership over the hunting and fishing rights, which would otherwise have been the natural defense against the Saami parties' claim of unlawful discrimination. Had the hunting and fishing rights not belonged to the Saami people, it would obviously not have constituted discrimination if they did not get to administer them. In 1987, the Swedish government, in a Bill proposing a new Hunting Act[43], suddenly hinted that it considered the state to be the owner of the hunting and fishing rights in the Saami people's traditional territory. Then in 1992, the government presented a Bill proposing amendments to the Reindeer Herding Act of 1971. According to the Bill, the administrative authorities were now no longer administering the Saami people's hunting and fishing rights. Instead, they were administering the hunting and fishing rights of the state. The government did not explain when and how the Saami people transferred the hunting and fishing rights to the state. As late as in 1942, the Swedish Attorney General[44] explicitly declared before the Supreme Court that the hunting and fishing rights on the Saami people's traditional land belonged to the Saami people[45]. Legal scholars have referred to the transfer of the Saami people's hunting and fishing rights to the state as a "confiscation".[46]

The transfer of the hunting and fishing rights has been criticized, not only because of its content but also for the way in which it was passed. For instance, the government did not explain to the parliament the complexity of the question of who actually owns the hunting and fishing rights - and indeed the land as such - before the parliament voted on the proposal. Further, in Sweden, *Lagrådet*, a body consisting of Supreme Court judges, examines a proposed legislation's conformity with the Constitution before it is enacted. The wording of the Bill that the government presented to *Lagrådet* differed from the text that was later presented to the parliament. The text submitted to *Lagrådet* omitted the question of who owned the land areas in dispute.

Conclusion

Because of the inseparable link between indigenous peoples' land and culture, international law requires states to particularly recognize indigenous peoples' land rights.

As has been evident from what has been outlined above, the Scandinavian countries do not recognize the Saami people's land rights under international law. They have not even bothered to investigate what land the Saami people traditionally occupy. Only Norway has attempted such an investigation. The Norwegian Saami Rights Committee has been surveying the Saami people's rights in

general since the 1980s. Among the Committee's tasks is that of examining what rights the Saami people have to their traditional land. The investigation has not yet been completed, but according to information available, the Saami Rights Committee is not expected to award the Saami people any further rights to their traditional land. In Finland and Sweden[47], similar investigations have been discussed but are yet to commence. Meanwhile, the Saami people's land rights erode further, mainly because of exploitation of the Saami people's territory, privatization of previously publicly held land and "confiscation" of rights that previously clearly belonged to the Saami people alone.

Furthermore, the Swedish Supreme Court has acknowledged that it is possible to acquire title to land through nomadic occupation. Research by legal and other scholars evinces that the Saami people has previously been recognized as owner of its traditional land. Still, in their policies and action, the Scandinavian governments disregard the possibility that the Saami people could actually have legal rights to their traditional land also under national law. There seems to exist no other group within Scandinavia that has to sustain similar treatment. There is, for example, no evidence of any farmer whose right to land is questioned in the same manner.

CERD has repeatedly expressed concern over the Saami people's land rights. Demonstrating insight, CERD has connected the Saami people's land rights to the Saami people's possibility of pursuing its traditional way of living[48], investigated below.

Cultural Rights

General

Having established all peoples' right of self-determination[49], the common Article 1 of the 1966 Covenants proceeds to state that:

> *"By virtue of that right [peoples] freely determine their political status and freely pursue their economic, social and cultural development."*

The right to maintain and pursue their culture is of particular importance to indigenous peoples. A mainstream culture rarely needs protection. It flourishes regardless. Indigenous peoples, however, are often marginalized in their respective home areas. They always run a risk of their culture being exploited by, and assimilated into, the majority culture. Consequently, Article 27 of the ICCPR specifically acknowledges, for example, indigenous peoples' right to maintain and develop their culture. In this context can also be mentioned

the United Nations Convention on the Rights of the Child[50] (the "UNCRC"), which explicitly acknowledges indigenous children's cultural rights. Further, pursuant to Article 2 (b) of ILO Convention No 169:

> *"[Governments shall promote] the full realisation of the social, economic and cultural rights of [indigenous] peoples with respect for their social and cultural identity, their customs and traditions and their institutions."*

The Saami People's Main Livelihoods in the Context of the Cultural Rights Protected by Article 27 of the ICCPR and other International Legal Instruments

Reindeer husbandry is the main traditional livelihood of the Saami people[51]. Reindeer husbandry is a keystone in, and a pre-requisite for, preserving the Saami culture. In *Kitok vs. Sweden*[52], the United Nations Human Rights Committee (the "HRC") - the treaty body of the ICCPR - stated that the right to pursue reindeer husbandry form part of the Saami people's cultural rights as protected under Article 27 of the ICCPR as well as under other international human rights instruments. Kitok was a Swedish Saami who had previously been, but no longer was, an active reindeer herder. Kitok wanted to resume his reindeer husbandry. The Swedish Reindeer Herding Act prevented him from doing so. Quoting a previously decided case, *Lovelace vs. Canada*[53], the HRC emphasized that Kitok's right to pursue reindeer herding was indeed protected under Article 27 of the ICCPR[54].

CERD too, has underlined reindeer husbandry's paramount importance for preserving and developing the Saami culture[55]. Moreover, Finland and Sweden are obliged to observe reindeer husbandry's centrality in the Saami culture under European Union ("EU") law. The Treaties regulating the accession of Finland and Sweden to the EU contain, in protocol no 3, some provisions regarding the Saami people, in particular stating that:

> *"Sweden and Finland are committed to preserving and developing the means of livelihood, language, culture and way of life of the Sámi people ... considering the dependence of traditional Sámi culture and livelihood on primary economic activities, such as reindeer husbandry in the traditional areas of Sámi settlement."* [56]

Further, the European Parliament Resolution *"A New Strategy for Agriculture in the Arctic Region"*[57] stresses the importance of enabling

the Saami culture, including reindeer husbandry, to develop on the Saami people's own terms.

The Winter Grazing Areas

The Saami People's struggle with regard to the winter grazing areas constitutes an eminent example of how the land rights of indigenous peoples is connected to their cultural rights[58].

Although not recognizing the Saami people as owner of its traditional land, all three Scandinavian countries entitle the Saami people to pursue reindeer husbandry on land they traditionally occupy. For example in Sweden, in the *Taxed Lapp Mountain Case*, the Supreme Court established that the Saami people has the right to pursue reindeer husbandry on land they have utilized since time immemorial. This reindeer husbandry right, which also encompasses limited hunting and fishing rights, has now been incorporated into the Swedish Reindeer Herding Act. The Reindeer Herding Act does not, however, define what areas the Saami people has utilized since time immemorial. Today, the non-Saami society has expanded into areas over which the Saami people used to be the sole proprietor. As a result, the Saami people today shares large parts of its traditional land with the non-Saami population. The uncertainty as to what areas - in the government's opinion - the Saami people has used since time immemorial has resulted in disputes between members of the Saami and non-Saami population. In particular, the Reindeer Herding Act's silence as to what winter grazing areas the Saami people has used since time immemorial has led to conflicts.

There are currently seven cases pending before Swedish courts, where non-Saami individuals and corporations claim compensation from different *Samebys* because of their reindeer grazing on land to which they hold title. The *Samebys* hold that the areas in dispute form part of their traditional winter grazing areas. Obviously, the title-holders deny that their lands form part of traditional Saami territory. To be successful in contesting the title-holders' claims, the *Samebys* must show that they have pursued reindeer husbandry in the applicable areas since time immemorial, which in practice implies with a certain amount of intensity since at least the 1880s. Both the Saami and non-Saami parties have asked the government to intervene and assist in coming up with a solution acceptable to both sides.

In August 2000, CERD expressed concern over the Saami people's land rights[59]. Responding to CERD's concern, the Swedish Minister of Agriculture announced that a committee would be appointed with the task of establishing what land the Saami people has traditionally used alone or is traditionally entitled to use along with the non-

Saami population[60]. The government did not, however, allocate any financial means for this purpose. As a result, the committee has not yet commenced its work. Meanwhile, a number of the *Samebys* have announced that they can no longer afford to carry on the lawsuits. Other *Samebys* are negotiating with the landowners, trying to reach a settlement. If no settlement is reached, the Court of Appeal is expected to rule on the first of these cases within the next couple of months. Due to lack of financial resources, however, it is questionable if the *Samebys* are able to effectively try their cases before the Court of Appeals.

Most reindeer herders operate on a tight budget. Should they have to pay compensation for utilizing their winter grazing areas, it would no longer be financially feasible for many reindeer herders to pursue their reindeer husbandry. Financial losses caused by predatory animals add to the difficulties of the reindeer herders.

Predatory Animals

Historically, reindeer herders have always defended their herd from hunting predators. In the past, this did not constitute a problem since there were always enough predatory animals to guarantee a continued existence of all species. During the twentieth century, the expansion of the non-Saami society has substantially decreased the total number of predatory animals in Scandinavia. The predators remaining have been forced further into less exploited land-areas which, to a large extent, coincide with traditional Saami territory. The presence of predatory animals in these areas is therefore still substantial. Many predators now depend fully on reindeers for their subsistence. Due to the overall reduction in predators, however, reindeer herders are no longer allowed to hunt the predatory animals to protect their herds, since the authorities fear for the predators' extinction.

The occurrence of the four big predatory animals[61] and the golden eagle in the Saami areas has increased over the last couple of years. In some areas, the increase has been substantial. There are examples of reindeer herders who have lost as many as 90 percent of their reindeer calves to predators during one single year[62]. In certain areas, predatory animals have reduced the total number of reindeer from 10,000 to 3,000 over the last twelve-year period. Some reindeer herders can no longer slaughter any reindeer for their own subsistence since further reduction would risk extinguishing the herd. The four big predatory animals, together with the golden eagle, today constitute the most severe threat to the continued existence of many reindeer herders.

Few, if any, Saami representatives call for a total extinction of the predatory animals. Saami representatives have repeatedly pointed out, however, that it is not feasible for a couple of thousand reindeer herders alone to carry the costs associated with preserving Scandinavia's predatory animals. There must be a cap on how many slain reindeers each reindeer herder should have to sustain. Further, adequate compensation must be paid for each reindeer killed. In none of the Scandinavian countries has the government responded to either demand.

In 1994, Swedish Saami organizations and the government concluded an agreement pursuant to which compensation for killed reindeer should be based on the number of predatory animals in an area[63], rather than on the number of reindeer actually found killed. The idea was, that since it can be calculated approximately how many reindeers it take to feed a predator, one should not have to spend time and resources trying to locate every carcass[64]. However, in its budget, the government allocated only a fixed amount for compensation to reindeer herders for reindeer killed by predators. The amount allotted was not based on the inventory carried out by the government's own agency. As a result, the 1994 agreement did not improve the situation of the reindeer herders. In a recently submitted Bill to the Swedish parliament[65], the government proposed a new policy with regard to predatory animals. The proposed Bill does not contain any limitation on how many killed reindeer each *Sameby* shall have to sustain. Neither does the bill propose any increase in compensation for reindeer slain.

The substantial financial loss caused by predatory animals jeopardizes the survival of many reindeer herders. In many places, predators have practically obliterated the possibility of exercising reindeer husbandry. Many young members of the Saami people are currently abandoning the reindeer husbandry business, and thereby also the culture and way of life of their forefathers.

Language etc.

Language is an important feature of every culture. The Scandinavian countries have acknowledged the Saami language as a minority language in the context of the Council of Europe Charter for Regional and Minority Languages and the Framework Convention on the Protection of National Minorities. To adhere to these standards, all three countries have enacted Saami Language Acts. The Saami Language Acts award members of the Saami people the right to use the Saami language in dealings with administrative authorities and before courts of law. The Saami Language Acts apply irrespective of

the Saami person in question's knowledge of Finnish, Norwegian or Swedish, whatever applicable. Under the Saami Language Acts, road signs in the most northern part of the Saami area shall be erected in both the Saami and the applicable non-Saami language[66]. Further, all three Scandinavian countries support the existence of radio and TV channels that broadcast in the Saami languages.

The Saami Language Acts and the support to Saami media constitute commendable attempts to safeguard the Saami people's cultural rights. In both Norway and Sweden, however, the Saami Language Acts are limited in scope. They only apply in the most northern parts of the traditional Saami territory. According to the Swedish government, only in the most northern parts of the Saami territory has the Saami language "established roots" to a significant extent, wherefore the Saami Language Act shall apply only in those areas.

The division of the Saami territory into one Saami and one non-Saami speaking area is artificial. Logically, the Saami language was the language traditionally spoken - and thus "established roots" - in all areas originally inhabited by the Saami people. If the knowledge of the Saami language has decreased in certain areas, perhaps one can rather assume that the reason is that the roots have been pulled up.

Furthermore, should it be correct that the Saami language is only spoken to a limited extent in certain parts of the Saami territory, then Saami living in these areas are in particular need of assistance to be able to preserve the knowledge of their original language. The Saami Language Acts do not apply to the southern part of the Saami territory, where a particular Saami dialect (*Sydsamiska*) is spoken. The troublesome situation for *Sydsamiskan* is aggravated by the fact that there are no longer any Saami schools[67] located in the South Saami area. Further, the right to use the Saami language in kindergartens applies only in areas where the Saami Language Acts apply. As a result, the knowledge of *Sydsamiska* is diminishing quickly. Similarly, in Finland, knowledge of the particular *Inari* and *Skolt* Saami dialects is on the verge of extinction[68].

Conclusion

The Scandinavian countries' policy with regard to e.g. predatory animals and the Saami people's land rights jeopardizes the continued existence of reindeer husbandry and other traditional livelihoods of the Saami people. Although commendable efforts have been made to preserve the Saami language, a substantial part of the Saami population still runs a risk of loosing its mother tongue. This constitutes discrimination under international law.

The Right of Self-Determination

General

The right of self-determination is perhaps the most fundamental of the collective[69], or indeed all, human rights. It is a keystone in the effective enjoyment of other human rights and freedoms. The common Article 1 of the 1966 Covenants states 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."*

The cardinal principle of self-determination is further recognized in several other international and regional human rights instruments, such as Part VII of the Helsinki Final Act 1975 and Article 20 of the African Charter on Human and Peoples' Rights. In addition, the International Court of Justice has endorsed the right of self-determination in, for example, the Namibia Case[70] and the Western Sahara Case[71].

The right of self-determination applies also to indigenous peoples. It does not differ from other human rights and freedoms in this regard. Article 1 of the 1966 Covenants does not distinguish between peoples, nor do other legal instruments referring to the right of self-determination. Mark again Professor Daes' words:

> *"There is no distinction between indigenous and other peoples, save that indigenous peoples have not been able to exercise the right of self-determination."*

It has previously been pointed out that Article 27 of the ICCPR evinces that indigenous peoples are entitled to all the human rights and freedoms established under international law. Encompassed therein is the right of self-determination. The HRC, in its concluding observations on Norway[72] and Canada[73], has expressed the opinion that the right of self-determination applies also to indigenous peoples.

Not surprisingly therefore, those advocating against a right of self-determination for indigenous peoples are not invoking legal standards. Experience shows that most such arguments are based on the fear that indigenous peoples, if granted such a right, would move to secede from their respective states. These are, however, practical concerns, and can as such not have priority over law. Moreover, there seems to be little basis for such concerns. Few indigenous

representatives have expressed an interest in seceding, and the Declaration on Principles of International Law, UN General Assembly Resolution 2625 (XXV) of 24 October 1970 - urging states to recognize all peoples' right of self-determination – expresses that the right of self-determination need not conflict with the territorial sovereignty of a state. In this context it should be noted that very few – if any - Saami representatives argue for a secession from the Scandinavian countries or Russia.

The Right of Self-Determination and its Relationship to the Right to Land

As it is not possible to consider indigenous peoples' relationship to their ancestral land without taking into account the cultural aspects of this relationship, indigenous peoples' right to land is also interwoven with the right of self-determination. Having reiterated that indigenous peoples have a distinctive spiritual and material relationship with their lands[74], the UN Expert Seminar on Practical Experience Regarding Indigenous Land Rights and Claims, went on to state that

> *"The importance of the issue of the link between self-determination and the right to land is recognized."* [75]

In line therewith, when addressing the Expert Group, Mr. Theodor van Boven, Professor of Law, referred to CERD Recommendation XXII, and linked the possibility of self-development to indigenous peoples' right to their land[76].

The Saami People and the Right of Self-Determination

In all three Scandinavian countries a Saami Parliament has been established. The Saami parliaments have a mandate to decide on certain issues of relevance to the Saami people. On other matters, governments and administrative authorities shall consult with the Saami parliaments. For example, Chapter 1, Section 1, of the Finnish Saami Parliament Act grants to the Saami people autonomy with regard to certain issues that relate to the Saami people's language and culture. This cultural autonomy applies in certain "home rule areas", defined by the Act. Further, pursuant to Chapter 2, Section 9, administrative authorities are obliged to negotiate with the Saami Parliament before deciding on certain issues. Such issues are defined as measures of particular importance that presumably can affect the Saami people's standing as an indigenous people, or that relate to

community planning, certain form of land usage, regulation of businesses forming part of the Saami culture, education or the Saami language and culture in the home rule area. The Saami parliament also decides on allocation of funds designated for the common use of the Saami people. The Norwegian and Swedish Saami parliaments operate in similar ways, although the mandate of these parliaments is more limited in scope than that of their Finnish counterpart.

The Saami parliaments constitute a commendable effort to enlarge the scope of the Saami people's self-determination. The Scandinavian countries have further contributed to the Saami people's self-determination by financially supporting the establishment of bilateral organizations such as the Nordic Saami Institute and the Saami Council. As another example, the Saami people have representation in the Arctic Council.

However, none of the Saami parliaments have a mandate to decide on the issues most central to the Saami people. The Saami parliaments cannot effectively influence the realization of the Saami people's cultural rights. They have no say with regard to predatory animals and cannot otherwise improve the conditions for the reindeer herders or for Saami pursuing other traditional livelihoods. In particular, the Saami parliaments do not have a mandate to decide on matters concerning the Saami people's land rights.

The Anti-Saami Movement in Finland

In Finland, an anti-Saami movement has arisen in the Saami home rule area. The movement consists of individuals and certain municipalities. The movement has registered itself as an organization, which opposes and systematically counteracts the Saami people's cultural autonomy. Members of the organization argue for a wider definition of who should be regarded as Saami. They want to be eligible to stand for election to the Saami parliament, thereby seeking to seize control of the parliament and, ultimately, of the Saami cultural autonomy. The organization has met with domestic authorities claiming to represent the Saami people and has also met with ILO officers at the ILO headquarters in Geneva, claiming to represent an indigenous people. The organization has several times threatened members of the Saami people with civil war and violence. The organization aspires to deny or at least cloud the existence of a distinct Saami culture.

Disregarding the Saami organizations' protests, the Finnish government has broadened the definition of who is to be regarded as Saami. The extension of the definition of Saami jeopardizes the Saami people's control over its cultural autonomy, which in turn might lead

to a dilution of the Saami culture, and, eventually, to an assimilation of the Saami people into the mainstream Finnish society[77].

Conclusion

With the establishment of the Saami parliaments, the Scandinavian countries have given the Saami people a certain degree of self-determination. However, the Saami parliaments have no saying in matters of real importance to the Saami people. As pointed out above, the rights of self-determination constitutes a keystone in the effective enjoyment of other human rights and freedoms. Had the Saami people been awarded effective self-determination, the problems with regard to land and cultural rights would surely have been remedied.

The denial of the Saami people's right of self-determination constitutes discrimination under international law.

Concluding Observations by CERD and the HRC

Finland

On March 4, 1999, CERD submitted its concluding observations on Finland's 13th and 14th periodic reports[78]. CERD expressed concern over the situation of the Saami people in general. In particular, CERD noted that the Saami people had contested the Finnish government's position according to which the State is the sole proprietor of the majority of the Saami people's land. According to one of the CERD experts, Finnish legislation does not secure the Saami people's right to land, water or natural resources, or their traditional livelihoods. CERD reiterated previously expressed concern over mining and other economic interests that might threaten the way of life of the Saami people. CERD urged Finland to find a solution that observed the interests of the Saami people in this regard. Regarding the right of self-determination, one of the CERD experts expressed concerns over the organization of non-Saami that systematically opposes and obstructs the operation of Saami cultural autonomy. CERD noted that by falsely claiming to be Saami, the organization aims to seize control over the Saami parliament and thereby over the Saami cultural autonomy.

On September 8, 2000, CERD released its concluding observation on Finland's 15th periodic report[79]. CERD emphasized its regret that the question of ownership of the Saami people's land had not yet been resolved. Further, CERD urged Finland to accede to ILO Convention No 169.

Sweden

In August 2000, CERD submitted its concluding observations on Sweden's 13th and 14th periodic reports[80]. CERD noted the Saami Language Act but urged Sweden to broaden the geographical scope of the act to cover the entire Saami territory. Further, CERD expressed its concerns over the Saami people's land rights. In particular, CERD stressed its concern over the hunting and fishing rights and the privatization of land in traditional Saami territory. CERD recommended that Sweden should introduce legislation recognizing traditional Saami land rights and reflecting the centrality of reindeer husbandry to the way of life of the Saami people. Finally, CERD recommended that Sweden should ratify ILO Convention No 169.

Norway

On November 5, 1999, the HRC submitted its concluding observations on Norway's fourth periodic report[81]. The HRC noted the positive developments in the field of protecting and promoting the human rights of the Saami people, in particular the strengthening of the Saami parliament. However, the HRC expected Norway next time to report on the Saami people's right of self-determination under Article 1 of the ICCPR.

Comments and ILO Convention No 169

Formally, CERD's and HRC's recommendations only apply to the state concerned. However, the Saami people's problems with regard to discrimination are not specific to a particular country. Consequently, although formally directed towards a specific state, CERD's and HRC's recommendations shall be understood to apply to all states the Saami people inhabit. It appears that CERD and HRC share the opinion that the Scandinavian countries violate the Saami people's cultural rights, its right to land and the right of self-determination.

Regarding CERD's recommendation to ratify ILO Convention No 169, Finland, Russia and Sweden have not yet ratified this convention. Norway ratified ILO Convention No 169 in 1991. As should be clear from what has been outlined above, Norway has yet to comply with several of the more important provisions contained therein. Finland's and Sweden's main obstacle to ratification of ILO Convention No 169 is Article 14, regarding lands rights.

In spring 1995, the Finnish parliament required the government to prepare, as soon as possible, a report on how and with what practical consequences the obstacles to a ratification of ILO Convention No 169 could be removed. In spring 1996, the Finnish Ministry of Labor and Ministry of Justice submitted a report on the issue. The report

concluded that obstacles still exist, for which reason the ministries deemed it necessary to wait for a complete study to be carried out. The study – which did not cover the question of the Saami people's right to land - was completed in the year 2000. Based on the results of this study, a committee is further investigating what measures are necessary for Finland to be able to ratify ILO Convention No 169. This committee is expected to report by November, 2001. A separate one-man committee is investigating what measures are necessary with regard to the Saami people's land rights.

Similarly, in September 1997, the Swedish government appointed a committee to investigate the implications associated with a ratification of ILO Convention No 169. In its report, submitted in March 1999, the committee recommended accession to ILO Convention No 169 within a period of five years[82]. The government's respons was to launch yet another investigation with the purpose of considering whether Sweden should adopt ILO Convention No 169. According to the latest information available, the results of the second investigation will be presented sometime during the autumn 2001.

Documentation of Specific Incidents of Racism and Race-related Discrimination

Racism and the Assimilation Process

It has been claimed that the Scandinavian countries' policy with regard to the Saami people during the late nineteenth and early twentieth century was marked by racist theories, influenced by the studies of Charles Darwin. During the early twentieth century, Scandinavian scientists traveled around the Saami territory to measure the Saami people's skulls and to conduct other similar experiments. Also in legislation one could find strains of racism. For instance, Swedish legislation prohibited members of the Saami people from living in normal houses until the 1940s, and Saami children were not allowed to attend schools alongside other children.

As the twentieth century proceeded, the authorities in Scandinavian countries, particularly in Norway, gradually changed their policy towards the Saami community. The aim was no longer to separate the Saami from the non-Saami peoples. Rather, a desire to assimilate the Saami people into the majority society emerged and came to dominate the Scandinavian countries' attitude towards the Saami people. For example, Norwegian and Finnish legislation prohibited the use of the Saami language. Further, in Norway, Saami-speaking persons were not entitled to own real estate. Members of the Saami people had to declare themselves Norwegian and denounce their Saami origin to be allowed to buy a house. These regulations remained in force well into the 1960s.

Although no longer measuring the Saami people's skulls, the Scandinavian governments used racism as a tool in their assimilationist aspirations. The strategy was to stigmatize the Saami identity[83]. The message conveyed - directly or indirectly – was that the Saami people's way of life was less developed than the way of life of the non-Saami society. Thousands of members of the Saami population hid, and ultimately managed to repress, their Saami origin. Parents refrained from teaching their children their own mother tongue. The assimilation process was particularly fierce in the northern part of Norway. In some villages, where only the Saami language was spoken in the 1950s, today only a couple of people identify themselves as Saami. There are families where teenage siblings are separated by the fact that one sister regards herself as a member of the non-Saami Norwegian population while her sister identifies herself as a Saami. Other families no longer know if they are Saami or not.

Acts of Racism and Racial Discrimination Directed at the Saami People

In 1998, the Swedish Ombudsman Against Ethnical Discrimination[84] (the "DO") commissioned a survey regarding the Saami people's experiences with regard to racism and racial discrimination[85]. One third of the Saami participating stated that they had been verbally or physically abused during the previous year because of their Saami origin. 20 percent had been victims of threats or similar harassment. In *Norrbotten*, the most northern of Sweden's counties, half of the Saami men had been subjected to verbal abuse during the previous year.

One out of ten Swedish Saami children had experienced unfavorable treatment in school on at least one or two occasions during the previous year. Similarly, in 1996, a local newspaper in *Enontekiö*, Finland, published a letter from four pupils to the principal of their former elementary school. In the letter, the former pupils described the discrimination they had experienced throughout their school years because of their Saami origin. Further, as late as in the 1980s in *Utsjokki*, Finland, a biology teacher is reported to have claimed that Saami children were more stupid than non-Saami children due to a different brain structure. Similarly belittling the Saami children, another teacher is quoted to have said that only reindeer herders go to college in *Kautokeino*[86], while normally minded persons go to normal schools. The schools in question have denied all accusations of discrimination. It is a fact, however, that when asked

about their names in school, many Saami children in Northern Finland still conceal their real Saami names and identities. It appears that although the assimilation programs are formally abolished, remnants of it remain are still traceable.

As the section "Language etc." described, under the Norwegian and Swedish Saami Language Acts, road signs in the northern counties of Norway and Sweden must be bilingual. On several occasions, the Saami road signs have been destroyed. Sometimes they have been gunned downed with firearms. In a northern Norwegian municipality, the predominant electoral pledge by the political party winning the local election was to work for the abolition of the Saami Language Act.

In 1999, a car drove around Stockholm, Sweden, with a bumper sticker announcing "Save a wolf – shoot a Saami". The bumper sticker attracted substantial attention - and caused serious dismay - within the Saami community. A complaint was filed, claiming that the owner of the car was guilty of agitating against an ethnic group. Since the period of prosecution had expired, it was, however, not possible to push charges. The Saami community reacted with anger and frustration, the sentiment being that the Swedish authorities would have reacted more forcefully had the bumper sticker advocated violence towards some other targeted group.

The Saami People's Frustration

Even though correct that the time for prosecution had expired, the Saami community's reaction puts the finger on a sore spot when dealing with racism and race-based discrimination directed at the Saami people. It is a general feeling within the Saami community that acts of racism and/or racial discrimination are not as vigorously combated when directed at the Saami population as when addressing other targeted groups.

An example similar to the one of the bumper sticker can be fetched from the sport-arenas. When football or ice hockey teams from northern Scandinavia encounter teams from the southern part, their players are not uncommonly depreciatingly referred to as "*lappdjävlar*" by the home crowd. "*Lappdjävel*" is an abusive name for Saami. Such utterances rarely, or never, attract the attention of the Scandinavian authorities or media. The crowds in sport arenas sometimes verbally abuse colored players too. In general, both media and authorities vigorously condemn such behavior. Obviously, combating racist tendencies is always commendable. Perhaps it is understandable, however, if the Saami community ponder over why the two examples stir different reactions from media and administrative authorities. In the autumn of 2000, the United Nations Committee

Against Torture (the "UNCAT") criticized Sweden for its treatment of refugees arriving in the country. The criticism caused immediate reactions from the government, which promised to remedy the situation. As the section "Concluding Observations by CERD and the HRC" described, UNCAT was not the only UN body to criticize Sweden in the autumn 2000. CERD, too, criticized Sweden for its treatment of the Saami population. The criticism from CERD has stirred no reaction from the government.

According to the survey commissioned by the DO referred to above, more than 90 percent of the members of the Saami people experienced Sweden to be a racist country. They also felt that hostility towards the Saami population had increased over the last couple of years. The percentage of the Saami people considering Sweden to be a racist country exceeded the numbers recorded in any immigrant ethnic group.

Saami Women as Victims of Racism and Racial Discrimination

Today, most members of the Saami people live together with the non-Saami population in the non-Saami society. Gender discrimination in the majority society therefore affects Saami women as well. It is, however, outside the scope of this Article to investigate gender discrimination in general.

Women historically held a strong position within the Saami community. Women and men were both active in reindeer husbandry, equal in status and in importance to the welfare of the community. During the most recent decades, technical improvements, society's progress and in particular new legislation, have changed the foundations for reindeer husbandry. These developments have weakened the Saami women's position within reindeer husbandry,[87] and thereby within the Saami community itself.

The recent developments are particularly noticeable in Norway. The Norwegian Reindeer Herding Act 1978[88] introduced a new concept - "reindeer herding entity"[89] - into reindeer husbandry. Following the introduction of the reindeer herding entity, a person needs a permit from the authorities to be allowed to pursue reindeer husbandry. Under traditional Saami law, the reindeer belonged to the household as a whole and not to a particular member of it. This is no longer possible. The reindeer must now be vested in a specific person, that is, the holder of the reindeer herding entity permit. Experience shows that such permits are predominantly granted to men. In 1996, only ten percent of the permits granted were given to

women[90]. Many Norwegian Saami women wanting to pursue reindeer husbandry are reduced to doing so within their husband's reindeer herding entity. As a result, Saami women have become gradually less involved in reindeer husbandry. The reindeer herding entity system has indirect consequences as well. For example, Norwegian tax authorities view applications for VAT-reduction from Saami men and women differently. Saami men are, to a larger extent than Saami women, allowed to reduce their taxes because of expenditure for snowmobiles and other vehicles utilized in reindeer husbandry. Further, a spouse not formally owning her reindeer risks suffering financially in a possible divorce.

Reindeer herding entities are particular to Norway. To pursue reindeer husbandry in Sweden, one must be member of a *Sameby*. Even though it is the authorities that formally grant membership in a *Sameby*, existing members have substantial influence over who, if any, should be accepted as new members. There are Saami women claiming that certain *Samebys* are more inclined to accept men than women as new members. In a commendable project, the Swedish government has allocated resources to examine to what extent gender discrimination exists within the Saami society.

Saami Children as Victims of Racism and Racial Discrimination

General

Pursuant to Article 26.1 and 2 of the Universal Declaration of Human Rights (UDHR):

> *"Everyone has the right to education ... Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance and peace."*[91]

Further, pursuant to Article 8.1 of the United Nations Convention on the Rights of the Child (UNCRC):

> *"States Parties undertake to respect the right of the child to preserve his or her identity ..."*

and, under Article 29.1 (b):

> *"States Parties agree that the education of the child shall be directed to the development of respect for the child's parents, his or her own cultural identity, language and values ..."*

Under international law, states have an obligation to respect the identity of a child. The obligation to respect children's identity applies in general, but is particularly emphasized with regard to education. International law particularly emphasizes the obligation to respect the identity of children from indigenous cultures and to pay attention to their cultural rights. Pursuant to Section 30 of the UNCRC:

> *"In those States in which ... persons of indigenous origin exist, a child ... who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her culture, to profess and practice his or her own religion, or to use his or her own language."*

Providing the same education to children with different cultural backgrounds does not necessarily fulfill the right to education. If necessary, special measures shall be taken to safeguard indigenous children's possibilities to maintain and develop their cultural rights. As the section "All Peoples Have the Right to Preserve and Develop their Particularities", above, touched upon, pursuant to ILO Convention No 169 Article 22.2:

> *"Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities ..."*

and pursuant to Article 27.1:

> *"Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with [indigenous peoples] to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their social, economic and cultural aspirations."*

It is thus not sufficient to provide indigenous peoples with the same education as the majority population. If required, the education must be tailored to meet indigenous children's special needs.

Saami Children and Youth

All three Scandinavian countries have established elementary Saami schools. The Saami schools give Saami children a chance to preserve and develop their language and culture. Further, all Scandinavian countries offer the possibility of higher education in the Saami language and culture. In for example Finland, the establishment of the Educational Center in *Inari* allows many Saami to switch from Finnish to the Saami language. The Saami schools are, however, few. In Norway and Sweden, Saami children in large parts of the Saami territory in practice do not have access to a Saami school. There are no Saami schools in the South Saami area, either in Norway or Sweden[92]. In Sweden, there exist no Saami secondary Schools. In areas where Saami schools do exist, textbooks and other educational material are often obsolete and otherwise of poor quality. For those Saami children that do not have access to Saami schools, the non-Saami schools and the Scandinavian society in general offer basically no education or information about the Saami society or culture. Further, there exist few Saami children books etc., since there are not enough financial means available to produce these kinds of media.

Children are particularly susceptible to assimilation into the majority society[93]. If not adequately equipped with a knowledge of – and self-confidence in - their culture, Saami children risk confusing, or losing, their Saami identity. International law requires the Scandinavian countries and Russia to respect the Saami children's Saami identity. They are obliged to provide all Saami children with the possibility of preserving and developing their culture, including the possibility of attending a school that addresses their special needs, and incorporates their histories and knowledge into the education. Today, many Saami children are not at all or only inadequately educated in their own language and about their own culture. This violates their cultural rights as established under international law.

Recommendations

The above has examined how the Scandinavian countries and Russia discriminate against the Saami people with regard to perhaps the most central human rights and freedoms: the right to land, the right to maintain and develop the culture and the right of self-determination. To determine whether discrimination exists, the situation of the Saami people has been compared with existing international law. If an international legal standard is violated, this constitutes discrimination. To suggest measures necessary to remedy such discrimination is therefore easy. To combat the discrimination against the Saami people, the Scandinavian countries and Russia need only adhere to the widely accepted and highly endorsed international legal instruments discussed above. In particular:

- ILO Convention No 169, DRIP and CERD, thereby acknowledging the Saami people's land rights, including its hunting and fishing rights. An end must be put to the privatization of land in, and exploitation of, the Saami people's traditional territory. The governments must stop acting as if it was established that the right to the Saami people's land is vested solely in the state, until they have presented evidence that such is actually the case. The inseparable link between the Saami people's land and culture must be acknowledged. In this context, the continued existence of reindeer husbandry must be safeguarded and the hunting and fishing rights must be immediately returned. The Saami people must be given financial opportunities to effectively test its legal right to its traditional land before a court of law, in particular with regard to the winter grazing areas. Finland, Russia and Sweden must ratify ILO Convention No 169. Norway must adhere to its provisions.
- The ICCPR, the ICESCR, the UDHR, the DRIP, the UNCRC, ILO Convention No 169, CERD and the EU bodies, thereby safeguarding the Saami people's possibility of maintaining and developing its culture. The paramount importance of reindeer husbandry to the Saami culture must be acknowledged. In this context, the problems with regard to predatory animals and the winter grazing areas, which constitute an immediate threat to the continued existence of reindeer husbandry, must be remedied without further delay. Women must be allowed the same possibility as men to pursue reindeer husbandry. The Saami Language Acts must be extended to apply in the entire Saami territory. Particular attention must be given to the *South*, *Inari* and *Skolt* Saami languages. All remnants of the assimilation programs must come to an end. It must be recognized that children are particularly susceptible to assimilation. Saami children must be provided an education tailored to their particular needs which adequately equips them with a knowledge of – and pride in - their culture and language, so that they are not confused in, or lose altogether, their Saami identity.
- The ICCPR, the ICESCR and the HRC, thereby acknowledging the Saami people's right of self-determination. The mandate of the Saami parliaments must be broadened to encompass issues of real importance to the Saami people, including matters relating to the

Saami people's cultural rights. In particular, the connection between the Saami people's right of self-determination and the right to land must be recognized. In Finland, the anti-Saami organization that seeks to seize control over the Saami Parliament and the Saami culture autonomy must be stopped.

Notes

1 The author of the article is a Saami from Sweden. He is therefore primarily familiar with the situation of the Saami people inhabiting that country. He thanks colleagues in Finland and Norway for their input on the situation of the Saami outside the Swedish borders.

2 The Scandinavian countries would normally be Denmark, Norway and Sweden. In this article, however, Scandinavia is understood to be Norway, Finland and Sweden.

3 Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of December 21, 1965.

4 See *RP 309/1993 rd* p. 69 and compare section "Cultural Rights", below.

5 *Sametingslag 17.7. 1995/974.*

6 *Lov om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven) av 21. mai nr. 30 ,1999.*

7 Adopted on November 4, 1950.

8 Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of December 16, 1966.

9 Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of December 16, 1966.

10 The Norwegian Constitution does not recognize the Saami people as a people.

11 *Sameloven.*

12 *Straffeloven.*

13 *Arbeidsmiljöloven.*

14 In the early 1990s, the Swedish Saami Rights Commission proposed an amendment to the Swedish Constitution in this regard. The government, however, deemed it unnecessary to strengthen the legal protection of the Saami people. See *Prop. 1992/93:32, Samerna och samisk kultur m.m.*, p. 30.

15 *Rennäringslagen 1971:437.*

16 Promulgated by KK 1974:152.

17 *Brottsbalken.*

18 *Skadeståndslagen (1972:207).*

19 *Lag (1999:130) om åtgärder mot etnisk diskriminering i arbetslivet.*

20 *Lag (1999:131) om Ombudsmannen mot etnisk diskriminering.*

21 Compare, however, the section "Documentation of Specific Incidents of Racism and Race-Related Discrimination", below.

22 Adopted and proclaimed by General Assembly Resolution 217 A (III) of December 10, 1948.

23 Regarding the right of self-determination, see further the section "The Rights of Self-Determination", below.

24 It is difficult to picture an individual exercising the right of self-determination in the widely accepted meaning of the term.

25 See RP 309/1993 rd p. 69.

26 The DRIP has not yet been adopted. Still, the DRIP has been developed and endorsed by the international human rights experts in the United Nations Sub-Commission on the Promotion and Protection of Human Rights (the "Sub-Commission"). This guarantees DRIP's conformity with existing international law.

27 See A/CONF.189 /PC.1/8, para. 30.

28 Adopted at ILO's 76th session on June 27, 1989, coming into force on September 5, 1991.

29 See E/CN.4/Sub.2/AC.4/1996/2. para. 72.

30 See further the section "Saami Children as Victims of Racism and Racial Discrimination", below.

31 The section "Cultural Rights", below, examines the Saami people's cultural rights in general.

32 Compare in this context the *Kitok Case*, discussed under the section "Cultural Rights" below.

33 See E/CN.4/Sub.2/AC.4/1996/6.

34 See General Recommendation XXII.

35 With a few exceptions.

36 See Supreme Court decision *NJA 1981* s 1.

37 A *Sameby* is a collective and well-defined social entity of individual Saami, accepted as a legal entity. In Sweden, only members of a *Sameby* are entitled to exercise reindeer herding. The legal distinction between Saami that are or are not members of a *Sameby* has for years been a source of internal conflict within the Saami community in Sweden. This article will not deal further with this conflict.

38 Swedish legislation defines immemorial rights as follows: *"It is immemorial right, when one has had some real estate or right for such a long time in undisputed possession and drawn benefit and utilized it, that no one remembers, or can in truth know, how his forefathers, or he from whom he got the rights, first came to get them"*, see *Jordabalken*: 15; Promulgation of the new *Jordabalken, SFS 1970:995.*

39 In Finnish titled, *Saamelaisten oikeusasemasta Ruotsi-Suomessa.*

40 Finland and Sweden, at the relevant time being one country.

41 See Supreme Administrative Court decision *T 1447*, of May 15, 1996.

42 Reporting Judge Bengtsson disagreed, holding that the guardianship was indeed discriminatory. He did not, however, find the regulation obviously discriminatory, which would have necessitated the Reindeer Herding Act being disregarded as unconstitutional.

43 Prop. 1986/87:58.

44 *Justitiekanslern.*

45 See Supreme Court decision *NJA 1942 s 336.*

46 See for example Professor Mr. Hugh Beach, Department of Cultural Anthropology, Uppsala University, Uppsala, Sweden, in *Beslutet om Småviltsjakten, En studie i myndighetsutövning*, Report issued by the Swedish Saami Parliament, April 1994, p 64 ff and Professor Anders Lange in *Samer om diskriminering, En enkät- och intervjuundersökning om etnisk diskriminering på uppdrag av Diskrimineringsombudsmannen (DO), Centrum för invandringsforskning, Stockholms universitet*, and compare Professor Bertil Bengtsson, *Några samerättsliga frågor, Svensk Juristtidning 2000*, p 36 ff and p 42.

47 Regarding Sweden, see further the section "The Winter Grazing Areas", below.

[48] See further the section "Concluding Observations by CERD and the HRC", below.
[49] Regarding the right of self-determination, see the section "The Right of Self-Determination", below.
[50] UNGA Doc A/RES/aa/25, adopted on December 12, 1989. See further the section "Saami Children as Victims of Racism and Racial Discrimination", below.
[51] As previously pointed out, however, reindeer husbandry is not the main livelihood of all Saami. For example, in certain areas the Saami gain their main income from fishing.
[52] See CCPR/C/D/197/1985.
[53] See CCPR/C/D/24/1977.
[54] The HRC expressed serious doubt that the Swedish Reindeer Herding Act was in compliance with Article 27 of the ICCPR. Still, Sweden avoided reprimands from the HRC. The reason was that Kitok had been awarded some, even though not full, fishing, hunting and reindeer husbandry rights by the *Sameby* concerned. Kitok was therefore not, in HRC's opinion, denied the right to enjoy his own culture in community with other members of his group.
[55] See the section "Concluding Observations by CERD and the HRC", below.
[56] See document AA-AFNS 5 FINAL.
[57] See document A4-0073/99.
[58] Compare the section "Land Rights and the Connection with Cultural Rights", above.
[59] See further the section "Concluding Observations by CERD and the HRC", below.
[60] The suggestion to appoint a committee with the task to identify the land that the Saami people have traditionally occupied was originally raised in connection with the investigation of whether Sweden should ratify ILO Convention No 169. See further the section "Comments and ILO Convention No 169", below.
[61] Scandinavia's four big predatory animals are wolf, wolverine, lynx and brown bear.
[62] The massive amount of reindeer killed has resulted in some reindeer herders ironically referring to themselves as predatory animal breeders.
[63] According to an inventory of the stock of predatory animals carried out jointly by Saami representatives and the Swedish Environmental Agency (*Naturvårdsverket*).
[64] Finland still practices the old system. To find the killed reindeer, reindeer herders follow the tracks of the predatory animals. In addition to the burden associated with finding as many as possible of their slain reindeer, this system causes additional dismay, since reindeer herders are often accused of illegally hunting predatory animals when trying to locate the carcasses.
[65] *Prop. 2000/01:57 om en sammanhållen rovdjurspolitik*
[66] As the section "Acts of Racism and racial Discrimination Directed Towards the Saami People", below, further outlines, in Norway and Sweden, there are examples of members of the non-Saami population vigorously protesting against this feature of the Saami Language Acts.
[67] Regarding Saami schools and education, see the section "Saami Children and Youth", below.
[68] Today, only about 400 – 500 people respectively speak the *Inari* and *Skolt* Saami languages as a mother tongue.

