Making a Place for Indigenous Rights in Global Justice

The final topic for plenary discussion was inspired by the life’s work of a native son of Sevilla, the regional capital of Andalusía located a short distance from the BIIJ 2012 venue. Bartolomé de las Casas (1474-1566) is considered by many as the first Western advocate of the rights of indigenous peoples. BIIJ participants considered the potential impacts of the body of law emerging around the concept of indigenous rights. Participants were asked to reflect on how this concept might influence the work of international courts and tribunals as well as the future development of international law.

A historian and Dominican friar, Las Casas wrote in 1542 A Short Account of the Destruction of the Indies (Brevísima relación de la destrucción de las Indias). This work recounts the mistreatment of indigenous peoples by the Spanish colonial system and makes an argument for new laws regulating the use of native labor by Spanish settlers. In later works, Las Casas emphasized the inherent humanity and dignity of the peoples of the New World, as well as their rights to freedom, sovereignty, and property.

It was not until four centuries later, however, that a formal movement to articulate the rights of indigenous peoples was undertaken. First the International Labour Organization and later the UN Working Group on the Rights of Indigenous Peoples took on this task, through consultation and collaboration with representatives from around the world. This process went on for almost 50 years.

A general concern by governments throughout this articulation process was that the “self-determination” of indigenous peoples in their territories might be taken as their right to secede or otherwise challenge state sovereignty. Many governments consider that the right to self-determination should necessarily be limited by the duty of indigenous peoples to respect the territorial integrity and political unity of states.

Governments were also concerned that the notion of “indigenous people” might be conceived of so broadly that it would include all minority groups or any other sub-state populations that consider themselves disadvantaged, politically or otherwise. African states were particularly concerned about this issue since most of their populations could be categorized as indigenous to their respective territories.

The indigenous peoples movement began with the “first peoples” of the Americas and Australasia, those dispossessed of their lands through colonial domination. The movement was eventually expanded, however, to include populations in other regions of the world that are distinguished by their unique livelihoods and marginalization from modern state building, such as nomadic pastoralists and hunter-gatherers (e.g. the Sami of Scandinavia, the Awas Tingni of Nicaragua, the Endorois of Kenya, and the San of southern Africa).

The following criteria are generally used for determining a population’s status as an indigenous people:
• occupation and use of a specific territory;

• voluntary perpetuation of cultural distinctiveness;

• self-identification as a distinct collectivity, as well as recognition by other groups;

• experience of subjugation, marginalization, dispossession, exclusion, or discrimination.\(^1\)

The result of this long articulation process was the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration),\(^2\) adopted on 13 September 2007 by most U.N. member states.\(^3\) An explicit definition of “indigenous people” is notably absent from this document.

The Declaration is a non-binding instrument. Some observers believe that, like the UN Declaration of Human Rights, it will have a powerful top-down influence on the adoption of minimum standards of protection and serve as a foundation on which indigenous rights law can develop. Others believe that the rights of indigenous peoples can best be ensured through local action and national political processes.

BIIJ participants began their discussion by considering several prominent cases addressing indigenous rights claims. The first concerned the San people of the Kalahari Desert. In 2002, the Botswana government evicted the San from their ancestral lands in order to develop the Central Kalahari Game Reserve for touristic purposes and for diamond mining. The High Court supported the government’s actions, in particular the decommissioning of a borehole that provided water to San who refused to be relocated. The Botswana Court of Appeal ruled in 2011 that the government’s actions were unconstitutional and constituted “degrading treatment.” One observer of this case has written, “This judgment has sent a strong signal to the government that economic interest even for the benefit of the overall population is not a justification for non-recognition of the basic rights of indigenous peoples.”\(^4\)

A recent decision concerning the Endorois people in Kenya was also referenced. The Endorois are an indigenous population in Kenya that was evicted from its ancestral lands around Lake Bogoria in the 1970’s by the state to make room for a game lodge and other touristic infrastructure. In return, individual members of the group were offered minimal compensation and relocated to lands that could not support their livestock (lacking water, vegetation, and salt licks), that did not have the plants used for their traditional medicines, and that separated the Endorois from sites of religious and cultural significance.

After domestic remedies were exhausted, the Endorois situation was brought before the African Commission on Human and Peoples’ Rights. In 2010, the Commission found that the Kenyan state had violated the Endorois’ rights to freedom of religion, property, health, culture, and natural resources under the African Charter on Human and Peoples’ Rights. It directed the Kenyan government to compensate the Endorois for the losses suffered through their dispossession, recognize their rights of ownership, restore their access to ancestral lands, and take a number of other reparatory measures.

The issues raised by these two cases, as well as the very notion of indigenous rights, elicited a spirited exchange among participants. The fact that there is no explicit definition of “indigenous people” in the Declaration was troubling to some participants. “If a claim by an indigenous people comes before me in court, I must know what an indigenous people is,” declared one judge. “That’s fundamental and you must tackle it before you proceed.” Another judge noted the counter-intuitive categorization of some peoples as indigenous. In the contemporary Caribbean, for example, there are mixed populations descended from Amerindians, Europeans and Africans – the latter two groups clearly not autochthonous to the region. However, due to their separate identity and language, such populations are generally recognized as indigenous peoples. One judge experienced in the area of indigenous rights asserted that it is best to have no single definition of the concept. “We are safer without
a definition. Who is recognized as an indigenous person in Africa is different than in Australia. It took a lot of compromises to get the Declaration adopted by the overwhelming majority of General Assembly members. I think we should let sleeping dogs lie.”