[69] Regarding collective human rights, compare the section "The Meaning of the Term 'Discrimination' in International Law", above.
[70] See (1971) ICJ 16.
[71] See (1975) ICJ 12.
[72] See CCPR/C/79/Add.112/1999 para. 17. See further the section "Concluding Observations by CERD and the HRC", below.
[73] See CCPR/C/79/Add.105/1999 para. 7.
[74] Compare the section "Land Rights and the Connection with Cultural Rights", above.
[75] See E/CN.4/Sub.2/AC.4/1996/6.
[76] See A/CONF.189/PC.1/8, para. 57 and 58.
[77] CERD has recognized the potential threat that this organization constitutes to the Saami culture in Finland, see further the section "Concluding Observations by CERD and the HRC", below. Regarding assimilation, see further the section "Specific Incidents of Racism and race Related Discrimination", below.
[78] See HR/CERD/99/8.
[79] See CERD/C/57/CRP.3/Add.3.
[80] See CERD/C57/CRP.3/Add. 2.
[81] See CCPR/C/79/Add. 112.
[82] See SOU 1999:25 – *Samerna ett ursprungsfolk i Sverige*.
[83] Compare the section "Acts of Racism and Racial Discrimination Directed Towards the Saami People", below.
[84] *Diskrimineringsombudsmannen.*
[85] *Samer om diskriminering. En enkät- och intervjuundersökning om etnisk diskriminering på uppdrag av Diskrimineringsombudsmannen (DO)*, Centrum för invandringsforskning, Stockholms Universitet.
[86] *Kautokeino* is a city in northern Norway with predominantly a Saami population.
[87] See Jobs, Solveig. 2000. *Hovedoppgave i sosialantropologi: Tradisjonelle kunskaper i bevegelse – Om kontinuiteten i reindriftas praksiser*, Department of Social Studies, Tromsö University.
[88] In Norwegian, *Reindriftsloven.*
[89] In Norwegian, *Driftenhet.*
[90] See Bull, Kirsti Ström. 1997. *Studier i reindriftsrett*, Tano-Aschehoug, Oslo.
[91] Compare also Article 5 of the United Nations Educational, Scientific and Cultural Organization ("UNESCO") Convention against Discrimination in Education, which entered into force on May 22, 1962.
[92] Compare the section "Language etc.", above.
[93] Compare the section "Racism and the Assimilation Process", above.

References

Bengtsson, Bertil. 2000. "Några samerättsliga frågor." In: *Svensk Juristtidning*, Uppsala. Pp. 36 - 46.
Beach, Hugh. 1994. "Shots Heard Round the World." In: *Beslutet om Småviltsjakten, En studie i myndighetsutövning.* Report issued by the Swedish Saami Parliament, Kiruna. Pp. 64 – 69.
Bull, Kirsti Ström. 1997. *Studier i reindriftsrett*, Tano-Aschehoug, Oslo.

Jobs, Solveig. 2000. *Hovedoppgave i sosialantropologi: Tradisjonelle kunskaper i bevegelse – Om kontinuiteten i reindriftas praksiser,* Department of Social Studies, Tromsö University, Tromsö.

Korpijakko, Kaisa. 1989. *Saamelaisten oikeusasemasta Routsi-Suomessa.* Doctoral Dissertation.

Lange, Anders. 1998. "Samer om diskriminering." In: *En enkät- och intervjuundersökning om etnisk diskriminering på uppdrag av Diskrimineringsombudsmannen (DO),* Centrum för invandringsforskning, Stockholms Universitet, Stockholm.

CHAPTER 5

BEHIND THE BAMBOO CURTAIN: RACISM IN ASIA

By Suhas Chakma

Is racism a Western phenomenon of the discriminatory relationship between Whites and non-Whites? The word "racism" spontaneously conjures up the image of discrimination by whites of non-whites. Although monotheistic religions, in their archaic form, contributed to the origins of racism, the stereotypical notion of racism is intrinsically intertwined with European colonialism, with particular reference to the Americas, Australasia and Africa both in the colonial and post colonial era. Afro-Asian countries consistently focused their attention on stereotypical notions of racism, such as enslavement of the Negroes, the Nazi holocaust and the attitudes and practices of the misconceived superiority of the Western countries, their policies and practices of colonialism and expansionism and structures with built-in forms of discrimination. The African, Asian and Latin American countries at the United Nations raised racial discrimination and apartheid as a political device against European countries and countries ruled by European descendants such as America, Canada, New Zealand, Australia and others, as if racism and racial discrimination existed exclusively in the colonial context and apartheid and similar forms of segregation were a poisonous evil that only plagued the majority of the population in South Africa. A large majority of the people in Asia construe "racism" in that manner. Racism is undoubtedly manifested more explicitly in the West but does it preclude the existence of racism elsewhere?

The bamboo curtain hiding the racial discrimination in Asia is falling apart. The treatment of the Koreans in Japan, the Bangladeshi illegal migrant workers across the self-proclaimed Tiger economies of East Asia and the Middle East, the indigenous Jumma people in Bangladesh, the Adivasis[1] in India, can be described as nothing short of "racism" as defined in the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (ICERD): (hereafter "the CERD Convention"). Article 1(1) of the CERD Convention states:

> *"In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."*

This article examines racial discrimination against the indigenous peoples of Asia on the basis of their race, colour, descent, national or ethnic origin. Although, many national constitutions and laws prohibit racial discrimination, there is a yawning gap between rhetoric and reality. Societal discrimination against indigenous peoples impairs the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Pervasive Racism

The worst form of racism in Asia has been the denial of the existence of racism by the governments in Asia. This racist attitude transcends geographical borders, political ideologies or form of governments – democrat, authoritarian or dictator. For governments, racism existed only in a colonial and apartheid context. This despite the fact many national constitutions prohibit racial discrimination. For example, *"Articles 15 (i) and 15 (ii) of the Constitution of India prohibit all forms of discrimination by the State and its agents, or between individuals, including discrimination based on race and castes, as well as article 153, paragraphs (a) and (b), and article 505 of the Penal Code prohibiting actions that promote disharmony, hatred, feelings of enmity and ill-will on the grounds of race or religion."*[2]

The Government of India, in its periodic report to the CERD Committee, stated that Article 1 of the CERD Convention was not applicable[3]. The CERD Committee rebuked India. The CERD Committee stated, *"Noting the declaration in paragraph 7 of the report, reiterated in the oral presentation, the Committee states that the term "descent" mentioned in article 1 of the Convention does not solely refer to race. The Committee affirms that the situation of the scheduled castes and scheduled tribes falls within the scope of the Convention."*[4]

With regard to the interpretation of the definition of racial discrimination contained in article 1 of the Convention, the CERD Committee, while examining the report of Japan in March 2001, stated that, "contrary to the State party, [that] the term 'descent' has its own meaning and is not to be confused with race or ethnic or national origin".[5] The Philippines Government, in its periodic report to the CERD Committee, stated that,

"racial discrimination, as defined under article 1, paragraph 1, of the Convention, is alien to the prevailing mores and culture of the Filipino people. The type of racial discrimination similar to what was practised in South Africa when the policy of apartheid was not yet dismantled has never officially or factually existed in the Philippines, neither in a systemic nor formal nor intermittent nor isolated manner. Hence, there have never been any references to the existence of a discriminatory policy on racial grounds nor have there been any allegations of instances of racial discrimination as a specific kind of human rights violation in the Philippines, even before or immediately after the Philippines adopted and ratified the Convention on 21 December 1965 and 15 September 1967, respectively." [6]

In its periodic report to the CERD Committee, Bangladesh maintained that:

"categorical distinction of 'race' or 'ethnic origin' per se has ceased to exist for the Bangladeshi people. Race itself as an issue does not impinge on the consciousness or outlook of the Bangladeshi people in their intrasocial relations as they seek to find homogeneity in their identity through common language, tradition, culture, norms and harmony in tolerance and coexistence. The quintessence of Bangladeshi society is therefore the intermingling of races and any consideration of Bangladesh's overall approach and policy towards the elimination of racial discrimination must begin with an understanding of the racial homogeneity of the Bangladeshis." [7]

In the same report, the Government of Bangladesh states,

"racially, socially and politically, Bangladeshis are one people of whom more than 99.5 per cent are homogenous, while only 0.45 per cent represent a tribal population which is unique in Bangladeshi society in terms of distinct tribal, cultural and social norms and traditions." [8]

Vietnam, in its recent report to the CERD Committee, states that,

"For the Vietnamese people, racial discrimination is unfamiliar and does not exist in the country."[9]

At the same time, the Ambassador of Vietnam told the CERD Committee in October 1994 that,

"the Government of Vietnam was aware that the elimination of racial discrimination meant guaranteeing ethnic groups an acceptable level of socio-economic development and giving them preferential treatment." [10]

While examining the report of the Government of India, Professor Theo van Bhoven, a member of the ICERD and former Director of the UN Centre for Human Rights stated,

"When the Convention had been drafted, the delegation of India at that time had made a valuable contribution to the same article 1 ... and there seemed to be some discrepancy between that historical contribution and the attitude in the report."

This perceptible change in policy on the part of the Governments across Asia remains a disturbing feature in addressing race and discrimination issues.

There exists no society or race in the world that has not at some point in time intermingled with other races or ethnic groups or has not imbibed cultural traits from other races or ethnic groups. It does not, however, mean that distinctions of "race" or "national or ethnic origin" have ceased to exist. Yet, there are many countries such as the Philippines where there is "no specific legislation prohibiting racial discrimination"[11]. On Japan, the CERD Committee in its hearing in 2001 stated that,

"Regarding the prohibition of racial discrimination in general, the Committee is further concerned that racial discrimination as such is not explicitly and adequately penalised in criminal law." [12]

The same has been reiterated in the case of Bangladesh[13]. Concerning Nepal, the CERD Committee expressed concern about,

"the insufficiency of information provided on the full implementation of article 4 of the Convention, especially on how this principle is reflected in other domestic legislation." [14]

The Committee recommended, as in the case of Japan, to consider giving full effect to the provisions of the Convention in its domestic legal order and to ensure the penalisation of racial discrimination as well as access to effective protection and remedies through the competent national tribunals and other State institutions against any acts of racial discrimination[15]. Even countries such as Thailand, Indonesia and Malaysia, where racial discrimination against indigenous peoples is pervasive, have yet to ratify the CERD Convention.

A large majority of the hill tribes of Thailand, such as the Akhas, Lahus, Lisus, Hmongs and Karens, are denied all the rights accorded to a citizen solely on the basis of their ethnic origin although their ancestors have been residing in the territory of Thailand for more than 200 years. Progress towards integration of these ethnic minorities into the larger Thai society is limited. Only half of the estimated 500,000 to 600,000 members of the hill tribes in northern Thailand possess official documentation that enlists them as citizens or places them on the record as being eligible for future citizenship. The rest lack adequate documentation and are denied access to education and health care. They cannot own land and are not subject to labor laws, including minimum wage requirements. Because of the lack of nationality, they are extremely vulnerable to exploitation and deprived of the vehicle to access fundamental rights, to access protection and to access expression as person[s] both under Thai law and international human rights law.

The Committee on the Elimination of Discrimination Against Women, while examining the report of Thailand in February 1999, expressed "concern about hill-tribe women and girls, whose rights may not be effectively protected by national laws" and recommended "the introduction of legislation and other measures to protect effectively the rights of hill-tribe women and girls"[16].

The Committee on the Rights of the Child in its 19th Session in October 1998 expressed concern that many children in Thailand were still not registered, particularly those living in nomadic and hill tribe communities. The Committee encouraged the State party to adopt measures to regularize the situation of hill tribe children and provide them with documentation to guarantee their rights and facilitate their access to basic health, education and other services. The Committee further expressed concern that, "some children, particularly those living in poverty and in nomadic and hill tribe communities, do not have access to education." [17]

Although the Thai Government is currently undertaking a programme to determine the citizenship status of the indigenous hill people, it has been marred by controversy in terms of whether the process meets the standards of international law or not.

The hill people of Thailand are not the only ones. Indigenous Chakmas and Hajongs in Arunachal Pradesh were settled in Arunachal Pradesh, India after being uprooted from the Chittagong Hill Tracts of then East Pakistan in 1964. The Chakmas and Hajongs have also faced more than nineteen years of institutionalised discrimination, first under the administration of Gegong Apang, and

now under the rule of his successor, Mukut Mithi because of their lack of citizenship. After coming to power in 1980, Apang banned Chakmas and Hajongs from government jobs. In the 1990s, as his hold on the post of Chief Minister was increasingly threatened, Apang made use of the Chakma issue to stir public hostility and scuttle criticism by his opposition. Through several administrative orders, Apang removed ration cards and trade licenses from Chakmas and Hajongs, withdrew their school facilities and hospitals, and allowed the members of the All Arunachal Pradesh Students Union (AAPSU) to operate against them with impunity. Apang also mobilised the political parties to demand expulsion of the Chakmas and Hajongs from the State. In the face of the State Government's consistent flouting of the directives of the National Human Rights Commission of India, the NHRC approached the Supreme Court of India on 2 November 1995 to protect the lives and liberty of the Chakmas and Hajongs[18].

On 9 January 1996, the Supreme Court of India decided on the case of *National Human Rights Commission v State of Arunachal Pradesh.* The Supreme Court of India in its judgement directed that:

1. The first respondent, the State of Arunachal Pradesh, shall ensure that the life and personal liberty of each and every Chakma residing within the State shall be protected and any attempt to forcibly evict or drive them out of the State by organized groups, such as the AAPSU, shall be repelled, if necessary by requisitioning the service of para-military or police forces, and if additional forces are considered necessary to carry out this direction the first respondent will request the second respondent, the Union of India to provide such additional force as is necessary to protect the lives and liberty of the Chakmas;

2. Except in accordance with law, the Chakmas shall not be evicted from their homes and shall not be denied domestic life and comfort therein;

3. The quit notices and ultimatums issued by the AAPSU and any other group which are tantamount to threats to the life and liberty of each and every Chakma should be dealt with by the first respondent in accordance with law;

4. The application made for registration as citizens of India by the Chakmas under Section 5 of the Act, shall be entered in the register maintained for the purpose and shall be forwarded by the Collector or the DC who receives them under the relevant

rule, with or without enquiry, as the case may be, to the Central Government for its consideration in accordance with law; even returned applications shall be called back or fresh ones shall be obtained from the concerned persons and shall be processed and forwarded to the Central Government for consideration; and

5. While the application of any individual Chakmas is pending consideration, the first respondent shall not evict or remove the concerned person from his occupation on the ground that he is not a citizen of India until the competent authority has taken a decision on his behalf.

Despite the apparent legal force of the Supreme Court's ruling, few concrete steps have been taken to implement the Court's directives[19]. Subsequently, the Government of India declared the Chakmas and Hajongs born in India to be citizens. To this very day, the Chakmas and Hajongs are being denied citizenship despite the judgement of the Supreme Court of India due to their ethnic or national origin.

The 1993 Constitution of Cambodia contains many provisions relating to the protection of human rights. However, "those constitutional provisions refer only to the rights of Khmer citizens" and raise concern with regard to article 5 of the CERD Convention"[20]. The CERD Committee, while examining Cambodia in March 1998, expressed concern that,

> *"Such a reference contributes to the ideology of ethnic purity of the Khmer which may lead to racial discrimination, if not hatred, against minority groups, in particular the ethnic Vietnamese."*

Moreover, the 1996 Law on Nationality, stating that Khmer nationals must have one parent who is a Khmer national, makes it difficult for persons belonging to minority groups, in particular ethnic Vietnamese and indigenous people, to establish their citizenship.

Although the CERD Committee noted the existence of the Inter-Ministerial Committee and its draft National Policy on Highland Peoples' Development in Cambodia, it expressed concern over:

> *"the situation of the indigenous peoples (also referred to as Highland Peoples, Khmer Loeu or Hill Tribes Peoples), and to their lack of legal status, as well as the insufficient legal framework to protect their rights, culture and traditional lands. The rights of indigenous peoples have been disregarded in many government decisions, in particular those relating to citizenship, logging concessions and concessions for industrial plantations. The lack of participation of the indigenous people in the management of natural resources and in other activities of concern to them is also a matter of concern."*[21]

> *"The Committee recommended that the State party recognize the citizenship of the indigenous peoples, as well as their use of lands, forests and other natural resources, and their distinct and unique identity, culture and way of life. The Committee further recommended that the State party take steps to fully implement its General Recommendation XXIII, which addresses the rights of indigenous peoples under the Convention. In particular, the State party should ensure that no decisions directly relating to the rights and interests of indigenous peoples are taken without their informed consent."*[22]

Rolling Back of Affirmative Action

Affirmative actions are vital to ensure equality and non-discrimination for disadvantaged communities such as indigenous peoples. "Two situations – racial minorities in the United States and the Roma in Europe – demonstrate the stakes of the debate on the issue of affirmative action."[23] As the Ambassador of Vietnam told the CERD Committee, "the elimination of racial discrimination meant guaranteeing ethnic groups an acceptable level of socio-economic development and giving them preferential treatment."[24]

The situation of the indigenous peoples of India vis-à-vis the other countries of the South Asian region in terms of their access to legislative bodies, employment, public contracting and the civil service will undoubtedly prove the need for affirmative actions. India's affirmative actions have been the best in the region.

The UN-sponsored Expert Seminar on Remedies Available to Victims of Racial Discrimination in February 2000 by leading experts raised the need for affirmative action programmes for indigenous peoples and others who have been victimized over a period of years[25]. The first and second World Conference Against Racism have been deficient in describing the need and scope of affirmative action. The World Conferences have, in the past, addressed affirmative action only in the field of education while disregarding the need for affirmative action in employment, public contracting and the civil service especially including programmes to ensure adequate representation of members of marginalized racial groups in the police force[26].

India is one of the few countries that ensured effective positive discrimination for the Scheduled Castes and Scheduled Tribes in the Indian Constitution, such as reservations in jobs, educational institu-

tions and legislative bodies. Among the constitutional guarantees in India, the 5th Schedule of the Constitution of India is one of the cornerstones of the affirmative action and constitutional protection provided in India. The Fifth Schedule of the Constitution of India governs the Scheduled Areas inhabited by the indigenous peoples in the Indian States of Andhra Pradesh, Bihar, Gujarat, Haryana, Madhya Pradesh, Maharashtra, Orissa and Rajasthan. The Fifth Schedule prohibits transfer of lands to non-indigenous persons in an attempt to stop alienation of tribal lands. But today, guarantees such as the ones provided under the 5th Schedule are under threat.

The Committee of Secretaries of the Government of India, in a decision classified as "SECRET", on 10th July 2000 (No.16/48/97-M.VI) proposed amending the Fifth Schedule of the Constitution of India to remove the legal basis for the Samatha Judgement. The proposal is a clear attempt to circumvent the Supreme Court judgement in the case of Samatha Vs State of Andhra Pradesh.

In clear violation of the Fifth Schedule of the Constitution of India and the Land Transfer Regulation Act of 1959, Regulation 1/70 and the Amendment to Section 11(5) of the Mines & Minerals Act of 1957, Andhra Pradesh had issued many leases to non-tribals to carry on industrial and mining activities since 1952. These led to the displacement of thousands of indigenous peoples.

Samatha, a non-governmental organisation working with the indigenous peoples, approached the Supreme Court in a Special Leave Application in 1995. The Supreme Court, in its judgement, which came to be known as the Samatha Judgement, stated that: (a) In the Andhra Pradesh Scheduled Area Transfer Regulation, 1959, person includes the State Government; and "transfer of immovable property" includes "the prospecting licenses and mining lease"; (b) All transfers of land belonging to the State Government at any time in the past or present in "scheduled area of Andhra Pradesh", to non-tribals, and of mining leases/prospecting licenses whensoever granted by the State Government in such areas to non-tribals were absolutely void and impermissible; and (c) all mining operations in the scheduled areas of Andhra Pradesh by industrialists may be stopped forthwith.

In the Samatha judgment, the Supreme Court specifically laid down the following guidelines:

1. Government lands, forest lands and tribal lands in Scheduled Areas cannot be leased out to non-tribals or to private companies for mining/industrial operations;
2. The government cannot lease out lands to non-tribals for mining operations as it is in contravention of Schedule V of the Constitution. It therefore declared all mining leases granted by the State Government in Schedule V areas and renewals thereof illegal and null and void and asked the State government to stop all industries from mining operations;
3. Mining activity should be taken up only by the State Mineral Development Corporation or a co-operative of tribals and, only then, if they are in compliance with the Forest Conservation Act and the Environment Protection Act;
4. Pursuant to the 73rd Amendment and the Panchayati Raj (Extension to Scheduled Areas) Act, the Gram Sabhas (village councils) are competent to preserve and safeguard community resources and it reiterated the right of self-governance of Adivasis;
5. In cases where similar Acts in other States do not totally prohibit the granting of mining leases of the lands in the Scheduled Area, similar Committee of Secretaries and State Cabinet Sub-Committees should be constituted and decisions taken thereafter;
6. Before granting leases, it would be obligatory for the state government to obtain concurrence of the Central Government which would, for this purpose, constitute a Sub-Committee consisting of the Prime Minister of India, Union Minister for Welfare, Union Minister for Environment so that the State's policy would be consistent with the policy of the nation as a whole;
7. It would also be open to the appropriate legislature, preferably after a thorough debate/conference of all the Chief Ministers, Ministers concerned, to take a policy decision so as to bring about a suitable enactment in the light of the guidelines laid down above so that there would emerge a consistent scheme throughout the country, in respect of the tribal lands under which national wealth in the form of minerals, is located and
8. Finally, at least 20% of the net profits should be set aside as a permanent fund as part of business activity for the establishment and provision of basic facilities in areas of health, education roads and other public amenities. This order was given with retrospective effect.

The Andhra Pradesh Government, in its letter of 21 October 1997, requested the Union Government of India to file a review petition to look into the so-called far-reaching implications of the Samatha judgement. The review filed by the Union Government of India was dismissed by the Supreme Court of India on 4 February 1999. Thereafter, the Government of India (i) filed an application for impleadment as a party respondent, (ii) an application for modification of the court order dated 11 July 1997 and (iii) an application for permission to file a petition for modification. The three-member

bench of the Supreme Court dismissed the applications on 4 February 2000.

The Attorney General of India, Mr Soli J. Sorabjee, advised the Government of India that that the way forward was to "effect the necessary amendments so as to overcome the said SC judgement by removing the legal basis of the said Judgement" by amending the Fifth Schedule of the Constitution of India. The secret note proposes that, as advised by Mr Sorabjee, an explanation be added after para 5(2) of the V Schedule removing the prohibition and restrictions on the transfer of land by Adivasis to non-Adivasis for undertaking any non-agricultural operations including prospecting and mining.

The proposed amendment of the Government of India is a clear attempt both to negate the constitutional guarantees and safeguards for one of the most vulnerable groups of people in India and to subvert the Supreme Court judgement. Rather than exploring ways and means to implement the directions of the Supreme Court judgement in its enabling spirit and provisions, especially concerning the involvement of tribal co-operatives and profit sharing, the secret note only exposes how the Union Government is actually searching for ways and means to nullify the judgement.

An estimated 50 million people have been uprooted in India due to various development projects. In a recent affidavit to the Supreme Court on a writ petition filed by the World Wildlife Fund, the Government of India made a proposal to set up a para-military force to protect forests. Some 60 percent of sanctuaries and 40 percent of national parks have not been legally constituted as, under the law, settlement of rights has to precede the notification of a park or sanctuary. The Union Government of India in its affidavit also reportedly acknowledged that while some 600 crores (1 crore = 10 million) are required for the settlement of rights of people living inside these protected areas, only Rs 45 crores have been sanctioned so far. This indicates that the Government of India has no policy of rehabilitating the displaced indigenous peoples. As the Government of India continues its aggressive policy of privatisation of the natural resources belonging to indigenous peoples and both the Union Government and the State Government, in league with the Attorney General, attempt to subvert the principles of social justice upheld by the Supreme Court, indigenous peoples in India face a very bleak future. When the order of the highest court of the land is subverted, anarchy and tyranny of the executive rule.

The Stepsons of Malaysia

Racial discrimination in Asia is not a new phenomenon. Two East Asian countries - Indonesia and Malaysia- have been practising racist policies by taking affirmative actions on behalf of the majority Javanese and Malays that put the disadvantaged communities in an even more disadvantageous situation. In 1959, Indonesia introduced two regulations that irrevocably changed the course of the lives of thousands of Chinese expatriates. First, President Sukarno banned aliens - mainly ethnic Chinese - from engaging in retail trade in rural areas of the country in an attempt to loosen the grip of the Chinese on the rural economy. Second, Chinese nationals were prohibited from maintaining residences in rural West Java. These racist measures of President Sukarno forced the evacuation of thousands of Chinese in the ghettos of major towns and cities. As the Chinese were uprooted, the Javanese were let loose on indigenous peoples' territories.

After Malaysia gave *talaq*[27] to Singapore in 1965, tension between the Malays and the Chinese and Indian immigrants, who came to Malay between 1890 and 1930 to work in mining and the plantation agriculture sector, grew due to considerable socio-economic disparities[28]. These disparities led to riots in 1969, resolved only by an amendment to the constitution creating "special rights" for the *bumiputera* ('sons of the soil') or all ethnic Malays and indigenous populations. Under this New Economic Policy (NEP), which cannot be challenged by individuals or institutions, the *bumiputera* are given preference in all social, political, and economic spheres. Specifically, ethnic Malays are afforded "access to rural credit, land and training along with investments in infrastructure, and improvements in rural education" and "special provisions...to participate in business and...tenders for certain government projects."[29] While the NEP expired in 1990, it was simply renewed through the current National Development Policy (NDP), which retained the NEP's discriminatory clauses. The government boasts that the NEP and the NDP are legitimate forms of affirmative action, "which focus on people development, and in essence a better quality of life for all."[30]

The institutionalization of the NEP and NDP did in fact have the intended effect of promoting educational and professional opportunities for the ethnic Malays, and undermining these same resources for immigrant communities. The NEP's effects became particularly apparent in the mid-1980s, when Malaysia experienced slow economic growth that limited the number of available jobs. During this time, ethnic Malays availed of the NEP and curtailed immigrants' access to education and jobs. Consequently, tensions between the *bumiputera* and immigrants increased significantly, and immigrants

began mass protests against the denigration of their cultural and educational policies. However, the Malaysian government simply responded by detaining the protesters without trial, arresting at least 88 people under the Internal Securities Act (ISA)[31].

Following the arrests, Prime Minister Mahatir Mohammed criticized the rioters for exploiting the race issue and threatening national unity. In his statement he also made a veiled threat, claiming that during the Independence movement the country "acknowledged the special rights of the bumiputras" and "if one race questions the rights of another race, then that race must be prepared for its rights to be counter questioned."[32] Therefore, both the Prime Minister and the Malaysian Police took active measures that immediately suppressed the rioters without jeopardizing the NEP, and ensuring that future protests for minority rights would remain subdued[33].

However, *bhumiputra* policy had little effect on Orang Aslis, the first peoples of Malaysia. The eighteen sub-ethnic tribal populations that inhabit peninsular Malaysia are collectively known as the "Orang Asli" (original peoples)[34] – sixty five percent of whom live in mountainous forests or rural hillside[35]. Together, the Orang Asli, who totaled 95,529 people in 1995, are not only the descendants of Malaysia's original inhabitants but they also represent a large range of languages, cultures, and modes of economic production, including fishermen, semi-nomads, hunters, gatherers, and even urbanites with regular wages[36].

The Orang Asli community is marked by extreme poverty and poor health conditions. The Department of Orang Asli Affairs (JHEOA) reports that eighty percent of the Orang Asli community lives below the poverty line, while the national level is a little above eight percent[37]. Similarly, the death rate among the Orang Asli is double that of the national average, and their infant mortality rate triple that of the national average. Furthermore, few Orang Aslis have access to resources such as land or education, as revealed by the sixty-six percent illiteracy rate and the fact that only 2% of all Orang Asli hold the title to their land[38]. In effect, the Orang Aslis constitute "the poorest and most marginalized sector of Malaysian society today".[39]

Despite these grim statistics, the Malaysian government claims to have instituted special protections for their indigenous populations, through the JHEOA and laws such as the Aboriginal People's Act. A closer scrutiny reveals that these laws have not only failed to protect indigenous peoples' interests but have, in fact, been actively used to exploit their culture and their land. In particular, the Aboriginal People's Act does guarantee the indigenous communities a right to

education and protection of their way of life but it also grants the state the authority to order any community to leave their land even without granting any compensation. The Orang Aslis are thus effectively reduced to "tenants at will" on their own land, and can be "evicted" at any given moment. Moreover, even though the government has gazetted fifteen percent of 776 Orang Asli villages as Orang Asli Areas and/or Reserves, it has also been known to renege on gazetting efforts. Between 1994 and 1996 alone, the government degazetted 2,764 hectares of Orang Asli land for development purposes[40].

In effect, the government and the JHEOA in particular have the final word on any Orang Asli matter. The Orang Asli themselves can exert little autonomy in their relationship with the State despite whatever promises it makes, and are instead subject to the decisions made by the government[41]. For example, there was a recent debate regarding whether or not to grant land rights to the Orang Asli through a Constitutional amendment. However, rather than consulting the Orang Aslis, the debate remained strictly within Parliament – despite the fact that the Orang Asli community was itself divided over the issue of land rights. While many Orang Asli tribes felt they could better protect themselves against the state if they retained land titles, many others felt that independent land rights would only threaten their community's cohesion[42]. Ultimately, all Orang Asli views were ignored, and the government decided to retain land rights over the Orang Asli, largely because private corporations have a significant interest in the economic value of indigenous land.

Indeed, there have been continual efforts to acquire Orang Asli land for logging and development projects and as indigenous tribes have no land rights, individually or collectively, their homes and livelihoods remain largely a function of government decisions and politics[43]. It is for this reason that land rights continue to be a sore point between indigenous communities and the government – because of "development" efforts, the Orang Asli are relocated to much smaller, often infertile lands, and the compensation they receive is miniscule compared to what non-indigenous land owners receive. In particular, in 1996 the Temuan tribes of Bukit, Tampoi, and Selangor were displaced when their land was used to construct a highway. These tribes were only compensated for their fruit trees and houses, while non-Orang Asli landowners in the area received five times that amount because the state regarded their land as privately owned and the Orang Asli land as state owned[44].

Another strategy the Malaysian State has employed in acquiring indigenous land at a fraction of the cost is by splitting the Orang Asli communities through relocation, thus decreasing their bargaining

power and ensuring that negotiations are conducted with individual tribes. This method was used in Bukit, Lanjan, and Selangor when a private housing developer wanted to acquire Orang Asli land that was worth millions of dollars because of its proximity to the capital[45].

Regroupment has in fact been a profitable scheme for the Government, for the State often persuades the Orang Asli to leave their native lands in exchange for relocation and the promise of educational facilities and piped water. Ultimately, however, many different tribes that are not necessarily accustomed to living together are grouped in the same area with a smaller subsistence base, and the promises of better facilities are rarely fully honored.

The indigenous peoples of Sarawak have experienced similar frustrations regarding both violations of their land rights and the consequent large-scale displacement of their communities. The indigenous peoples in Sarawak constitute 1.9 million people, eighty percent of whom live in rural areas. The twenty-six tribal groups of this area in particular have seen repeated attacks on their land, such as excessive logging or the construction of the Bakun Dam[46].

In the interior of Sarawak there exists one of the highest rates of logging in the world[47]. This export industry began in the 1950s and still dominates today, as timber is heavily exported to both Europe and other East Asian countries such as Japan and Thailand[48]. While the State and the timber industry enjoy the massive wealth that accompanies the logging exportation, indigenous peoples throughout Sarawak are rapidly witnessing the destruction of their homes, communities, and livelihoods[49]. Indeed, while Eastern Penan was once a largely nomadic community, today only eight fully nomadic bands exist, and are thus "one of the last surviving societies in the world who practice hunting and gathering today".[50] Therefore, the vigorous logging efforts have a direct bearing on the rapid displacement of tribal communities and families. Moreover, even those tribes that have adjusted to the changing economy by participating in the logging industry as timber workers rarely see its profits. Their wages constitute a mere four percent of the total gross income from timber sales, even though ninety-five percent of the logging industry's members are timber workers[51].

However, when members of the Penan tribe protest the excessive logging efforts and the effects this industry has on their community, the government simply detains them without trial, allowing the logging operations to go forward. In fact, police violence and harassment have become commonplace when indigenous tribal communities in Sarawak oppose logging activities on their ancestral land.

Many instances have been documented by human rights organizations, detailing the use of tear gas, machine guns and police forces against indigenous communities, and the question of violence in detention centers always remains. In particular, in August 1996, six native Penan were arrested for their participation in a human blockade against logging efforts, followed by the arrest of seven Iban men for their opposition to logging in October[52]. Also in 1996, paramilitary members intimidated women and children in Ulu Baram with the use of machine guns, and handcuffed and beat one man[53]. Not only do the police authorities use direct violence as a method of intimidation and suppression but they also frequently ignore reports lodged by communities regarding land encroachment or they simply fail to follow up on investigations of police violence[54].

Logging is not the only threat to the indigenous communities in Sarawak, for also of significant concern is the construction of the Bakun hydroelectric power plant, which upon completion is to be the largest dam in South-East Asia. Construction began in 1997, by a private Swedish-Swiss company, with planned dimensions of 205 meters in height and 740 meters in length[55]. The dam would generate Malaysia's most expensive electricity, mainly by flooding 696 square kilometers of indigenous people's land – land that is mainly rainforest rich in bio-diversity and home to over one hundred endangered species that are presumably protected by Malaysian laws[56]. Moreover, this project promises to displace at least 10,000 indigenous minorities from sixteen communities, and would thus also constitute the largest relocation of indigenous people in Malaysia's history[57].

Approval for this project was granted in 1994, and the process of relocation immediately went forward despite the repeated warnings by anthropologists and even the temporary suspension of the project[58]. Furthermore, economists also called the project's viability into question, and many investment firms warned that investment returns would be very long term, and even then "inadequate".[59] Unfortunately, the government ignored all human rights, economic, and ecological concerns, and proceeded with the relocation. In the process, it has shown little sensitivity to the unique cultures, lifestyles, and practices between tribes, and has grouped people from different indigenous cultures into an area that is one tenth the size of that needed.

The people of Sabah face a similar situation despite being the richest state in the Malaysian federation in terms of natural resources. Conversely, however, Sabah is also known as one of Malaysia's poorest states, in terms of household income[60]. The population count has been difficult but it is estimated that Sabah comprises thirty-nine ethnic communities, which together make up 84.8% of Sabah's 1.4 million population[61]. Much like their indigenous counter-

parts in Sarawak and the Orang Asli, the indigenous communities in Sabah face constant threats to their land from development projects, plantation growth, and logging industries.

The indigenous communities of Sabah are presumably protected by the Land Ordinance of Sabah, which contains Native Customary Rights (NCRs) such as rights to land possessed by customary tenure, grazing lands, or burial grounds and shrine sites. However, in practice, the NCRs have proved to be entirely inadequate or are simply ignored by the Malaysian government[62].

In particular, "Vision 2020", a Malaysian development scheme, earmarks Sabah as a key resource base for raw materials, and specifically for oil and timber[63]. Consequently, Sabah has witnessed a dramatic rise in plantations; and the government has even reserved twelve percent of the land in Sabah exclusively for commercial plantation purposes. In doing so, it has arbitrarily degazetted indigenous land, ignored the NCR provisions of Sabah's Land Ordinance, and dismissed any claim that the indigenous people have to these lands[64].

Indeed, the rise of plantations has emerged as a significant threat to indigenous tribes in Sabah. In 1996, the Sabah Land Development Board, a statutory body that grants land to be developed into palm oil plantations, was privatized. As a result, much of the land owned by indigenous people was transferred into plantations, reducing the bio-diversity in Sabah and severely curtailing the indigenous tribes' access to traditional medicinal plants, foods, and building materials[65]. Specifically, the Rungus tribes were entirely displaced by plantations opened by the Sabah Forest Development Authority, and consequently had limited land for their staple food, hill paddy, as well as other crops necessary for their survival[66].

Logging is also a threat to the indigenous people's lifestyle and security. Reportedly, 3,593,809 hectares or 48.8% of Sabah's total forest area was gazetted as Forest and Park Reserves and 3,777,458 hectares of State forests were also allowed for logging[67]. While the Forest Enactment provides that notices must be posted where reserves are gazetted so that objections can be filed and heard, this procedure is rarely followed[68]. In fact, indigenous communities rarely know of loggers' impending arrival until they actually arrive. Loggers often respond to indigenous communities' protests with promises of reverting the land back to their communities once the land has been used for its timber. However, these promises are rarely delivered, and instead the land is often alienated to other government agencies or sold to corporations for oil palm plantations, as was observed in Tawau[69]. If the land is repossessed by indigenous peoples, the tribes often find that the land has been

stripped of its agriculture value, given the ruined soil and depleted natural resources.

It is clear that *Bhumiputra* policy is meant only for the Malays rather than the indigenous peoples of Sabah, Sarawak and the Orang Aslis of peninsular Malaysia.

Population Transfer: Continuing Colonisation

After Java replaced the Netherlands as the colonial power in 1945, the Javanese-dominated Indonesian Government adopted the transmigration of millions of Javanese settlers to consolidate political, economic and military control. In 1950, President Sukarno declared that migration to the outer islands was a "matter of life and death for the Indonesian nation". Both Sukarno and Suharto sought to justify the Java's expansionist designs as redistribution of overpopulation within the confines of the mythical Indonesian state. The Indonesian government listed seven goals it sought to achieve through transmigration: promotion of national unity, national security, an equal distribution of population, national development, the preservation of the nation, help to the farming classes and improvement of the condition of local peoples.

Contrary to the objectives of the Indonesian Government, transmigration led to the spread of poverty, displacement of aboriginals, deforestation and soil erosion, destruction of indigenous peoples' traditional governments, destruction of local economies, forced assimilation of indigenous communities and widespread use of disproportionate force to quell the structural violence between the *transmigrasis* and the original inhabitants. Under the 1984-1989 Five Year Plan, 5,000,000 people from Java, Madura and Bali were settled specifically in those areas that continued to resist Java's rule: Sumatra, Kalimantan, Sulawesi, South Moluccas, East Timor and West Papua. As Indonesia continues its aggressive transmigration programmes to consolidate the Javanese domination, structural violence between the *transmigrasis*, mainly the Muslims, and Aboriginals have become a part of life. The riots in West Kalimantan and West Papua between the *transmigrasis* and the Aboriginals in March 1997 left hundreds of people dead.

Transmigration - the resettlement of people belonging to the dominant community and loyal to their government - is a disguised invasion and destruction of a nation through "ethnic genocide" in the name of nation building. Transmigration is the beginning of colonialism and prohibited under Article 49 of the Fourth Geneva Convention. It has been the main tactic of the "smokeless wars"

being waged by the neo-colonial powers in order to consolidate their grip on their colonies.

In the late 1970s, the Government of Bangladesh sponsored a Planned Population Transfer Policy in order to Bengalize and Islamize the indigenous Jumma peoples of the Chittagong Hill Tracts (CHTs). In 1979, President Zia-Ur Rahman presided over a secret plan to encourage the large-scale transmigration of thousands of Bengalis into the CHTs. The Government of Bangladesh urged Members of Parliament and local authorities to identify poor Bengali families from their areas who were willing to resettle in the CHTs. The illegal settlers were allotted five acres of hill land or four acres of mixed land or 2.5 acres of wet rice land in addition to free transport to reach the CHTs, free rations and the protection of the Bangladesh security forces. In 1979 and 1980, around 100,000 Bengali settlers were moved into the CHTs. Another 100,000 entered in 1981 and 200,000 more between 1982 and 1983.

The population growth rate of plains settlers speaks for itself. The Bengali Muslim population in the CHTs steadily rose from 2.94 per cent in 1941 to 6.29 per cent in 1951, 11.77 per cent in 1961, 22.83 per cent in 1974 and 35.18 per cent in 1981. The present Bengali Muslim population in the CHTs forms well over 50 per cent of the total population[70].

The Bangladesh Government views the resettlement as necessary for the overall development of the country in view of the undeniable problem of population pressure and land resources. A representative of the Bangladesh diplomatic mission in Geneva said in a statement to the Working Group on Indigenous Peoples,

> *"The people of Bangladesh have to share the available resources in an equitable manner within severe economic constraints well known to the international community."* [71]

However, this is merely an excuse. A study commissioned by the then Pakistan Government in 1967 concluded,

> *"as far as its developed resources are concerned, the hill tracts are as are constrained as the most thickly populated district... The emptiness of the hill tracts is a myth."* [72]

According to District Statistics (CHT) - 1983, the total surface area of the Chittagong Hill Tracts was 5,089 square miles (32,56,960 acres) out of which cultivable land averaged 0.28 acres per head.

The policy of settlement advanced by the highest political levels, carried out by the District Administration under the supervision of

the army and in collaboration with local government officials is undeniably for politico-military purposes[73]. Firstly, Bengali settlements in the interior of the district are considered to be effective counter checks on the Jumma insurgent movement by way of their providing counter-intelligence and a supply of auxiliary military support to the Bangladesh army[74]. Secondly, a policy of increased Bengali settlement "under the aegis of the government" can ultimately turn the local hill people into a minority group on their "own" soil - thereby solving the political problem of the hill people being the majority of the population[75].

The European Parliament, in a resolution on 23 October 1996, recognised that population transfer in the Chittagong Hill Tracts constitutes a serious form of human rights abuse. Article 49 of the Fourth Geneva Conventions also prohibits population transfers.

The Government of Bangladesh has emphasised time and again that citizens in Bangladesh have the right to freedom of movement. The government has subverted that right by organising planned population transfers with the clear purpose of destroying the ethnic identity of the indigenous Jumma peoples.

Although the Government of Bangladesh has presently suspended its planned population transfer policy, according to the United States State Departments Country Reports on Human Rights Practices, the Bengali settlers continue to trickle into the CHTs. The Government of Bangladesh sustains the Bengali settlers by providing free rations to the Bengali settlers – an act of racial discrimination. The hypocrisy is clear - both Indonesia and Bangladesh consistently supported resolutions at the UN Commission on Human Rights against the Jewish settlements in the occupied Arab territories.

In fact, these transmigrations were funded by multilateral financial institutions such as the World Bank and development agencies. It is clear that the policies and practices of these financial institutions directly contribute to racial conflicts. The conflicts across Indonesia and Chittagong Hill Tracts are clear testimonies to this.

Religious Intolerance

While Malaysia's official religion is Islam, its Constitution does permit freedom of religion. However, the Sunni Muslim practices and customs are "revered as intrinsic to their identity" and thus are largely promoted by the government[76]. Indeed, the government constantly funds efforts to "infuse Islamic values" into Malaysian society, mainly by attempting to convert its indigenous populations and resident Christians to Islam, while forbidding any attempts to

convert Muslims to another faith.

The JHEOA has instituted a special chapter for the "spiritual development" of the Orang Asli, namely for their conversion from animist traditions to Islam. Yet these efforts are not sincere efforts by the government to aid indigenous communities but rather have become a modern-day form of colonialism that imposes one sector of society's values on another, less powerful one[77].

The practice of animism by indigenous peoples and their spirituality has raised considerable debate. Mr Arun Shourie, a prominent Indian journalist and presently a Minister in the ruling Bharatiya Janata Party, Government of India, rightly reflects the mainstream Indian mindset. Mr Shourie writes in *Missionaries in India:*

> *"The foremost target group - the tribals were declared to be not Hindus, but Animist. The tribals of course would not have known what Animism was, but it was defined by officials, missionaries and scholars: a belief in spirits, which move about freely, exercise power over the affairs of men and have therefore to be propitiated, spirits which often take up residence in some object which in turn becomes the object of worship; belief in omens - no journey or task being commenced unless the omens have been ascertained to be propitious etc. And on the basis of criteria of this kind tribals were hacked off from society."*

Mr Shourie further states that "the beliefs and practices of tribals were species of Hinduism" but the British colonial rulers separated the tribal faiths as "Animism" from Hinduism. Mr Shourie quotes the Census of India, 1901 to support his argument, which states that,

> *"The dividing line between Hinduism and Animism is uncertain. Hinduism does not, like Christianity and Islam, demand of its votaries the rejection of all other religious beliefs; and ... amongst many of the lower castes of Hindus the real working religion derives its inspiration, not from the Vedas, but from the non-Aryan belief of the aborigines."*

Many practices of Hinduism are species of Animism, but not all animism is a form of Hinduism. Most of the Tibeto-Mongoloid aboriginals of North East India practiced animism before many of them were converted to Christianity in the 19th century. But to consider the beliefs of the Adivasis in Animism as a species of Hinduism is certainly an insult to their beliefs, a distortion of their history, culture and a denial of their distinct identity. The animism practiced around the world is not a properly defined religion like Christianity or Islam nor is it a part of "Hinduism". If the Adivasis are considered as Hindus just because they do not know what

Animism means as Mr Shourie opines, many tribal groups in Africa who also do not know what animism means could be called "African Hindus". There would be "Latino Hindus".

The Adivasis differ from the Indo-Aryans by way of their cultural practices, absence of a caste system, caste-based occupational specialization and their belief in animism. They are a distinct ethnic, social, cultural and religious group. However, thousands of years of a process of assimilation has yet to turn full circle as many Adivasi groups continue to preserve and assert their distinct identity until today. Consequently, the contempt of Adivasis on the part of mainstream Hindus remains the same. In fact, in the census, animism is no longer referred to.

The Government of Bangladesh has sponsored religious conversion in the CHTs. The *Dhaka Courier* in July 1994 reported that, in the military-controlled areas, young Muslim women were being married to local youths after converting them to Islam. Similarly, Jumma women - after being converted - are married to Bengali youths and even security personnel[78].

Al-Rabita, a Saudi Government-funded NGO, is the main Islamic missionary organization in the region. Backed by the military, it is entrusted with the task of Islamisation of the CHTs. It has an Islamic centre at Alikadam. It has offices in Rangamati and Longudu, where it also maintains a hospital[79]. The Jammat-I-Islam works very actively with the military in CHT. The number of mosques and madrasahs (Islamic education schools) is steadily increasing in the area. The following will demonstrate this[80].

Year	Mosques	Madrasahs
1961	40	2
1974	200	20
1981	592	35
1991	650	37

Apart from instances of proselytism, there have been many reported incidents of religious persecution in the form of the violation and destruction of religious places of the indigenous Jumma people by the military.

The UN Special Rapporteur on the Elimination of all Forms of Religious Intolerance in his report to the millennium session of the UN General Assembly after his visit to Bangladesh including Rangmati stated:

> *"Apart from the issue of the implementation of the Peace Accord, with respect to the situation of indigenous peoples in the field of freedom of*

religion, most of those consulted said that they had been able to practise their religious activities freely since the end of the armed conflict. It was also mentioned that the army had stopped destroying indigenous places of worship. However, many representatives of the indigenous community described how they had been traumatized by the incident of 16 October 1999. Following an altercation between indigenous people of the Jumma tribe, which had arisen after a Bengali soldier had molested a Jumma woman, the army – assisted by around 150 Bengali civilians – attacked the Jumma of Babu Chara Bazar at Dighinala Thana/Khagrachari, leading to the deaths of three members of the indigenous population. The assailants also proceeded to sack the Buddhist temple of Benuban, attacked monks, and damaged statues of the Buddha. Even though a commission of enquiry had been set up, and some victims compensated, this particular incident had created a genuine feeling of insecurity among lay and religious members of the indigenous community in the Chittagong Hill Tracts, who were faced with an army and a police force consisting entirely of Muslim Bengalis. Those consulted also explained that their communities were subject to covert pressure from Islamic non-governmental organizations, and even Muslim extremist groups, seeking to convert them to Islam, notably in return for services or money. Certain representatives interpreted the financial assistance provided by the State for the construction of new madrasahs and mosques as a discriminatory policy favouring Islam, since, in contrast, indigenous religious institutions received meagre public subsidies." [81]

Indigenous Women

The Racial Dimension of Trafficking: The Case of Nepal

It all began with feudal practices originating from the Himalayan feudal nobility of Nepal who brought concubines as part of their baggage to India, "baggage" that was later dumped. As a result, these women were forced into brothels and harems as sex workers[82]. From this period of "dumping" Nepalese women into India, the trafficking industry has significantly grown, with as many as 5,000-7,000 women and girls lured each month[83] by fraudulent promises of jobs or marriage[84]. Today, it is estimated that there are 200,000 Nepalese girls in Indian brothels when the total population of Nepal is only 25 million, which indicates the heavy outflow of Nepalese[85]. It is also estimated that thirty percent of women in the sex industry are under the age of 18[86].

While forced trafficking cuts across caste and ethnic lines, ethnic and/or indigenous women are more vulnerable to exploitation, mainly because generally they are in greater economic distress than the upper caste Hindus. About 70% of females in brothels belong to ethnic minority and/or indigenous groups of Nepal, including the Tamang, Gurung, Magar and Sherpa[87]. Women and girls from Nepal's Hindu majority communities comprise only 10-15% of those trafficked into India[88]. While Mumbai, Calcutta and Delhi continue to be the most common destinations for trafficking of women, destinations now include a large number of other Indian cities. Traffickers now recognise the great demand for Nepalese women and so have targeted Nepal as a rich source, more so than other South Asian countries[89].

Some communities in Nepal even encourage and accept trafficking to countries such as India because of the possible financial gains that would allow them to live a more comfortable life. Five districts in Nepal: Sindhupal, Chowk, Nuwakot, Rasuwa, and Mukawanpur are notorious for parcelling their daughters off to India[90]. Girl trafficking in Sindhupalchowk is actually very well organised, a phenomenon that is less common but still prevalent in the other Nepalese districts. A broker or trafficker will contact the family of a young girl and, if the family is interested, they will bargain a price of between Rs. 10,000 to Rs. 20,000 for the girl to be taken to India and set up in a brothel to work. Before most girls cross the border into India, they are taken to a Nepalese brother where they are "broken in". A girl's father or another family member will usually make a trip every three years to collect her earnings for the family[91]. Most females are obliged to serve 6-7 clients per day and some even serve 10-15 clients per day. Women are treated like bonded labourers because they have to remain ready 24 hours a day for service. Anyone who refuses is beaten and tortured. On average, 6-7 females share one room in the brothel and about 30-35 females share one bathroom. Escape is nearly impossible because there are no windows in the rooms and guards patrol the whole property at all times. Anyone who attempts to escape is severely beaten[92].

The glitz and glamour of Indian cities like Mumbai has attracted many Nepalese women who hope to live the "city life" after a few years of working hard in a brothel. Not surprisingly, most females end up with HIV/AIDS or other STDs and are either killed by their employer or are forced to return home, where their family, in most cases, disowns them due to society's reaction. Ironically, a society that ostracises women who return home with HIV/AIDS also supports and often places these girls in high-risk situations.

Some fathers are mesmerised by the circus industry, feeling that their daughter can still make money for the family while avoiding the sexual exploitation of the sex industry. Fathers generally make Rs. 1,000

while agents or brokers make Rs. 4,000 for selling a girl into the circus. On average, girls are paid only Rs. 200 for their stunts, many of which result in permanent physical damage. The meagre Rs. 1,000 inspires fathers to withdraw their daughters from schools, while other fathers do not even let their daughters begin school and sell them to a circus at age 5. The trend to send girls to circuses began about 15 years ago in the region of Makwanpur. Consequently, the girls are the ones who suffer the most because they receive no education. Often girls are sexually exploited and return home with various STDs and injuries. After a certain age, girls cannot work in the circus and have to find other forms of employment. Most fall into the trap of the sex industry, partly to keep their big city dreams afloat and partly because there is nothing else they are qualified for[93].

Despite the fact that thousands of females, both adult and child, are trafficked each year, official records show that only a small fraction of traffickers are reported, apprehended or prosecuted[94].

Year	Number of cases registered	Number of criminals charged	Arrests
1994-95 (2051-52 BS)	150	300	181
1995-96 (2052-53 BS)	133	318	164 (154 managed to flee)
1996-97 (2053-54 BS)	117	305	65
1998 (2055 BS) (as of April 1998)	88	189	111

Official collusion regarding traffickers has also been reported in several instances[95]. While law enforcement would benefit from the co-operation of victims and community members, people remain reluctant to report traffickers and serve as witnesses in court cases, often fearing and mistrusting police and officials because it would place their life in jeopardy:

> *[In Sindhupalchowk], [s]ocial workers, local community leaders, political parties and even police officers are afraid to pinpoint the "dalals" (middlemen) and take actions against them for they know that in doing so they will have to pay heavily for it and even endanger their lives for the cause.*[96]

Underlying Causes

A recent mission team fielded by the United Nations Task Force on Trafficking found the following to be the root causes of trafficking in Nepal:

1. *economic factors* such as poverty, indebtedness, food scarcity, unemployment, and market disparities;
2. *social and cultural factors*, including the lack of appropriate legislation and community support, cultural norms, the practice of polygamy and bigamy, physical and sexual abuse at home, and marginalisation by community members;
3. *historical factors* including feudalism, militarism, and caste, class, and ethnic hierarchies;
4. *political factors* such as government policies towards development, immigration, and the environment.[97]

The demand for sex workers, particularly children has risen, clearing the way for interested families to easily demand more money for the sale of their child or wife. An increasing number of traffickers in all of the Nepalese regions makes the notion of trafficking easily feasible. Females that are pulled out of school or never even begin school are placed in a very disadvantaged situation. The economic needs of the family that compel girls to work are not the only reason fathers take girls out of school or do not even put them in school. Discrimination against ethnic minority and indigenous groups is also an underlying factor. For example,

> *the Brahmin Caste (upper caste of ruling groups) students have been monopolising Sanskrit education, a source of Hindu religion, from schooling to University with free lodging, food and stipend while indigenous people's children are not getting even a free compulsory basic education.*[98]

The ignorance that often accompanies illiteracy among parents, children and the community at large is also another underlying cause of trafficking. Many communities have no knowledge of the conse-

quences that accompany the commercial sex industry, such as contracting STDs and HIV/AIDS. Material objects are also a huge pull toward attaining work in India. Families wish to transform their dreams of television, better clothing, electricity and motor cars, to name but a few, into a reality and so sending female members to work in India seems like the only way for them to escape their rural lifestyle[99].

Systemic gender discrimination and violence against women[100] along with racial discrimination against ethnic minorities and members of indigenous groups, most of whom are targeted by traffickers[101], are threads that run through all of the above factors, making them the underlying primary root causes of trafficking in Nepal. Violence has become a tool through which discriminatory structures are strengthened, allowing for the more insidious and subtle forms of discrimination women face daily to be reinforced. By failing to protect and promote women's civil, political, economic and social rights, governments create situations that allow trafficking to flourish. The State's failure to guarantee women's rights leads to sexual and economic exploitation in both the home and the community as well as within the local, national and global economies.

Trafficking of women flourishes in many less developed countries like Nepal because the vulnerabilities arising from women and girls' lack of accessibility to resources, poverty and gender discrimination inherent in the society are maintained through the collusion of the market, the State, the community and the family unit. Traditional family structures, which are based on the maintenance of traditional sex roles and the division of labour that derives from such roles (for women, housekeeping, care-taking and other unpaid or underpaid subsistence labour), support the system of trafficking. Moreover, feudal and exploitative social structures have given rise to consumerism and a skewed, gender, caste and class-based resource distribution system. These, in turn, legitimate discrimination against women on two levels:

1. At the community level as represented by the uneven division of wage labour and salaries, and citizen rights and inheritance rights;

2. At the family level through a preference for male children and the consequent discrimination against girls that perpetuates throughout their lives.

The preference for male children and the culture of male privilege deprive girls and women of access to basic and higher education,

thus keeping illiteracy rates among females in Nepal higher. In addition, certain religious and customary practices, reinforced by government policies, further entrench and validate discrimination as well as perpetuate the cycle of oppression that many women are sadly stuck in[102].

Among the above-mentioned groups, the most highly victimised are the Magar, who are the largest ethnic and indigenous group in Nepal, and the Tamang[103].

With a population growth of more than 2% annually, even the government acknowledges the increasing pressure on land resources that has forced many, mostly of the lower castes, poorer ethnic and indigenous groups, to struggle in order to sustain themselves after each harvest. As rural incomes become more precarious and less stable, families are compelled to find alternative means of subsisting and this, to many families, means selling their daughters to traffickers. The indigenous Tamangs are one of Nepal's most impoverished ethnic groups[104]. On average, Tamang families own less than one hectare of unirrigated land, which has made it almost impossible to live on only subsistence farming. Additionally, with the lack of educational resources or a means of entry into a cash-based economy (as they live in rural areas), some Tamangs were forced to migrate to India in search of work as porters, manual labourers, or construction workers. Even with these types of employment, it has been a struggle for the Tamangs. Finding a huge demand and considerable financial incentive in the sex industry has thus become very appealing because they see it as being of importance to their survival, even if it means sacrificing their daughter[105].

Across India, Thailand, Cambodia, Laos and Burma, indigenous communities have been the worst victims of trafficking.

Other Abuses against Indigenous Women

A large number of armed conflicts across Asia relate to indigenous peoples. Torture, rape and extra-judicial killings are a daily occurrence. Indigenous women are specifically targeted.

At 1 am on 12 June 1996, the day of the Bangladesh national elections, Ms Kalpana Chakma, Organising Secretary of the CHTs Hill Women Federation, was abducted from her home in New Lallyoghona village, Baghaichari Thana, Rangamati District, by six or seven plain-clothes military agents. The military agents entered her house, waking everyone, to find Ms Chakma. She and her two brothers, Mr Kalicharan Chakma and Mr Khudiram Chakma, were blindfolded and tied up and then forcibly led from the house. At some point, orders were given to shoot the two brothers but they were able to escape unharmed. The whereabouts of Ms Kalpana

Chakma is still unknown. One of the kidnappers has been identified: one Lt Firdous, who led the raid (Case No 2 of 12/6/96). What is disquieting is that the same army who kidnapped Kalpana Chakma announced a reward of Taka 50,000 for any information on her disappearance, and even distributed leaflets by helicopter[106]. Meanwhile, the army threatened to kill anyone who dared to file a habeas corpus petition. Prime Minister Sheikh Hasina Wazed subsequently promised to order a Commission of Inquiry into Ms Chakma's disappearance. The Inquiry was completed but the report has not been made public.

At least three Jumma women were physically violated and 13 others Jummas injured when a group of army personnel raided a Tripura village, namely Bara Chandra Karbari Para at Matiranga Sadar in the Chittagong Hill Tracts, at midnight on 21 May 2001. A group of army personnel numbering about 12 of the Bangladesh Artillery division of the Guimara Zone raided the Tripura village and raped three Tripura women. They also mercilessly beat the villagers.

Army personnel from the Durgabari Artillery camp of Matiranga Sadar on attacked the Bara Chandra Karbari Para at midnight on Monday and raped three Tripura women. The Tripura women were identified as (a) Mrs. Pubali Tripura (22 years) wife of Bata Roy Tripura, (b) Ms. Sanita Tripura (15 years) and (c) Ms. Karandi Tripura, daughter of Hari Mohan Tripura. The one year old child of Mrs. Pubali Tripura was also seriously injured when the army personnel chopped the child with a sharp knife during the gruesome incident. Three Jumma women and the child were admitted to Khagra Chari Sadar Hospital.

One Jogendra Tripura of the same village was arrested by the army and later sent to Khagra Chari court hazat on 22 May 2001.

There have also been consistent reports of human rights abuses against indigenous women. In addition to conversion to another religion, there have been reports of forcible sterilization of indigenous women in Vietnam. In August 2000, a group of indigenous peoples from Vietnam met Mr. P N Bhagwati, Vice Chairman of the Human Rights Committee. While urging for special intervention in the case of Vietnam, Mr Bhagwati stated, "*the suffering of other indigenous groups all over the world was of lesser relevance in the present case. The fact was that the Committee had been presented with direct evidence of the gradual extermination of an indigenous people, including mass sterilization of women. The Committee had a duty to do what it could as soon as possible, without standing on procedure, before it was too late.*"[107] Vietnam was requested to submit its periodic report to the Human Rights Committee.

National Security Laws?

It was hoped that the process of decolonisation would solve many of the problems in Asia. However social, cultural, religious and ethnic differences, which had remained latent for the sake of the independence struggle, resurfaced after decolonisation. The armed conflicts raging across Asia are a clear testimony to this and show that the nation-building processes did not fulfil the aspirations of the indigenous peoples. The attempts to assimilate indigenous peoples have exacerbated the conflicts which, in many instances, have turned violent. The Government sought the military solution. The governments also enacted draconian national security laws to address such dissent. While the draconian laws have no racist contention, an examination of the application of such laws clearly shows the racist elements.

In 1958, Indian Parliament passed the Armed Forces Special Powers Act (AFSPA) to tackle a particular political problem — the Naga tribal insurgency. Amended in 1972, the AFSPA allows arbitrary arrest, search without warrant, and summary execution with virtual impunity; it was supposed to be on the statute book for one year. But 42 years have elapsed, the Act is still in operation, and the political problems of the Nagas remains as acute as when it was passed originally. In the process, AFSPA was extended all over the North East, and many innocent people have become victims of the Act.

While justifying the introduction of the Armed Forces Special Powers Act, the then Home Minister, Mr G. B. Pant stated on 18 August 1958 "*there (Assam and Manipur), they (certain misguided sections of the Nagas, in the words of Mr Pant) are indulging in arson, murder, loot, dacoity etc. So it has become necessary to adopt effective measures for the protection of the people in those areas. In order to enable the armed forces to handle the situation effectively wherever such problem arises hereafter, it has been considered necessary to introduce this Bill (AFSPA).*"[108]

If "arson, murder, loot, dacoity, etc." are the yardsticks for the imposition of the Armed Forces Special Powers Act, then the Act has been imposed discriminatorily on the North East. There have been equal numbers of such incidents, if not more, in Uttar Pradesh and Bihar; the incidents of violence and insecurity of common citizenry has been systematic and persistent. Armed insurrections have also taken place in parts of India other than the North East: by the Maoist Communist Centre in Bihar and by other Maoist groups generically known as the Naxalites in Bihar, Andhra Pradesh, West Bengal and Madhya Pradesh. What is most disturbing is that state governments themselves have resorted to "arson, murder, loot, dacoity, etc." and sought to get away with impunity. A glaring example is the involve-

ment of Shiv Sena, the Hindu right-wing fundamentalist party, in the communal[109] riots in Bombay in the aftermath of the demolition of Babri Mosque on 6 December 1992 and the subsequent attempt by the Shiv Sena-controlled Maharashtra Government to nullify the Sri Krishna Commission inquiring into these incidents.

According to the stated purpose of the AFSPA, it could well have been imposed in these States. As the South Asia Human Rights Documentation Centre in its Alternate Report to the Human Rights Committee stated:

> *"This observation should not be misinterpreted: SAHRDC does not want the imposition of an unlawful law like the Armed Forces Special Powers Act in mainland India. What SAHRDC seeks to highlight is the Government of India's 'step-motherly' treatment of North Eastern India and to assert unequivocally that if the normal law of the land such as the Indian Penal Code and Criminal Procedure Code can deal with the violence in other parts of India like Uttar Pradesh, Bihar, Andhra Pradesh, there is no reason why the normal laws cannot address the situation in the North East. An emergency law which targets specific groups of people in clear violation of the Indian Constitution and India's obligation under international human rights law is legally and morally unjustified."*

"This (Indian) Parliament is giving its seal of approval to a legal monstrosity to quell another kind of monstrosity," said Mr Mohanty, Member of Parliament, on 18 August 1958 while opposing the AFSPA. Just because the indigenous peoples of the North East are ethnically and culturally different does not mean that there is a need for more stringent laws with complete disregard for equality before the law.

Militarisation has been one of the characteristics of the indigenous peoples. Even when a Peace Accord has been signed, there has been reluctance to withdraw the armed forces. Clause 17 Ka of the Chittagong Hill Tracts signed by the Parbattya Chattagram Jana Samhati Samiti, a political organisation representing the indigenous Jumma peoples, and the Government of Bangladesh on 2 December 1997 provides that, *"Immediately on signing and executing the agreement between the government and the PCJSS and with the members of the PCJSS returning to normal life, all temporary camps of the army, Ansar and Village Defence Force in the Chittagong Hill Tracts excepting Bangladesh Rifles and permanent cantonments (three in three district headquarters and in Alikadam, Ruma and Dighinala) will be gradually brought back to the permanent places and a deadline for this be fixed."*[110]

But until today, the Government has failed to implement this

provision of the Peace Accord. "A mere 29 camps out of about 500 military camps in the CHTs have reportedly been withdrawn since December 1997."[111] The army continues to resort to serious human rights abuses.

Impunity: The Case of Chittagong Hill Tracts

During the two and half decades of low intensity armed conflict from 1975-1997, the CHTs witnessed unprecedented human rights abuses. A series of massacres of the Jumma peoples by the Bangladeshi security forces and illegal plain settlers led to the influx of 60,000 Jumma refugees to Tripura State, India in 1986. There has been no accountability for such human rights violations.

The Chittagong Hill Tracts Peace Accord did not have a single clause relating to accountability for such gross and widespread human rights abuses. By failing to ensure that the human rights violators in the CHTs are brought to justice, the Bangladesh government effectively condoned the massacres of the Jummas. It led the perpetrators to believe that they were beyond the reach of the law. Impunity is the single most important factor responsible for continuing human rights abuses in the CHTs.

To the knowledge of the Asian Indigenous and Tribal Peoples Network, no one has ever been convicted for human rights abuses in the CHTs. In fact, prosecution of the law enforcement officials cannot take place without the permission of the Government. Section 132 of Bangladesh Code of Criminal Procedure (CrPC) says that,

> *"no prosecution against any person for any act purporting to be under this chapter (Chapter X: Unlawful Assembly) shall be instituted in any court, except with the sanction of the government";*

and no magistrate, civil or military officer or any

> *"inferior officer, or soldier, or volunteer, doing any act in obedience to any order which he was bound to obey, shall be deemed to have thereby committed an offence."*

Therefore, criminal prosecution of the law enforcement officials has been hampered by a lack of political will. The VDP personnel were also given protection under the Section 132 of Bangladesh CrPC.

Even after signing the CHTs Peace Accord, the indigenous Jumma peoples are continuously subjected to serious human rights violations without any accountability process. If the treatment of the

under-privileged and indigenous peoples is one of the principle yardsticks of a functioning democracy, Bangladesh abysmally fails on this account. Presently, the issue in Bangladesh with respect to the minorities is not to provide special protection but to prevent the Jummas from being the "SPECIFIC TARGETS" of the law enforcement officials in the CHTs on the basis of their ethnic origin.

The following illustrates the policy of impunity of the Government of Bangladesh with regard to the Chittagong Hill Tracts.

On 17 November 1993, the Hill Students' Council (HSC) organized a peaceful protest against army harassment in the Naniachar area. The Bangladesh army had been using a bus passenger shelter as a checkpost to harass and torture the Jummas. The Hill Students Council had held an earlier demonstration on 2 November 1993 demanding the withdrawal of the checkpost, and had also approached the District Commissioner of Rangamati about the matter. When the authorities failed to take action, HSC called for another demonstration.

The demonstration began at around 12 noon at the Naniachar Bazaar, which is surrounded on three sides by the lake of the Kaptai Hydro-Electric Project. Around 4 pm, illegal Bengali settlers gathered under the banner of the *Bengali Samonnoy Parishad* and started shouting anti-Jumma slogans. They were carrying lethal weapons like bows and arrows, *daos* (large knives), iron bars, and sticks. The police made no attempt to disarm or divert them as they approached the Hill Students' Council rally. Interestingly, the Officer in Charge of Naniachar Thana informed the District Commissioner of the situation at about this time.

Around 4.15 pm the Bengalis attacked the unarmed Jumma students with their lethal weapons. Since it was a market day, there were a few hundred Jummas in the market in addition to the protesters. As the massacre begun, the Jummas were trapped. Those who tried to flee to the North Eastern side, the only land passage, were attacked by the army, positioned on the road and firing indiscriminately. The Jummas who attempted to flee by swimming were caught by army speed boats and held underwater until they drowned. The Deputy Commissioner himself arrived late in the evening and saw Jummas being chased by the armed Bengali settlers.

The Jumma Peoples Network gathered a list of 40 Jummas killed at Naniachar. Many disappeared and more than 100 people were injured. Only one illegal settler died in the incident. In the light of these figures, and the other facts in the case, the Naniachar Massacre cannot accurately be described as "a clash between the two groups."[112]

The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions stated in his report to the 51st Session of the Commission on Human Rights that he was not provided with full information on the killings at Naniachar by the Bangladesh Government. The Special Rapporteur urged the government to *"fulfill its obligation under international law to clarify the circumstances of each alleged violation of the right to life with a view to identifying those responsible and bringing them to justice, and to take appropriate measures to prevent similar acts from happening in future"*.[113]

A representative of the Jumma Peoples Network raised the issue of the Naniachar massacre during the 13th Session of the United Nations Working Group on Indigenous Populations, held from 23-29 July 1995. In its exercise of the right to reply, the Bangladesh delegation said that the Inquiry Commission on the Naniachar Massacre had submitted its report on 26 May 1994 and the Government had accepted the recommendation. Also, the delegation said the Government had initiated a departmental inquiry and four cases had been registered and a detailed reply had been sent for the consideration of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities under the 1503 Confidential Procedure[114].

To this day, the report has not been made public. No information has been given about the prosecution of the perpetrators[115].

Instead, the Jummas have only faced further persecution since the massacre. Mr Sachib Chakma, a leader of the Pahari Gano Parishad (Hill Peoples Council) was arrested on 11 February 1998 at Naniachar Bazar after the signing of the CHTs Peace Treaty, along with two colleagues, Mr Jyotimoy Chakma and Mr Tapan Jyoti Chakma. They have allegedly been charged with rioting in Naniachar on 17 November 1993, and with the assault of Mr Gautam Dewan, former Chairman of the Rangamati Local Council on 12 June 1996 during parliamentary elections[116].

Nearly Extinct Indigenous Peoples

About 250 Jarawas of Andamana and Nicobar are facing extinction in India. Little is known about the Jarawa. No-one speaks their language and they have remained hostile to outside contact for thousands of years. Some members of the previously isolated tribe, which numbers no more than 400 members, had begun to come out of their forest home and make contact with Indian settlers on the edges of their land and along the road cutting through their territory.

There have been concerns about the Indian government's plans to forcibly settle the Jarawas, a move, Survival International said, "that

would spell the end for the tribe - as it has for so many others around the world". One potential danger from resettlement is that of exposure to new diseases to which the tribe have no immunity. In September 1999, contact with outsiders led to a measles epidemic. Fortunately, only one Jarawa is known to have died of the disease, although more than 100 had to receive treatment. After being treated, most Jarawa returned to the forests[117].

In 1877, a measles epidemic broke out amongst the 5,000 Great Andamanese who had been settled by the British colonial administration. Fifteen per cent of the population died from the disease. Officials at the time estimated that at least half of the Andamanese on one island, and all of the Andamanese on another island, died subsequently as a result of its effects. Contemporary records state, "This epidemic was the most serious disaster which has befallen the Andamanese." Only 28 Great Andamanese survive today[118]. If measles was able to wipe out the 5,000 strong Andamanese, the approximately 400 Jarawa stand little chance unless urgent measures are taken – according to Survival International[119]. In 1976, the Onges in Andaman & Nicobar Island were forcibly relocated. Presently most of them are working as plantation workers and the tribe itself is facing extinction.

A Public Interest Litigation brought against the Union of India could herald the rapid extinction of the Jarawas of the Andaman islands. One Ms. Ganguly, a lawyer residing in the islands, is asking for these nomadic hunter gatherers, who have lived for thousands of years in their rainforest home, to be forcibly settled. Time and again history has shown that when a tribe is forcibly settled disease, disintegration and death soon follow[120].

Ms Ganguly, whose knowledge of the Jarawa is limited to having seen them from a passing vehicle, says, "This is the high time to make them acquainted with the modern civilisation." She cites the two other contacted tribes on the Andaman islands as examples of the type of settlement she wants for the Jarawa. Yet even the tribal welfare department has reportedly admitted that these cases were disastrous. Ms. Ganguly has at no point consulted the Jarawa with regard to her intentions and they will not take part in the proceedings. The language barrier (only one Indian anthropologist can communicate with the Jarawa on even a very basic level) makes it unlikely that they are even aware that their future is hanging in the balance[121].Similarly, the Vedda of Sri Lanka, believed to be 28,5000 years old, are facing gradual extinction. There are only 2,500 Veddas in Sri Lanka remaining to be Sinhalised. The Gal Oya irrigation project of the 1950s, the Mahaweli project of the late 1970s and the establishment of Maduru Oya National Park in 1977 dispossessed the Veddas from their natural habitat. Today, no one but tourists can enter Madura Oya National Park without a permit from the Department of Wildlife [122].

On 7 August 1997, President Chandrika Kumaratunga issued a proclamation stating that the Veddas would be allowed to continue their traditional way of life. But, in the absence of precise legislation or government order, the Veddas are still being targeted for continuing their way of life.

Conclusion

The most vulnerable people, whether the aborigines in Australia, Native Americans and Afro-Asians in the United States of America, Maoris in New Zealand, the Adivasis in India or the Bushmen of Kalahari, continue to be victims of racial discrimination, xenophobia and domination. As the domination of one group by another increases on the basis of "race, colour, descent, or national or ethnic origin" in the neo-colonial countries, the societal slur called racism seems to be a disquieting discovery in Asia. The focus on racism will continue to remain in the West due to a host of reasons such as colonialism, domination and simply because of the explicit and vulgar form of racial discrimination there. But Asians must neither ignore the presence of the same slur in their societies nor should an emphasis on colonial history and continuing Western domination become any excuse to hide it. From Gurinder Chadda's film for the British Broadcasting Corporation, "Bhaji on the Beach", where an Indian girl is scorned for carrying a bastard baby from an African boy, to Mira Nair's "Mississippi Masala" dealing with the hatred by Afro-Americans of the Indian expatriates from Uganda, the debate on racism has even invaded Hollywood's silver screen in a very Asian way – one of subtlety. Asians need to reconsider racism in their societies, both at the time that the World Conference Against Racism takes place, as well as afterwards.

Notes

1 The word *Adivasi* has its origins in the mother of Indian languages, Sanskrit. It is a conjunction of two words *Adi* meaning original and *Vasi* meaning inhabitants. *Adivasi* means original inhabitants.
2 CERD/C/304/Add.13.
3 CERD/C/299/Add.3.
4 CERD/C/304/Add.13.
5 CERD/C/58/Misc.17/Rev.

6 CERD/C/304/Add.52.
7 CERD/C/379/Add..
8 *Ibid.*
9 CERD/C/357/Add.2.
10 CERD/C/SR.994.
11 CERD/C/304/Add.52.
12 CERD/C/58/Misc.17/Rev.
13 CERD/C/58/Misc.26/Rev.3.
14 CERD/C/304/Add.7.
15 *Ibid.*
16 A/54/38.
17 CRC/C/15/Add.97.
18 "Indigenous Peoples Denied Their Right to Franchise", *Human Rights Features* (HRF/1/99), South Asia Human Rights Documentation Centre.
19 *Ibid.*
20 CERD/C/304/Add.54.
21 *Ibid.*
22 *Ibid.*
23 "Affirmative Action: Guarding against a rollback", by the South Asia Human Rights Documentation Centre, Human Rights Documentation Centre and International Service for Human Rights, *WCAR Think Paper,* V, December 2000
24 CERD/C/SR.994.
25 A/CONF.189/PC.1/8 (Annex, para. 29 (Mr. Asbjørn Eide) & para. 57 (Mr. Theodor van Boven).
26 "Affirmative Action: Guarding against a rollback".
27 Divorce under Islamic laws.
28 *World Directory of Minorities.* P. 628.
29 *Malaysia,* a profile by Asia Partnership for Human Development (APHD). Hong Kong: May 1993. P. 5.
30 "Statement of the Malaysian Delegation on Agenda Item 7: Right to Development to the 56th Session of the Commission on Human Rights", Permanent Mission of Malaysia to the United Nations. Geneva: 27 March 2000.
31 "Not a Time for Racial Riots: Malaysian P.M," *The Hindu*. By V.T. Sambandam. November 3, 1987.
32 *Ibid.*
33 *World Directory of Minorities.* P. 629.
34 *Indigenous Peoples of Asia.* Ed. Colin Nicholas and Raajen Singh. Asia Indigenous Peoples Pact, Thailand: 1996. P. 157.
35 *World Directory of Minorities.* P. 630.
36 *Indigenous Peoples of Asia.* Pp. 157-58.
37 *The Indigenous World: 1996-1997*, IWGIA. Copenhagen, 1997. P. 171.
38 *Ibid.*
39 *Ibid.*
40 *Indigenous Peoples of Asia.* P. 16.
41 *Country Reports on Human Rights Practices for 1998* – Volume I. P. 1002.
42 *Ibid.*
43 *World Directory of Minorities.* P. 630.
44 *The Indigenous World 1996-1997.* P. 169.
45 *Ibid.* P. 17.
46 *World Directory of Minorities.* Pp. 630-631.
47 Sarawak's People Campaign – homepage.

48 *Indigenous Peoples of Asia.* P. 201.
49 Sarawak's People Campaign – homepage.
50 *Ibid.*
51 *Indigenous Peoples of Asia.* P. 201.
52 *The Indigenous World: 1996-1997.* P. 173.
53 *Ibid.*
54 "Item 15: Intervention on Indigenous Peoples," Statement by Cynthia Gabriel, 14 April 2000. ALIRAN: On the Roster of the Economic and Social Council of the United Nations. Malaysia.
55 *The Indigenous World: 1996-1997.* P. 171.
56 *Ibid.*
57 "Item 15: Intervention on Indigenous Peoples," Statement by Cynthia Gabriel, 14 April 2000.
58 *Ibid.*
59 *The Indigenous World: 1996-1997.* P. 171.
60 *Indigenous Peoples of Asia.* P. 177.
61 *Ibid.* P 178.
62 *Ibid.* P. 190.
63 *The Indigenous World: 1995-1996.* IWGIA. Copenhagen, 1996. P. 159.
64 *Indigenous Peoples of Asia.* P. 191.
65 *The Indigenous World: 1996-1997.* P. 176.
66 *Ibid.* P. 160.
67 *The Indigenous World: 1995-1996.* P. 159.
68 *Indigenous Peoples of Asia.* P. 191.
69 *The Indigenous World: 1995-1996.* P. 159.
70 Source; Government Census, 1991.
71 *Chittagong Hill Tracts: Militarization, Oppression and the Hill Tribes*, by the Anti-Slavery Society, London, 1984.
72 *The Charge of Genocide against Bangladesh*, by Organizing Committee Chittagong Hill Tracts Campaign, The Netherlands, 1986.
73 The PCJSS leaflet dated 1st August, 1978.
74 Kaokhali Massacre: Bangladesh Army Slaughters Civilians in Chittagong hill Tracts, press conference by Member of Parliament Mr Upendralal Chakma, Mr Shahjahan Siraj and Mr Rashed Khan Menon.
75 "Changing Nature of Dominant Social Forces and Interventions in the Chittagong Hill Tracts", by M. M. Huq, *Journal of Social Science*/56, 1991.
76 "Country Reports on Human Rights Practices for 1998 – Volume I," Committee on Foreign Relations US Senate, Committee on International Relations, U.S. House of Representatives, by the Department of State. April 1999. US Government Printing Office, Washington, DC: 1999. P. 99.
77 *Indigenous Peoples of Asia.* P. 168.
78 *Dhaka Courier*, Dhaka, 8 July 1994.
79 *The Politics of Nationalism: The Case of the Chittagong Hill Tracts, Bangladesh*, by Amena Mohsin, The University Press Limited, Dhaka, 1997.
80 "Parbattya Chattagramer Unnayan O Bashtabata" (Development of CHTs and Reality), by Shri Jagdish, *Jumma Sambad Bulletin*, No 20, 28 February 1993.
81 A/55/280/Add.2.
82 "Destined to Die", by Manoj Narain, *Agenda, The Pioneer*, New Delhi, August 20, 2000.
83 *Ibid.*
84 See, *Trafficking in Children- A Nepalese Perspective*, at 1-2 (Paper Presented to

Working Group on Contemporary Forms of Slavery, May 25, 1998), by Anu Radha Koirala, Maita, Nepal; Ministry of Women and Social Welfare, Proceeding of the Consultative Workshop on the Development of A National Plan of Action against Trafficking in Children and their Commercial Sexual Exploitation, pp. 19-20 (22-24 April 1998) (hereinafter MWSW National Plan of Action); Anisha Schubert, The Trade in Girls: Trafficking for Prostitution in Nepal, §1.1, available at http://www.angelfire.com/az/Anisha/traffic.html (last updated July 28,1999); see also CWIN, State of the Rights of the Child in Nepal, at 35 (1998) (estimating that at least 20 percent of all individuals trafficked from India to Nepal were first sold when they were below the age of fourteen).

85 "Destined to Die"

86 See, *Trafficking in Children - A Nepalese Perspective.*

87 Human Rights Watch/Asia, *Rape for Profit Trafficking of Nepali Girls and Women to India's Brothels* (New York: Human Rights Watch, 1995) p.1. While Human Rights Watch has accurately described these three groups as "ethnic", SAHRDC also wishes to add that, according to the International Work Group for Indigenous Affairs and the Nepal Federation of Nationalities, the Tamang, Gurung, Magar and Sherpa are also "indigenous" peoples of Nepal. Source: IWGIA, *The Indigenous World: 1995-1996*, p. 207.

88 *Ibid.*

89 See MWSW National Plan of Action, P. 17.

90 "Destined to Die".

91 ABC/Nepal, Red Light Traffic, at 60.

92 Compiled by ILO-IPEC officials, Kathmandu, Nepal, 15 February 1999.

93 "Destined to Die".

94 Data cited in MWSW National Plan of Action, Annex 7.3 (Remarks by Mr. Tirtha Kumar Pradhan, DIG, Police Representative).

95 As one observer recently noted:
"[I]t is known that the local administration and the police of the districts of Sindhpalchowk, Makwanpur, and Nuwakot, where trafficking is rampant, have repeatedly released traffickers under direct instructions from ministers and politicians. The involvement of police personnel in protecting traffickers and in abuse and rape is no secret, but hardly ever reported." Schubert, supra note 2, § 9.3; see also Human Rights Watch/Asia, Rape for Profit, at 52 (noting that "traffickers routinely pay protection money to local police and Nepalese politicians as 'a sort of commission' to prevent arrests and prosecutions"; ABC/Nepal, Red Light Traffic, at 38 (noting survey finding that "approximately 35% of all sexual offence cases are linked either to the police or a political figure").

96 ABC/Nepal, A Situation Analysis Report on "Girls Trafficking in Sindhupalchowk," Mahankal and Inchowk Village Development Committees, at 2 (updated); see also Schubert, at § 11.2.1 (describing structural barriers to reporting and testifying by trafficking victims, including lack of access to legal assistance, harassment and complicity by officials, and threats of retaliation by traffickers); Global Alliance Against Traffic in Women et al., Human Rights Standards for the Treatment of Trafficked Persons, at 3 (Jan. 1999) (noting that fear and mistrust of police among trafficking victims deters reporting and inhibits enforcement).

97 See United Nations Task Force on Trafficking, *Trafficking of Women and Children, Nepal*, at 2 (June 1999) (hereinafter *UN Task Force Report*); see also Schubert, §§ 9.1-9.2 (describing economic, social, and cultural factors that contribute to trafficking).

98 *The Indigenous World: 1995-1996.* P. 210.

99 Compiled by ILO- IPEC officials, Kathmandu, Nepal, 15 February 1999.

100 See *UN Task Force Report*, at 2. See also Schubert, §§ 9.1-9.2.

101 *The Indigenous World: 1995-1996.* P. 207.

102 Global Alliance Against Traffic in Women, Foundation Against Trafficking in Women and International Human Rights Law Group, Human Rights Standards for the Treatment of Trafficked Persons, January 1999.

103 "Insurgency forces women to choose between ultra-left and police terror," *The Asian Age* [New Delhi] 10 July 1998.

104 *Rape for Profit*, Human Rights Watch/Asia. P.10.

105 *Ibid.*

106 *The Hindu*, New Delhi, 20 July 1996.

107 02/08/2000. CCPR/C/SR.1866.

108 Lok Sabha Debates, 18 August 1958.

109 Sectarian.

110 "Life Is Not Ours: Land and Human Rights in the Chittagong Hill Tracts, Bangladesh – Update 4" by Chittagong Hill Tracts Commission, 2000

111 "Elusive Peace in the Chittagong Hill Tracts: Why international monitors are imperative for the Peace Accord", by Asian Indigenous and Tribal Peoples Network, New Delhi, 23 March 2000.

112 "Perpetrators Roam Scot-Free: The Naniachar Killings & Impunity in Bangladesh", Jumma Peoples Network, 17 November 1995.

113 UN Document E/CN.4/1995/61.

114 "Perpetrators Roam Scot-Free: The Naniachar Killings & Impunity in Bangladesh", Jumma Peoples Network, 17 November 1995.

115 *Ibid.*

116 "Elusive Peace in the Chittagong Hill Tracts: Why international monitors are imperative for the Peace Accord".

117 Pressure builds in paradise, Survival International Newsletter, Spring 2000.

118 "Fatal Measles Epidemic Ravages Jarawa Tribe", *Survival International Bulletin update*, October 1999.

119 *Ibid.*

120 "Legal genocide - court case spells death for recently contacted tribe", Survival International Press Release, August 1999.

121 *Ibid.*

122 "Sri Lanka, Stop Extinction", *Indigenous Asia*, Volume 1, No 1, January-March 1999, Asian Indigenous and Tribal Peoples Network.

References

Anti-Slavery Society. 1984. *Chittagong Hill Tracts: Militarization, Oppression and the Hill Tribes*, London.

Asian Indigenous and Tribal Peoples Network. 23 March 2000. "Elusive Peace in the Chittagong Hill Tracts: Why international monitors are imperative for the Peace Accord", New Delhi.

Chittagong Hill Tracts Commission. 2000. *Life Is Not Ours: Land and Human Rights in the Chittagong Hill Tracts, Bangladesh - Update 4.*

Colin, Nicholas and Raajen Singh, (eds). 1996. *Indigenous Peoples of Asia,* Asia Indigenous Peoples Pact, Thailand.

Human Rights Watch/Asia. 1995. *Rape for Profit Trafficking of Nepali Girls and Women to India's Brothels.*

Huq, M. M. 1991. "Changing Nature of Dominant Social Forces and Interventions in the Chittagong Hill Tracts". In *Journal of Social Science* / 56.

Jumma Peoples Network. 17 November 1995. "Perpetrators Roam Scot-Free: The Naniachar Killings & Impunity in Bangladesh."

Koirala, Anu Radha. *Trafficking in Children- A Nepalese Perspective,* (Paper Presented to Working Group on Contemporary Forms of Slavery, May 25, 1998) Maiti, Nepal.