The issue of definitions led to another question: what exactly are indigenous rights, and how do they differ from human rights? “I’m trying to understand the nature of these rights,” said one participant. “The modern conception of human rights is often deeply antithetical to the idea of a cultural distinctiveness that makes people who they are. I see the threads of this antithesis running throughout the Declaration.”

Another participant agreed, characterizing the Declaration as “full of paradoxes,” such as its simultaneous assertion of both collective and individual rights for indigenous peoples, despite real potential for conflict between the two. For example, the right of indigenous peoples “to practice and revitalize their cultural traditions and customs” (Article 11) may not mesh with guarantees for the protection of indigenous women and children and their freedom from discrimination (Article 22). There is also a potential contradiction in the Declaration between the right of indigenous peoples to self-determination and “to freely determine their political status” (Article 3) and the assertion that nothing in the Declaration should be interpreted as sanctioning the destruction of “the territorial integrity or political unity of sovereign and independent States” (Article 46).

The question was then raised as to the relationship between indigenous rights and minority rights, such as those guaranteed by Article 27 of the Covenant on Civil and Political Rights (see sidebar, at right). A participant with past service on the U.N. Human Rights Committee suggested that international bodies should deal with indigenous peoples as minorities since there is currently insufficient legislation to address a different special status.

International Covenant on Civil and Political Rights, Article 27

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 practise their own religion, or to use their own language.

Another judge pointed to the rich case law produced by the Inter-American Commission and Court of Human Rights involving indigenous peoples. Despite the fact that the Inter-American system does not explicitly recognize indigenous rights, it has used the rights to property and landholding, freedom of movement, and self-determination to great effect. “The Inter-American system has been extremely brave and forward in upholding the rights of these peoples,” a judge declared. It was acknowledged that recent cases surrounding indigenous rights in Africa have drawn substantially from Inter-American jurisprudence.

The occupation and use of a specific territory – one of the criteria by which indigenous peoples are identified – was then discussed by participants. It is clear that many populations have been dispossessed of their traditional lands and questions of compensation consequently arise. One judge was bothered by the “backward-looking” character of some demands for compensation. Does it make sense to compensate the descendants of those whose land was originally seized, sometimes centuries earlier? And doesn’t the state have the right to take some land if it is in the common interest in the first place? More generally, the same participant expressed puzzlement at the public apologies issued by certain governments
for actions taken against indigenous peoples in the past, for which those alive today are not directly responsible. Other participants disagreed, clearly believing apologies and other kinds of “symbolic compensation” can aid in efforts toward peaceful coexistence among populations.

Another judge observed that some indigenous populations are not interested in being compensated for their loss of land; what they really want is to have the land returned. The cases of the San and Endorois summarized above suggest that this was their desired goal. The Sami of the Nordic countries feel equally strongly, a judge commented, about the return of the land that they have traditionally used to herd reindeer. Furthermore, this population is well informed about the international treaties and conventions that might help them achieve their goal. The understanding of the African Commission on Human and Peoples’ Rights on this issue, a participant noted, is that traditional lands of indigenous peoples should be returned if this is feasible. Otherwise, there should be fair compensation.

The session ended with a reminder by one participant that indigenous peoples are not monolithic entities, with all group members in agreement about what they need and wish for in terms of rights and aspirations. Furthermore, the search for indigenous rights may exacerbate fault lines that already exist within their cultures. Legal negotiations about indigenous rights may well bring new challenges – and not just remedies – to the groups that wish to avail themselves of the provisions of the recently adopted Declaration on the Rights of Indigenous Peoples. Recognition of these rights adds one more piece to the complicated puzzle of contemporary global justice.

Other topics of discussion

BIIJ 2012 offered several opportunities for small groups of participants to gather for focused discussion on topics of particular interest. Judges serving on inter-state dispute resolution bodies covered a number of legal issues pertinent to their institutions, including those raised by the ECJ Kadi case. Human rights judges discussed a number of logistical challenges facing their courts, including how to cover the costs of cases, handle requests for adjournment, and respond to state representatives before their courts who use abusive language or otherwise show contempt for the proceedings. Judges serving in criminal jurisdictions shared their respective institutional practices on limiting the scope of indictments, amending indictments, dismissing cases, and recharacterizing the facts of a case. BIIJ participants also convened informally to exchange views on the special roles played by the presidency and other leadership positions in international courts and tribunals, the challenges associated with reappointment to an international judgeship by one’s state, and the position of women in the international justice system.
Notes


3. The Declaration was initially rejected by four powerful nations – Australia, Canada, New Zealand, and the United States – all of which possess particularly problematic histories vis-à-vis the populations indigenous to their territories. All four have since recognized the Declaration.


6. Id.

7. Id.

8. Id.