Minority Rights Group. 1998, *World Directory of Minorities.*

Mohsin, Amena. 1997. *The Politics of Nationalism: The Case of the Chittagong Hill Tracts, Bangladesh,* The University Press Limited, Dhaka.

Organizing Committee Chittagong Hill Tracts Campaign. 1986. *The Charge of Genocide against Bangladesh,* The Netherlands.

South Asia Human Rights Documentation Centre, Human Rights Documentation Centre and International Service for Human Rights, December 2000, *WCAR Think Papers,* May 2001.

US State Department, *Country Reports on Human Rights Practices* series.

International Work Group for Indigenous Affairs (IWGIA). *The Indigenous World* series, Copenhagen.

CHAPTER 6

THE GAP BETWEEN LEGALITY AND REALITY: THE CASE OF INDIGENOUS WOMEN AND CHILDREN IN SOUTH AMERICA

By Carlos Romero Bonifaz

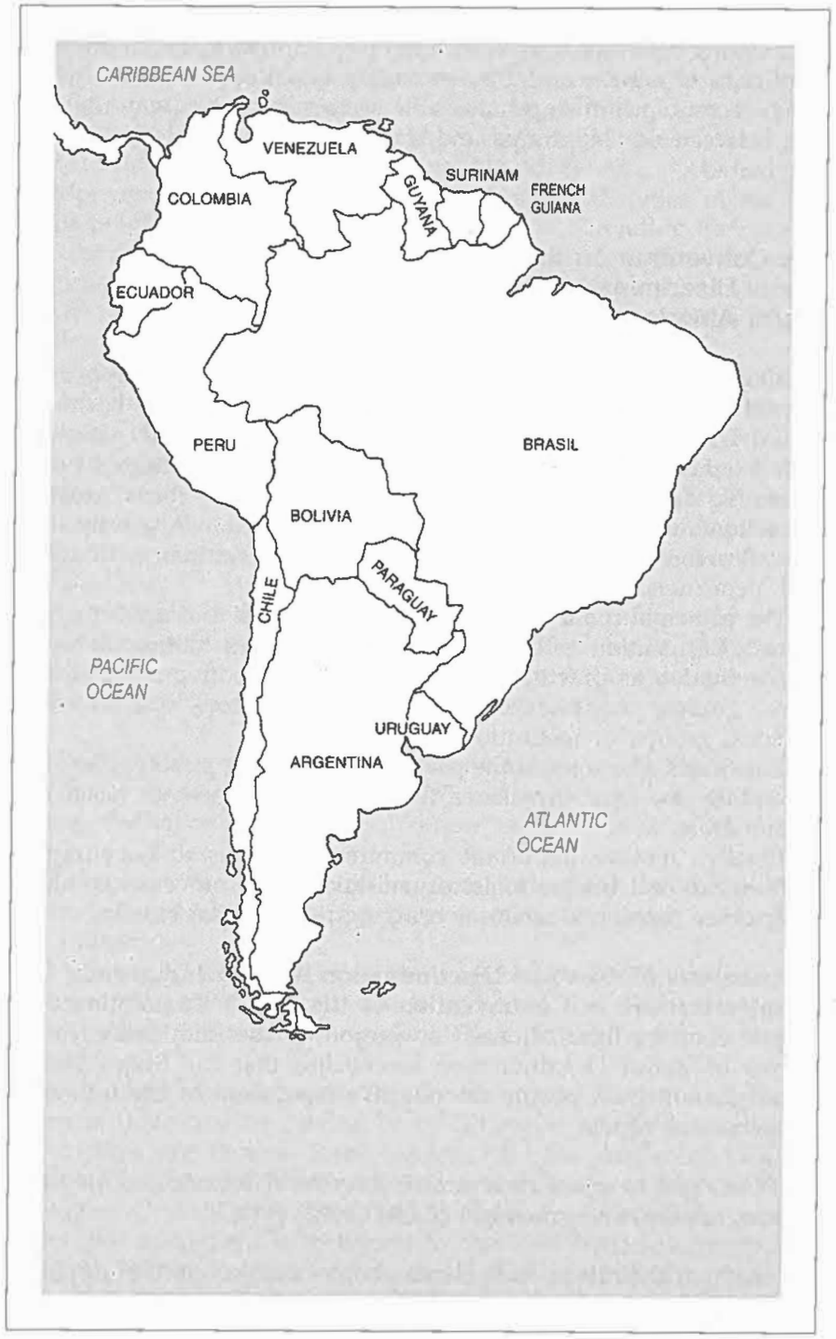
This chapter considers the racial discrimination in South America to which indigenous peoples, and especially indigenous women and children, are main victims.

The principles of freedom, equality and non-discrimination are cornerstones of contemporary international law, such as the Convention on the Elimination of All Forms of Racial Discrimination. Yet contemporary South American constitutions, too, speak of freedom, equality and non-discrimination.

These principles base their ideology on the French Revolution's Declaration of Human (and Citizen) Rights, which is the source of the liberal thought that has become the theoretical sustenance of modern and contemporary society. Different doctrinal currents such as humanism, social democracy, utopian socialism, anarcho-syndicalism and Marxism, which have all defended social, collective and human values and denounced discrimination, exploitation and social wrongs, have been further important influences.

However, the enforcement of these legal provisions is frequently threatened and stymied by a number of material factors. The most important of these factors are the unequal and unjust economic conditions that result in exploitation, poverty, illiteracy, lack of access to education and all the other situations through which discrimination is ultimately expressed. While all indigenous peoples suffer from these conditions, it is the indigenous women and children who are most affected by these expressions of discrimination.

This chapter will first assess the scope of the Convention on the Elimination of All Forms of Racial Discrimination, contrasting the measures protecting fundamental and anti-discriminatory human rights with cases where these rights were significantly violated in South American countries. It will then go on to look at how these same countries' constitutions deal with discrimination and inequality and, in a last section, exemplify the gap that exists between legislation and reality by assessing the situation of indigenous women and children. The emphasis will be on indigenous women of the Amazon region of Bolivia, and on indigenous children in Bolivia and Paraguay.



By way of conclusion, we will go on to note that the only way of overcoming discrimination is through real improvements in physical conditions of existence and by providing equal opportunities for all social sectors, prioritising vulnerable sectors in such a way that the gap between power groups and the marginalised majority can be eliminated.

The Convention on the Elimination of All Forms of Racial Discrimination and the Indigenous Peoples of South America

In 1965, the General Assembly of the United Nations approved the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) – (hereafter "The CERD Convention"), which entered into force in 1969 after being ratified by 27 States. To date, a total of 156 States have joined. In South America the following countries have signed the convention: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Suriname, Uruguay and Venezuela.

The principal commitments made by the States that are contained in this Convention refer to the prohibition and halting of racial discrimination as practised by authorities, public or private institutions, groups, organisations or individual persons against other persons, groups or institutions.

The States also commit themselves to reviewing public policy and amending any legal provisions that create or perpetuate racial discrimination.

Finally, another important commitment relates to encouraging multi-racial and integrationist organisations and movements, along with other measures aimed at bringing down racial barriers.

An Analysis of Cases of Discrimination Against Indigenous Peoples that are in Contravention of the CERD Convention.

Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination establishes that the States Parties must guarantee all people the effective enjoyment of the following fundamental rights:

a) "The right to equal treatment before the tribunals and all other organs administering justice" **(CERD,1992: p.17)**

Throughout their lives, indigenous peoples lack equality of opportunity in terms of access to jurisdictional bodies. The restrictions they

have to confront relate to the fact that, in practice, the administration of justice is not free.

The costs of judicial processes include proceedings, legalisations, judicial stamps, formalities etc. Indigenous people, in most cases, have insufficient means to cover these costs, which places them at a disadvantage in relation to any possible adversary.

Moreover, problems caused by language difficulties mean that indigenous people not only have difficulty in defending their rights but also in knowing and understanding these very rights. Whilst the majority of legislation provides for the use of interpreters, this is not always enforced and, even if it is, does not occur at all stages and levels of the process.

Finally, the very way in which legal regulations and procedures are structured is alien to indigenous culture, thus forming a barrier to them. All things considered, racial discrimination in terms of indigenous peoples' access to, and treatment by, the organs of justice administration is inherent in the legal system itself. It must be remembered that Indigenous Law and the validity of traditional justice is conditional, in the final analysis, upon the current system of positive law.

An example of this situation is the case of the indigenous Brazilian, Macuxi, arrested in a discriminatory fashion, tortured and murdered by the police: the Brazilian State delayed the prosecution and punishment of those responsible for more than ten years.

b) "The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution" **(CERD. 1992: p.17)**

This provision of the Convention cannot be merely declarative. The victims of mistreatment, aggression or physical violence are primarily indigenous.

To this must be added permanent aggression from people linked to economic power groups, which occurs in the form of reprisals against those demanding the right to land, natural resources, social security etc.

A number of indigenous Colombian leaders have found themselves in this situation, having been kidnapped and later murdered. The victims are Embera Katío leaders: in 1998, Alejandro Domicó was murdered, in 1999 Lucindo Domicó Cabrera who, together with the higher Council of the Sinú and Verde rivers, pressed for consultation and agreement with regard to the Urrá hydro-electric plant. Armando Achito Lubiaza was assasinated by paramilitary groups in December 2000. In March of this year, the Jenené, José Angel

Tomicó, was kidnapped and murdered for having organised actions to take control of territories on behalf of his people. On 2nd July last in the municipality of Tierra Alta, Córdoba, the Embera Katío leader, Kimy Pernía Domicó, was kidnapped. Paramilitary groups would appear to be responsible. Kimy was renowned for defending the indigenous rights of Colombian peoples.

Cases resulting from armed attacks, particularly by paramilitary groups, and which have indigenous populations as their military target, must also be considered. The primary victims have been the Colombian indigenous peoples, particularly those living along the banks of the Sinú River where, according to the Indigenous Organisation of Antioquia (OIA), more than fifty indigenous people have been killed. Nor must one forget the *"massacre del Nilo"* in which more than 20 indigenous people died.

Military clashes, both in Colombia and in Peru during the dirty war between the government and groups such as the Shining Path, have caused the deaths of indigenous peoples, the invasion and loss of their lands and property, massive displacements and the destruction of their culture.

The indigenous Aché in Paraguay have also complained in 1973 to the Inter-American Commission on Human Rights that they are the victims of attacks and practices of forced malnutrition, attempted enslavement, disappearance of their people and the destruction of their culture.

***c) "Political rights, in particular the right to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service"* (CERD, 1992: p.17)**

It is at the level of political rights that the greatest restrictions are found. The scope of exercise of public power is nothing but the political expression of economic power. Consequently, even in countries with an indigenous majority, the exercise of political power is monopolised by a non-indigenous minority.

The very right to elect is compromised by virtue of the fact that the States do not establish sufficient mechanisms to guarantee its exercise. To begin with, indigenous people do not even have the personal identification documents that would enable them to vote, nor is the State aware of the number and location of indigenous electors.

This situation can be seen in the case of Venezuela, in relation to the election of indigenous representatives to the last Constituent

Assembly. The lack of an indigenous census made the task of establishing electoral constituencies very difficult.

In addition, even if they hold the necessary documentation, the hold exercised over these people by dominant sectors is generally too tight, particularly in the case of captive communities and those that are subject to systems of servitude or dependent labour relations in relation to the estates or employers who, through unfair practices, ensure that electoral actions and decisions respond to the dominant interest.

In terms of the right to stand for election to public office, the restrictions are even greater. This is due to the establishment of electoral systems within which political participation is unequal and which, in the case of party systems, require nomination by means of mechanisms that are utterly alien to indigenous culture. Consequently, access to public office on the part of an indigenous person is generally limited to his or her incorporation into the civil service bureaucracy by means of individual or group co-option.

Moreover, State institutions function as a systematic mechanism for the exclusion of indigenous representatives from public power because they are incompatible with indigenous traditional organisational structures, autonomous spaces which the States are not prepared to recognise.

To verify this situation, you have only to look at the make-up of Parliament and the Executive Power in the different countries, at which levels indigenous peoples do not have their own representatives. In the case of Bolivia, the Law of Popular Participation only recognises spaces for social control at the level of the municipality. Even then, this is through authorities other than the indigenous peoples' organisations. Otherwise, the proposal for recognition of indigenous, peasant and native communities, submitted to the State authorities by the social organisations, was branded as unconstitutional and secessionist.

***d) "Other civil rights"* (CERD 1992)**

This category includes: the right to freedom of movement and residence within the border of the State, the right to nationality, the right to freedom of thought, conscience and religion, and the right to freedom of opinion and expression.

In the case of indigenous peoples, these civil rights are also severely restricted. The racial discrimination against the civil rights of indigenous peoples that is of greatest relevance and demands special consideration takes forms that range from the impossibility of freedom of movement to the difficulty of exercising the freedom to meet and associate.

With regard to freedom of movement and choice of residence, discriminatory practices can be seen in the fact that social stratification has "zonified" the geographic location of the different social sectors within the cities. It has reached such an extreme that residential zones will not allow just "anybody" to enter, and this has direct implications for the freedom to choose one's place of residence.

All this is influenced by the unequal material conditions of social life, which have determined the existence of marginalised districts, shanty towns, peri-urban belts and towns of poverty, the places that are destined for the poor, particularly indigenous migrants.

The situation is not greatly different in rural areas. The areas occupied by indigenous people do not attract great attention from the State; the lack of services often turns them into places inappropriate for planning the development of social groups.

Nonetheless, the worst situations are the various cases denounced in Peru relating to forced military recruitment of indigenous people in order to incorporate them into patrols or use them as army guides in the military actions undertaken against the guerrillas, and these are clear examples of attacks against liberty, dignity and freedom of movement.

With regard to the right to leave for another country and return to one's country of origin, there are implausible restrictions: some countries choose their visitors according to their economic status, excluding lower income sectors, particularly the indigenous. To this end, requirements are established such as obtaining a visa, proving stable and well-paid employment, minimum assets, bank account, credit card, social "credit" etc.

All of this encourages illegal immigration, exploited by the host countries, which obtain a cheap source of labour, even for the most menial of work, and this situation is worst in the case of migrants of indigenous origin. Such is the situation of the Mexicans living along the borders with the United States, who are exploited within the cross-border assembly plants.

In addition, it is worth considering the right to individual or collective property. It is the main desire of indigenous peoples to enjoy title to their territories. Nonetheless, as indigenous peoples' traditional environments are the areas of greatest natural wealth in the country, and over which there is great economic interest, recognition of property rights over their territories, including the possibility of the exclusive use of the natural resources found there, is a process that still has a long way to go.

The achievements made in this area have been possible only through much struggle, pressure and sacrifice. Frequent protests have had to be undertaken (Peru, Colombia, Chile, Bolivia, Paraguay, Mexico, Ecuador), and in some cases the *de facto* occupation of estate lands (Brazil).

In spite of the validity of ILO Convention 169, by means of which the States Parties have made a commitment before the international community to recognising the fundamental rights of indigenous peoples, in particular those relating to the legal security of their territories, the land tenure structure is characterised by a high concentration of lands into estates, exclusion of indigenous peoples from land ownership and a lack of political will to resolve this problem.

In Bolivia, 1% of land owners hold 8 times more land than the indigenous and peasant majority. In 1996, the State agreed to resolve this problem by processing and titling the lands demanded by indigenous peoples within a year. Nonetheless, in five years on only a little over one million hectares have been titled, out of a total of 20 million hectares claimed by indigenous peoples. In addition, the State has granted forestry concessions that are superimposed upon 714,000 has of indigenous land, and this without prior consultation or the regularisation of agrarian rights, which has led the ILO, following complaints from the Indigenous Confederation (CIDOB), to declare a violation of Convention 169.

In Brazil, 12% of the national land mass has been classified as indigenous areas to the benefit of 215 tribes representing a population of more than 350,000 inhabitants.

In Peru, only one million hectares have been recognised for the indigenous peoples. However, the threat of commercialisation hovers over their lands since the property of native communities is not imprescriptible and can be alienated.

Complaints regarding dispossession, invasions and subjugation of indigenous lands made to international bodies are many and cover all countries of the region.

The remaining rights, that is, of opinion, conscience, meeting and association, are equally compromised because indigenous peoples lack the means to exercise them and because there is a permanent disregard for their language, concepts, institutions and organisations, resulting in racial discrimination in these areas.

e) "Economic, social and cultural rights" (CERD, 1992: p.18)

These rights include: the right to work; the right to form trade unions; the right to public health and medical care, social security and social services; and the right to education and training.

The origins of racial discrimination can largely be found in unequal socio-economic conditions. The exclusion to which indigenous peo-

ples are victim is expressed at all levels; this means that the impossibility of having legal security over their territories and natural resources also results in their not being able to access work, social services, to have the protection of social rights, to access education, health, social security, housing, etc.

It is impossible to consider making equal work opportunities a reality when systems of semi-slavery and servitude affecting indigenous peoples persist, people who enjoy no protection from industrial legislation or social security.

Nor do the conditions of poverty and marginalisation in which indigenous peoples struggle enable them to exercise the right to form trade unions. In many cases, the condition of being exploited is a "privilege" because they at least have work and do not form part of the enormous army of unemployed that desperately roam the streets, swelling the underclass. In these conditions, the relinquishment of the exercise of social rights, should one find oneself protected by them, is often for the purposes of keeping one's employment.

In addition, the employers' permanent use of "unfair practices" and the vision of fragmenting and breaking up the social sectors promoted by the State (and innate to the ruling system itself) does not allow the consolidation or normal development of social organisations.

Nor do the benefits of social security reach the indigenous population for, in the majority of cases, these people are involved in the informal sector of the economy and hence excluded from such services.

There have been a number of complaints regarding environmental contamination caused by industrial companies, with a series of health and other social impacts. Such is the case of the Urra Hydroelectric Project in Colombia, which affects the Embera-Katío people, the construction of the thermo-electric plant in Venezuela affecting the Penón people, oil exploration on the part of the Arco Oriente company in the Pastaza and Santiago Provinces of Ecuador, which affects indigenous Shuar and Ashuar, and the contamination of water caused by mineral exploitation on the part of the Billinton company in the same region.

The Quichua communities of Ecuador have also denounced the contamination caused by the construction of an oil pipeline by the Arbgep company, in addition to continuing action against Texaco for compensation, 20 years after oil drilling, for an amount of 1.5 million dollars.

***f) "The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks"* (CERD, 1992: p.18)**

With regard to public places and services, there are no restrictions apart from the inconvenience and embarrassment caused by those who consider themselves to have the exclusive prerogative of using those services and accessing those places. Otherwise, restrictions can be better expressed in the impossibility of accessing those services for whose use a certain tax or levy must be paid. In any case, apart from these aspects, it must be noted that this provision does not extend to private services, in which there are restrictions, particularly in relation to indigenous people.

Contemporary Legislation in South America

In almost all South American countries, the Constitution as well as other fundamental laws emphasize equality and human freedom as well as prohibiting all forms of discrimination.

Thus, in **Brazil,** the fundamental objective of the Constitution is:

> *"To promote common well-being without prejudice with regard to origin, race, sex, colour, age or any other form of discrimination."* (Article 3, paragraph IV)

The constitution establishes that all people, without discrimination of any type, are the beneficiaries of collective well-being. However, this is not expressed as a fundamental right of people but rather as an objective of the State.

There are other laws that specifically refer to discrimination, prohibiting its practice and classifying it as a criminal activity subject to penal sanction, for instance Law 7716 (January 5, 1989), which speaks of crimes due to prejudice based on race or skin colour. This law is complemented by Law 8081 (September 21, 1990), which lists the crimes and establishes the sanctions applicable in cases of acts of discrimination or prejudice by the media or publications of any type based on race, color, religion, ethnicity or national origin.

In **Colombia,** Article 13 of the Constitution points out that:

> *"All people are born free and equal before the law. They will receive the same protection and treatment from the authorities and will enjoy the*

same rights, freedoms and opportunities without any discrimination on the basis of sex, race, nationality or family origin, language, religion, and political or philosophical opinion."

"The State will promote conditions so that equality is real and effective and will adopt measures in favor of groups who are discriminated against or excluded."

"The State will especially protect those people who because of their economic, physical or moral condition find themselves in circumstances of apparent weakness. The State will also sanction abuses or mistreatment against them."

The Colombian Constitution is one of the most progressive and complete in relation to the prohibition of discrimination, insofar as it not only lists the different ways in which discrimination manifests itself and proclaims the equality and freedom of all people in the eyes of the law but also establishes that all people must enjoy the same opportunities and, what is more, that it is the State that must promote real and effective equality.

This means that the State must make the equality stated in the law concrete by protecting particularly vulnerable people and punishing discriminatory practices against them.

Unlike other constitutional regulations, the Political Constitution of Colombia starts from the realistic assumption that the law has little possibility of being fully applied due to the existence of deeply rooted social practices and physical factors that make validity of the law impossible. For this reason, with a view to achieving its effectiveness, the law is strengthened by obliging the State to adopt special measures in favour of traditionally marginalised and discriminated social groups and persons finding themselves in an economic, physical or mental condition of manifest weakness having, in addition, to punish the abuse or mistreatment to which they are victim.

This is extremely pertinent as by virtue of this, the equality of all people in the eyes of the law must be understood not only as non-discriminatory treatment but, fundamentally, as a process in which the inequalities that exist must be overcome, in such a way that the "weakest" are worthy of special protection so that they achieve a balance in relation to other people.

In **Peru,** according to Article 2 (2) of the Constitution, all people are entitled to:

"Equality before the law. Nobody should be discriminated against for reasons of origin, race, sex, language, religion, opinion, economic condition or conditions of any other nature."

Equality and non-discrimination are thus considered to be fundamental rights.

The **Argentinian** Constitution points out in Article 16 that:

"The Argentine Nation does not admit blood or birth privileges. There are no personal privileges nor titles of nobility."

The Argentinian constitutional provision is abstract and very general. However, the fact that blood or birth privileges and titles of nobility are not recognized enables us to assume that it does prohibit all forms of racial or social discrimination as well as privileges of a political, religious, or institutional nature. The Argentinean Constitution can therefore be said to have the same scope as constitutional legislation in other Latin American countries.

In **Chile,** Article 1 of the Constitution states that:

"Men are born free and equal in dignity and rights."

This provision is complemented by Article 19 (2), which stipulates:

"The Constitution assures all people equality before the law. In Chile there are no privileged people or groups. Neither the law nor any authority will be able to establish arbitrary differences."

Perhaps the content of this later provision is explained by the fact that, during the 1970s, Chile had an authoritarian military government and, for this reason, the Constitution contemplates discriminatory actions related to the nature of the prevailing regime at that time.

Equality is also at the core of the constitution in **Uruguay** as well in **Paraguay.** The Constitution of Uruguay states in its Article 8 that:

"All people are equal before the law. No distinction among them is recognized other than those having to do with their talents and virtues."

Although strictly speaking it may be related to the nature and develop-

ment of people's capacities, it is debatable whether there should be discrimination of people according to their talents and virtues. We need to bear in mind that the full validity of the legal principles of freedom, equality and non-discrimination is linked to the fact that, ultimately, all people do not enjoy the same opportunities.

In this sense, the Colombian Constitution is more realistic and complete because it establishes that the State is obligated to promote effective equality and guarantee equality of opportunities as well as safeguard the weakest.

In **Paraguay,** Article 46 deals with equality among people in the following terms:

> *"All the inhabitants of the Republic have the same dignity and rights. Discrimination is not permitted. The State will remove obstacles and will impede factors that maintain or propitiate discrimination. Protection from unjust inequalities will not be considered a discriminatory factor but rather an equalizing factor."*

The normative formulation of the Paraguayan Constitution is interesting as it associates equality with non-discrimination and people's dignity. It also establishes that it is the obligation of the State to eliminate obstacles that prevent the full implementation of these rights, and even authorizes it to adopt "positive" discriminatory measures when the purposes of these measures are to even out inequalities. The spirit of the Paraguayan Constitution resembles that of Colombian legislation.

In **Bolivia** the Constitution recognizes the pluri-cultural and multiethnic character of the Republic:

> *"Bolivia, free, independent, sovereign, multiethnic and pluri-cultural is constituted as a unitary Republic..."* (Article 1)

And its Article 6 further states that:

> *"Every human being has legal status and capacity in the eyes of the laws. Every person enjoys the rights, freedoms and guarantees recognized by this Constitution without discrimination by race, sex, language, religion, political or other type of opinion, origin, and economic, social or any other condition."*
>
> *"A person's dignity and liberty are inviolable. The State's fundamental duty is to respect and protect them."*

These provisions recognize that all people have the ability to act as subjects of the law, with the full capacity to possess rights and legal duties. All people can enjoy and exercise these rights, the only restrictions being those of age and nationality for certain specific rights (e.g. the right to vote).

It is thus clear that the Bolivian Constitution prohibits all forms of slavery, servitude or any other manifestation of discriminatory treatment. At the same time it also stipulates that it is the obligation of the State to guarantee and preserve the people's exercise of rights, freedoms and guarantees. These rights must be guaranteed under conditions of equality, freedom and dignity.

With respect to native and indigenous peoples, Article 171 recognizes their fundamental rights in the following manner:

> *"Within the law the economic, social and cultural rights of indigenous peoples who inhabit the national territory are recognized, respected and protected, especially those rights relating to their native community-based lands. Their rights to sustainable use of natural resources, identity, values, language, customs and institutions are guaranteed."*
>
> *"The State recognizes the legal status of indigenous and peasant communities as well as peasant associations and rural unions. The natural or traditional authorities of indigenous and peasant communities are able to exercise administrative functions and, in accordance with their customs and procedures, apply their own norms as an alternative means of conflict resolution as long as they are not contrary to the Constitution and laws. The law will create compatibility between these functions and the attributes of the State's powers."*

This article incorporates the fundamental content of the International Labour Organization's Convention 169 on Indigenous and Tribal Peoples in Independent Countries. This Convention establishes the commitment of the State Parties before the international community to recognizing, respecting, restoring and defending the individual and collective rights of indigenous peoples.

The Gap between Equality and Reality

To a large extent, the actual validity of legal principles of equality and non-discrimination is determined by material conditions of existence and social development. When there are very marked differences in terms of access to and availability of economic resources or where these resources are excessively concentrated in the hands of

a minority, the immediate consequence is poor living standards for the majority of the population. Other consequences include: conditions of under-development, poverty, exploitation, illiteracy, morbidity and other indicators that characterize marginalized sectors.

The main victims of discrimination are indigenous peoples. They are the most vulnerable and under-developed sector of society. And among indigenous peoples, it is the women and the children who suffer greater marginalisation and inequality, not only because they are indigenous and poor but also precisely because they are women and minors.

Women's Rights in Bolivian Legislation

Bolivia ratified the Convention on the Elimination of All forms of Discrimination against Women on September 15, 1989.

> *"....In terms of the present Convention the expression discrimination against women will denote all distinctions, exclusions or restrictions based on sex whose objective or result is to impair or annul the recognition, enjoyment, and exercise by women of human rights and fundamental freedoms in the political, economic, social, cultural and civil spheres or in any other context. Such rights should be independent of their civil state and based on equality between men and women...."*

This was a big step towards the goal of equal rights for Bolivian women in general. But as the document of the Declaration of native and peasant women at the NGO Forum during the 1995 IVth World Conference in Beijing showed, so-called democratic society has still not taken into consideration respect for the fundamental rights of indigenous and peasant women as human beings within a pluricultural and multilingual society and so indigenous women continue to be discriminated against and marginalised in all spheres, riding roughshod over their human rights and denying their cultural values.

Women and Indigenous Rights in Bolivian Legislation

Although at the level of national legislation there has been some progress towards recognition of the rights of indigenous peoples, these have referred to the land issue, natural resources and political participation. But if we look at indigenous women specifically, Bolivian legislation has only recently begun to make progress towards recognising women's rights in general, incorporating important demands into law.

Article 3 of the INRA Law concordant with Article 171 of the State Political Constitution (CPE) recognises women's rights to property, management and exploitation of the land, be they single, married, divorced or widowed in accordance with the CPE and the Convention on the Elimination of Discrimination Against Women. These provisions apply the criteria of equality in land distribution, whereby women are given the right to hold property title to land and to manage it, particularly in indigenous and peasant communities where they were not taken into consideration and, on the contrary, were discriminated against.

The Law against Family or Domestic Violence, Law 1674 and its governing body of regulations, in Article 16 authorises the community and natural authorities in indigenous and peasant communities to intervene in the resolution of intra-family conflicts where complaints of violence are made, punishing in accordance with their customary practices and concordant with the CPE.

Indigenous women suffer physical and sexual violence at the hands of their partners and others, which discriminates against the value and recognition of their rights. These cases occur particularly with employers on the large cattle ranches, and workers in the timber and oil companies who, in addition to exploiting and plundering resources, abuse indigenous women.

In the political sphere, there are large voids in participation where the vast majority of the country is excluded because the Electoral Code and the Law of Political Parties do not recognise the basic forms of natural representation of indigenous peoples.

Nevertheless, a significant step towards the political participation of women took place with the promulgation of the Law of Quotas, which obliges political parties to include 30% women on their electoral lists, alternating their order on the list with that of male candidates.

Indigenous Women: Poverty and Socio-Economic and Cultural Discrimination

This analysis focuses on the indigenous women who belong to various and diverse ethnic groups of Amazonia and maintain communal ties, their own languages, and their own customs.

To speak of gender roles in general is very complex. Firstly, and above all, cultural and ethnic diversity needs to be considered because the role of indigenous women can differ depending on the ethnic group. For example, among the Ayoreo people of Santa Cruz, women's participation is decisive due to the prevailing matriarchal relationships. However, in most other indigenous communities there are marked differences between men and women and it can be said

that, in general, indigenous women suffer from a triple discrimination or dominance:

> *"Because they are women,.... there is patriarchal dominance. Because they are indigenous,... they suffer violence and the scorn of society. Because they are poor ...and due to their socio-economic position in the labour market, they are also victims of exploitation by bosses".*

Their conditions of under-development, poverty, exploitation, lack of rights and opportunities, as well as the unclear situation in which they find themselves, are clearly and objectively demonstrated by the official social indicators from the National Institute of Statistics in Bolivia.

As biological and social producers and reproducers of the labour force, indigenous women play a fundamental role in the life of their communities as they are the ones who preserve culture, language, and a relationship with the environment. They also maintain a strong cultural resistance to change.

Indigenous women also play an important economic role. They carry out domestic tasks in the home and assist their husbands in agricultural activities by weeding and sowing. During the brazil nut harvest, when men migrate to the forest, women become responsible for the care of their farm plot. Women are also responsible for providing the households with firewood and water, and, along with children, are in charge of caring for gardens and livestock. They are responsible for most of the craft production, weaving hammocks, bags, *jasayes* and baskets and also producing ceramics. These crafts enable them to generate income for their families.

At the same time, they also often suffer gender domination in their communities, expressed as physical and sexual violence on the part of their husbands and as sexism. Outside their communities, besides suffering social subordination and the racial and colonial discrimination and exploitation that indigenous peoples endure in national society, they are also the victims of sexual abuse committed, in particular, by large cattle ranch owners and timber and oil company workers.

Due to the poverty in which they live, indigenous women who migrate to the city in search of better opportunities end up working as maids. In these jobs, their labour rights are not recognized and they receive low wages. In addition, they are mistreated and discriminated against because they are indigenous women. On cattle ranches, when men are hired, their wives and children are automatically included but their labour is not recognized or remunerated (APCOB n.d.).

In a study on wage discrimination based on ethnicity and gender, Roberto Rivero (1999) points out that:

> *"remuneration does not always reflect the level of knowledge and experience. Instead it would appear that it is determined on the basis of characteristics that an individual cannot choose, such as race, gender, age, etc."*

In terms of health, the indicators show that maternal mortality is 390 women per 100,000 live births in urban areas with 524 deaths per 100,000 live births in rural areas. A study on maternal mortality in Bolivia published in 1997 reported that 85% of all deaths occur in the home, due to limited access to health services (Escobar, 2000: 83).

The 1994 Indigenous Census indicates that the rate of maternal mortality for indigenous women is 395 deaths per 100,000 live births. The overall fertility rate is 8.8 children per woman, and only 13% of indigenous women receive attention from trained health workers during childbirth.

They prefer to go to the traditional midwives or to healers in the community. This attitude is rooted in custom as well as socio-economic and cultural factors, which have a significant influence over the personal decisions of indigenous families.

In some ethnic groups, women account for 70% of those who are illiterate. In rural areas, at the primary school level, only half of the female population attend and, out of every 100 girls, 99 drop out. Seventy percent of children in rural areas abandon school in the first year and only 1.4% of boys and 0.7% of girls finish secondary school. (Salguero 1999: 49).

This may be due to the lack of schools in the communities or the lack of qualified personnel who can teach them in a way that is in harmony with their socio-cultural characteristics. But other factors are also involved. Indigenous girl children abandon education because they take on a domestic role at a very early age and also because parents give more importance to the education of their sons, who are seen as the future spokespersons of their communities.

Bilingual Education is being implemented and, within this process, there are ongoing efforts to recuperate indigenous languages and elaborate educational materials with cultural content. In spite of this, among some groups, education is still in Spanish and the cultural characteristics of indigenous peoples are not taken into account.

In terms of political rights, there have been no significant advances. In municipalities there are 3,376 elected council members, half of whom are substitutes. Of the 1,688 council members, 1,424 are men and only 245 are women. According to the Confederation of

Indigenous Peoples of Bolivia, (CIDOB), only 7 out of these 245 are indigenous women from the lowlands.

With respect to substitute municipal council members there are more women (1,175) than men (475) (VAIPO, 2000) but among these only two are indigenous women from the lowlands.

At the level of the legislature, there are 27 male senators and only one female, and 130 male deputies and 15 female, of whom three are indigenous women.

These figures show that indigenous women have little access to participation in the various facets of State power. They are excluded due to the precarious political mentality of traditional and patriarchal parties, which do not allow the incorporation of women into their party structures. But this is also, as often pointed out by indigenous women themselves, because the conditions in which they compete with men are unequal, because they were unable to access primary school education or, in other cases, had to leave school at an early age.

Women's Participation in the Indigenous Movement

The Organization of Indigenous Women of the Beni (CMIB)

At organizational level, indigenous women in the Amazonia have a representative departmental organization in the Beni called the Organization of Indigenous Women of the Beni (CMIB). It was founded in 1987 and includes different ethnic groups within the Department.

> *"Having seen their rights to territorial recognition trampled on women decided that it was important to organize and fight for their rights, because by being organized they could strengthen the whole indigenous movement... CMIB was founded because there was a need to claim educational and health rights as well as to find ways to subsist in the city..." (Sonia Justiniano: in Lehm 1999).*

CMIB developed a proposal for the section on "Indigenous women's rights" (1994) that was incorporated into the proposed Law of Indigenous Peoples of the Eastern, Chaco and Amazonian regions of Bolivia. In relation to political rights, Article 52 of the proposed law stated that:

> *"... all citizens are obligated to respect an indigenous woman's right to vote, stand for elections, be a local authority, a national representative, or an union leader or carry out any other activity that is related to the social problem of their areas." (TIJARAIPA, 1994).*

The proposed law also stipulated that the State should guarantee the execution of fundamental rights established in the Universal Declaration of Human Rights, the Political Constitution of the State and the Convention on the Elimination of All Forms of Discrimination Against Women as well as other international agreements. It stated that appropriate measures should be adopted in order to eliminate discrimination against indigenous women and ensure conditions of equality. It also stated that the State should propose public policies that guarantee women's participation in processes of economic, social, cultural and political development. Such policies should respect their customs and culture as well as indigenous forms of organization.

Indigenous Women and their Participation in CIDOB

At the national level, the Confederation of Indigenous Peoples of Bolivia (CIDOB) has eight secretaries, two of whom are women. One is the Economic Development Officer and the other the Gender Officer. The mission of the Gender Officer is

> *"to promote and develop actions aimed at achieving conditions of equality between men and women among indigenous peoples as well as in society. Such actions are meant to strengthen relationships of solidarity instead of discrimination or confrontation"*
> (Margarita Salas, 1999: 50).

It is clear that there is a prevalence of men within the mechanisms of organizational control, and that women are assigned responsibilities that traditionally identify them as women. Since most of the leaders within CIDOB are men, they are the ones who design the principles, aims and objectives of the indigenous movement, and it is at this level of leadership that actions and mobilizations are decided upon with respect to demands to be made on the State. As Lehm points out, this relates to the "age-old monopoly of the power to speak well and know how to write" (Lehm and CIDEBENI Team 1999: 430).

> *"50% of the husbands of our sisters who are leaders do not understand them and they question them. They do not allow them to attend training and other meetings. There are usually more men in all the training workshops and leaders' meetings" (Mosua, 1999:45).*

Although there have been training processes aimed at indigenous peoples, they have mostly been directed at leaders at the national, departmental and intermediate levels where women's participation

is minimal, especially when the objective is to discuss important issues such as territorial consolidation. This happens in spite of the fact that women and children have been strategic political actors in marches carried out by the indigenous movement.

In general, it can be said that, for indigenous men and women, territory is a common denominator that guarantees the strength of their culture and the unity of their struggle. Territory is their main political demand, because it guarantees collective property, sustainable development and self-administration by indigenous peoples and communities.

The Situation of Indigenous Children

The Rights of Children

The 1989 United Nations Convention on the Rights of the Child (CRC) considers children and adolescents as subjects with rights who should not suffer any form of discrimination. They have the right: to survival, full development, protection from dangerous influences, abuse and exploitation, and to fully participate in the family as well as cultural and social life.

By ratifying the CRC, States commit themselves to protecting and ensuring the rights of children and to proposing policies and programs aimed at guaranteeing children's rights. This Convention is also the first international instrument that legally incorporates the civil, political, economic, social and cultural rights of children. All South American countries have ratified the convention. In relation to the specific rights of indigenous children, Article 30 of this Convention points out that:

> *" ...In states where ethnic, religious or linguistic minorities or people of indigenous origin exist, a child who belongs to one of these minorities or who is indigenous will not be denied the right to have his/her own cultural life, to practice his/her own religion and to use his/her language."*

In terms of education, the Convention points out that the State should inculcate respect for the identity of its cultures, languages, and its own cultural and national values as well as those of different civilizations.

The Bolivian Code for Boys, Girls and Adolescents (Law 2026) promulgated on October 27, 1999, considers the prevention, protection and attention that the State and society should guarantee to all children or adolescents in order to ensure their integral development under conditions of freedom, respect, dignity, equity and justice.

Article 105 discusses the right to respect and dignity.

> *"No boy, girl or adolescent should suffer discrimination for ethnic, social, and gender [sic] reasons or due to religious beliefs.... The State is obligated to guarantee a treatment that is respectful of equality and equity for all children and adolescents."*

In terms of education, Articles 115 and 116 point out that the State should ensure that every boy, girl and adolescent has the right to education, especially in rural areas. The school calendar and schedules of attendance should be adapted to the local reality and agricultural production calendars. In relation to health, these articles indicate that the State is obligated to take the necessary measures to ensure that children have the right of access to health.

However, reality demonstrates that this is not the case. Indigenous boys and girls suffer marginalisation within society. Around 400,000 minors do not have a birth certificate, which means they are not legally registered and will not have the possibility of claiming their rights. Indigenous boys and girls suffer age-based discrimination and are not entitled to give their opinions freely. Because they are poor, they suffer socio-economic discrimination, and because they are indigenous they suffer racial or ethnic discrimination that affects the development of their integral rights and does not permit the full exercise of these rights.

Indigenous children lack access to the most elementary rights that the State offers them, such as access to education and health.

In indigenous communities, it is difficult for children to access education because they have to travel great distances. Often, in spite of having finished primary school, they have to repeat these grades because there is no intermediate level school in their community or nearby communities. Four out of every 100 children between the ages of 10 and 14 do not know how to read or write. In rural areas, the average increases to eight. Only 60% of the student population that enters first grade reaches fifth grade

UNICEF 2000 health data shows that Bolivia is one of the Latin American countries with the highest infant mortality rate: 66 children die per thousand live births. Malnutrition affects 57.2% of the children in the highlands, 50.8% in the valleys and 31.5% in the lowlands.

Like women, children are also the objects of family violence. Nine out of 10 minors suffer abuse within their families, schools or on the streets.

Child labourers in Bolivia are exploited. Children work eight to

fourteen hours a day without any type of social benefit or security. Data from the National Institute of Statistics (INE) (official figures) shows that the number of child labourers below 12 years of age continues to increase. While in 1988 they accounted for 13% of the economically active population, the 1992 Census showed that this figure had risen to 21.3 percent. (Presencia, 2000)

This panorama reveals that Bolivia has one of the highest rates of infant mortality, the most exploitation, the lowest school attendance, physical and psychological violence, discrimination and the negation of the most elementary rights of children, especially of indigenous children.

Projections also indicate that the poverty and marginalisation in which children are immersed will continue to deepen if government and society are not willing to effectively recognize children's rights.

Street Children

In South America as a whole, the total number of child labourers on the streets is more than forty million (Espinoza et al, 1989). A survey conducted in Asunción, Paraguay reveals that of approximately 15,000 child labourers on the streets, 90% of them are of indigenous origin (*ibid.*). The description of the situation of these minors in Paraguay very much resembles that of other countries, particularly if we bear in mind that the causes and effects of this problem are fundamentally the same. Of the child labourers on the streets of Asunción 88% are boys and 12% are girls. The age of these minors varies between eight and sixteen.

Poverty forces these minors to survive on the streets. According to the study mentioned, 62% of the families of these children do not have a fixed income. On the other hand, according to the same study, 77% of these children attended school and the rest expect to study some day.

The main occupations of these child labourers are as: street vendors (39%), newspaper sellers (15%), shoe shiners (13%) and car attendants (12%). These are occupations associated with misery and scorn. They constantly face permanent mistreatment and profound levels of discrimination.

These occupations are part of what has been labelled the informal economy. This sector has very particular characteristics, such as the relative ease with which one can enter it, restrictions on competitive markets, the utilization of labour with low levels of schooling, capital scarcity, simple technology, little organization and scarce State control.

The informal economy is also very appropriate for indigenous women who, due to the levels of discrimination they face, can often only find work opportunities in this environment. According to the authors of the study on child labourers in Asunción:

> *"Workers in the informal economy should have a high degree of adaptability, agility, mobility and creativity, and those who have these characteristics have more economic success. In particular, it seems to be the case that women are the ones who most frequently have these "professional talents", due to the social and sexual discrimination to which they are subject and which trains them, from childhood, to cultivate the abilities mentioned in order to survive in the face of the limited spaces that men allow them." (Espinoza et al.1989: 56).*

Indigenous Children as Protagonists of History

Indigenous peoples are tired of abuses and invasions of their territories by cattle ranchers, loggers, oil companies, and land traffickers, as well as poverty and exploitation. After several meetings to create greater unity and strengthen their organizations, they decided to undertake a protest march for "Territory and Dignity" on August 15, 1990. In spite of government efforts, this march was able to reach the city of La Paz where it was greeted by the massive solidarity of important sectors of the population.

Fifty children under 15 years of age and 21 children in their mothers' arms participated in the march and, like their parents, walked 34 days and 607 km to arrive at the offices of the national government in La Paz. In the process, they received recognition from Bolivian society and social sectors of the population for undertaking such an action in support of their ethnic and cultural demands.

Indigenous children value the right to recover the lands bequeathed by their ancestors, but they also have their own specific demands which they outlined to government representatives. These demands prioritised the right to education: " ...We need books, chalk, and notebooks to study. There are many children who are suffering from hunger and thirst but we want to have a better school" (Jacobo Mateo Ino, 13 years of age: 1993).

Later the indigenous movement was to play a leading role in two other significant historical events, giving continuity to a process that had already begun. In 1996, the indigenous peoples of Bolivia, together with peasants, were the protagonists of a new march, the march for "Land, Territory, Political Participation and Development". One of the main achievements of this march was the promulgation of Law 1715 or the Law of the National Agrarian Reform Service, a law containing important victories for indigenous peoples, particularly in relation to recognition of their native community-based lands.

In this march, too, indigenous and peasant children accompanied their parents throughout the whole journey, and marched from morning to night suffering from hunger and fatigue.

In the face of the non-fulfilment of agreements with the government and the political and organizational weakness of CIDOB, the Confederation of Unions of Peasant Workers of Bolivia, (CSUTCB) and indigenous peoples and peasants from lowland Bolivia decided to undertake the third march for "Land, Territory and Natural Resources". This march took place in July 2000 and had a platform of 31 points, focussing primarily on territorial claims and access to natural resources. Children were also present during this historical event and accompanied their parents in the journey and struggle.

Conclusion

We have seen that, in reality, racism, xenophobia and intolerance, both at individual and collective level, are practices that persist in different forms and with different characteristics.

These practices are colonial prejudices that persist and which are generally denied or ignored by the States and many sectors of civil society itself, and the real implementation of agreements, stipulations and other types of legal instruments that expressly prohibit practices of discrimination is frequently made impossible due to the profound inequalities that are the product of the socio-economic structure of society.

One general conclusion would therefore be that the only way of overcoming discrimination is through the effective and substantial improvement in material conditions of existence as well as through offering equal opportunities for all social sectors, privileging the weakest in society. In this way, the gap between powerful groups and excluded majorities could be eliminated.

As a consequence, States should not only contemplate legal provisions to counter discrimination in all its expressions but should also adopt special measures to protect the weakest sectors, particularly indigenous peoples, indigenous women and indigenous children. These measures should enable indigenous peoples to overcome existing inequalities.

Recommendations

On this basis, it is recommended:

- To urge the States that have not already done so to ratify the Convention on the Elimination of All Forms of Racial Discrimination and ILO Convention 169 on indigenous and tribal peoples.

- To supplement international legal instruments with content and procedures that strengthen the full validity of fundamental human rights.
- That the States must adopt structural reforms aimed at democratising national societies, for which they must broaden and deepen recognition of economic, social, cultural and political rights to the benefit of marginalised and discriminated sectors.
- The implementation of special anti-discrimination Laws must be promoted, covering the following important aspects:
  - o The classification of crimes of racial discrimination, xenophobia and intolerance.
  - o The punishment of the previously mentioned crimes;
  - o Recognition of legal recourse aimed at guaranteeing the exercise of fundamental human rights when these are being threatened, restricted or violated by racist or xenophobic practices;
  - o The adoption of safety and prevention measures against these practices;
  - o Measures of compensation for damage caused and of rehabilitation of victims.

At the level of Indigenous Peoples:

- To recognise constitutionally the economic, social, cultural and political rights of indigenous peoples, with special reference to accessing their lands and territories, to the exclusive exploitation of the natural resources existing within them, to the effective validity of indigenous law, of their traditional authorities (self-government), of their language, religion, etc.
- The rights recognised to the benefit of indigenous peoples must guarantee them their territorial, economic and political autonomy.
- The integral right to indigenous territory must result in geographic entities that form part of the politico-administrative structure and in which the indigenous peoples exercise their right to define their own destiny.
- Consultation and participation procedures must be approved that guarantee the involvement of indigenous peoples within development plans and programmes and in public strategies.
- Indigenous peoples must be guaranteed the full validity of their traditional economic systems within their territory.
- The autonomous political participation of indigenous peoples must be channelled so that they elect their representatives to the Legislative and Executive Powers in special electoral constituencies, applying their traditional electoral systems.

- With regard to access to justice, the free provision of defence lawyers and interpreters must be guaranteed to indigenous peoples within all jurisdictional bodies and at all stages of the judicial process.
- Special State organs for the defence and protection of the rights of indigenous peoples must be set up, such as Indigenous Ombudsmen and Indigenous Rights Lawyers.
- Bilingual and intercultural education must be recognised in all countries.
- Educational programmes specifically aimed at indigenous women and children must be developed, as these are the people with the highest levels of illiteracy, which is one of the reasons explaining their condition of greatest vulnerability.
- Formal education systems must include content relative to pluriculturality and multi-ethnicity.
- The States must guarantee the cultural heritage of indigenous peoples.
- Traditional medicine must be recognised, and access to health and social security services guaranteed to indigenous peoples.
- An obligation must be established on the media to broadcast messages and information that enables all things multiracial, multiethnic and pluricultural to be considered as national values.
- Information campaigns, dissemination and training on fundamental human rights must be undertaken, emphasising their scope in relation to indigenous peoples and particularly aiming these campaigns at civil servants, judges, magistrates, lawyers, the army, police and business sectors.

References

APCOB. *"Lineamiento de Trabajo para la Mujer Indígena".*

Contreras, Alex. 1993. "Los niños por el Territorio y la Dignidad" 2da Edición. MEC UNICEF.

Defensa de los Niños Internacional. 1992. *"Convención Sobre los Derechos del Niño"* La Paz.

Constitución Politica del Estado de Bolivia. 1995. Gaceta Judicial de Bolivia.

Escobar, Alexia. 2000. *"Situación de salud de las mujeres indígenas de tierras bajas"* Paper presented at the workshop on "Políticas Públicas con equidad de género para los pueblos indígenas de tierras bajas" La Paz.

Espinoza, Basílica, et al. 1989. *"En la Calle"*. Menores trabajadores de la calle en Asunción. Paraguay. 1989.

Ley N° 1715. "Ley del Servicio Nacional de Reforma Agraria" Gaceta Judicial de Bolivia. 1996.

Ley N° 1674. "Ley Contra la Violencia Doméstica" Gaceta Judicial de Bolivia. 1998.

Ley N° 2026. "Código del Niño, Niña y adolescente". Promulgada el 27 de octubre de 1999.

Lehm, Zulema and CIDEBENI team. 1999. "El Saber y el Poder en la sociedad mojeña aproximación desde una perspectiva de Género" en: RIVERA, Silvia."

Perfiles Liberales. "Constituciones Políticas de América Latina" (volumen I: Argentina Brasil, Chile, Paraguay y Uruguay) Fundación Friedrich Naumann. Bogotá-Colombia. 1995.

Perfiles Liberales. "Constituciones Políticas de América Latina" (volumen II: Colombia, Perú, Venezuela). 1995. Fundación Friedrich Naumann. Bogotá.Colombia.

Presencia, 2000. "Situación de la Niñez" UNICEF. La Paz.

Presencia, 2000. "Trabajo Infantil en el país se acerca a la explotación". La Paz.

Rivero, Roberto. 1999. "Discriminación salarial por Género y por Etnia en Bolivia" en: *Cuadernos de Diálogo Social N° 4 Ediciones Pirámide La Paz.*

Salgureo, Elizabeth. 1999. *" Mujeres Rurales en Bolivia".* La Paz.

TIJARAIPA. 1994. "Cuadernillo Jurídico N° 1 *"Por la Lucha de Nuestros Derechos"* La Paz.

TIJARAIPA. 2000. "Manual de Formación en Género para Pueblos Indígenas de Tierras Bajas". La Paz.

VAIPO, OPS/OMS, CIDOB. 2000. "Políticas Públicas con Equidad de Género para Pueblos Indígenas de Tierras Bajas". La Paz.

UNFPA-SNE-UNESCO. 1995. *"Memoria primer encuentro de mujeres indígenas campesinas y originarias"*. Cochabamba 24 al 26 de julio 1995. La Paz.

CHAPTER 7

RACISM AGAINST INDIGENOUS PEOPLES IN THE UNITED STATES AND CANADA

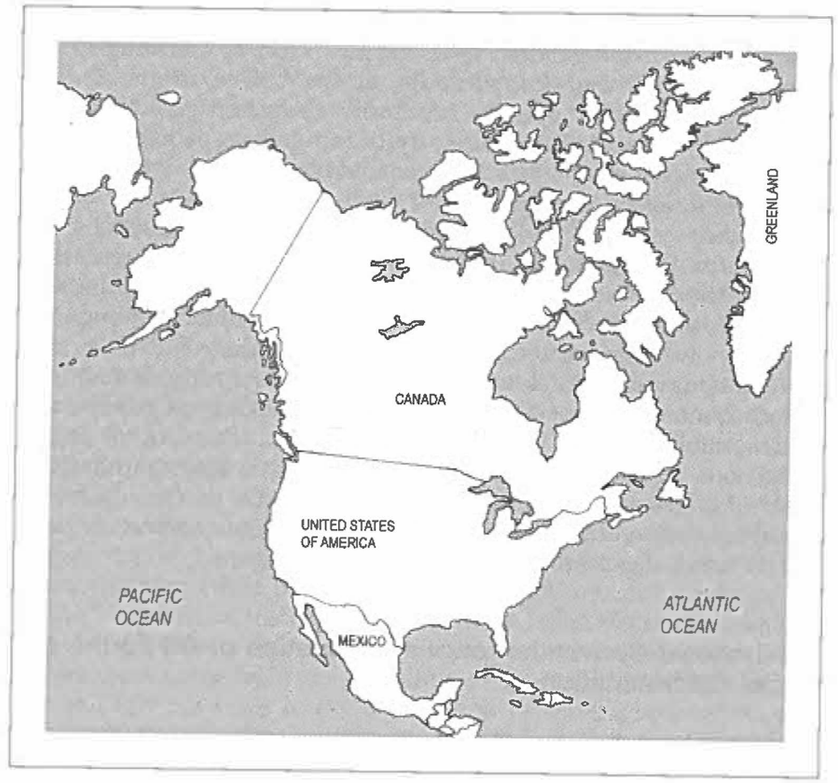
By Andrew Huff

The indigenous peoples of the United States and Canada share a common history of adversity rooted in violence and dispossession. Many indigenous peoples in these countries still live under the threat of having their lands taken or despoiled; of having their means of livelihood subverted; of being poisoned or killed by the toxic contamination of their resources; of being deprived of their languages and traditions; and of violence directed at them as individuals and as peoples. The familiar pattern of colonialism, in which settlers displace an indigenous population and expropriate their resources, continues to exist in various forms in the United States and Canada.

The international community is becoming increasingly aware of these problems and abuses, and significant advances are being made in the development of international standards to protect indigenous rights. Little progress has been made, however, in correcting the continuing wrongs against indigenous peoples that are condoned and encouraged under the domestic laws and policies of the United States and Canada. The attainment of just, democratic societies - societies that value cultural diversity and in which indigenous governments can shape the future of their peoples - depends upon the abandonment of ideas rooted in old-style colonialism and racial discrimination.

The struggle against these old but still widely held ideas is founded upon a vision of the future in which autonomous, dignified, and culturally vital indigenous nations exist within a principled framework of indigenous and non-indigenous communities and governments. Injustice and discrimination against indigenous peoples manifests itself in unique and complicated layers: socio-economic disparities; discrimination in the law; violence and discrimination directed at individuals; domestic policies directed at undermining the collective rights of indigenous peoples; environmental racism. These manifestations of injustice and discrimination work against the emergence of strong, modern indigenous nations.

The decolonization of Canada and the United States means moving beyond the mire of laws and policies that keep indigenous



peoples from exercising their human right of self-determination on an equal basis with non-indigenous peoples. Moving beyond these laws and policies should not be regarded as a dangerous or threatening process. Rather, it should be regarded as a critical step in the attainment of stable, just and pluralistic societies.

THE UNITED STATES

The United States, in its recent report to the United Nations Committee on the Elimination of Racial Discrimination, states that it has *"historically recognized Native American tribes as self-governing political communities that pre-date the U.S. Constitution"*.[1] Although it is encouraging to see the government of the United States recognizing the self-governing status of the indigenous nations within its borders, there is much that the Report to the Committee leaves unsaid. In the United States today, indigenous nations and tribes can be deprived

of their lands and resources without due process of law and without compensation[2]; indigenous governments can be terminated or stripped of their rightful authority at the behest of the federal government[3]; treaties may be arbitrarily abrogated[4]; and the religious freedom and cultural integrity of indigenous peoples may go virtually unprotected[5]. U.S. law can readily be used as a weapon against indigenous peoples.

A recent example of this threat is a resolution passed by the Washington State Republican Party to terminate tribal governments. The objective of the resolution's sponsor was to encourage the next President to initiate another era of forced assimilation. Although the resolution was repudiated after indigenous leaders and their supporters mounted a successful public campaign against it, it stands as a stark reminder that U.S. law still permits the federal government to dis-establish tribes and tribal governments. The lack of secure indigenous rights in the United States means that American Indians, Native Hawaiians and Alaska Natives continue to live under an unstable scheme of law and policy, which at times empowers them and at times deprives them of fundamental rights.

International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), to which the United States is a signatory, defines racial discrimination as "*any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*"[6] The experience of indigenous peoples in the United States, although different from the experience of other racial groups in the United States, falls solidly within this definition of racial discrimination.

Racism against indigenous peoples in the United States is of a character different from the racism against minorities in the United States. In the United States, there exist 554 federally recognized American Indian and Alaska Native tribes, many of which exercise self-government within distinct territories[7]. When indigenous peoples are within their own territories, they are governed principally by their own laws and political systems. These indigenous governments are not political subdivisions of the federal or state governments - they derive their powers of governance from their inherent

sovereignty, which predates the United States. To be sure, the federal judiciary has over the past two centuries developed a host of laws that enable the federal government to exercise great power over tribal governments. Further, state governments constantly challenge tribal governmental jurisdiction. Indigenous leaders must therefore defend their rights in a continuous war of attrition waged by the state and federal governments against tribal sovereignty, while simultaneously carrying on the business of governing their own peoples. The continued existence of these indigenous governments within the American Republic is a testament to the long struggle of indigenous peoples to maintain their own cultures in the face of overwhelming assimilationist pressures.

The struggle of indigenous nations and tribes for rights in the United States is thus a struggle for a dignified separatism rather than a fight for inclusion in mainstream America. The most fundamental human right sought by American Indians, Alaska Natives and Native Hawaiians is the right to remain indigenous. This right includes being a member of a unique culture and speaking a unique language; worshiping in a traditional manner; maintaining control over traditional territories; and being able to govern the internal affairs of the people[8]. American history is replete with failed experiments to remove or assimilate the indigenous peoples of this continent. These experiments range from the outright massacres and land thefts of the 19th and 20th centuries to the termination of tribal governments and mass removal of Indian peoples to urban locations in the 1950s to the judicial extinguishment of Native jurisdiction over their lands in Alaska and the diminishment of the Yankton Sioux reservation as recently as 1998[9].

When federal and state governments enact laws and policies that particularly undermine the ability of indigenous peoples to maintain the cultural and physical integrity of their communities, then these governments are engaging in official conduct which has "the effect of nullifying . . . the . . . enjoyment . . . , on an equal footing, of [the] human rights and fundamental freedoms" of indigenous peoples, in contravention of the Convention on the Elimination of All Forms of Racial Discrimination. Of course, racism and discrimination against indigenous peoples takes many other forms as well, as we discuss further below.

Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination (the Committee) was established pursuant to the International Convention on the Elimination of All Forms of Racial Discrimination[10]. The Committee is charged with reviewing state reports and other com-

munications regarding State compliance with the Convention, and making recommendations to the United Nations General Assembly regarding these reports and communications[11]. Thus far, the United States has submitted only one Report to the Committee since it ratified the Convention in 1994. Because the United States only recently submitted its Report, the Committee has not yet made any official response or recommendations.

The U.S. Report is notable for its lack of serious discussion of many of the most serious problems regarding the rights of indigenous peoples in the United States. The Report notes several positive advances in domestic law and policy as they relate to indigenous peoples. The Report states, for example, that *"many [indigenous nations] enjoy considerable governmental autonomy on reservations or other Indian lands and Alaska villages"*. [12] Further, the Report cites various laws and federal policies protective of indigenous rights, including the American Indian Religious Freedom Act[13] and the executive orders that generally affirm the government-to-government relationship between tribes and the federal government[14].

The Report omits the fact that the American Indian Religious Freedom Act and the executive orders are merely policy statements that create no rights enforceable in the federal courts or elsewhere. If federal agencies choose to disregard these policy statements, American Indians have no means to force compliance[15]. The Report also entirely avoids any discussion of the overtly discriminatory doctrines that plague federal law. However, in a separate report on the federal government's compliance with the Convention compiled by American NGOs, the United States government is strongly criticized for both its domestic and international indigenous policies[16].

Status of American Indians in the United States

As discussed in the U.S. Report to the Committee on the Elimination of Racial Discrimination, the United States government has since 1997 been engaged in a "major review of domestic race issues". [17] That review, entitled the President's "Initiative on Race", resulted in a comprehensive report[18]. The report is an excellent effort to capture the complexity of race issues and makes recommendations aimed at achieving reconciliation and respect amongst the various groups in America. Regarding American Indians, the report states bluntly,

> *"On virtually every indicator of social or economic progress, the indigenous people of this Nation continue to suffer disproportionately in relation to any other group. They have the lowest family incomes, the lowest percentage of people ages 25-34 who receive a college degree, the highest unemployment rates, the highest percentage of people living below the poverty level, the highest accidental death rate, and the highest suicide rate. . . . They have become America's most invisible minority."* [19]

The poverty and social dislocation experienced on most reservations today are the direct and inevitable result of two centuries of federal policy designed to break up tribes and assimilate the indigenous peoples of America. At the end of the 19th century, Indian land holdings totaled approximately 139 million acres[20]. By 1932, Indian peoples were left with 48 million acres[21]. The majority of the lost lands were sold as surplus to non-Indians under the General Allotment Act[22]. Half of the lands that remained in Indian possession were seized for nonpayment of taxes[23]. The massive loss of land has not only resulted in a loss of economic viability for indigenous communities but a loss of irreplaceable cultural resources.

Tribal integrity has thus been under a sustained assault since the inception of the American Republic. The indigenous peoples of America now live on a very small part of the territory they bargained for in the treaty negotiations of the 19th century. The federal government has taken millions of acres of land from tribes and given or sold it to non-Indians[24]; "lost" billions of dollars in revenue from the remaining lands, which it supposedly manages for the benefit of Indian tribes and individuals[25]; taken thousands of Indian children from their homes and put them in boarding schools and non-Indian foster homes; prohibited Indian religious ceremonies[26]; destroyed Indian trust resources[27]; and allowed the destruction of sacred lands vital to the practice of native traditional religions[28]. Only since the 1970s have tribal governments begun to make headway in their efforts to overcome the consequences of these devastating federal practices.

Overall Socio-Economic Status of Indigenous Peoples in the United States

Socio-economic indicators for American Indians, Alaska Natives and Native Hawaiians reflect the persistence of race discrimination and the aftermath of federal policies of assimilation[29].

Population

- About two million indigenous individuals live in the United States, according to 1990 census figures. Prior to contact with Europeans, it is estimated that 12 million indigenous peoples lived within the borders of what is now the United States.

Employment
- In recent years, Indian unemployment has been six times the national average. On some reservations, unemployment rates are as high as 80%.
- More than a third of all Indians live in poverty, and 51% of the Indians living on reservations are living below the poverty line.
- The federal government has reduced economic assistance to tribes by 2/3 over the last 15 years.

Education
- Fewer than 10% of American Indians go to college.
- Indian youth have the highest school dropout rate of any minority group, at 35.5%.

Health
- American Indians have the highest rates of diabetes in the world – 2.5 times the rate for the total U.S. population.
- The incidence of tuberculosis among Indians is over 400% higher than the national average.
- The suicide rate for Indian youths is four times higher than for any other ethnic group.
- Infant mortality rates are 30% higher for Indians than for the white population and higher than all other races except for African Americans.
- The age-adjusted alcoholism death rate for Indians was 5.5 times the rate for all other races in the U.S.

Housing
- Approximately 93,000 Indians are homeless or under-housed, according to the Bureau of Indian Affairs. Twenty percent of Indian homes lack plumbing, and over half do not have a telephone.

Environment
- A Wisconsin study concluded that the number one environmental threat faced by Native Americans is the contamination of their food, particularly fish, by toxic pollutants.
- The federal government has allowed the disposal of more than two million tons of radioactive uranium mill waste on Indian lands.
- It is predicted that half of all global gold production over the next 20 years will come from territory used or claimed by indigenous peoples.
- Currently, 1 in 5 mining projects is on indigenous land.

Urban Indigenous Populations and Racism

Indigenous people suffer from racism directed at them both as individuals and as peoples. Although it is difficult to draw conclusions about racism against urban Indians without more research, statistical data on the urban Indian populations point to trends that suggest societal discrimination. As much as 63% of the total U.S. indigenous population lives in urban areas, away from their traditional territories. These urban indigenous people are excluded from all Indian-specific government programs including housing, schools, enterprise development and elderly assistance programs. Urban Indian unemployment is double that of all other races. Urban Indian poverty levels are three times that of any other race. The urban Indian high school dropout rate is over 75%. Urban Indians have higher mortality rates from alcoholism and related causes than other races. The urban Indian suicide rate is four times that of all other races. Urban Indians have three times the national rate of diabetes and heart disease. Health care is unavailable to 50–75% of the urban Indian population[30].

Further, according to a recent U.S. Department of Justice report, American Indians are the victims of violent crimes at more than twice the rate of other U.S. residents. Even more disturbing is the fact that 7 in 10 violent crimes against indigenous people in the United States involve an attacker of a different race. A full sixty percent of those who committed violent crimes against Indian people during the period of the DOJ study were white[31].

Analysis of the Legal Roots of Racism

Indigenous peoples in the United States bear the burden of tremendous disadvantages in socio-economic status, largely as a result of two centuries of discriminatory federal law and policy. Despite the continued existence of these laws and policies, indigenous governments have, since the 1970s, achieved enormous gains for their tribal members. Many indigenous nations of the United States now run their own schools; supervise economic development programs on their territories; manage their own natural resources; implement sophisticated regulatory programs; hear civil and some criminal matters in their own tribal court systems; levy taxes on businesses; and are reviving languages and traditions. These efforts, however, have been undertaken in an environment of extreme uncertainty. Whenever an indigenous government taxes a business or regulates a resource, there exists a strong possibility of a court challenge to tribal jurisdiction and possibly new legislation by Congress, which

may result in a loss of self-governing powers. The insecure status of indigenous rights in American law is a result of several interrelated doctrines that operate to deny indigenous peoples many of the most basic human rights, which other people take for granted in the United States.

The Doctrine of Discovery

Under modern Indian law, the United States owns the underlying legal title to most indigenous land in the country, subject only to the use and occupancy rights of the native inhabitants. This strange and discriminatory legal doctrine whereby indigenous peoples in the United States do not collectively own full title to their traditional lands grew out of early federal jurisprudence concerning the relationship between indigenous governments and the federal government. Chief Justice John Marshall of the United States Supreme Court elaborated the legal foundations for modern U.S. Indian law in three seminal cases during the 1820s and 1830s[32]. These cases simultaneously recognized limited indigenous sovereignty while providing a mechanism – Marshall's version of the Doctrine of Discovery – for the future erosion of this sovereignty and indigenous land holdings.

Marshall's formulation of the Doctrine of Discovery distorted previous European legal discourse regarding the relationship between indigenous peoples and Europeans and transformed the Doctrine into a positivist rationalization for the dispossession of indigenous peoples[33]. The Doctrine of Discovery as originally formulated in European international legal discourse acted as a limit on European acquisition of indigenous lands. By mutual agreement, the European nation-states competing for spoils in the New World limited unnecessary inter-European strife by granting to the first European "discoverer" of an indigenous territory the exclusive right of acquiring the lands of the native inhabitants through purchase or conquest. Justice Marshall, however, corrupted the Doctrine by holding that *"[indigenous] rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery [of an indigenous territory by a European nation] gave exclusive title to those who made it".* [34] Marshall thus transformed an exclusive *right of acquisition* to exclusive *title* by virtue of discovery.

The central thesis of Marshall's formulation of the Doctrine of Discovery - that indigenous peoples were divested of certain natural rights by the mere arrival of Europeans because of an assumed European superiority - has repeatedly been seized upon to justify erosions of tribal sovereignty in the century and a half that has

passed since Marshall's decisions. There is no legal basis for Marshall's holdings, although he provides clues to his thinking in another decision: *Johnson v. McIntosh, "The character and religion [of indigenous peoples] afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy."* [35] Marshall's formulation of the Doctrine of Discovery thus became the racist framework within which all of U.S. Indian law evolved. Only a small step is required from the Doctrine of Discovery to the emergence of the doctrines of plenary federal power over indigenous peoples, treaty abrogation, the "trust relationship" between the federal government and indigenous peoples and the dispossession of the indigenous peoples of the United States.

Plenary Power and Treaty Abrogation

The Plenary Power doctrine is the most comprehensive statement of the almost limitless power of Congress in dealing with the indigenous peoples located within the United States. Although it is recognized that indigenous nations derive their powers of self-governance from their inherent, pre-Constitutional sovereignty, the federal courts of the United States have crafted a doctrine of plenary federal power over indigenous affairs based, apparently, on the thin reed of justification elaborated by Marshall. As stated by the U.S. Supreme Court in the 1886 case of *United States v. Kagama*,

> *"The relation of the Indian tribes living within the borders of the United States . . . to the people of the United States has always been an anomalous one and of complex character.*
>
> *Following the policy of the European governments in the discovery of America towards the Indians who were found here, the colonies before the Revolution and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority.*
>
> *... [This paramount authority over Indians] must exist in [the federal] government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."* [36]

The doctrine holds that Congress has plenary or absolute power over the affairs of indigenous peoples in the United States, limited only by the requirement that the proposed Congressional action be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians". [37] At no time in the history of the United States has the Supreme Court ever declared any act of Congress to be beyond the power of Congress in the field of Indian affairs.

The law concerning treaty abrogation arises directly from the U.S. Constitution and from the doctrine of plenary power. In the 19th Century, indigenous peoples entered into treaties in good faith with the federal government, giving up vast land holdings in exchange for specific territories that would be protected from non-Indian encroachment and within which they would control their own affairs. These treaties represent legally binding agreements entered into by distinct, sovereign peoples. They are, under the U.S. Constitution, the supreme law of the land. However, seventeen years after the decision in *Kagama*, the Supreme Court decided *Lone Wolf v. Hitchcock*[38]. In *Lone Wolf*, the Court extended the doctrine of federal plenary power over indigenous peoples to include the power to unilaterally abrogate treaties between indigenous nations and the federal government, without any judicial review or any relief whatsoever available to indigenous peoples.

> *"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.*
>
> *The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so."* [39]

Furthermore, the federal courts have decided that not only Congress but the federal courts themselves possess a version of plenary power over the affairs and lands of indigenous peoples, under a judicial theory of "implicit divestiture" of sovereign rights. Under this theory, tribes may lose lands and powers of self-governance not only through acts of Congress but through decisions of the federal courts when these courts deem a certain exercise of tribal powers to be inconsistent with the "limited sovereignty" of a tribe or with the overriding interests of the federal government[40]. Thus, Congress and the federal courts have invested themselves with almost unlimited power over the affairs of indigenous peoples in the United States, without ever having elaborated any coherent legal basis for these sweeping powers. This virtually unlimited power means that, as a corollary, Indian nations and tribes are denied the basic rights and legal protections that are afforded to all others in the United States.

Trust Relationship

The relationship between indigenous nations and the United States is often described by courts, the Congress and others as a trust relationship, that is, a relationship between a trustee and beneficiary[41]. This doctrine is yet another outcome of Marshall's early Indian law decisions, in which he described Indian nations as being "in a state of pupilage; their relation to the United States resembled that of a ward to a guardian."[42] By virtue of the United States' obligation to act as a trustee or guardian for indigenous peoples, it claims extensive power to manage the lands and affairs of tribes. The doctrine assumes, therefore, that indigenous nations and tribes in the United States are incompetent or legally disabled from exercising full control over their own property and affairs. Ironically, the gross mismanagement and misdeeds of the federal government in managing tribal affairs and resources have resulted in the indigenous peoples of the United States becoming the poorest and most disadvantaged segment of the population.

Currently, the federal government is being sued by indigenous parties for the loss of billions of dollars in trust monies, which were supposedly being managed by the federal Bureau of Indian Affairs for the benefit of tribes and individual Indians[43]. At one time these monies, which came from the leasing and selling of indigenous resources, could have become the foundation of stable reservation economies throughout the United States. Instead, these monies are simply gone – lost in a corrupt and incompetent federal bureaucracy.

Although the trust doctrine is merely a manifestation of the plenary power doctrine and has been used to justify a variety of harmful federal laws and policies, indigenous rights activists in the United States have successfully used the doctrine in recent years to protect indigenous lands and resources from the mismanagement of federal agencies[44]. The difficulty of holding the United States accountable as trustee and the involuntary nature of the trusteeship, among other problems, make this a perennial issue for most indigenous nations and tribes.

"Tee-Hit-Ton" and the Dispossession of American Indians

In the case of *Tee-Hit-Ton v. United States*[45], the Supreme Court announced that the United States government was free to take or confiscate indigenous land without due process of law and without fair market compensation. Certain indigenous lands, those that have been unmistakably and permanently guaranteed by Congress against taking by treaty or statute, are exempt from this doctrine. Most indigenous lands, however, are not so protected and remain subject to outright confiscation by the United States government. Under *Tee-Hit-Ton*, there is no requirement that the property be taken for a public purpose. The power exercised by Congress under the *Tee-Hit-Ton* doctrine is thus totally unlike the power of eminent domain, under which property must be taken only for a valid public purpose following the strict requirements of legal due process and fair market compensation. As stated by the Supreme Court,

> *"The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation. Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land."*[46]

This bluntly racist language has continued to be upheld and applied by United States courts. In the case of *Karuk Tribe of California, et al. v. United States*[47], decided in April of last year, the federal circuit court held that the Karuk Tribe of Indians was not entitled to compensation for lands taken from them in 1988 by an act of Congress to a federal land act, even though those lands had been reserved for the Karuk Tribe pursuant to a federal statute and executive orders and were repeatedly recognized as reservation lands in federal statutes passed thereafter. The holding in *Karuk* is thus an expansion of the holding in *Tee-Hit-Ton*, applying the principle that Indian land can be taken without compensation even when the land is part of a congressionally established Indian reservation. In a strong dissent, Judge Pauline Newman made the following observations:

> *"It is not tenable, at this late date in the life of the Republic, to rule that Native Americans living on a Reservation are not entitled to the constitutional protections of the Fifth Amendment. . . .This case is not concerned with Indian title deriving from aboriginal occupancy . . . it is concerned solely with Reservation lands duly established by governmental action . . . . The argument, pressed by the panel majority, that reservations established by Act of Congress and implemented by executive order are somehow inferior in their property attributes, is without force or support."*[48]

The federal judiciary is thus actively engaged in defending the power of Congress to take indigenous lands without compensation – a brazen denial of the basic property rights enjoyed by the rest of the U.S. population.

Conclusion

The indigenous peoples of the United States live under a regime of discriminatory and unjust laws and policies that have no legitimate foundation in law and that include only minimal limitations protective of indigenous rights. The foundation for these laws and policies that *does* exist is merely a discriminatory rationalization for the dispossession and assimilation of indigenous peoples. This unjust framework of law, which so profoundly determines the welfare of indigenous peoples in the United States, must be reformed if indigenous nations are to rebuild their economies, maintain their cultures and contribute to the attainment of a vibrant, pluralistic and tolerant society.

CANADA

The legitimacy of any modern government rests on the consent of the people whose interests it purports to represent and protect. This axiom is no less true in Canada than in any other democratic nation. Like her neighbor to the south, however, Canada chose to pursue laws and policies that unilaterally extended Canadian federal and provincial power over the aboriginal people living within her borders without their consent. As with the United States, the legal foundations for Canada's unilateral extension of power over aboriginal peoples and First Nations are rooted in discriminatory social mores rather than in any legitimate legal principles. The extension of Canadian laws and policies over the affairs of aboriginal peoples in Canada has resulted in aboriginal dispossession, disempowerment and impoverishment.

Depending on which data source one looks at, there are between

six hundred thousand and one million indigenous or Aboriginal persons living in Canada today. They constitute about 4% of the overall population of 32 million people[49]. The Canadian Constitution recognizes three groups of Aboriginal people - Indians, Metis people and Inuit. The majority of these peoples prefer to call themselves First Nations, although the Canadian government still recognizes the term "Indian". There are 609 First Nations in Canada. The lands set aside for their use by the federal government are called reserves[50].

Canadian and U.S. law regarding indigenous peoples share many commonalities in their history and evolution. Both countries have pursued assimilationist policies to the detriment of native peoples. The law of the United States is more explicit in its articulation of discriminatory doctrines that undermine indigenous sovereignty, such as plenary power and treaty abrogation. There is, however, a more developed U.S. policy of supporting the development of functioning indigenous governments within the United States, despite the continued existence of overtly discriminatory laws. In Canada, the law is less overt in its articulation of discriminatory ideas such as plenary power but, nonetheless, there does exist in the law a *de facto* Canadian governmental power over the affairs of aboriginal peoples. The Canadian "Indian Act", for example, still controls the lives of aboriginal peoples in Canada from the cradle to the grave[51].

Aboriginal governments in Canada, outside the framework of the Indian Act, have not been given a chance to form, much less to function. The nature of the discrimination in the laws governing indigenous peoples in Canada and the United States is thus fundamentally the same – indigenous peoples and their cultures have been deemed inferior to European cultures, and the right of indigenous peoples to exist as unique peoples has been attacked and undermined since the military balance of power on the continent shifted to favor the European newcomers.

Canadian federal and provincial governments have only recently begun to expand their thinking beyond the old policies of assimilation. In 1996, the Royal Commission on Aboriginal Peoples released a groundbreaking report, strongly recommending a new era of true aboriginal self-government in Canada as the only means of moving into a future in which "dissimilar peoples can share lands, resources, power and dreams while respecting and sustaining their differences".[52] Aboriginal self-government in Canada may be slowly becoming a reality. The days of Canadian federal rules and regulations controlling every aspect of an aboriginal person's life seem to be changing as policy makers realize there is much to gain and little to lose by respecting aboriginal rights and treaty rights.

Committee on the Elimination of Racial Discrimination

Canada has submitted several reports to the Committee on the Elimination of Racial Discrimination. The Reports, as they relate to aboriginal peoples, generally track the efforts of the Canadian government to settle land claims and negotiate self-governance agreements with various aboriginal groups[53]. For example, in Canada's 12th Report to CERD, the Gwich'in Land Claim Settlement Act, the establishment of the Territory of Nunavut, a framework agreement with the Indian Nations of Saskatchewan, and the Charlottetown Accord are all mentioned but not described in any detail. The Report does state that the Charlottetown Accord, which would have helped define aboriginal rights to self-government, was not approved in a national referendum[54]. The Report also lists the measures that Canadian provinces have enacted regarding aboriginal peoples. Most of these measures are superficial and do not support true aboriginal self-determination. CERD's concluding observations on Canada's 12th Report express concern regarding the "slowness at which negotiations have been undertaken to further define aboriginal rights to land and resources in many parts of the country". [55]

Status of Aboriginal Peoples in Canada

From the time of the first Anglo-aboriginal encounters to the present, the experience of Canadian aboriginal peoples has been marred by discrimination and oppression[56]. This discrimination has been multi-dimensional and diverse, extending from such wrongs as ignorant classifications of aboriginal peoples to overt bigotry in both official government policies and general social attitudes[57]. In preparing its 1996 Report, the Royal Commission on Aboriginal Peoples found that, for many native Canadians who testified before the commission, *"[m]emories of relocation, residential schools, discrimination and racism keep coming to the surface, causing them to lose heart and wonder whether things will ever change."*[58]

As Canada moved from the colonial era towards independence, indigenous peoples were regarded as an obstacle to the progress of the nation. This view of indigenous peoples was reflected in Canada's policies of removal, assimilation and the establishment of reserves[59]. Disregard for aboriginal rights was based not merely on indifference toward native peoples but on disdain for aboriginal life and culture and the belief that aboriginal peoples would in time cease to exist as distinct groups and would be absorbed into the larger culture[60].

Over the past century, the Canadian government has attempted to destroy aboriginal religions and cultures [61], oppress Indian languages[62] and destroy Indian families[63]. Canadian Indian children were routinely subjected to residential school systems in efforts at forced assimilation, and countless Indian children were taken away from their homes through the child welfare system in the 1960s[64]. While recent social movements have encouraged minority groups to protect their racial and cultural identities, society has increasingly treated aboriginal efforts aimed at cultural preservation with hostility, especially in the context of land claims[65]. Aboriginal land interests have been characterized as "primeval" by mainstream society, and aboriginal views of justice have been characterized as "primitive curiosities". [66]

In almost all aspects of modern life, racial discrimination against native Canadians persists. For example, native Canadians continue to be subjected to racial prejudice at the hands of government officials, including police[67], wildlife enforcement officers[68], and prison guards.

Racism has been identified as a significant contributor to severe unemployment and abject poverty amongst Canadian Indians[69]. In turn, the elevated high-school dropout rates, severe alcoholism, poor health and diminished self-esteem that are directly correlated with unemployment can be linked to racial discrimination[70]. Mainstream educational systems, intentionally or not, have filtered out native cultural, spiritual and psychological views[71], while perpetuating the colonial paradigm of European superiority[72]. Native Canadians are the victims of racially motivated violence and hate crimes[73] and studies demonstrate that Canadian aboriginals are victims of violent crime in significantly disproportionate levels to their numbers in the population[74]. For many aboriginal women, the problem of sexism, faced by countless women in general, is compounded by racial discrimination[75]. Racism against aboriginal youths is a particularly serious problem for a generation that increasingly feels torn between two worlds[76]. The popular media continues to perpetuate racial stereotypes of aboriginal peoples[77]. Racism pervades many corporate offices and workplaces[78]. These continuing discriminatory actions exacerbate poverty and unemployment amongst aboriginal peoples[79].

Analysis of the Legal Roots of Racism in Canada

Canada began its relationship with aboriginal peoples by recognizing them as separate sovereign powers with whom it was necessary to pursue treaties and other forms of nation-to-nation diplomacy. As the military balance of power began to shift to the disadvantage of

aboriginal peoples, Canadians adopted a policy of assimilation that has remained more or less uniform until very recently.

The Royal Proclamation of 1763 laid the seeds of dispossession in much the same way as Chief Justice Marshall's opinions laid the seeds of dispossession in the United States. The Civilization of Indian Tribes Act of 1857 announced an official Canadian policy of assimilation. The British North America Act of 1867 and the Constitution Act of 1930 asserted complete federal jurisdiction over aboriginal lands and affairs, and transferred title to natural resources from the federal government to the Canadian provincial governments. The Indian Act of 1876 established rules for every aspect of aboriginal life in Canada.

In 1969, the federal government issued a "White Paper" recommending total assimilation of the aboriginal peoples of the country. It was not until the 1970s that Canadian courts began to recognize aboriginal rights. In 1982, the Constitution Act was passed, which recognized existing aboriginal rights and treaty rights. Since 1982, the trend has been away from assimilation to an understanding of aboriginal self-determination as the most efficacious method of overcoming the crippling effects of discrimination suffered by aboriginal peoples in Canadian society. The following is a brief review of some of the more discriminatory aspects of Canadian law.

The Indian Act

The Indian Act[80], which was passed in 1876 as a grand consolidation of previous *ad hoc* Canadian law governing Indians, continues to be the primary legal mechanism for the regulation of Canada's aboriginal peoples. The legal foundation for the jurisdictional reach of the Indian Act is found in section 91(24) of the Constitution Act of 1867, under which the Canadian federal government claims jurisdiction over "Indians and land reserved for Indians". [81] The Act defines "Indian" as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian". [82] The Act provides detailed regulations governing eligibility for registration as an Indian[83], while specifically excluding Metis peoples and making special provisions for certain limited exemptions[84]. Thus, whether or not the Act applies to a particular set of people depends entirely on the Act's eligibility requirements and not on any criteria regarding membership established by indigenous peoples themselves.

From the outset, the Act treated Indians as dominated and subjugated peoples[85]. More specifically, the very purpose of the Act was the assimilation of Indians[86], and it has been argued that the present version of the Act remains focused on assimilation[87]. Later amendments to the Act, such as a 1927 provision that undermined Indian

land claims by requiring a license for anyone soliciting funds to pursue such claims, continued to deny basic justice to aboriginal peoples[88]. While revisions over the years have improved some of the Act's provisions, especially in regard to the treatment of aboriginal women, the Act continues to violate normative standards of equality and prevents Indians from pursuing their own policies of self-government.

The Denial of Self-Governance

1. The Indian Act denies aboriginal peoples the opportunity of self-government and self-determination

The Minister of Indian Affairs and the Governor in Council retain great discretion in controlling the affairs of aboriginal peoples. According to the Royal Commission on Aboriginal Peoples, approximately 90 provisions of the Act give the Minister an array of "law-making, quasi-judicial and administrative powers in all-important areas," and an additional 25 provisions give the Governor in Council broad powers that infringe on the law-making authority of indigenous First Nations, called in the Act, "band councils."[89] The Act provides the Minister with at least some level of authority over nearly every provision of the Act. Some of the most significant areas include regulating Indian status, band membership, band councils, the administration of wills[90], the distribution of property[91], land management[92], and schools[93]. Areas that the Governor in Council may regulate include the protection and preservation of fish and wildlife, the regulation of parking and traffic, insect and weed control, building inspections, and sanitation[94].

Aside from these and other specific areas of authority, the Governor in Council is provided with the sweeping power to "make orders and regulations to carry out the purposes and provisions of this Act". [95] Although band councils are permitted to pass by-laws, this privilege is limited only to those laws "not inconsistent with this Act or any regulation made by the Governor in Council or the Minister". [96] Thus, the unilateral decisions of the Governor in Council or the Minister will trump any inconsistent by-law passed by a band council, imposing severe restrictions on the ability of bands to exercise meaningful self-determination.

2. The Indian Act denies bands the opportunity to choose their own rules for structuring councils and electing council leaders

Under the Act, "[w]henever he deems it advisable for the good government of a band", the Minister can require that council elections be conducted, and "[u]nless otherwise ordered by the Minister", the council, subject to some restrictions, must consist of one chief and one councilor for every one hundred band members[97]. The Act further prescribes how elections are to be conducted, how winners are to be determined, who is eligible for nomination, who is eligible to vote, and the term limits of those who are elected[98]. Each of these provisions denies First Nations or bands the opportunity to structure their own government systems. Thus, while non-Indian Canadians have the opportunity to influence the structure of their provincial and municipal government systems, Indians are denied an equal opportunity under the Indian Act to determine for themselves the structure of their governmental systems.

3. The Act allows for the imposition of provincial "laws of general application" in areas over which the Act has not spoken, denying Indians the opportunity of self-determination and removing prior federal protections that, despite their paternalism, sheltered Indian interests

Such general provincial laws may include those that "impair the status or capacity of Indians, subject to treaty provisions and other federal legislation". [99] For example, Indians are subject to provincial laws pertaining to the management of resources, including any forestry laws that do not conflict with the Indian Act's provisions for cutting timber[100]. Section 88 of the Act applies in matters of child welfare and labor relations to allow provinces to regulate areas that, under prior versions of the Act, were protected by the federal government[101]. While the Court held in *Delgamuukw v. British Columbia* that laws of general application are inapplicable to Indians to the extent that they touch on Aboriginal rights or other matters at the heart of Aboriginal identity[102], it is not clear how much protection this provides. Moreover, while the *Delgamuukw* Court protected Indians against provincial laws threatening to extinguish aboriginal title, it has not protected them against such dispossession by the federal government[103].

The Dispossession of Aboriginal Peoples:
The Indian Act fails to adequately protect Indian lands

Under Section 35, the Governor in Council has the discretion to authorize the taking of aboriginal lands without their consent – *"[w]here by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner"*.[104] Thus, while the Act initially created the reserve

policy for Indians, allowing their lands to be reduced and confining them to designated territories, it further allows for the taking of these lands under certain circumstances beyond Indian control.

While the Canadian Courts have recognized a fiduciary relationship between Indians and the federal government[105], the Courts have not always construed that relationship to adequately protect Indian interests[106]. Moreover, the relationship of indigenous peoples to their lands is not to be understated or trivialized. It is a relationship that has been described as "dynamic", to reflect an ever-changing association that includes "vital economic, social, cultural, political and spiritual dimensions". [107] Each of these dimensions represents an area fundamental to human life, the denial of which to any non-Indian person would be universally criticized as unjust. Yet, in the area of Indian affairs, the Canadian government's power to take away Indian lands – thereby implicating each of these basic entitlements – remains a realistic threat.

Finally, the idea that the Canadian Crown can unilaterally take native lands is rooted in the concept of *terra nullius* and the doctrine of discovery[108]. *Terra nullius* stands for the idea that when Europeans came to North America, the land was empty, because no "civilized" people inhabited it, while the doctrine of discovery employed this idea to allow "discovering" European nations to proclaim sovereignty over those "barren" lands. In its 1996 Report, the Royal Commission on Aboriginal Peoples wrote:

> *"[O]ne of the first steps in building a renewed relationship is the need to abandon doctrines such as 'terra nullius' and 'discovery'. ...To the extent that [these] concepts...carry with them the baggage of racism and ethnocentrism, they are morally wrong as well. To the extent that court decisions have relied on these fallacies, they are in error. These concepts have no legitimate place in characterizing the foundations of this country, or in contemporary policy making, legislation or jurisprudence. If we are to build a renewed relationship between Aboriginal and non-Aboriginal people in Canada, we cannot do it by unilateral and demeaning assertions. Rather, we have to find or rediscover other ways to describe the foundations of this country, to recognize rather than dismiss the rights and contributions of Aboriginal peoples, and to undertake the difficult task of renewal through dialogue and agreement."*

Determining Tribal Membership

Under the Act, Indian status and control of band membership are defined by non-Indians. The Indian Act operates in a paternalistic fashion by removing from Indians the decision on how best to define

who is or is not an Indian, as well as the decision of determining who is entitled to membership of an Indian band[109]. While a band may assume control of its own membership, it may only do that upon a vote by the majority of its own electors after establishing written rules "in accordance with" the Indian Act[110].

The Indian Act does not measure whether or not one is "Indian" according to ancestry, traditional practices, participation in band activities, or location of residence on or off of a reserve but according to whether one meets "the requirements of having the right combination of parents on the right dates under the provisions of the *Indian Act*". [111] Thus, the Act sometimes covers persons having no Indian ancestry, while excluding others that do[112]. Moreover, it has been argued that, because the band registration system contains a strong bias in favor of patrilineal descent, in less than one hundred years, some bands will cease to officially exist under the Act[113].

Further, when the current system was initiated, band lists that were not necessarily complete or accurate were used. Consequently, when registration was finalized, many people who should have been included on band lists were not, and this wrongful exclusion has thus meant denial of Indian status to later generations[114]. While the 1985 amendments to the Indian Act were aimed at correcting many of these problems[115], it is not clear that this effort was entirely successful. Moreover, efforts to restrict qualification for status or membership have been driven, not by neutral principles but by financial motives, particularly to reduce the number of persons eligible for federal benefits[116].

Conclusion

The law in Canada as it relates to aboriginal peoples has always been an assimilationist enterprise. However, recent court decisions as well as renewed treaty negotiations have breathed new life into aboriginal rights and treaty rights in Canada. Many First Nations in British Columbia, for example, are now negotiating treaties with the province to secure their territories and governing jurisdiction. The treaty process is, however, in some ways flawed and discriminatory. Aboriginal peoples have approached the process with the intent of determining and securing their aboriginal title to certain tracts of land. Provincial negotiators have approached the process with the intent of extinguishing aboriginal rights. These conflicts have marred the process. The effort to respect existing treaties and engage in a renewed treaty-making process must, however, continue. As stated in the final report of the Royal Commission on Aboriginal Peoples:

"The arguments for recognizing the Aboriginal peoples as nations spring from the past and the present. They were nations when they forged military and trade alliance with European nations. They were nations when they signed treaties to share their lands and resources. And they are nations today – in their coherence, their distinctiveness and their understanding of themselves.

Recognition of Aboriginal nationhood poses no threat to Canada or its political and territorial integrity. Aboriginal nations have generally sought coexistence, co-operation and harmony in their relations with other peoples."

Recommendations

Racism as it affects indigenous peoples is not well understood by non-indigenous peoples. Ignorance of the many manifestations of racism as it affects indigenous peoples fosters the deprivation of the basic rights of indigenous peoples to cultural and physical security, and to self-determination. Racism against indigenous peoples, like racism against other peoples, has deep roots in the economic, political and social institutions of countries. This racism continues to dominate the laws and policies relating to indigenous peoples today. We make the following recommendations as a starting point for the eradication of racism against indigenous peoples in the United States and Canada.

- A strong Declaration on the Rights of Indigenous Peoples should be adopted by the United Nations before the end of the International Decade of the World's Indigenous Peoples;
- The strong OAS American Declaration on the Rights of Indigenous Peoples should also be adopted as soon as possible;
- Indigenous peoples should be recognized by the United States and Canada as peoples, having the right to self-determination;
- The United States and Canada should examine their laws, legal systems, and policies in order to identify and eradicate both explicit and inherent racism or bias regarding indigenous peoples. Examples of such racism include the doctrines of discovery and *terra nullius*; plenary power; prohibitions against the collective ownership of land; the doctrine that indigenous lands can be taken by the government without due process of law or adequate compensation; doctrines that provide for the unilateral extinguishment of indigenous land rights and title; and discriminatory land claims processes. This analysis must be included in reports to CERD for those countries that have signed the Convention on the Elimination of All Forms of Racial Discrimination, or reports to the Sub-Commission for non-signatories;
- As recommended by the distinguished Special Rapporteur, Erica-Irene Daes, in her study on *Indigenous Peoples and their Relationship to Land*, countries should formally renounce discriminatory legal doctrines and policies that deny human rights or limit indigenous land and resource rights;
- As recommended by Special Rapporteur, Erica-Irene Daes, governments should, in consultation with indigenous peoples, develop processes, standards and methods for the co-existence and co-management of lands and resources, with a view to accommodating indigenous peoples' traditional practices and law of land tenure;
- States must engage in meaningful consultations with indigenous peoples regarding all matters that may affect indigenous cultural or physical security;
- The UN Permanent Forum on Indigenous Issues should be effectively implemented with all necessary funding;
- ILO Convention 169 should be ratified by all states that have not done so;
- An effective human rights complaints procedure should be developed for indigenous peoples and problems of racism in general;
- States should take steps to eradicate the racism that inheres in their criminal and civil justice systems, and provide funding and other programs to strengthen and enhance indigenous peoples' own justice systems.

Notes

1 See "United States Initial Report to the United Nations Committee on the Convention on the Elimination of all Forms of Racial Discrimination", submitted September 2000 (visited February 15, 2001) <http://www1.umn.edu/humanrts/usdocs/cerdinitial.html>, at 5 [hereinafter U.S. Report].
2 See, *e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).
3 See, *e.g.*, Menominee Indian Termination Act, 25 U.S.C. Sec. 891 (1954); see also Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).
4 See, *e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
5 See, *e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).
6 "International Convention on the Elimination of All Forms of Racial Discrimination", entered into force Jan. 4, 1969, art. 1, para. 1, 60 U.N.T.S. 195 [hereinafter International Convention].
7 See U.S. Report, *supra* note 1, at 12.
8 See, *e.g.*, *Universal Declaration of Human Rights*, arts. 1–2, U.N.G.A. Res. 217A

(III), U.N. Doc. A/810 (1948); *International Covenant on Civil and Political Rights*, Dec. 16, 1966, art. 1(1), U.N. Doc. A/6316 (1967), 999 U.N.T.S. 171; *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994).

9 See, *e.g.*, Brown, Dee. 1970. *Bury my Heart at Wounded Knee: An Indian History of the American West*; Deloria Jr., Vine, & Clifford Lytle. 1984. *The Nations Within: The Past and Future of American Indian Sovereignty*. See also, Alaska v. Native Village of Venetie Tribal Government, 118 S.Ct. 948 (1998); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).

10 See International Convention, *supra* note 6, art. 8.

11 See *id*. arts. 9–13.

12 See U.S. Report, *supra* note 1, at 12.

13 42 U.S.C. Sec. 1996 (1978).

14 See U.S Report, *supra* note 1, at 36.

15 See, *e.g.*, Lyng, 485 U.S. 439 (stating that "nowhere in the [American Indian Religious Freedom Act] is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.").

16 See *Racial and Ethnic Discrimination in the United States: The Status of Compliance by the U.S. Government with the International Convention on the Elimination of All Forms of Racial Discrimination*, compiled by the World Organization Against Torture USA, October 2000, at ix, 151.

17 See U.S. Report, *supra* note 1, at 2.

18 See *One America in the 21st Century: Forging a New Future* (2000).

19 *Id*. at 38, 40.

20 See Taylor, Graham D. 1980. *The New Deal and American Indian Tribalism*. P. 5.

21 See *id*.

22 Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887).

23 Taylor, *op. cit*., note 20.

24 See Act of Feb. 8, 1887, 24 Stat. 388; Deloria, Jr., Vine. 1969. *Custer Died for Your Sins*. P. 46.

25 See Cobell, et. al. v. Babbitt, U.S. District Court, Washington, D.C.

26 See Brown, *supra*, note 9.

27 See, *e.g.*, Fort Belknap Indian Community Council v. Bureau of Land Management, CV 00-69-M-DWM, U.S. District Court, Montana.

28 See Lyng, 485 U.S.439.

29 These statistics come from a variety of sources, including the 1990 U.S. Census. Although much of the information will soon be updated, there has been no drastic change in the socio-economic status of indigenous peoples in America. See *One America*, *supra*, note 18. It must also be noted that, for a few reservations, tribal gaming enterprises have made positive economic contributions. The overwhelming majority of Indian people in the United States, however, remain at the bottom of every socio-economic indicator. See, *e.g.*, "Indian Nations are at the Bottom of the Economic, Social Ladder, National Indian Gaming Association" (visited Feb. 19, 2001)<http://www.indiangaming.org/proceeds.html>.

30 *Report to the White House Domestic Council on Native Americans* (April 1995).

31 See "American Indians and Crime", Bureau of Justice Statistics, U.S. Department of Justice, February 1999 (visited February 20, 2001) <

32 See Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

33 21 U.S. (8 Wheat) at 543-44.

34 21 U.S. (8 Wheat) at 572-73.

35 21 U.S. at 543.

36 118 U.S. 375 (1886).

37 Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977).

38 187 U.S. 553 (1903).

39 187 U.S. 565-566.

40 See, *e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); United States v. Dion, 476 U.S. 734 (1986). For an excellent discussion of implicit divestiture, see also Berkey, Curtis, "International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples", 5 *Harv. Hum. Rts. J.* 65 (Spring 1992).

41 See, *e.g.*, Seminole Nation v. United States, 316 U.S. 286 (1942).

42 Cherokee Nation v. Georgia, 30 U.S. (5Pet.) 1, 16-18 (1931).

43 See Cobell v. Babbitt, note 25 above.

44 See, *e.g.*, Seminole Nation, 316 U.S. 286; U.S. v. Mitchell, 445 U.S. 535 (1980); U.S. v. Mitchell, 463 U.S. 206 (1983).

45 348 U.S. 272 (1955).

46 348 U.S. at 288-290.

47 209 F.3d 1366 (Fed. Cir. 2000).

48 209 F.3d at 1380–84.

49 See RCAP, V.1, Ch. 2 §2 (1).

50 See "Indian Affairs in Canada and the United States", August 1998 (visited February 20, 2001) <http://www.inac.gc.ca/pr/info/info122_e.html>.

51 Indian Act, R.S.C. 1985, ch. 1-5 (2001)(Can.).

52 "Final Report of the Royal Commission on Aboriginal Peoples: A Word from Commissioners" (visited February 22, 2001) < [hereinafter RCAP].

53 See, *e.g.*, "Canada's Twelfth Report on Cerd, Part III: Measures Adopted by the Government of Canada" (visited February 22, 2001)<http://www.pch.gc.ca/ddp-hrd/english/cerd/rd12fed.htm> (hereinafter "Twelfth Report").

54 "Twelfth Report", para. 14.

55 "Concluding Observations of the Committee, Committee on the Elimination of Racial Discrimination", 54th Session, 1-19 August 1994, para. 6 <.

56 See Morse, Brad W., "A View From the North: Aboriginal and Treaty Issues in Canada", 7 *St. Thomas L. Rev.* 671, 674-76 (1995) ("The experience of racism has plagued Canadian society, as has the threat to traditional lands been a hallmark of Canadian-Aboriginal relations for well over 100 years.") [hereinafter "A View From the North"]; RCAP at V.1, Ch.5, Conclusion; see generally, Adams, Howard. 1975. *Prison of Grass: Canada From the Native Point of View* (discussing racism against Native Canadians from the time of the fur trade to the 1970s); Moran, Bridget. 1988. *Stoney Creek Woman: The Story of Mary John* (a biographical account of a member of the Carrier Indian Band, discussing hardships endured by the people of the Stoney Creek Reserve, including among other struggles, racism).

57 One scholar argues that cultural racism against Indians is even more dangerous than other overt forms of racism, because it is not always as easily recognized. Adams, Howard.1995. *A Tortured People: The Politics of Colonization*, p. 29 ("Cultural racism, was and still is a more sophisticated and insidious form of eurocentrism. It is the degradation of and prejudice against Aboriginal life styles, including language, dress, food, and traditional social mores. Unlike the more obvious biases and gross errors that typify vulgar racism, cultural

racism is more vague and flexible to suit new generations and is, therefore, harder to dispel from the mainstream's consciousness.").

58 See RCAP, at V. 2, Ch.1, Introduction.

59 See *id.* at 712-13.

60 See RCAP, at V.1, Ch.13, Conclusion (quoting a 1920 statement by the Deputy Superintendent General of Indian Affairs on the Indian Act, as follows: "Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this bill."); see also Dickason, Olive Patricia. 1997. *Canada's First Nations: A History of Founding Peoples From Earliest Times*, p. 412.

61 See Morse, Bradford W., "Indigenous Renascence: Law, Culture & Society in the 21st Century: Common Roots But Modern Divergences: Aboriginal Policies in Canada and the United States", 10 *St. Thomas L. Rev.* 115, 141-42 (1997)[hereinafter "Indigenous Renascence"].

62 See Fred, Randy. 1988. *Foreword to Resistance and Renewal: Surviving the Indian Residential School*, p. 16, (describing physical torture of children at Indian residential schools for speaking native languages, including the pushing of needles though their tongues).

63 See Morse, "Indigenous Renascence", *supra* note 61, at 141-42.

64 See Morse, "A View From the North", *supra* note 56, at 674-76.

65 See Macklem, Patrick, "Distributing Sovereignty: Indian Nations and Equality of Peoples", 45 *Stan. L. Rev.* ppS. 1311, 1312 (1993).

66 Trakman, Leon E., "Native Cultures in a Rights Empire Ending the Dominion", 45 *Buffalo L. Rev.* 189, 205–6 (1997).

67 See Charney, Davin, "Racism – A Canadian Tradition Continues", *Imprint* (newspaper of the University of Waterloo), Feb. 4, 2000 (visited Feb. 13, 2001) <http://imprint.uwaterloo.ca/ issues/020400/ 2Forum/forum11.shtml>.

68 See Palmater, Pamela D., "An Empty Shell of a Treaty Promise: R. v. Marshall and the Rights of Non-status Indians", 23 *Dalhousie L.J.* 102, 146 n.118 (2000) (discussing *R. v. Keepness*, [1999] S.J. No. 869, in which an all-white male wildlife enforcement group, self-named "WASP," treated aboriginal people in a cavalier, insensitive and racist manner).

69 See Powless, Richard C., "Native People and Employment: A National Tragedy", 4 *Currents* 2, 2-5 (1985) (article excerpted from a larger paper prepared for the research study, *Equality in Employment*, Abella Royal Commission, April 1985) (visited Feb. 13, 2001) <http://www.tgmag.ca/magic/mt2.html>; see also RCAP, at V.4, Ch.7, §§6.4-7.

70 See Rees, Tim, "Native People and Racism", 4 *Currents* 1, 1 (1985) (visited Feb. 13, 2001) <http://www.tgmag.ca/magic/mt1.html>.

71 See Hampton, Eber. 1995. *Towards a Redefinition of Indian Education in First Nations Education in Canada: The Circle Unfolds*, p. 7 (likening mainstream educational practices to "cultural, spiritual and psychological genocide"); see also RCAP, at V.4, Ch.1, §3.3.

72 See generally Graveline, Fyre Jean. 1998. *Circle Works: Transforming Eurocentric Consciousness* (arguing that the current Canadian educational system is oppressive and politically controlled and needs to be revamped to ensure that the suppressed teachings of cultural communities are given a voice).

73 See Tremblay, Bill, "Anti-racism Rally Unites Students", *Wawatay News*, Oct. 9, 1997 (discussing a rally protesting the racially motivated assault on a Native high school teenager).

74 See National Crime Prevention Center, Department of Justice, Ontario, Canada, "Aboriginal Canadians: Violence, Victimization and Prevention" (last modified Dec. 7, 2000) (citing a January 2000 police study finding that 42% of victims of violent crime in Prince Albert and Regina were aboriginal Canadians, even though aboriginals represent only 10% of the population in those cities) <publications/ aboriginal/ aboriginal.html>.

75 See RCAP, at V.4, Ch.7, §4.3.

76 See RCAP, at V.4, Ch.4, §3.3.

77 See, *e.g.*, Crary, David, "Air Canada Apologizes for Using Ad", *The Detroit News*, May 8, 1996 (visited February 13, 2001) <http://detnews.com/menu/stories/47048.htm>; Vallis, Mary, "Students Condemn Media Racism", *The E-Peak*, Apr. 6, 1999 (visited Feb. 13, 2001)<http://www.peak.sfu.ca/the-peak/99-1/issue13/mediaracism.html>; see RCAP, at V.5, Ch.4; see generally Crawford, James, "Media, Stereotypes and the Perpetuation of Racism in Canada " (1998) (unpublished paper of graduate student at University of Saskatchewan) (visited Feb. 13, 2001) <http://www.usask.ca/education/coursework/802papers/crawford/crawford.PDF>.

78 See Perreault, Marvin, "Cross-cultural Awareness: The Importance of Implementing Programs in Corporate Canada", *The Virtual Circle*, May 2000 (visited Feb. 13, 2001).

79 See RCAP, at V.2, Ch.5, §2.7.

80 Indian Act, R.S.C. 1985, ch. 1–5 (2001)(Can.).

81 Constitution Act, R.S.C. 1867 (2001) (Can.). The Constitution Act contains no definition of "Indian."

82 R.S.C., ch. 1-5, § 4(1).

83 R.S.C., ch. 1-5, §§ 5-7. In addition, some Indians are eligible for "band" membership under the Act. R.S.C., ch.1-5 §§ 2(1) and 8-13.3. While most registered Indians are band members, not all band members are registered Indians. See Palmater, Pamela D., "An Empty Shell of a Treaty Promise: R. v. Marshall and the Rights of Non-status Indians", 23 *Dalhousie L.J.* 102, 112 (2000). However, under § 4.1 of the Act, non-registered band members are also subject to the Act for certain purposes. See *id.*

84 R.S.C., ch.1-5, §§ 4(1)-(2). By contrast to the Indian Act, under *Re Eskimos*, [1939] S.C.R. 104, Inuits are included in the term "Indian" under §91(24) of the Constitution Act.

85 See Russell, Peter H., "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence", 61 *Sask. L. Rev.* 247, 257-58 (1998).

86 See RCAP at V.1, Ch.13, Conclusion (quoting a 1920 statement by the Deputy Superintendent General of Indian Affairs on the Indian Act, as follows: "Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this bill."); Palmater, *supra* note 83, at 113-14.

87 See Palmater, *supra* note 83, at 113-18 (citing Larry Gilbert's argument that the Act's restrictive provisions for defining Indian status and band membership are part of a larger attempt to reduce the number of Indians in Canada).

88 See Russell, *supra* note 85, at 257-58. That amendment was no longer effective as of 1951. See *id* .

89 See RCAP, at V.1, Ch.9, § 11.

90 R.S.C., ch.1-5, §§ 45-46.

91 R.S.C., ch.1-5, § 48-52.5.

[92] R.S.C., ch.1-5, §§ 53-58.
[93] R.S.C., ch.1-5, §§ 114-22.
[94] R.S.C., ch.1-5, § 73(1).
[95] R.S.C., ch.1-5, § 73(3).
[96] R.S.C., ch.1-5, § 81(1).
[97] R.S.C., ch.1-5, §§ 73(1)-(2).
[98] R.S.C., ch.1-5, §§ 73-78.
[99] Curran, Deborah and Michael M'Gonigle, "Aboriginal Forestry: Community Management as Opportunity and Imperative", *37 Osgoode L.J.* 711, 718 (citing P.W. Constitutional Law of Canada, vol. 1, loose-leaf (Toronto: Carswell, 1992) at c. 27.2(a)).
[100] *Id.* (providing as examples provincial laws governing forest planning, reforestation, and preservation of ecosystem values).
[101] For the argument that Indians have valued protection from the federal government despite its many shortcomings, see, John Borrows and Leonard I. Rothman, "The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?", 35 *Alberta L. Rev.* 9, 33 n.130 (discussing the First Nations' rejection of the "White Paper," which sought to repeal the Indian Act, because First Nations felt that it was better to work within the confines of the Act than lose their unique status vis-à-vis the federal government).
[102] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010.
[103] See Borrows, John, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia", *37 Osgoode Halle L.J.* 537, 588 (1999) (asserting that, while the Court held in *Delgamuukw v. British Columbia* that the Indian Act "does not evince the requisite clear and plain intent to extinguish aboriginal rights" through referential incorporation by provinces, this does not prevent the Crown from snuffing out those rights).
[104] R.S.C., ch.1-5, § 35.
[105] See *Guerin v. R.*, [1984] 2 S.C.R. 335.
[106] See *R. v. Badger*, [1996] 1 S.C.R. 771.
[107] See Joffe, *supra* note, at 163.
[108] See RCAP, at V.1, Ch.4.
[109] See R.S.C., ch. 1-5, §§ 4 (defining "Indian," excluding Inuit peoples from Indian status, and providing that the Governor in Council may further determine "Indian" status), 5-7 (describing who is eligible to register as an "Indian" under the Act), (2)(1) (defining band membership), and 8-13.3 (describing who is eligible for membership of a band).
[110] R.S.C. ch.1-5, § 10(1).
[111] See Palmater, *supra* note 83, at 108-09.
[112] See *id.* (also see Palmater's article, generally, for the assertion that the Indian Act unfairly discriminates against Metis peoples).
[113] See *id.* at 117-18 (citing Stewart Clatworthy and Anthony Smith's work).
[114] See RCAP, at V.1, Ch.9, § 11.
[115] See Communications Branch, Department of Indian Affairs and Northern Development. 1985. *Report to Parliament on the Implementation of the 1985 Changes to the Indian Act.*
[116] See RCAP, at V.1, Ch.9, § 11.

References

Adams, H. 1995. *A Tortured People: The Politics of Colonization.*

Berkey, C. Spring 1992. *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples.* 5 Harv. Hum. Rts. J. 65.

Borrows, J. and Rothman, L. I. *The Sui Generis Nature of Aboriginal Rights: Does It Make a Difference?* 35 Alberta L. Rev. 9, 33 n.130.

Borrows, J. 1999. *Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia.* 37 Osgoode Halle L.J. 537, 588.

Brown, D. 1970. *Bury My Heart at Wounded Knee: An Indian History of the American West.*

Canadian Broadcasting Corporation. Dec. 14, 2000. *Ontario Corrcetions Wants Human Rights Commission to Back Off.*

Canada's Twelfth Report on CERD. February 22, 2001. *Part III: Measures Adopted by the Government of Canada.*

Charney, D. Feb. 4, 2000. *Racism - A Canadian Tradition Continues.* University of Waterloo newspaper.

Committee on the Elimination of Racial Discrimination. August 1994. *Concluding Observations of the Committee.* 54th Session, 1-19, para. 6.

Communications Branch, Department of Indian Affairs and Northern Development. 1985. *Report to Parliament on the Implementation of the 1985 Changes to the Indian Act.*

Crawford, J. 1998. *Media, Stereotypes and the Perpetuation of Racism in Canada.*

Crary, D. May 3, 1996. *Air Canada Apologizes for Using Ad.* The Detroit News.

Curran, D. and M'Gonigle, M. 1992. *Aboriginal Forestry: Community Management as Opportunity and Imperative.* 37 Osgoode L.J. 711, 718.

Dickason, O. P. 1997. *Canada's First Nations: A History of Founding Peoples From Earliest Times.*

Deloria, Jr., V. 1969. *Custer Died for Your Sins.*

Deloria, Jr., V. & Lytle, C. 1984. *The Nations Within: The Past and Future of American Indian Sovereignty.*

Draft United Nations Declaration on the Rights of Indigenous Peoples, **1994**. U.N. Doc. E/CN.4/Sub.2/1994/56.

Fred, R. 1988. *Foreword to Resistance and Renewal: Surviving the Indian Residential School.*

Graveline, F. J. 1998. *Circle Works: Transforming Eurocentric Consciousness.*

Hampton, E. 1995. *Towards a Redefinition of Indian Education in First Nations Education in Canada: The Circle Unfolds.*

International Convention on the Elimination of All Forms of Racial Discrimination, **Jan. 4, 1969**. Art. 1, para. 1, 60 U.N.T.S. 195.

International Covenant on Civil and Political Rights, **Dec. 16, 1966**. Art. 1(1), U.N. Doc. A/6316, 999 U.N.T.S. 171.

Indian Affairs in Canada and the United States. **August 1998.**

Final Report of the Royal Commission on Aboriginal Peoples: A Word from Commissioners.

Mcklem, P. 1993. *Distributing Sovereignty: Indian Nations and Equality of Peoples.* Stan. L. Rev. 1311, 1312.

Moran, B. 1988. *Stoney Creek Woman: The Story of Mary John.*

Morse, B. W. 1995. *A View From the North: Aboriginal and Treaty Issues in Canada.* 7 St. Thomas L. Rev. 671, 674-76.

Morse, B. W. 1997. *Indigenous Renascence: Law, Culture & Society in the 21st Century: Common Roots But Modern Divergences: Aboriginal Policies in Canada and the United States.* 10 St. Thomas L. Rev. 115, 141-42.

National Crime Prevention Center, Department of Justice, Ontario, Canada. Dec. 7, 2000. *Aboriginal Canadians: Violence, Victimization and Prevention.*

One America in the 21st Century: Forging a New Future. **2000.**

Palmater, P. D. 2000. *An Empty Shell of a Treaty Promise: R. V. Marshall and the Rights of Non-status Indians.* 23 Dalhousie L.J. 102, 146 n.118.

Powless, R. C. 1985. *Native People and Employment: A National Tragedy.* 4 Currents 2, 2-5.

Perreault, M. May 2000. *Cross-cultural Awareness: The Importance of Implementing Programs in Corporate Canada.* The Virtual Circle.

Rees, T. 1985. *Native People and Racism.* 4 Currents 1, 1.

Report to the White House Domestic Council on Native Americans. **April 1995.**

Russell, P. H. 1998. *High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Indiepandence.* 61 Sask. L. Rev. 247, 257-58.

Taylor, G. D. 1980. *The New Deal and American Indian Tribalism.*

Trackman, L. E. 1997. *Native Cultures in a Rights Empire Ending the Dominion.* 45 Buffalo L. Rev. 189, 205-6.

Tremblay, B. Oct. 9, 1997. *Anti-racism Rally Unites Students.* Wawatay News.

Universal Declaration of Human Rights, **1948**. Arts. 1-2, U.N.G.A. Res. 217A (III), U.N. Doc. A/810.

Unites States' Initial Report to the United Nations Committee on the Convention on the Elimination of all Forms of Racial Discrimination, **September 2000**.

U.S. Department of Justice, Bureau of Justice Statistics. February 1999. *American Indians and Crime.*

Vallis, M. Apr. 6, 1999. *Students Condemn Media Racism.* The E-Peak.

The World Organization Against Torture USA. October 2000. *Racial and Ethnic Discrimination in the United States: The Status of Compliance by the U.S. Government with the International Convention on the Elimination of All Forms of Racial Discrimination.*

CHAPTER 8

RACISM AGAINST THE INDIGENOUS PEOPLES OF CENTRAL AMERICA AND THE CARIBBEAN

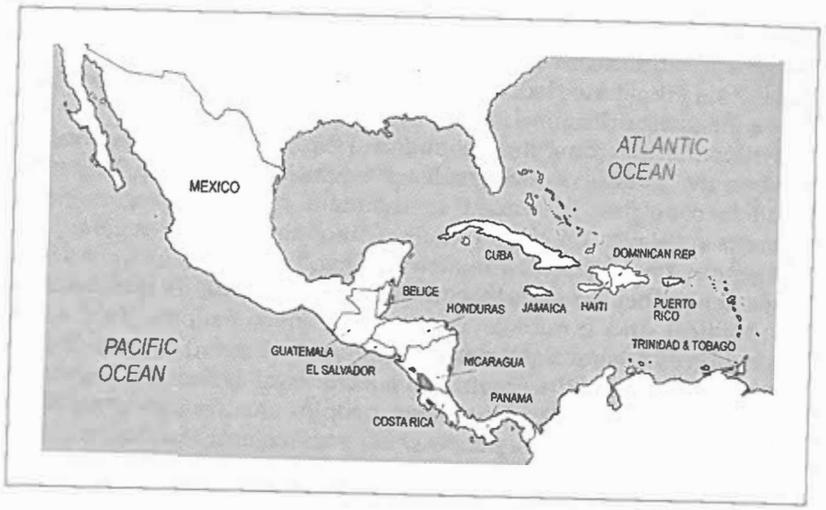
By Atencio López Martinez

In Abya Yala (the Americas in the Kuna language), the origins of racism and racial discrimination date back to the time of the Europeans' arrival on the continent. Ethnically-motivated exclusion and segregation can be found in the pattern of conquest and colonisation that was established from the 15th century onwards. The subjugation of, firstly, the indigenous peoples and, later, the Afro-Americans, had the aim of obtaining mass labour for the agricultural and mineral tasks of supplying the mother country of the colonists. The mechanisms used to obtain such labour force were initially based on the so-called practices of encomienda[1] and slavery.

Since then, indigenous peoples have suffered constant violations of their rights. As colonial society progressed, the indigenous peoples were faced with a growing loss of their age-old culture and customs. The violent incorporation of indigenous peoples into a new form of social organisation was accompanied by the expropriation of their territories, natural resources, destruction of politico-administrative organisation and disregard for their spirituality. Colonial institutions were built on the remains of what had been their civilisation.

During colonial times, the indigenous communities witnessed fragmentation and destruction of their ways of life, language and culture. They were often displaced, dispersed or evicted from their native territories, thus losing their unifying societal and cultural links. The accompanying loss of and decline in natural resources, together with other factors (exploitation of labour, disease, etc.), were to be the cause of a demographic catastrophe. In a matter of years, the estimated population of the continent was reduced by more than half. This situation may well have been one of the reasons behind the need for slave labour of African origin.

It scarcely needs repeating that the *"leyenda negra"*[2] is closely associated with the largest genocide ever experienced on this planet. All forms of human rights were violated. At the end of the colonial period, a situation of domination and subordination continued to characterise the relationship between the continent's indigenous and non-indigenous populations.



It is worth noting that, during this period, one of the most notorious acts of racial discrimination lay in the views towards the people of mixed race who began to inhabit the new states of the continent. Manuel Rodríguez Cuadros, in his work *"La situación de otros grupos vulnerables, diversas manifestaciones de discriminación racial en la vida pública y privada"* ("The situation of other vulnerable groups, different manifestations of racial discrimination in public and private life"), states that colonialism established a social order based on a class structure that assumed a strict division between Indians and Spaniards. However, reality imposed a complex process of contacts at legal level that gave rise to the emergence of new ethnic patterns, characterised by different forms of "interbreeding". The *mestizos*[3] were "children of the two but often despised by both".

Garcilazo de la Vega, the first important figure in the colonies to come to terms with his mixed background, has left a testimony to the structure of colonial interbreeding. He states, "The children of Spaniards born there (in the Americas) are called criollos[4]... the children of Blacks or Indians - or of Blacks and Indians - are called mulatos[5]. Their children are called *cholos*[6]. The word comes from the Islas de Barlovento. It means 'dog' but not just any dog. It refers to a bad local dog, not the same as Spanish dogs. And the Spanish use it as a term of disgrace and a criticism. The children of a Spaniard and an Indian are called *mestizos*, meaning that we are a mix of both nations...the children of a Spaniard and a mestizo are called *cuatralbos*, meaning that they are one quarter Indian and three quarters Spanish. The children of a mestizo and an Indian are called *trasalbos*, meaning

they are three quarters Indian and a quarter Spanish... (Gonzalo Portocarrero, Racismo y Mestizaje, Lima, 1993)". During colonial times, this ethnic mix led to varying degrees of the negative connotation of "bastardisation".

Following this came the Republican period. Many of the so-called leaders, or "fathers of independence", whilst seeking the liberation of their countries, continued to maintain indigenous workers as servants or slaves on their estates. Although, in some regions, the indigenous populations were actively involved in the independence movements, they were soon considered an obstacle to fulfilment of the political and economic goals of the new nations. This same perception was prevalent across the region. Later, the rule of law conceived by the Latin American countries was based on the principles of one State, one nation, one people, one way of organising social relations, one law, one way of administering justice.

There were no laws that explicitly denied any rights to indigenous peoples. In practice, however, all possibilities of exercising the rights of developing and protecting their identity, language and way of life were ruled out. Indigenous peoples in Costa Rica, Chile, Argentina etc experienced direct action, often violent, in order to "convince" them about the benefits of being part of the nation and civilisation (Bello and Rangel 2000).

For centuries, indigenous peoples were kept in exclusion and deprivation. Most still live in poverty, with an education system that does not take into account their cultural, linguistic or religious specificities. In general terms, indigenous peoples lost everything, including their main subsistence resources (such as the land, the territory and its natural resources). For decades, they have been forced to emigrate to large urban centres where they find low paid and low quality temporary employment.

Colonialism was based on the doctrine of discovery. The notion of European racial superiority, as opposed to the supposed inferiority and savagery of the natives, was to be a part of the historic processes on which cultural images of the conquerors and conquered were built.

Racial and ethnic discrimination still lives on like a plague, functioning by means of a combination of social and cultural mechanisms, which some authors have called prejudice. According to Giddens (1991), prejudice *"refers to the opinions or attitudes held by members of a group in relation to those of other groups, whilst discrimination refers to their actual conduct towards them. Prejudice implies sustaining preconceived points of view regarding an individual or group, based frequently on hearsay rather than on direct experience, perspectives that are difficult to change even in the face of new information"*.

In Central America and the Caribbean, as in the continent as a whole, the seeds of racial discrimination that were sown during colonial times afflict the whole of Latin American society. The Catholic Church treated indigenous peoples as heretics or simply as inhuman for not professing a religion. This despite the fact that indigenous peoples built great civilisations and indigenous religions were a part of these civilisations.

Theoretical Discourse on Discrimination

The problem of exclusion in the continent is demonstrated through the worst disparities in income distribution. In Central America, the majority of States have applied policies of discrimination based on assimilation and integration. These policies are based on the belief that the dominant national culture is superior to indigenous cultural, social and legal customs and institutions and that a process of acculturation will make indigenous peoples become part of a national society in a cultural, social, economic and political sense.

Political and administrative measures have accelerated the process of assimilation or integration. These measures originated in the Mexican School of anthropology at the beginning of the 1940s, which provided the theories on how to deal with the "indigenous issue" in the different countries.

The existence of international standards protecting more general human rights is virtually unknown amongst indigenous peoples, far less those that relate to indigenous peoples in particular. This is an underhand form of racism because many countries do not agree with the indigenous struggle for rights and far less that they should seek protection from international agreements, always arguing the vulnerability of their sovereignty or internal security.

Indigenous peoples are denied the right of self-determination. Nor was the UN Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514 (XV) of the General Assembly of 14th December 1960) applied to indigenous peoples. Even the provisions of the Universal Declaration of Human Rights are denied to indigenous peoples, and their human rights are violated on a daily basis.

No government is interested in the fact that,

> *"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". Nor that, "Everyone has the right to life, liberty and security of person".*

The indigenous make government news and publicity when there are disasters and when there are consultations and studies that state in black and white that these communities are the ones that suffer most from misery and poverty.

In the case of the Caribbean governments, there is a marked tendency towards denying the existence of indigenous peoples in the region. In recent decades, movements for indigenous demands have emerged in Puerto Rico, the Dominican Republic and some small islands. These movements include such a high level of mestizos that they are often confused with Afro-Latin movements.

After centuries of exclusion and domination, indigenous, Afro-Latin and Afro-Caribbean peoples demonstrate the worst socio-economic indicators. They are the poorest people in Latin America and the Caribbean. The loss of ancestral territories and the deterioration in the basic natural resources surrounding their regions are the main causes of poverty. This is compounded by the complete lack of government policies to address these shortcomings.

Both indigenous and Afro-Caribbean peoples enjoy less access to health, education, employment, income, justice, and political consideration than those enjoyed by the white population. In the majority of countries of the Caribbean, it is common to hear that the indigenous were "exterminated" long ago - this is stated with pride by the white population in power. For others, the indigenous peoples are no more than brand names for the sale of spirits and other alcoholic drinks or to attract tourism but only extolling their "disappearance".

Poverty as a Consequence of Racism

Over the last three decades, political persecution and extermination of indigenous communities have been added to the poverty, as in the case of Guatemala and El Salvador and, to a lesser extent, neighbouring countries. These have led to the mass displacement of indigenous peoples from their places of origin, becoming internally displaced in their own country. In Guatemala, indigenous peoples, who constitute more than half of the population, have been the most affected in the protracted 30 year old civil war.

It is difficult to establish the size and structure of the Latin American indigenous population because the censuses taken to date have been "limited" or "incomplete", in addition to being based on different types of variables and criteria. Both the IADB (Deruyttere, 1997) and ECLAC (Peyser and Chackiel, 1999) agree that the indigenous population must comprise approximately 8% of the total population of Abya Yala, being the equivalent of between 33 and 40 million people.

On the Caribbean islands, there are between 30 and 55,000 direct descendants of indigenous peoples. In Latin America, indigenous peoples are concentrated in Bolivia (between 50 and 70% of the national population), Guatemala, Peru and Ecuador. The following five countries together account for almost 90% of the region's indigenous population: Peru (27%), Mexico (26%), Guatemala (15%), Bolivia (12%), and Ecuador (8%) (Deruyttere - IADB, 1999).

In Central America, the number of indigenous peoples is estimated to be between 15 and 20 million in the area stretching from Panama to Mexico. According to government censuses during the 1990s, the figure is only around 15 million, with the majority living in Mexico and Guatemala. Official censuses up to the end of the last century did not take the registering of indigenous peoples very seriously, particularly outside of the native territories.

Indigenous Population by census and estimations in the countries of Central America and Mexico in 1990

Guatemala	(1994)	3,476,684	(42.8%),	the estimate is 4,600,000 (49.9%)
Honduras	(1990)	48,789	(1.3%)	
Mexico	(1990)	5,282.347	(7.4%),	the estimate is 10,900,000 (12.6%)
Nicaragua	(1995)	67,010	(1.8%)	
Panama	(1990)	194,269	(8.3%)	

(ECLAC, Santiago, 1999)

In Guatemala, where the indigenous peoples are the majority, statistics show that 86.6% of those suffering from poverty are indigenous peoples (G. Psacharopulos and H.A. Patrinos, 1994). In Mexico, more than 50% of the housing located in indigenous regions has no electricity, 68% lacks clean water and 90% drainage, and 76% has an earth floor. The 1990 census revealed that in places with an indigenous population of 30% or more, 26% of inhabitants between the ages of 6 and 14 years did not go to school, only 59% of those above the age of 15 could read and write and 37% had never been to school. In Honduras, illiteracy amongst indigenous groups is as high as 87%, in addition to the low level of nutrition and health and inequality of opportunities. In Honduras 6.3 million people live in conditions of

poverty, among those the Xicaque, Lenca, Chortis, Pech, Misquitos, Tawhakas and Tolupanes ethnic groups, in addition to Blacks and *Ladinos*[7].

Migration as a Consequence of Racial Discrimination

Another main cause of poverty amongst indigenous peoples is attributed to the liberal reforms of the 19th century, which introduced the notion of private land ownership (Plant, 1998). The progressive loss of lands and destruction of community economies led to migration from rural to urban areas.

Migration is one of the most serious problems facing indigenous peoples. Its origins date back to colonial times. However, its greatest effects have appeared during the 20th century. A deterioration in peasant economies, the loss and reduction of community lands, the general lack of productive resources and overall population growth have all caused migration. The taking of lands by landowners and *caciques*[8], combined with the violence towards indigenous peoples during their forced removal have taken hundreds of indigenous cultures to the verge of extinction.

In recent decades, the region has witnessed massive internal displacements caused by depredation of the environment and natural resources on indigenous territories, wars and generalised violence. Guatemala, El Salvador and Nicaragua suffered large internal displacements of their indigenous populations due to civil war. The same is being witnessed in Chiapas in southern Mexico. In Colombia particularly, the plight of indigenous peoples is worsening by the day. The consequences of the war in Colombia have now spilled over the frontiers and indigenous communities living in the border areas of Panama have been displaced towards the interior and the capital Panama City, fleeing violence and terror.

Many of these internally displaced people arrive to swell the ranks of the unemployed or beggars in the capitals. As the prejudices continue, they are treated as second class citizens. They join the urban poor and, as an ethnic group, they are disproportionately affected.

Racist Practices in the Legislative Sphere

Across Central America and the Caribbean, there is no law that overtly discriminates and promotes racism. But racial discrimination and racism are practiced in daily life. There are little affirmative

actions. The repeal of integrationist and assimilationist laws adopted some fifty years ago has been unsatisfactory.

One of the most racist and discriminatory expressions at the level of legislation takes place at the time of granting legality to indigenous communities or of negotiating the natural resources existing in these areas, or at the time of granting licences or permits for the extraction of mineral resources. Although there are international agreements in existence that talk of the prior consultation and information of indigenous peoples, and that they should share in the benefits accruing from exploitation of these resources, they are never taken into consideration. They are informed when everything has already been decided by the government.

The debate over approval of ILO Convention 169 in Guatemala is a case in point. On 5th March 1995, the Guatemalan Congress unanimously approved Convention 169 on "Indigenous and Tribal Peoples in Independent Countries". But the National Progress Party (PAN) included an amendment to Article 1 of what is currently Decree 9-96. It distorts the spirit of this international instrument by stating that: "*Art. 1. Convention 169 is approved. This approval is given on the understanding that the stipulations of the Political Constitution of the Republic prevail over the said Convention, which does not affect acquired rights and cannot be applied retrospectively.*" Therefore, some indigenous peoples cannot lay claims against the soldiers and landowners who had robbed them of their land during the period of terror in the country. This is a typical case of racial discrimination in the region.

Another expression of racism and discrimination at legislative level can be found in the Political Constitutions. Very few countries have recognised pluriculturality or multiculturality in their constitutions. There is strong opposition to granting recognition or affirmative actions to indigenous peoples. Consequently, indigenous peoples have very little access to government posts with decision-making power. Even the offices that deal with indigenous affairs are always run by non-indigenous peoples even though there are indigenous professionals and politicians capable of holding these posts.

Racial Discrimination in the Judicial Sphere

One of the clearest cases of racism and racial discrimination toward indigenous peoples in the region takes place in the delivery of justice. Many indigenous people are serving prison sentences throughout Central America for crimes they did not commit, purely because they do not speak Spanish, or because they are poor and thus not able to appoint a lawyer.

Until very recently, in criminal disputes, indigenous peoples were tried in a language they did not understand and for acts that would often be considered differently within their community. Nowadays there are new factors in the trials, with the possibility of a translator or cultural experts; however, these elements are still not sufficiently applied in legal practice. It has been observed that it is very difficult to hold a fair trial against indigenous defendants because, at times, the transcription of the hearing does not tally with what the accused actually said. The boundaries between translation, interpretation and defence do not appear clear in the view of an indigenous person who shares with the defendant a whole history of marginalisation and violence from an authority considered external to his/her communities.

In the case of expert studies, it has not been possible to get this form of evidence made compulsory for cases in which the acts presumed to form a crime have been motivated by cultural factors. So far, expert studies have been trivialised, being used as proof that a subject is indigenous or, in other cases, turned into long anthropological discussions about the history of the people to which the accused belongs, without reference to the specific actions in question.

The law establishes the possibility of offering practical reports from a traditional authority. This method has not been used; generally the accused has already lost his links with the community, which occasionally expels its members by delivering them to the judicial authority. The judges thus continue sentencing indigenous peoples with no reference to their habits and customs, and when they do so, they may fall into a legal folklorism by quoting "customs" out of context.

For orthodox jurists and defenders of the unity of the State, the suggestion that another law, indigenous law, exists is quite aberrant. However, the recognition of indigenous law within national law is an urgent need, due to the fact that there is a growing process of delegitimisation in the indigenous communities, resulting from the imposition of laws and ways of life foreign to their worldview (M. Gómez, 2000).

Customary laws are of vital importance to indigenous peoples. Many problems arising between the people of the same community can often be resolved by means of customary law. It has been proven that customary law exercised by traditional authorities within these communities is often far more effective and far more human than western law.

But, in the majority of countries, this traditional or customary law is classified as mere habit or custom, and even ridiculed in many

cases. Neither the law courts nor the lawyers come to the communities, nor is there any interest in promoting and institutionalising customary law in the country. This racial discrimination is expressed in the fact that those committing supposed crimes in the indigenous communities spend years in prison with neither trial nor hearing, even though they are accused of minor crimes. On many occasions, they have even been subsequently proved innocent.

Racist Practices in the Political Sphere

Although some countries in the region emphasise their multi-ethnicity or pluriculturality, in practice little has been done to ensure respect for these declarations. In this regard, the Constitution of Guatemala (1985) declares the protection of the country's ethnic groups; the Constitution of Mexico (1992) declares its multicultural composition based on the original indigenous peoples and the Nicaraguan Constitution (1987) declares the political, social and ethnic pluralism of the nation, also stating the multiethnic nature of the Nicaraguan people.

In general terms, political participation on the part of indigenous peoples is perhaps one of the factors that most clearly highlights their exclusion and discrimination, particularly in countries and areas where the indigenous population is in a majority. The conflict in Chiapas, the mobilisations in Ecuador during January 2000 and 2001, and the conflicts on Mapuche land in Chile all demonstrate that there is growing indigenous pressure to influence decisions that affect their own future.

There is a need to undertake deep reforms at the level of the political participation and representation of indigenous peoples so that they are recognised as key factors in citizenship, integration and social unity, in the democratic governability and stability of Latin American and Caribbean countries.

The traditional political parties have always aspired to represent indigenous peoples in the elections so that they could choose a government or elect deputies to Congress in the name of national unity. But when indigenous peoples join forces to choose their own spokespersons or representatives, this is considered racism.

Another classic argument is illiteracy in the indigenous communities. As a judge of the Electoral Court of Panama at the end of the 1980s, Dr. Cesar Quintero said that electoral fraud or vote and ballot box stealing took place, above all, in the indigenous areas. He said that the fact that indigenous peoples were illiterate contributed to the corruption and to the fact that illegitimate governments gained

power. This is wrong because, through their poverty and illiteracy, it tries to blame indigenous peoples for things they are little interested in, due to the fact that they will always continue to be seen as second class citizens by their governments. This is just another example of racism and racial discrimination by which the majority try to hide their inability to face up to the corruption and the supposed rule of law they claim to defend.

In the countries with a significant number of indigenous peoples, and despite their votes being valuable at election time, the political parties have very few or virtually no indigenous representatives in leadership posts; on both the Left and the Right, there is a marked tendency towards discrimination.

Discrimination in Relation to Land Ownership Rights

The concept of Mother Earth is not something that has occurred by chance. For indigenous peoples, the land means everything. Protecting their territories comes second only to protecting their lives, because these territories provide food, medicine, clothing, and a stable home, and they are also the guarantor of culture for future generations.

The indiscriminate felling of the native forests, for example, like oil extraction or the construction of dams or reservoirs, has devastating effects on indigenous peoples and their environment. Apart from affecting their production and subsistence base, it also affects ancestral ways of life, their culture and worldview. This is gradually eroding the peaceful coexistence that indigenous peoples have for so long maintained with Mother Nature. All kinds of racial discrimination and racism began on the continent on the basis of the expropriation of indigenous lands.

In recent years, inequalities have been increasing. This is due to the fact that, on many occasions, indigenous peoples' rights in relation to their territories are unknown or denied by the States. The customary law of indigenous peoples by which indigenous peoples regulate the use, occupation and distribution of lands is ignored.

Given that the majority of indigenous communities had neither the means nor the knowledge to register their lands as private property, the 19th and early 20th centuries sowed the seeds for a substantial expropriation of communal indigenous lands throughout the continent.

From an indigenous perspective, the situation appears to have been particularly serious in those countries where the development of cash crops for export (such as sugar cane and coffee) entailed a demand for indigenous labour as well as pressure on their lands. In

Guatemala and in parts of Mexico, where the coffee economy grew particularly rapidly at this time, indigenous peoples lost a large part of their communal lands. Many became workers "bound" to the coffee plantations because, in the Guatemalan highlands where the indigenous population was concentrated at this time, the plots for agricultural production became too small for subsistence production.

Until 1940, coercive "debt" and "idleness" labour laws forced indigenous peasants to provide seasonal labour. (Guatemala)

The period from approximately 1920 to 1970 was witness to the gradual changes in State policies. It was originally inspired by the Mexican Revolution of 1910 to 1920, which culminated in an era of agrarian reform from 1950 to 1970 in which many countries had the explicit aim of distributing reform lands to the indigenous communities.

Discrimination and racism based on the expropriation of indigenous lands continues in the same way as it did 100 years ago throughout the whole of the Central American and Caribbean region. Indigenous peoples have been unable to recover the lands they were evicted from during the devastating war in Guatemala because the laws continue to protect illegal occupations that benefit corrupt soldiers and politicians.

Racial Discrimination in Terms of Culture

Culture has various components and manifests itself in different forms. These cultural elements need to consider the spiritual, material and technical when describing them. Amongst other things, instrumental and technological aspects have to be considered, along with the economy and agriculture, combined with beliefs, habits, customs, ancestral rites and symbols, social and family organisation, social and legal institutions, traditional dress, religious and mythical concepts etc. As a very important element, it must be borne in mind that all this is filtered by a concept of the world that is peculiar to these communities when compared with the other population groups they coexist with (Martínez Cobos, 1982).

At the moment, indigenous culture is little valued by other nationals of the Central American and Caribbean countries. In general terms, there is a trend towards placing indigenous culture on a folkloric level. For example, for some government institutions, art and designs or the artistic expressions of indigenous peoples are no more than handicrafts or demonstrations of folklore - although they are true works of art - due to the mere fact that they are crafted by indigenous hands. In this way, they try to minimise indigenous cultural expressions.

The same occurs with music and literature, because they do not have a known author or because they are age-old, they are denied protection and are made available to be endlessly pirated or copied. This means that indigenous culture continues to suffer discrimination and, in return, serves to sell the tourist image of a country. Many use indigenous culture, in general terms, only to gain economic benefit without considering the moral, economic or generational harm done to these ancestral cultures.

One of the clearest signs of racist practice towards indigenous culture in Central America is the recognition of traditional clothes. Until a few years ago, indigenous peoples were prohibited from wearing their traditional clothes in government offices or schools. Racism is present from the moment that traditional clothing is treated as simple attire. It is the women who suffer from this racial discrimination the most, for it is they who particularly preserve the cultural heritage of indigenous peoples.

In order to confront this racism in relation to dress, some indigenous legislators, as in the case of Panama, are negotiating a draft law that will enable indigenous peoples to enter any government building or attend schools and universities in their traditional dress. If this Law is approved, it will be possible to try anyone not abiding by these rules in a criminal court.

Racial Discrimination in Terms of Language

Language is a fundamental cultural element in identifying a people as indigenous. In fact, it holds great importance for all individuals. One's mother tongue forms a means of contact with the world. But, since the arrival of the European colonialists, the New World has done all it can to wipe out indigenous languages. It is estimated that, at the time of arrival of Christopher Columbus, more than one thousand languages were spoken on the continent.

It is normal and commonplace to hear some non-indigenous peoples treat indigenous languages as mere dialects and refuse to give them their due value, not treating them like the languages of other civilisations existing in the world. It is the indigenous children who suffer most from racial discrimination in this context who, when starting school, are forced to stop speaking their mother tongue and study in a language they have never heard before.

Racial discrimination in relation to language is the same throughout Latin America and the same can be said for the way it is handled by governments. The right to language is fundamental to the fulfilment of human or indigenous rights. For example, in Guatemala, the right to language is a battle that many Mayans are fighting, in terms of making official and developing their languages, which form the cultural heritage of humankind.

Defending language in the face of existing racism constitutes one of the principles of any indigenous organisation and people, so that making a language official and developing its use in all spheres can become a reality, from the media to primary and university education. The right to language is included in the UN International Covenant on Civil and Political Rights, as well as in other international legal instruments.

The influence of other languages brought to the region by the *conquistadors* has left many indigenous peoples without this essential element of identity. Defending those languages still in existence is thus of importance not only in terms of their cultural value but also because of their specific weight in demographic terms, given that there are approximately 30 million speakers of indigenous languages throughout the continent, distributed amongst 400 linguistic groups (in Mexico alone there are 56). The "Pátzcuaro Declaration on the right to language" (see complete document in the journal *México Indígena*, #17, 1987) states that:

> *"The right to language means: a) That the ethnic groups of America, like those elsewhere in the world, have the right to express themselves in their respective languages in all acts of public life and that the states are obliged to recognise this right, passing the necessary legislative reforms aimed at making these languages official; (...) e) That the formulation of systematic plans, programmes or educational curricula in any area of knowledge is the job of each particular ethnic group and, consequently, it will be the group that determines who will formulate it and what content and methodology will be used: (...) g) That the members of the different ethnic groups, in the same way that they have the right to full use of their language, as has been established in the previous paragraphs, also have the right to be tried in their own language in accordance with the norms established by courts in accordance with the respective culture."*

Racial Discrimination in Terms of Access to Health Care

The Pan-American Health Organisation and the International Labour Organisation have highlighted that "ethnic minorities show a deterioration in their health status that is greater than the average amongst the general population" (ILO/PAHO, 1999).

A PAHO/ECLAC document (1997) notes that ethnic discrimination is one of the main causes of inequality in health, given that indigenous peoples live in conditions of extreme poverty with regard to health, malnourishment, and in extreme sanitary deprivation. The organisations note that the discrimination of traditional medicine, in favour of western medicine, has ignored or denied the possibility of benefiting from the rich medical tradition of indigenous peoples for decades.

In Panama, although disaggregated information does not exist, the provinces of greatest indigenous population show the worst health indicators. In Bocas del Toro, a province with a high concentration of indigenous peoples, mortality due to diarrhoea in recent years was 34.4%, whilst the national rate was 6.4%. In the Kuna Yala region, the maximum rate of cholera in 1993 was 80 times the national rate and the incidence of pneumonia in 1994 was six times as high (WHO, 1998).

Racism in the Education System

The educational inequity amongst indigenous peoples expresses itself in two ways. Firstly, as exclusion or difficulty in accessing the system and, secondly, in terms of content and general teaching strategies that embrace neither diversity nor specificity, thus becoming an instrument of domination and assimilation.

The educational curriculum, for example, starts by recreating and transferring, from generation to generation, content and knowledge about indigenous and black peoples that not only devalues them but, in the case of indigenous peoples, creates the image of beings from the past, archaic figures that appear to have no real existence in the present day. On the other hand, when it does try to tackle the situation of real indigenous peoples, it does so in terms of backward societies, opposed to modernisation and to ideas of social change.

In any case, the mechanisms for symbolic incorporation of indigenous and black peoples have varied according to the circumstances and different local realities. It is undoubted that not all the Republics could so flagrantly deny groups whose presence was so evident and influential. They thus sought less violent inclusion mechanisms, such as the "folklorisation" of their cultures and traditions, or else the indigenous peoples were simply disowned by isolating them from the progress being enjoyed by the rest of the population.

Education, for example, gradually became a mechanism that was to profoundly influence the incorporation process, because it was considered that the special features of indigenous cultures, their

language, religion and way of life were an obstacle to the development of the nation.

Discrimination in the education system can clearly be seen in the high levels of illiteracy, more visible amongst adults, and the low average number of years of schooling gained, particularly at secondary and university levels. For example, in Panama, according to the 1990 census, illiteracy stood at 15% in rural areas and 3.3% in urban areas but at 44.3% amongst the indigenous population. In Mexico, in the areas of greatest concentration of indigenous population, illiteracy is double, and often triple, that of the rest of the population.

Education for indigenous peoples has been an instrument of integration into the dominant culture and has, for some scholars, failed in this respect, making it necessary to look for new alternatives that will enable indigenous peoples to have access to modern education. In this respect, it is noted that, "*...for countries which, over the last half century have tried to assimilate indigenous peoples, recognition of the failure of integrationism has meant the need to completely review the principles and practices of the so-called indigenist policy in the field of economic development and educational policies*" (Varese, 1987).

Formal education is another nub of inequity, not only due to the problems of access and coverage but also because, in an eagerness to gain homogeneity rather than recognise diversity, the educational systems of the region have tried to achieve the assimilation and integration of the different ethnic and racial groups into the national culture and "national identity".

Racial Discrimination in Terms of Employment

The employment profile of indigenous peoples has a significant gender component. Whilst men become involved in jobs that provide them with greater work mobility, the women of many countries in the region undertake domestic work in the towns. But hard conditions of work and wage exploitation are suffered by both men and women due to their indigenous origin.

The labour market has historically been a source of ethnic and racial discrimination and segregation, from the use of slave labour right up to the concentration of the active indigenous, Afro-Latin and Afro-Caribbean populations in badly paid jobs, with little social security, specialisation or training. Many politicians put this down to what non-indigenous employers (in both State and private companies) call the "low educational levels of ethnic and racial minorities".

This demonstrates that racial discrimination towards indigenous peoples in employment is moulded by the system even at the time of

implementing large-scale works (be they social or infrastructural) in indigenous areas. For the duration of the project, non-indigenous peoples are employed on high salaries, discriminating against indigenous professionals themselves in their own territories.

In agriculture, the situation existing between Mexico and Guatemala should be mentioned. In Chiapas, the coffee work force is recruited locally from indigenous communities or from Guatemala by means of contractors. Indigenous workers are always preferred, apparently because they are more docile and, given the fact they are monolingual, violation of their labour rights is easier, under threat of hunger or subhuman conditions in temporary housing or, in the case of migrants, under threat of deportation or false complaints to the police.

In the main, indigenous peoples emigrate from extreme poverty to poverty or extreme poverty. From a humanitarian point of view, the recruitment, transportation, living and working conditions of indigenous emigrants working seasonally in agriculture remains an issue of great concern. Although daily wages can be high in comparison with the average income in their community of origin, the cost in terms of health, hygiene, loss of education for the children and social disintegration can be very serious indeed.

Discrimination Towards Religion

The great civilisations that existed on the continent were built on the great religious concepts of the indigenous peoples. This was what the Europeans found on their arrival. But the Europeans also brought with them their own religion, and subjugated and vilified age-old religions.

From that moment on, intolerance began to appear, defined by many as a closed and violent attitude towards those who express different religious opinions or beliefs. In Central America, from Panama to Mexico, the sacred and ceremonial places where indigenous religions were forged can still be seen to this day.

In Guatemala, Honduras and Mexico, indigenous peoples' religions and the indigenous peoples practising them were demeaned. Following imposition of the Christian religion, native religions were considered no more than mere displays of paganism or satanic rites. In order to integrate into supposed civilisation, people thus had to stop believing in their gods and recite the catechism brought from Europe.

This discrimination still continues today. In many countries some ceremonies are still forbidden, so indigenous peoples have to hold

them in private to avoid persecution. Some of these religious ceremonies, through pressure on the part of the State, and out of pure survival, have been reduced to folkloric displays to attract tourism and sell the country abroad on the part of governments.

The same occurs in terms of access to traditional areas or sacred places where religious rites are practised. They are currently considered the "ruins" or remains of a now extinct culture. The greatest discrimination existing in this field is when legitimacy of ownership of these monuments is taken away from the indigenous peoples themselves, and they become the heritage of the State or humankind, as many call it. There is not the slightest concern that there are still some indigenous peoples who need access to these centres of religion to pray to the all-powerful in private, in the way that other religions are respected.

In this way, various articles of the "Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief", declared by the UN General Assembly in 1981, are being violated. Article 2 states:

> *"1) No one shall be subject to discrimination by any state, institution, group of persons, or person on the grounds of religion or other belief; 2) For the purposes of the present Declaration, the expression 'intolerance and discrimination based on religion or belief' means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis."*

These principles of international law are violated across Central America and the Caribbean.

Discrimination and Racism Towards Indigenous Children

Children are the most important part of the present because it is they that guarantee the future of a people. They thus deserve the utmost care and attention.

Governments of the Central American and Caribbean countries were not in the least concerned with indigenous children until a few decades ago. There was little protection from the State. And if the family did not have the resources, as is generally the case in indigenous communities, children had to develop in moral and intellectual misery, society not taking even the most minimal responsibility for them.

Across Central America and Mexico, from the moment indigenous labour is hired, the workers are subjected to rigorous exploitation of child labour, with extended working hours, under the most miserable working and living conditions. Most indigenous children start working at the age of 12, although in many cases they start earlier, as is the case of the coffee and sugar cane workers.

Crowded together in their temporary housing, with neither sanitation nor medical services, the majority of indigenous peoples providing their services have poor access to medicine. Loss of life is very high, in some cases the average life span is estimated at around thirty years of age. In the conditions of ill-health and misery in which they live, illnesses are not, in all honesty, the most serious problem. The most serious problem is a lack of medical assistance: thousands of people die each year, many of them children, through infections that were not caught in time, such as: tuberculosis, dysentery, parasitosis, an enormous variety of cardiovascular complaints, anaemia and gastro-enteritis.

Research carried out on children in schools has highlighted the fact that many indigenous children have to work: they arrive at school completely exhausted from the morning's work. Before coming to school, many have walked several kilometres to deliver some of their products or have sold or hawked newspapers, or spent time working in houses, and so they arrive tired and hungry, their only wish being to rest. These children are understandably unable to pay attention to the teacher or to understand the explanations given. In a discriminatory way the teachers just say, "poor little native", knowing the hard conditions these children endure.

In Panama, in the year 2000, the Human Rights Committee of the Legislative Assembly described the exploitation of indigenous Ngöbe Buglé children in the sugar cane plantations and, in turn, tried to obtain an answer from government officials. The declaration of the Ministry of Labour, when trying to justify the exploitation of the Ngöbe-Buglé in sugar plantations owned by wealthy families closely linked to the government, was the last straw. It stated:

> *"The working conditions are certainly not the best but where they (the indigenous) live they are worse. During the sugar harvest, they eat three times a day and the sanitary conditions are much better than they have at home so, when they come down from the mountains (...), it is like going on holiday"* (El Siglo newspaper, 12th April 2000).

The Ombudsman himself travelled to the area and in his report stated that, "the children working in the sugar harvest, those who - out of need - have to help their parents in the arduous task of

work, do not enjoy the right to a full education". Part of his report stated:

> *"...we notice that many under age children are brought by their parents to the place of work because it has become a custom amongst indigenous and peasant men to take their wife and children to live together with them for several months.*
>
> *This has the consequence that some children miss the first two months of classes, which damages their school performance. This situation may also lend itself to children under the age of 14 being put to work in the hard task of sugar cane cutting, violating the human rights conventions and legal regulations protecting children. "*

The Right to Have Your Birth Recorded

Another case of racism and racial discrimination suffered by indigenous children can be found on the borders of Panama and Costa Rica, in relation to the right to registration or to have a legal identity, like any other citizen of a country. The parents of these children are unaware of the procedures, and there is no interest on the part of the national authorities to resolve this problem, which dates back some considerable time.

The Ombudsman Dr. Italo Isaac Antinori-Bolaños, in his report entitled "In defence of children" stated that there is a considerable number of people, largely not of legal age, who have neither legal identity nor are registered with the Registry of Births, Marriages and Deaths of the Electoral Court of the Republic of Panama, in spite of the fact that they are children of Panamanian parents but who, out of a need for medical care, were born in San Vito, Costa Rica. With no status they do not exist, at least, they cannot be citizens; they are called "*Chiriticos*". Between April 1999 and September 2000, the Ombudsman of the Republic of Panama made five working trips to the border area between Panama and Costa Rica, and was able to obtain significant information, which is reproduced below.

The "*Chiriticos*" are children born in the town of San Vito, Coto Brus administrative centre, Province of Punta Arenas, in the Republic of Costa Rica. They are the children of Panamanian parents who, by virtue of their place of birth, should be registered in Costa Rica but through the law of consanguinity have the right to be recognised as Panamanians by birth, given the fact that they are the children of Panamanian parents. However, given that the town of Río Sereno is thirty minutes from San Vito (as opposed to two and a half hours from the town of David, administrative centre of the Chiriquí re-

gion), the women from Río Sereno choose to give birth to their children in San Vito, Costa Rica, because there is no Maternity Hospital in Río Sereno that could give them the required care, and the town of David is very far away.

The Ombudsman has investigated the fact that, for more than ten years, there was no alternative to this anomalous situation for the peasant and indigenous parents in the area, whose only option was to go to San Jose, capital of the Republic of Costa Rica, to legalise the papers. But not having the financial resources, they decided not to do this, leaving the children trapped in an ambiguous situation because they lived in Panama but were not legally Panamanian but Costa Rican. The name "*Chiriticos*" came about from the combination of "*Chiri*", for the region of Chiriquí, and "*ticos*" - the people's usual name for Costa Ricans.

In Río Sereno the population more than doubles during the coffee harvest, which usually takes place between the months of September and December of each year. During this period, the population increases from twenty thousand (20,000) to sixty thousand (60,000) inhabitants. Many indigenous Ngöbe Buglé arrive with their whole family to work in the coffee harvest. Their wives are often expecting and become the main users of the San Vito hospital, which is a State-run Costa Rican hospital.

The Ombudsman has investigated the fact that there are a total of approximately fifteen thousand (15,000) people, mostly under legal age, who are to be found in the so-called position of being "*Chiriticos*". However, the Panamanian government has never carried out a census to determine statistically what the figures are, nor the location and social characteristics of these Panamanians who do not have legal identity.

The Ombudsman has received reports that the situation is so serious that there are now at least two generations (parents and children) without identity. There are also a few known cases of three generations (grandparents, parents and children) living without identity. This anomalous and unusual situation is furthermore in violation of the human rights of these people because the Panamanian government has not found a lasting solution to a problem that has been going on in this area for years.

During the trip it could be seen that, at that time, the majority of people being cared for in the hospital were Panamanian. It could be noted that there were several indigenous Ngöbe Buglé amongst the hospitalised. One of them had just given birth, and she herself had no identity documents. She was a "*Chiritica*" of twenty years of age who said she had been born in San Vito after her parents had emigrated from Tolé in the region of Chiriquí, to the town of

Sabalito in Costa Rica, where they had since worked both in coffee harvesting and roasting. This young woman was an indigenous Ngöbe-Buglé but, as she had lived her whole 20 years in a different cultural environment, she had never learned to speak the language of her parents. It would logically be the same for her child, who would have legal identity in neither of the two countries.

This violates the most fundamental human rights of children, as established in the international legal instruments that have been ratified by both Panama and Costa Rica as national laws, but which have received no follow-up in terms of implementation in this regard. These peasant children, the majority of them indigenous, will remain condemned to being discriminated against and ignored by Panamanian society.

Faced with these serious anomalies, the Panamanian Ombudsman recommended a number of solutions for the case of the "*Chiriticos*":

- That a census should be undertaken throughout the whole of the District of Renacimiento and in the areas in which the problem might occur, so that a study could be carried out to determine the number of Panamanian children born in San Vito, Costa Rica and living without identity documents.
- That the necessary mechanisms be sought to facilitate registration of the children born in San Vito, Costa Rica, in the Panamanian Registry of Births, Marriages and Deaths.
- That the fact that the majority of people in this situation were peasant and indigenous should be taken into consideration, people who do not have sufficient financial resources to pay for the cost of regularising their documents.

Indigenous Women as Victims of Racism

Indigenous women suffer the most serious racial discrimination. They face oppression, discrimination and marginalisation for being women, indigenous and poor. This situation is generalised throughout the Central American and Caribbean region. It is common to observe, in any country, in the streets, in the markets, on the buses and even in private and government offices, women being shouted at, suffering mistreatment and even violence. The surnames of women demonstrate their cultural membership, they are both indigenous and women. Double exclusion is encountered from the very beginning, to which must be added the overwhelming feature of extreme poverty that they share jointly with their peoples.

Yet it is the women who best preserve the age-old traditions and

endeavour to educate their children so that their language and culture do not disappear. On top of this, indigenous women in the region work the same as men and under the same extreme conditions.

For example, in farming, indigenous women have a high level of specialisation in the use of certain natural resources. Such is the case of non-timber products from the native forests, on which the health, diet and income of many indigenous families depend. Through the work of women, these families gather mushrooms, roots and medicinal herbs, fibres and bark with which to make handicraft products, dyes and firewood, amongst other things. It is the same for resources such as water and land, over which women combine a productive and reproductive rationale with a logic of protection and sustainability, given the importance of the said products.

All these efforts of work and sacrifice are badly paid, to the point that indigenous women work for other people and, because of their marginalisation, they suffer malnutrition and hunger. The treatment received by non-indigenous women in similar work is not comparable.

A large number of indigenous women migrate to the city to work as domestic staff in the houses of the middle class or wealthy and, in addition to their working conditions, suffer mistreatment at the hands of their employers, and even sexual persecution or violence.

They are also discriminated against in the work place and at school because of their traditional way of dressing. Indigenous men, for various reasons, are rarely seen in traditional attire, as opposed to indigenous women who are not ashamed of their clothes, because for them this way of dressing is symbolic of their culture and identity.

In education, indigenous girls have far less opportunities than their male counterparts from their ethnic group because it is often necessary to go to other towns or cities and, through lack of financial resources, parents prefer to keep them at home. In addition, the distances travelled expose them even more to the generalised sexist violence in the region.

In general terms, all the considerations and points relating to the practices of racism or racial discrimination that occur are suffered disproportionately by indigenous women and children, which makes the establishment of legal instruments that respect the dignity of indigenous women and children an urgent need.

Recommendations for the Elimination of Racism Towards Indigenous Peoples

As recommendations, the following proposals and conclusions are drawn from the Satellite Conference organised by the Indigenous

Initiative for Peace, meeting in Mexico City on 4th and 5th November 2000; the People's Preparatory Conference to the World Conference against Racism, Racial Discrimination, Xenophobia, and related forms of Intolerance, held during the Forum of NGOs and Civil Society Organisations of the Americas, which took place in Santiago de Chile at the beginning of December 2000, and the "Indigenous Peoples' Declaration" of Santiago de Chile.

In the *People's Preparatory Conference to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance*, held during the Forum of NGOs and Civil Society Organisations of the Americas, the following was decided:

- To urge the Latin American States undertaking public policies in the areas of health, education and sanitation to also provide basic public services, and register the protection of lands and territories that directly benefit descendants of the Black population and indigenous peoples, in particular women.
- The States must promote cultural development and social conduct that encourages coexistence without racism, xenophobia, homophobia, sexism or discrimination, through their regular education and social communication programmes. Governments and societies must undertake cultural and political action which, by stimulating cultural diversity, criticises and denounces stereotypes that are racist, xenophobic, homophobic or intolerant to cultural diversity.
- The States must recognise the scientific and technological contribution of indigenous peoples, in the areas of biogenetics and pharmacology, to the security of human health and nutrition, and to incorporate mechanisms that combat biopiracy and the expropriation of age-old knowledge into their action plans.
- To urge the States to admit that implementation of their development policies in indigenous and Black territories ignores internationally and nationally recognised ancestral rights, causing the loss of their territories, language and identity, along with massacres and forced displacements. In this regard, recognition of, and respect for, other development perspectives is necessary.
- To urge the States to adopt coordinated legislation and migratory policies that tend towards the elimination of illegality and which guarantee the fulfilment of the human rights of the migrants.

In the *Declaration of the Indigenous Peoples of the Americas in Santiago de Chile*, the following points were highlighted:

- We call upon the international community, the UN and the OAS

to recognise that we Indigenous peoples are **PEOPLES** in the full sense of this term as understood within international law.

- We call upon the UN to create a body that addresses the exclusive issue of the rights and development of Indigenous peoples, a body with the power to watch over and penalise lack of compliance of international treaties and agreements signed by all States in favour of Indigenous peoples.
- We call upon all States to recognise the rights of Indigenous peoples within their respective political constitutions as well as within other regulatory texts. This recognition must include the right to lands, territories and natural resources, the right to exercise and develop our own legal systems and jurisdictional powers and the right to decide upon our own political, economic, social, educational and cultural development, and on our own indigenous institutions and authorities.
- To promote the necessary legal and constitutional reforms and to define policies that will guarantee the self-determination of our peoples along with the right to define our own priorities and strategies so that we can exercise our right to sustainable development.
- We call upon the States to incorporate the collective rights of Indigenous peoples into their legal code, and to ensure their full application, clarifying and criminally punishing all offensive, discriminatory and racist conduct against the indigenous community.
- To incorporate legal frameworks that promote truly multicultural and plurilingual policies, with full recognition and respect for the diversity of intercultural relations and their promotion, within the framework of individual and collective rights.
- We call upon the States to ratify and implement ILO Convention 169, overcoming its deficiencies in subsequent proceedings and ensuring its ongoing appraisal by Indigenous peoples.
- We call upon the States to formulate, revise and implement policies and legislation governing indigenous migrant workers, involving the wide participation of their own organisations and of other bodies linked to the issue, so that they may establish the full validity of the fundamental human rights of migrant populations and corresponding migratory services within this context.
- We call for the adoption of policies and public actions that take into account the cultural specificity of the Indigenous peoples they are intended for, and that these include policies in favour of developing the indigenous family, indigenous women, children, youth, the elderly and any other distinct group, designed with the involvement of the population they are aimed at.

- We call upon Spain and Europe to return the records and historic sources of information of the Americas, and to provide compensation in the form of resources (compensation for damages caused) aimed at the development of Indigenous peoples and at programmes combating racism.
- Education and interculturality are the affirmation of identity and, at the same time, are indispensable tools in the Americas because they are the path to peace, to coexistence in diversity and to the development of Indigenous peoples. For this reason, it is essential that all American universities in which homogenisation and eurocentrism can currently be observed should become intercultural, and that indigenous universities should be created.
- As a positive sign, the United Nations and member States should promote the advancement and approval of the draft Declaration on the Rights of Indigenous Peoples approved by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in its Resolution 1994/45, with neither abandonment nor weakening of the main criteria, such as the right to self-determination, which are contained within the text.

The Indigenous Initiative for Peace in the preparatory Satellite Conference to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, highlighted the following recommendations, amongst others:

Legal measures against discrimination

- To urge the States to formulate legal frameworks that promote truly pluricultural and multilingual policies, with full recognition of and respect for diversity and the promotion of intercultural relations within a context of individual and collective rights.
- To apply the International Convention on the Elimination of all forms of Racial Discrimination fully, plus the formulation of the Declaration as provided for in Article 14.
- To promote the ratification of ILO Convention 169, and its application in those places where it is already ratified, overcoming its deficiencies in subsequent procedures, as well as ensuring its ongoing evaluation on the part of Indigenous peoples.
- To promote the advancement and early approval of the United Nations Draft Declaration on the Rights of Indigenous Peoples, approved by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in its Resolution 1994/45, with neither abandonment nor weakening of the main criteria, such as

the right to self-determination, which are contained within the text.

- To promote the ratification by all countries of the International Convention on the Protection of the Rights of all Migrant Workers and their Families.
- To demand the ratification and full application of the Convention on the Elimination of All Forms of Discrimination against Women and the Belem do Pará Convention on the Prevention, Punishment and Eradication of Violence against Women.
- To promote the necessary legal and constitutional reforms and the definition of public policies that will guarantee the self-determination of our peoples and the definition of our own priorities and strategies through which to exercise our right to development.

Education, culture and the media

- To demand from the States the conditions and resources that will ensure the widening of our opportunities in order to exercise our right to acquire, reproduce, express, practise, develop and teach our knowledge, traditions, customs and spiritual practices.
- To recognise the educational processes, systems and methodologies of our peoples through an education system that contributes to the development of the indigenous language and affirmation of identity.
- To formulate intercultural and bilingual models for education at all levels of the national educational systems, which value the wealth of cultural and linguistic diversity of each country and overcome the discriminatory practices existing in these systems, and to provide the necessary resources to put them into practice.
- To promote the elimination of discriminatory content in the media and to demand that the media show respect for the values, rights and identities of our peoples. To invite the public and private media to get to know and duly reflect upon the cultural diversity of our countries.
- To request support for the establishment and strengthening of our own forms of media and spaces through which we can have access to other non-indigenous means of information in order to disseminate a dignified image of what we are and what we are proposing.

Participation

- To strengthen the capacity of indigenous peoples' institutions and organisations in the struggle against racism and the affirmation of their inalienable rights, at local, national, regional and international level.
- To declare our decision that crimes against humanity committed against the Indigenous peoples of the world should not go unpunished, appealing to the appropriate courts in each case.
- To ensure that governments facilitate the participation of indigenous leaders at all events in the preparatory process and the World Conference itself and that they include indigenous representatives in their official delegations.

These proposals and requests require renewed political will and a commitment on the part of the States and international organisations to the elimination of racism and all forms of discrimination. Their implementation will not be possible without a regulatory framework, institutional mechanisms and sufficient resources so that the 3rd World Conference against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance can be achieved.

We reproduce these recommendations because they are the demands of all indigenous peoples of the continent and the people of Central America and the Caribbean have the same demands to make of the States in which they live, where the roots of racial discrimination, racism, xenophobia and other related forms of intolerance are the same.

The new millennium that has dawned must be the millennium of indigenous peoples, in which the scourge that brings shame upon humankind is eliminated so that, in future, indigenous culture may continue to be the pride and heritage of every human being on this Earth, in peace and harmony with Mother Nature.

Notes

1 "Encomienda" - a system of control over the land and the people found on it.
2 "Leyenda negra" - a view of the Conquest of Latin America which emphasises the negative side of Spanish involvement i.e.,s an unfavourable interpretation of Spain's colonising role in the Americas.
3 "Mestizo" - person of mixed race, particularly of indigenous and white parentage.
4 "Criollo" – cf Creole.
5 "Mulato" - of mixed race, often black and white or black and Indian.
6 "Cholo" - generally, a pejorative term for someone of mixed race.
7 "Ladino" – of Spanish descent.
8 "Cacique" – local chiefs or headmen.

References

Antinori-Bolaños, Italo Isaac. 2000. Informe Especial: *El Dr. Italo Isaac Antinori-Bolaños, Defensor del Pueblo en defensa de los niños y adultos que no tienen identidad.* Ombudsman of the Republic of Panama.

Antinori-Bolaños, Italo Isaac. 2000. Informe Especial: *El Defensor del Pueblo Dr. Italo Isaac Antinori-Bolaños, en defensa de los niños.* Ombudsman of the Republic of Panama.

Bello, Alvaro and Rangel, Marta. 2000. *Etnicidad, "raza" y equidad en América Latina y el Caribe.* ECLAC, Santiago de Chile,

Compilation of International Instruments. **1995.** *Human Rights,* United Nations Organisation, New York.

ECLAC. 1992. *Educación y conocimiento: eje de la Transformación Productiva con Equidad,* Santiago de Chile.

Declaration of the Forum of NGOs and Civil Society Organisations of the Americas during the Peoples' Conference against Racism, Xenophobia, Intolerance and Discrimination, Santiago de Chile, December **2000**.

Declaration of the Indigenous peoples of America in Santiago de Chile, Forum of NGOs and Civil Society Organisations of the Americas during the Peoples' Conference against Racism, Xenophobia, Intolerance and Discrimination, December **2000**.

Declaration. Peace Initiative, preparatory Satellite Conference to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance. Mexico, November **2000**.

Deruyttere, Anne. 1999. "Nativos en números" in the journal *BIDAMERICA,* Inter-American Development Bank, September-October 1999.

Gómez, Magdalena. 2000. *Las poblaciones indígenas y la protección de los derechos civiles y políticos: tratamiento igual y plena participación en el gobierno, acceso a los tribunales, acceso a los establecimientos privados abiertos al público y plena protección de slas leyes. Estudio de caso: México.* Santiago de Chile.

Hopenhayan, Martín. 2000. *Tendencias generales, prioridades y obstáculos en la lucha contra el racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia. América Latina y el Caribe.* Santiago de Chile.

ILO/PAHO. 1999. *Panorama de la exclusión de la protección social en salud en América Latina y el Caribe,* Reunión Regional Tripartita de la OIT y OPS. Mexico, 1999.

López, Atencio. 2000. "Acción de las ONGs y de la Sociedad Civil". Seminario de Expertos en medidas económicas, sociales y jurídicas para luchar contra racismo, con referencia especial a los grupos vulnerables. Santiago de Chile.

Mártinez Cobo, José. 1987. *Estudio del problema de la discriminación contra las poblaciones indígenas,* volumes I, II, III and IV. UNO.

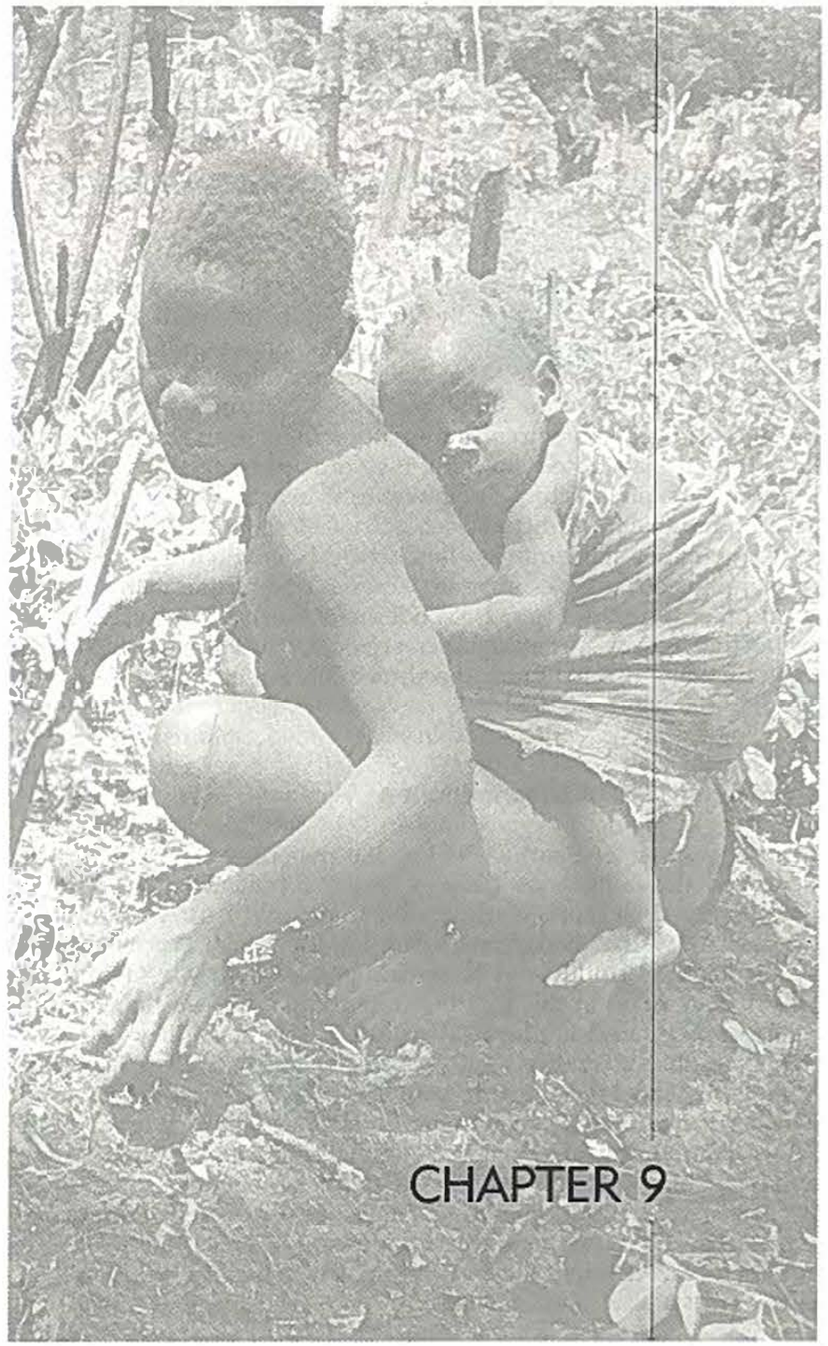
PAHO. 1998. *Health in the Americas.* Vol. II. *Scientific Publication* No. 569, Washington, D.C.

Plant, Roger. 1998. *Poverty and Indigenous Development: Some Thoughts.* Inter-American Development Bank, Washington, D.C.

Ramnek, Magdalena. 2000. *¡Yo también quiero ser alguien! Testimonios acerca de la vida de la mujer emberá en la ciudad,* Rufina Alfaro series No.6, Serpaj-Panamá y Gesellschaft für bedrohte völker – Viena. Panama.

Rodríguez Cuadros, Manuel. 2000. *La situación de otros grupos vulnerables, diversas manifestaciones de discriminación racial en la vida pública y privada.* Santiago de Chile.

Various authors. 1992. *Derechos contemporáneos de los pueblos indios, justicia y derechos étnicos en México.* Instituto de Investigaciones Jurídicas, UNAM. Mexico.



CHAPTER 9

DISCRIMINATION AGAINST THE FOREST PEOPLE ('PYGMIES') OF CENTRAL AFRICA

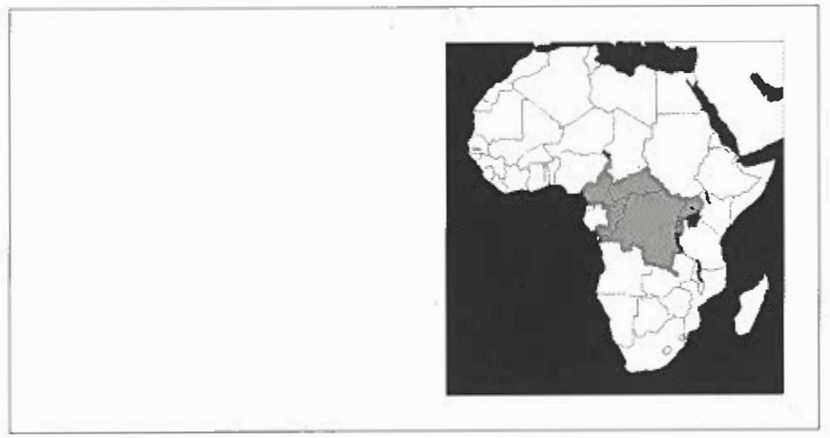
By Justin Kenrick and Jerome Lewis

The Forest People[1] (or "Pygmies") of Central Africa experience discrimination in their daily life at the hands of their farming neighbours. When governments and other organisations intervene to help Forest People, in practice it means a continuation of discrimination in other ways. In situations where discrimination against a category of people is entrenched in a dominant society, it is often to be observed that those who think they are opposing the discrimination are very often actually reinforcing it in what would appear to be a more benign but actually equally destructive way.

To highlight this process, this article briefly outlines examples from indigenous peoples in South America and colonised Africa. The article then examines James Woodburn's excellent analysis of discrimination against hunter-gatherers in Africa, before going on to look in more detail at the discrimination suffered by the Forest People of Central Africa.

The "Catch 22" of Discrimination

In the conquest of South America, the majority of the conquerors perceived the indigenous peoples of the continent to be creatures who deserved no moral consideration and could be treated in much the same way that Europeans today treat animals. They should be subjugated and could even be slaughtered without consideration. It was in opposition to this that the ruling Pope decreed that Amerindian people should not be treated in this way since they had souls that could be converted and "saved" (Bennett 1978: 29). Consequently, those who claimed to care about indigenous peoples' souls made great efforts to ensure that such individuals were "saved" rather than simply annihilated. The extermination of their culture and way of life was, however, often a consequence of both approaches, which were based on a fundamentally discriminatory attitude and saw no value in indigenous peoples' culture. They sought to either crush it beneath, or convert it into, the dominant culture.



A similar evolving process can be seen in many situations of discrimination - for example, in the actions of European colonialists in Africa. In the context of the slave trade and colonization of Africa, a great number of European traders and colonists saw Africans as a raw material to be exploited like any other, not as people with equal rights to themselves. Missionaries and humanists reacted to this and sought to curb the barbaric excesses of colonialism but, in its place, would normally embark with great zeal on the "civilizing mission". This was often more benign than military conquest and subjugation, but the results were similar. The ways of life of the cultures they encountered were ultimately seen as an obstacle to "civilisation", to native peoples' adoption of Christianity and becoming as similar as possible to Europeans.

James Woodburn's Analysis of Discrimination Against Hunter - Gatherers in Africa

So what is the nature of the discrimination suffered by Central African hunter-gatherers? James Woodburn, writing about "Indigenous discrimination: the ideological basis for local discrimination against hunter-gatherer minorities in sub-Saharan Africa", summarises the forms of discrimination experienced by hunter-gatherers as involving negative stereotyping, a denial of their rights and segregation. He argues that, all over sub-Saharan Africa, there is a tendency for differences in modes of subsistence to be represented as ethnic differences and, conversely, that people who consider themselves ethnically distinct often present this as a difference in mode

of subsistence. Thus, in Burundi or Rwanda, for instance, Tutsi and Hutu may both be mixed agriculturalists and pastoralists yet will identify themselves as one or the other. Likewise, even where hunter-gatherers are no longer hunting and gathering and are effectively excluded from their forests (as with the Twa in Uganda), they continue to view themselves, and are seen by others, as primarily hunter-gatherers.

Woodburn points out that ethnic identity in Africa is very flexible, people of different groups expect to eat together, drink together, intermarry; "in total contrast to India, group identities for most Africans are not rigid and exclusive but tend to stress the mixed origins of groups" (1997: 348). He points out that the situation of hunter-gatherers in Central Africa is very unusual for Africa, since although there has always been rivalry and conflict between different ethnic groups in Africa, the situation of people such as the Twa of Rwanda has not been like this since they are numerically such a small minority, posing no political threat to anybody, and yet rigid barriers have been drawn up against them excluding them from normal dealings with other people.

The Twa of Rwanda and Burundi are treated by both Hutu and Tutsi as completely inferior. Eating, drinking and intermarrying with the Twa is unacceptable to the vast majority of Hutu and Tutsi; even sitting and talking with them is often forbidden, and they have frequently been dispossessed of whatever land they held without this being seen as theft. The 1994 Genocide in Rwanda resulted in the death of around 14 per cent of the total Rwandan population. The Twa make up between 0.3 and 0.4 per cent of this total yet it is estimated that around 30 percent of the Rwandan Twa died as a result of this war (Lewis and Knight 1995:93).

Woodburn's description of the discrimination suffered by the Twa of Rwanda and Burundi, although extreme, is equally applicable to much of the discrimination suffered by other Forest People throughout the Central African rainforest region. He describes the negative stereotyping as involving open and publicly-asserted stigmatizing characterizations of hunter-gatherers as ignorant, stupid, primitive, lacking in proper culture and not fully human. From this perspective, any denial of hunter-gatherer rights by non hunter-gatherers is justified since they are not properly human nor living as people should. This denial of rights, widely contested by Forest Peoples themselves, often takes the form of claiming that Forest People should not have control over their own labour, their lands or their marriages. They are denied rights to the land they hunt and gather over and "are freely, even casually, dispossessed of the land by agricultural and pastoral people" (Woodburn 1997: 350).

Actions like these are based on the highly discriminatory notion, often supported by national governments and international agencies, that agriculture constitutes legitimate land use and confers some level of rights to land, whereas hunter-gatherer usage confers no such rights. This can easily lead to hunter-gatherers being denied the right to hunt and gather and to their being excluded from their forests without adequate consultation or compensation, if any is even offered. If compensation is offered, Forest People are given much less than their farming neighbours. Forest People are also frequently denied the right to represent themselves. They are frequently not granted any rights or sustained support from governments, missionaries and development agencies, unless they are willing to give up their way of life, settle by the road, engage in agriculture and send their children to school.

When such changes are carried out forcefully, they continue to embody a fundamentally discriminatory attitude that denies, and can potentially destroy, a people's way of life in a similar manner to the way in which Europeans sought to destroy indigenous cultures in North America and Australasia. Similarly, the agencies and people engaged in such fundamentally discriminatory activities towards the Forest People of Central Africa often believe that their assimilationist attitudes and practices are generous and paternal rather than recognising that they are shocking to outsiders and a denial of hunter-gatherers' fundamental human rights.

In looking at the reasons for this discrimination by their neighbours, Woodburn suggests that these hunter-gatherers are politically weak since, more than in any other human societies, they stress egalitarianism and work hard to minimize social differentiation of power, wealth and status. Their lack of property and wealth accumulation means that they appear poor by the standards of their farming neighbours, neighbours whose security lies in accumulating resources. For Forest People, their security lies in high mobility and a rich natural environment, in a social system where people share with others what they have hunted, gathered or bartered for, in the ritual forms through which Forest People ensure that relationships between themselves, and those with their forest environment, are based on co-operation, harmony and abundance. The processes that ensure equality - demand sharing, nomadism, the high valuation of personal autonomy, equalizing rituals and practices that can involve much hilarity, ridicule, shouting and improvised singing, storytelling and music – are in sharp contrast to farmers' values of authority, politeness and deference to seniors. This can mean that farmers are unable to understand the values and strengths of Forest Peoples' cultures, and see them instead as uncivilized or threatening.

There are two key points here. One is that Forest People can be willing to participate in (everyday and ritual) relations with their farming neighbours in which they appear to be destitute, subservient or clients. Forest People do this in order to gain access to goods that farmers have and often describe such behaviour in idioms normally used in hunting. The difficulty and suffering they may experience as a consequence of discrimination during interactions with farmers is equated with the hardships of the hunt. However, wherever Forest People retain their forests and sufficient wild resources, they have little difficulty in maintaining their autonomy and also exerting control over their neighbours. Forest Peoples' central rituals are ones that celebrate their knowledge of and relationship with the forest and, as such, are at variance with the values of their neighbours. Such central rituals include the Ejengi ritual of the Baka and Aka, and the Molimo ritual of the Mbuti (Kenrick 1999, 2002).

The second key point is that Forest People are seen as the first inhabitants of the Central African forests. Farming groups' origin stories are all about arriving from non-forest areas into the forest and then clearing forest for their villages. In contrast Forest Peoples' origin stories begin in the forest and remain there. They see themselves, and are seen by their neighbours, as the autochthons or "First People" of the Central African forests. Their neighbours commonly see them as the custodians of fertility, whether it is to make crops grow, animals multiply or women conceive and give birth. These aspects of Forest Peoples' identities are recognised in certain farmers' rituals. However, often during these rituals, this recognition is subverted by the ritual dispossession of the Forest Peoples' rights over their land through portrayals of their forest-oriented lifestyle as animalistic and debauched, and the investment of rights over the forest in the real people – the farming group[2]. Despite this history, these widely recognised aspects of their identity are today becoming a potent way for Forest People to assert their rights through the international Indigenous Peoples' movement.

Discrimination Suffered by Central African Forest People

The opposition between colonised and coloniser, which has informed notions of who is indigenous in South America and Australasia and formerly informed such notions in pre-independence Africa is, in Central Africa today, equivalent to the enduring opposition between Forest People and farmers or village people.

This is nowhere more evident than in relation to their land rights. Throughout most of the Central African region, both under colonialism and since independence, traditional territories became State lands unless they had permanent buildings on them or were in active exploitation as farms. This definition of land ownership has remained in place today and effectively discriminates against Forest Peoples' land use and claims over land, since the majority of their lands will appear unoccupied at any given time (see Barume 2000). The official alienation of Forest Peoples' rights over forest has been further compounded since the 1980s as the forests in Congo, Central African Republic, Cameroon and DRC have been divided into large forestry concessions in order to attract investment from foreign companies wishing to exploit forest resources.

Almost all the forestry concessions in these countries have been attributed to multinational logging companies. Others, such as Nouabale-Ndoki in Congo, have been given to conservationist organisations such as the Wildlife Conservation Society and been turned into National Parks. Like the logging companies they replace, the wildlife protectionists often impose their presence on local people without meaningful consultations. It is villagers rather than Forest Peoples' communities who are approached for their agreement and also occasionally to receive compensation. This is the broader context, which exacerbates and deepens the pre-existing discrimination experienced by Forest People (Lewis 2001: 2-3).

The stigmatisation and discrimination of Forest People by other local people is endorsed and reinforced by official attitudes to these "Pygmy" peoples that tend to perceive of their hunter-gatherer way of life as primitive and shameful to the national heritage, yet celebrate their extensive knowledge of plants for healing and magic, and their incomparable skills as singers and dancers (Lewis 2001: 3). Similarly, conservation organisations make use of their forest skills whilst often enforcing policies of exclusion and control that will destroy the very relationship with their forest that enabled the knowledge to be passed down (see Kenrick 2001a for the case of the Ugandan Twa). Logging companies make use of Forest Peoples' forest knowledge to identify trees whilst destroying the biodiversity of their forest, such as is happening to the Baka in south-eastern Cameroon (Kenrick 2000) which, makes nomadic hunter-gathering unsustainable in the extreme.

The contradictory perception of Forest People as backward people who need to be controlled, civilised and developed, and yet who are seen as possessing extraordinary skills and knowledge, effectively devalues the very process by which they maintain the celebrated and special knowledge derived from a forest lifestyle. On the rare occasions that governments have taken an interest in Pygmy people, it has been to enforce sedentarisation programmes and

assimilationist policies that discriminate against and, if effectively enforced, can render ineffective a Forest People's culture.

The Example of the Bagyeli of Cameroon

During the enforced "villagisation" programmes of the 1960s and 1970s throughout Central Africa, many Forest People were obliged to comply with government enforcement agencies or the demands of missionaries and settle by roads for a time. Most of them soon moved back to a lifestyle that involved spending some part of the year working in the village fields of other local people and the rest moving through the forest hunting, gathering and occasionally trading forest produce for villagers' garden produce and other materials. However, to date, almost all interventions by governments, missionaries or development organisations have been directed at settling Forest People and stopping their hunter-gatherer lifestyle in favour of farming. This is presented as a benevolent attitude and charitable activity rather than one that is fundamentally discriminatory and a denial of Forest Peoples' culture and right to self-determination. Regardless of how far a group of Forest People follows the plans of their "developers", they are rarely considered the equals of their neighbours. This is most apparent when officials arriving in Forest Peoples' areas will invariably seek out and deal with farmer communities rather than the Forest People. When these visits are offering benefits to the population, they are easily monopolised by the villagers.

A good example of this during the last few months has been the experience of the Bagyeli hunter-gatherers in south-western Cameroon. Here, the consequence of the preliminary cutting through of the pathway to mark where the World Bank-funded Chad-Cameroon oil pipeline is going to run has led not to the alleviation of poverty, as claimed by the World Bank, but to the entrenchment of inequality. Bagyeli land, which they have been cultivating for years, as well as places where they live, have been formally claimed by literate villagers in order that the villagers can obtain the compensation due for its damage by the pipeline (Kenrick 2001b).

This small example of discrimination needs to be seen in its wider context. The Bagyeli have been dispossessed of these lands merely because fields have been created there. In contrast, there is no legal way of framing as dispossession the way in which the construction of the pipeline will disrupt their forest and their ability to hunt and gather in it because Bagyeli rights to the forest are not even recog-

nised in the first place. The daily discrimination they experience at the hands of their neighbours is made possible because the ongoing discrimination by the colonial and now post-colonial State against their way of life is so firmly established and accepted that it is almost invisible.

Thus, when consultations with the Bagyeli were held (as required by the World Bank Indigenous Peoples' policy) to determine what measures should be taken to safeguard Bagyeli welfare in the context of the pipeline being established, the Bagyeli were shocked that it was being carried out by academics belonging to those very same farmers' groups they experience as dominating and discriminating against them. Furthermore, what the survey concluded was not that the Bagyeli needed land rights and their forest but rather that various inadequate forms of compensation should be established which (as the earlier example shows) have easily been siphoned off by farmers. For example, the survey still stresses the need for the Bagyeli to become fully sedentarised in order to "benefit" from the development opportunities it appears to offer. This is despite the fact that it acknowledges that Bagyeli nutrition in the forest is very good and that it deteriorates rapidly with sedentarisation. The survey failed to take into account Bagyeli wishes and needs. Rather it assumed to know what these were (Kenrick 2001b).

In these and other ways, there is tacit acceptance and support by outside agencies and local authorities of the discrimination and denial of basic rights of the Forest People by their villager neighbours. The lack of representation of Forest People at the local and regional levels in Central Africa shows how effectively the discrimination they experience prevents effective representation. The villagers' traditional structures that justify and encourage this situation are rarely questioned or criticised by regional authorities; often they are supported since many officials come from local villages.

The Example of the Mbendjele of Congo

The situation of the Mbendjele hunter-gatherers of northern Congo fits James Woodburn's analysis of discrimination against African hunter-gatherers clearly. Mbendjele are considered by the villagers to be: chimpanzee-like, backward, impoverished, lazy, gluttonous, disgusting, dirty, stupid, childish, and uninterested in change. They may not eat or drink together with their neighbours, have sexual relations or marry, or sleep in the same houses, and many villagers deny that Mbendjele have any basic human rights, frequently describing them as their "slaves". The Mbendjele oppose these deroga-

tory characterisations of themselves by village people, and reject the fictional kinship links that underpin the villagers' claims to authority over them (Lewis 2001: 4).

When village people claim they own areas of forest or rivers or Mbendjele, it is viewed like the noise gorillas make – it is meaningless, self-deluding nonsense. From the Mbendjele point of view Komba (god) created the forest for Forest People to share with his creatures (Lewis 2001: 5). Where the villagers see the forest as a dangerous place inhabited by bad spirits, and the opposite of the safe village and farms, the Mbendjele see the forest as safe, peaceful, cool and clean. This opposition between village people and Forest People is widespread among the people of Central Africa. Even when Forest People no longer have access to forest, these oppositions do not easily break down, and can even become more entrenched, as has happened to the Twa of the Great Lakes Region (Lewis 2000).

Like other Central African hunter-gatherer peoples, the Mbendjele act in an inclusive way towards each other, and also extend this to other peoples. Their egalitarian ethic does not focus on excluding others by asserting individual or group property rights but focuses on ensuring equality of access and ensuring that whatever is found there is shared. However, despite the Mbendjele always being tolerant and sharing their forest with outsiders, they are outraged that no one is in the least bit concerned to respect their rights. Mbendjele strongly resent this lack of reciprocity but know that no one cares or ever listens to them. Most Mbendjele simply adapt, by hunting in different areas, or by seeking employment with the loggers and the communities that spring up around their activities, or by working with commercial hunters and so on but even here they are aware of being severely discriminated against when, for example, they attempt to secure work with logging companies. Although in national law the Mbendjele are supposed to be equal to other Congolese citizens, in practice, this is not the case. The discrimination they are subjected to by village people, their lack of northern-style education, their attachment to an "immediate-return" economy and lifestyle within the forest, their mobility, egalitarianism and small social groups all contribute to make effective representation or protest difficult (Lewis 2001: 7).

The Example of the Baka of Cameroon

The Baka in south-eastern Cameroon have a similar story. Here, the pre-existing discriminatory attitudes of their farming neighbours

towards them have not mattered too much, as long as they have had the forest to return to. Like the other Forest Peoples of Central Africa, such as the Mbuti of the Ituri Forest (Kenrick 1999), over the centuries since the farmers moved into the forest, the Baka have been able to benefit from social and economic exchange with the farmers. From the Baka point of view, these relations have been on an equal basis because, however much villagers have chosen to believe they are controlling the relationship, the Baka can get up and leave to go into the forest whenever they wish. However, as the forest is destroyed, the villagers' attempts to control the relationship become effective, and discrimination against the Baka becomes less of a rhetorical device used by villagers and more of a daily reality for the Baka.

As first colonial governments and subsequently post-colonial governments, missionaries and multinationals seek to exploit and, in the process, damage the forest, they have been destroying Forest Peoples' independent resource base. The destruction of forest is mostly a consequence of the activities of European, and increasingly Asian, logging companies. As their forest becomes more and more intensively exploited by outsiders, government, missionaries and development agencies tend to increase efforts to settle Baka along roadsides, to make them take up agriculture and become involved in the wage economy. Among the Baka, the social support mechanism of sharing visible excesses, which works well within the day to day world of hunting and gathering in the forest or when working on their neighbours' farms, comes under intense pressure and may even break down within the wage economy of the logging concessions and amid the accumulation and structured planning necessary for successful farming (Kenrick 2000a).

Put in conflict with their neighbours, denied access to their independent resource base - which is the context for the spiritual beliefs and practices that underpin their economy of sharing - they are marginalised from a way of life in which they are the experts. Many attempt to put whatever remains of their expertise to use in working for loggers, safari hunters and bushmeat traders. Thus, the underlying pressures of resource appropriation and forest destruction gradually remove both the economic and experiential resources that provide the basis for their forest-oriented culture and lifestyle (Kenrick 2000a).

Their experience of discrimination is usually compounded by the "awareness raising" activities of those agencies who believe they are helping the Baka by turning them into farmers. Like most Mbuti, Baaka and Bagyeli, Baka were forced to settle by the roadside in the 1960s. Whereas most of the other groups have since moved back

some distance into the forest, the intense activity of missionaries and Northern NGOs attempting to "help" the Baka to become independent by assisting them to turn to agriculture has meant that in some places many Baka remain centred on a roadside existence. They suffer far more from discrimination by their neighbours when they can no longer flee them. Often, those instigating such projects have sought to justify their actions as an effort to combat discrimination.

Conclusion

The intention of this article has been to show some of the ways in which discrimination evolves and reacts to new values and norms. For those being discriminated against, this is a "Catch 22" situation as reflected in the ongoing discrimination experienced by the Forest People of Central Africa where Forest People still have access to their forests (Bagyeli, Mbendjele and Baka) rather than on situations where their forests have been destroyed by farmers (as, for instance, among the Twa of Rwanda and Burundi) or where they have been forcibly excluded by Western conservationists from their forests (Twa of south-west Uganda and Kahuzi-Biega in DRC).

Where their forests have been destroyed, or where they are forcibly excluded from them, this can often be presented as if it were to the Forest Peoples' benefit, as if it will oblige them to benefit from "modernisation" and "development". In reality, however, there is no such benefit: the process simply subjects them to increasingly severe poverty and continued discrimination at the hands of their neighbours and locally active institutions. The attempts of many governments, missionary and development agencies to help the Forest People have not addressed the fundamental need for their rights to their lands, culture and way of life to be recognised. Instead they have continued the pre-existing process of discrimination evident in the attitude and behaviour of farmers towards hunter-gatherers. Asserting that the discriminated group must be enabled to become like the discriminating group fails to address the fundamental basis of the discrimination and simply changes its paradigm. Discrimination can only be subverted and dissolved by dismantling the process by which one category or realm is made to be inferior to another. If, instead, members of the dominated group are given help to become like those who dominate them, this does not alleviate the discrimination suffered; it intensifies it.

Notes

1 The use of "Forest People" rather than "Pygmy" is a direct translation of the label many Pygmy peoples in Central Africa prefer to give themselves.
2 See for instance Kagabo and Mudandagizi 1974:77, or Woodburn 1997:354-5.

References

Bennett, G. 1978. *Aboriginal Rights in International Law*, Royal Anthropological Institute of Great Britain and Ireland. Occasional Paper No. 37.

Barume, Kwokwo with Dorothy Jackson. 2000. *Heading Towards Extinction? The Expulsion of the Twa from the Kahuzi-Biega National Park, Democratic Republic of Congo. A study of indigenous rights in Africa.* Copenhagen: IWGIA and FPP.

Jordanova, L.J. 1980. "Natural facts: a historical perspective on science and sexuality". In C.P. MacCormack and M. Strathern (eds.) *Nature, culture and gender.* Cambridge: Cambridge University Press.

Kagabo, J.H. and Mudandagizi, V. 1974. "Complainte des gens d'argile, les Twa du Rwanda". In *Cahiers des Etudes Africaines* 14 (1) Cahier No. 53, pp. 75-87.

Kenrick, Justin. 1999. "Reflections in the Molimo Pool: Gender, Ritual, Economics and the Mbuti of Zaire". In Biesbrouck, Karen, Stefan Elders and Gerda Rossel (eds.) *Challenging Elusiveness: Central African Hunter-Gatherers in a Multidisciplinary Perspective.* Pp. 153-168. Leiden: CNWS (Research School for Asian, African and Amerindian Studies).

Kenrick, Justin. 2000. - *The Forest Peoples of Africa in the 21st Century: Present Predicament of Hunter Gatherers and Former Hunter Gatherers of the Central African Rainforests.* In *Indigenous Affairs* 2000/2. Pp. 10-24. Copenhagen: IWGIA.

Kenrick, Justin. 2001a. *The Batwa of South West Uganda: World Bank Policy on Indigenous Peoples and the Conservation of the Bwindi and Mgahinga National Parks.* Manila: Tebbatebba.

Kenrick, Justin. (Forthcoming: 2001b). *The Chad-Cameroon Oil Pipeline and Bagyeli Rights: deepening inequality not alleviating poverty.* Forest Peoples Programme Report.

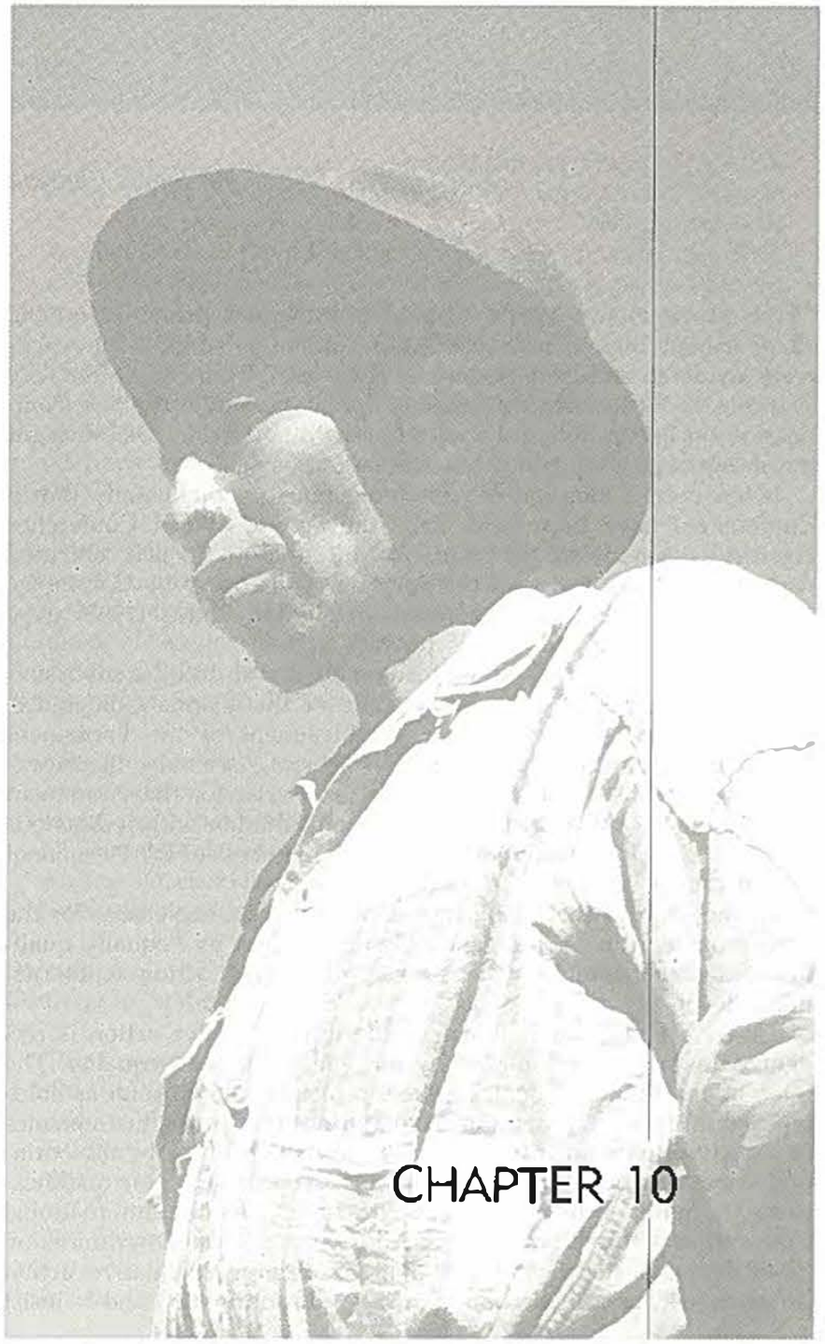
Kenrick, Justin. (Forthcoming: 2002). "Images of Hunter-Gatherers, Westerners and the Environment: Anthropology and Anthropocentrism". In Barnard, Alan and Henry Stewart (eds.), *Self- and Other Images of Hunter-Gatherers* (SENRI Ethnological Studies, Special Issue). Osaka: National Museum of Ethnology.

Lewis, Jerome. 2000. *The Batwa Pygmies of the Great Lakes Region: The Problem of Discrimination.* London: Minority Rights Group Report.

Lewis, Jerome. (Forthcoming, 2001). "Forest People or Village People: whose voice will be heard?" In *Africa's Indigenous Peoples: "first peoples" or "marginalised minorities"?* Alan Barnard and Justin Kenrick (eds.) Edinburgh: CAS.

Lewis, Jerome and Judy Knight. 1995. *The Twa of Rwanda: Assessment of the Situation of the Twa and Promotion of Twa Rights in Post-War Rwanda,* Copenhagen, IWGIA and World Rainforest Movement.

Woodburn, James. 1997. "Indigenous Discrimination: the ideological basis for local discrimination against hunter-gatherer minorities in sub-Saharan Africa". In *Ethnic and Racial Studies,* 20/2: 345-361



CHAPTER 10

RECOMMENDATIONS: WHY AFFIRMATIVE ACTION?

By Suhas Chakma

The previous two World Conferences focused primarily on the apartheid regime in South Africa although specific references were made to indigenous peoples. The establishment of the UN Working Group on the Indigenous Populations under the Sub-Commission on Prevention and Protection of Minorities in 1982 brought the indigenous peoples to the international stage.

It has been a long journey for indigenous peoples. Many World Conferences have been held since the Second World Conference Against Racism in 1983. The Rio World Conference, which coincided with the movement against the doctrine of discovery by Columbus, and the Vienna World Conference on Human Rights (1993) were both important for indigenous peoples' rights.

The establishment of the Permanent Forum on Indigenous Issues is another milestone. It is an outcome of the Vienna Conference. Although the resolution on the establishment of the Permanent Forum has been adopted by the UN General Assembly, the movement for establishment of a separate Secretariat for the Permanent Forum and the process to hold "wide consultation with indigenous peoples" in the nomination of indigenous members of the Permanent Forum remain key issues.

At the heart of the establishment of a separate Secretariat for the Permanent Forum on Indigenous Issues, staffed by "equally qualified indigenous staff", is the issue of affirmative action at international level.

Under existing international standards, affirmative action is recognized as an important remedy for achieving racial equality. The international standard qualifies these principles only insofar as holding that affirmative programmes should not lead to the maintenance of separate rights for different racial groups and must be discontinued once their objectives have been achieved[1]. With these qualifications in mind, Article 1(4) and Article 2(2) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) were specifically designed to exempt affirmative action programmes from the definition of racial discrimination and to insist

States implement such programmes when the circumstances warrant[2].

The Human Rights Committee, in its General Comment XVIII, also supported affirmative action under certain circumstances. It states:

> *"The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting, for a time, to the part of the population concerned, certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination, in fact, it is a case of legitimate differentiation under the Covenant."*

The previous World Conferences Against Racism had already adopted language strongly supporting the need for affirmative action. Most significant in this regard is the Declaration and Programme of Action for the Second World Conference to Combat Racism and Racial Discrimination (1983). Paragraph 15 of the Declaration of the Second World Conference states:

> *"The proscription of racism and racial discrimination by law should be accompanied by vigorous efforts to ensure equality in the economic, social, and cultural fields; and in particular special programmes, such as affirmative action programmes, should be developed to address the problem of racism and racial discrimination inherent in the system and institutionalised."*

Paragraph 16 of the Programme of Action of the Second World Conference states:

> *"The Conference invites States . . . [t]o ensure that the teaching staff of institutions reflect, as far as possible, the racial and ethnic composition of the community. Affirmative action programmes should be instituted to facilitate the hiring of teachers who represent the racial, ethnic and linguistic composition of the community.*
>
> ...
>
> *The Conference invites States . . . [t]o take remedial measures in instances where particular racial, ethnic, linguistic or other groups have had a history of being placed at a disadvantage . . . . This is the*

responsibility of society. This might necessitate special educational programmes at all levels of the society."

In describing the need and scope of affirmative action, the texts of the previous World Conferences are deficient in a number of areas. The Third World Conference Against Racism should address the issue of affirmative action at national and international level.

Firstly, the WCAR should move away from the earlier conferences' statements of "inviting" States to adopt affirmative action measures and towards statements that accurately reflect the **obligation of States** to do so when the circumstances require it under international law. The WCAR must appropriately reflect that obligation in its own text[3].

Secondly, an explicit reference to **the need for affirmative action programmes for indigenous peoples** is important.

Thirdly, affirmative action as provided for in the last World Conferences should not be restricted to the field of education. As the experience of affirmative action in India shows, there is a need for affirmative action in **legislative bodies, employment, housing, public contracting** and the **civil service,** particularly including programmes to ensure adequate representation of **members of marginalized racial groups in the police force**.

Fourthly, the WCAR should also take up the issue of affirmative action within the **international arena**. In his 1996 report to the General Assembly, the Special Rapporteur on Racism recommended the General Assembly to *"explore the possibility of establishing a fund to assist ethnic or racial communities that are victims of racial discrimination and condemned to live in conditions of injustice and inequality . . . Can we not envisage an appropriate affirmative action mechanism at the international level?"*[4]

The WCAR should take up that challenge and begin detailing specific measures for appropriate affirmative action at international level. One affirmative action that has been taken is the preference given to equally qualified women candidates in the staffing of the UN Secretariat. The establishment of a separate Secretariat for the Permanent Forum on Indigenous Issues comprising equally qualified indigenous staff could be the beginning of such affirmative action at international level.

Indigenous peoples have organised many regional and international conferences as part of the preparatory process for the WCAR. The Draft Declaration and Programme of Action of the Third World Conference Against Racism should focus on: (1) A declaration on principles of equality, non-discrimination and prohibition of racial discrimination at national and international level; (2) an effective

programme of Action with special focus on comprehensive affirmative action at national and international level.

The following recommendations are drawn from various national, regional and international conferences organised by indigenous peoples and the Draft Declaration and Programme of Action. They are neither exhaustive nor prescriptive but a reflection of the ongoing negotiations around the Draft Declaration and Programme of Action.

Unless the World Conference Against Racism recognizes the following principles with regard to indigenous peoples, it cannot hope to address the racial discrimination practiced against indigenous peoples or fashion any realistic solutions to end the practice:

1. Indigenous Peoples are Peoples within the full meaning of international law.
2. Indigenous Peoples have the right of Self-Determination to the same extent as all other peoples of the world.
3. The World Conference Against Racism must reiterate the principles established by the first two World Conferences to Combat Racism, recognizing the special physical and spiritual relationship between Indigenous Peoples and our lands and territories, and stressing that our lands and natural resources should not be taken from us.
4. In all measures to be taken by States that may affect Indigenous Peoples, consultation in good faith must be undertaken by the State with the Indigenous Peoples affected and such measures not implemented without our free and informed consent.
5. The World Conference Against Racism must call upon the States to end the militarization of Indigenous Peoples' lands and territories and the forced relocation of Indigenous Peoples. The grave situation of the militarization of indigenous lands and territories, and resultant gross and massive violation of our civil, political, economic, social and cultural rights must end. Indemnification for damages and material losses during Indigenous Peoples' forced displacements should be made.
6. Religious intolerance toward Indigenous Peoples' spiritual practice has been a fundamental instrument in the subjugation of Indigenous Peoples, since the beginning of colonialism. The World Conference must recognize the persistent evil of religious intolerance toward Indigenous spiritual practice and belief and make concrete proposals to end this widespread and persistent related xenophobia.
7. The World Conference Against Racism must recognize and address the new and deadly form of racial discrimination, including

institutionalized racism, that of environmental racism, and the ruination of our lands, waters and our environment by the implementation of development schemes and unsustainable practices such as mining, deforestation, the dumping of contaminated waste, and other land use practices that do not respect but discriminate against our spiritual beliefs and ways of life, our economies and means of subsistence, our right to health, our very lives and our existence, and our future generations.

The Indigenous Peoples Millennium Conference, held in Panama on 7-11 May 2001 made the following recommendations for a Programme of Action:

1. ***Call*** for a World Conference on Indigenous Peoples.
2. ***Recommend*** a comprehensive review of the International Decade of the World's Indigenous Peoples.
3. ***Recommend*** to the Secretary General the development of "principles for the inclusion of Indigenous Peoples' Issues into the United Nations programmes and practices."
4. ***Recommend*** to the Secretary General the early establishment of a separate Secretariat for the Permanent Forum, and that preference be given to Indigenous candidates in the staffing of the Secretariat.
5. ***Call*** for the elimination of religious intolerance and the recognition of the right of Indigenous Peoples to our own cultural and religious traditions as well as the right to defend our rituals and spiritual sites.
6. ***Call*** for the recognition of the relationship between Self-Determination, land rights and protection of cultural rights, including the need to recognize that discrimination against the use of our language exists.
7. ***Strongly recommend*** the adoption of the draft UN Declaration on the Rights of Indigenous Peoples, approved by the Subcommission on the Prevention of Discrimination and Protection of Minorities in its Resolution 1994/45. The draft OAS Inter-American Declaration on the Rights of Indigenous Peoples should be adopted with the full participation of Indigenous Peoples, and must not contain lesser standards than those contained in Sub-Commission Resolution 1994/45.
8. ***Urge*** the UN to effectively implement the Permanent Forum on Indigenous Issues and the position of Special Rapporteur on Indigenous Issues and Human Rights with all necessary funding, and in consultation with Indigenous Peoples.

9. ***Recommend*** that States ratify international conventions and agreements protective of Indigenous Peoples' rights, and abide by agreements and treaties signed between States and Indigenous Peoples. States that have not already done so should ratify the *Convention on the Elimination of All Forms of Racial Discrimination* and make the Declaration under Article 14 of that Convention.
10. ***Recommend*** that States examine their constitutions, laws and legal systems, and policies to identify and eradicate both explicit and inherent racism towards Indigenous Peoples contained therein.
11. ***Cease*** the use of the doctrines of discovery and *terra nullius*; the prohibitions against the collective ownership of Indigenous land; the doctrine that Indigenous lands can be taken without due process of law or adequate compensation; doctrines which provide for the unilateral extinguishment of Indigenous land rights and title; the presumption that Indigenous Peoples do not own the resources of the subsoil; doctrines that allow concession of Indigenous resources to be made without Indigenous consultation or consent; the denial of legal protection for Indigenous religions, including protection of sacred sites and areas as well as denial of religious practice and Indigenous prisoners; and discriminatory land claim processes.
12. ***Strongly recommend*** that States renounce laws and policies that deny or limit indigenous rights over the land and its resources, including rights to the resources of the subsoil, submerged lands and wetlands, affirmatively recognize Indigenous Peoples as the rightful managers of their lands and resources. States should, in consultation with Indigenous Peoples, initiate programs to demarcate and protect Indigenous territories.
13. ***Urge*** States and financial and development institutions to examine their policies and practices that affect Indigenous Peoples, to ensure their policies and practices contribute to the eradication of racism, encouraging the participation of Indigenous Peoples in development projects in accordance with the principle of free and informed consent; by democratizing international financial institutions and trans-national corporations by developing codes of conduct enforceable against them; and by consulting with Indigenous Peoples in any matter that may affect our physical, spiritual or cultural integrity.
14. ***Recommend*** that States promote programs to benefit Indigenous women, with their full participation, to promote their civil, political, economic, social and cultural rights; to end disadvantage due

to gender; to urgently resolve problems affecting them in education, employment, health, traditional knowledge, justice, the environment and biodiversity; and to eliminate policies of forced sterilization and the use of sexual violence as a weapon of war as well as the trafficking of Indigenous women and children.

15. ***Urge*** the States to commit financial resources to anti-racism education and media campaigns to promote anti-racism awareness, acceptance of diversity, and respect for the cultures of all Indigenous Peoples. In particular, the States should promote a real understanding of the dignity and worth of the histories and cultures of Indigenous Peoples.

Notes

1 For a discussion of the definition of affirmative action under international law, see Mr. Asbjørn Eide, Working Paper on the Protection of Minorities: Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities, E/CN.4/Sub.2/1993/34, paras. 168-184.

2 *WCAR Think Paper X: State Support for CERD.* A joint project of the Human Rights Documentation Center (HRDC), International Service for Human Rights (ISHR) and South Asia Human Rights Documentation Centre (SAHRDC), May 2001.

3 *Ibid.*

4 A/51/301, para. 58.

BIOGRAPHIES

BIOGRAPHIES

Carlos Romero Bonifaz was born in La Paz, Bolivia, in 1966. He is a lawyer and is presently the Executive Director of the Centre of Legal Studies and Social Investigation (CEJIS), an institution dedicated to the defence and promotion of the rights of indigenous peoples. He has thus participated in the technical formulation of the land claims of indigenous peoples, in particular of the Mojeño, Movima, Itonama, Baures, Moré Cayubaba Esse-Ejja, Tacana, Cavineño, Chácobo and Yaminahua-Machineri peoples of Bolivia. He has also elaborated proposals for legal reforms regarding the Bolivian legislation on land use (agriculture) and biodiversity.

Suhas Chakma is the Coordinator of the New Delhi based Asian Indigenous and Tribal Peoples Network (AITPN). An indigenous activist, he trains activists in the use of national and international human rights procedures for the protection and promotion of human rights, and he follows the UN human rights procedures and the functioning of the national human rights institutions in the Asia-Pacific region. As a freelance writer, he regularly writes for English national dailies in India and is occasionally hired as a consultant by the Office of the United Nations High Commissioner for Human Rights for evaluation of its Technical Cooperation Projects.

Andrew Huff is an enrolled member of the Chippewa-Cree Tribe of Montana and a staff attorney for the Indian Law Resource Center. The Indian Law Resource Center is a non-profit law and advocacy organization that provides assistance to indigenous peoples working to protect their lands, resources, human rights, environment and cultural heritage. The author would like to thank Jennifer Snyder, Harvard Law School, and Professor Robert Williams, Indigenous Peoples Law and Policy Program at the University of Arizona, for their assistance with this article.

William Jonas is the Aboriginal and Torres Strait Islander Social Justice Commissioner and Acting Race Discrimination Commissioner of Australia. Until his appointment as Social Justice Commissioner,

William Jonas was Director of the National Museum of Australia and from 1991-96 he was Principal of the Australian Institute of Aboriginal and Torres Strait Islander Studies in Canberra. In the mid-1980s William Jonas was a Royal Commissioner on the Royal Commission into British Nuclear Tests in Australia with the late Justice Jim McClelland. He has held positions on the Immigration Review Tribunal, the Australian Heritage Commission, and the State of the Environment Advisory Council. He chaired the Joint Ministerial Taskforce on Aboriginal Heritage and Culture in NSW and the Heritage Council of the ACT. He is a long-standing member of Newcastle's Awabakal Aboriginal Co-operative and has been both Director and Chair of its Board. William Jonas commenced his five-year appointment as Social Justice Commissioner on 6 April 1999. His appointment as Acting Race Discrimination Commissioner ends on 1 October 2001.

Justin Kenrick is Africa Policy Advisor for the Forest Peoples Programme. His work currently focuses on the situation of the Bagyeli in Cameroon and the Batwa in Uganda. He is a social anthropologist teaching at both at the University of Glasgow and Edinburgh University.

Jerome Lewis is at present completing a Ph.D. in social anthropology at the London School of Economics, University of London, on the cultural identity of the Mbendjele Yaka of Congo-Brazzaville. He has also been involved in research and training with Batwa communities in Rwanda since 1993

Nic Maclellan has worked as a journalist, researcher and community development worker in the Pacific islands. Since 1984, he has travelled extensively throughout the Pacific region, and between 1997-2000 he lived in Suva Fiji, working as Educational Resource Developer with the Pacific Concerns Resource Centre. Nic Maclellan has written widely on development, disarmament, human rights and environment in the South Pacific, and is co-author of three books: *La France dans le Pacifique - de Bougainville à Moruroa* (Editions La Découverte, Paris, 1992); *After Moruroa - France in the South Pacific* (Ocean Press, Melbourne, 1998); and *Kirisimasi - Na Sotia kei na Lewe ni Mataivalu e Wai ni Viti e na vakatovotovo iyaragi nei Peritania mai Kirisimasi* (PCRC, Suva, 1999).

This article was written by Nic Maclellan on behalf of the Pacific Concerns Resource Centre (PCRC) in Suva, Fiji. PCRC serves as the secretariat for the Nuclear Free and Independent Pacific (NFIP) movement, and has programs on decolonisation, demilitarisation, human rights, environment and sustainable human development.

Atencio López Martinez is a Kuna lawyer, who was born and raised in the Kuna Yala region of Panama. He studied law and political science at the University of Panama, and he is an activist in the Indigenous Movement at both national and international level.

Mattias Åhrén is a Saami from Sweden. He holds a law degree from the University of Stockholm and an L.L.M. (Master of Law) degree from the University of Chicago. Having finished his clerkship at the Stockholm District Court, he is currently an associate with Danowsky & Partems lawfirm in Stockholm. Mattias Åhrén is actively involved in the Saami Council and is a member of the board of directors of the Saami Lawyers Association.