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THE CHALLENGE OF "COLLECTIVE" RIGHTS

- **at the U.N.**
- **in Canada**

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PRESENTATION

In this issue, we wish to draw attention to a much neglected dimension of human rights, namely to what is ambiguously called collective rights, that we here prefer to call communal rights.

Official declarations of human rights in the West, generally tend to speak only about individual and Nation-State rights. There is generally no recognition of the rights of communities, peoples, nations. Human rights in the West, ever since the Middle-Ages, encourage the individual and the Nation-State to prevail over communities.

Moreover, the Nation-State system tends to reduce what is communitarian to administrative and functional notions: "minorities", professional or ethnic associations, municipalities, etc. The very notion of collectivity has become ambiguous, referring to both the first and the second. But it usually refers primarily to what is functional, thus bypassing and even replacing such organic realities as communities, peoples, nations.

Stavenhagen's synthesis describes how the UN excluded the question of "collective rights" from the Universal Declaration of Human Rights, and how the modern Nation-State, constantly baffled by this issue, tries, without success, to reduce the irreducible communal dimension of life to an administrative definition, and thus to turn communities, peoples and nations into subjects and objects of its own power and control.

Jackson shows how Canada is not faring any better with regard to the "collective" rights of the indigenous Nations in this country.

*

It is clear that the Nation-State system cannot cope with the issue of collective (communal) rights. The reason behind it might be the following: since it confuses the person with the individual, or the personal with the private, it is logically led to confuse what is communal with what is public, hence with the Nation-State and its sub-categories.

Maybe the time has come to give priority to personal, family and communal rights over the rights of the individual, and of the Nation-State. In other words, to personal, family, communal law over private and public law. Such a reversal of value will require a decolonization of our minds with regard to the Nation-State and to the actual grip of its supposedly "a-" and "trans-"cultural categories. In short a genuine mutation.

In view of that, it may be useful to start by making a clear distinction, not only between the individual (the private realm) and the personal, but also between the collective (the public realm) and the communal. Both the individual and the collectivity are abstractions, while what is personal and communal is existential. This would allow us to always give priority to what is organic over what is functional, and to subordinate the mind to reality, the latter being always free from the former.

Hence the quotation marks on the word "collective" of the title, in spite of the fact that the authors themselves do not use them. But these quotation marks may be in keeping with the authors' fundamental concerns which is to safeguard and to promote the communal dimension of human rights.

Robert Vachon, Director

Human Rights and Peoples' Rights — The Question of Minorities[1]

by RODOLFO STAVENHAGEN [2]

Introduction

The opening phrase of the preamble of the United Nations Charter refers to the "peoples of the United Nations". Yet the United Nations Organization is an association of states, not of nations or peoples. States are political and legal entities wich exercise sovereignty over a specific territory and wield power over the inhabitants of this territory. Nations are sociological collectivites based on ethnic and cultural affinities which may or may not be constituted into states, but which in any case become politically relevant under certain historical circumstances, when they acquire political (national) consciousness. Peoples are ethnic groups which have not achieved national consciousness but are nevertheless united through racial, linguistic, cultural or national links, which likewise distinguish them from other similar groups, and through which their members are aware of sharing a common identity.[3]

The world system is made up today of roughly 160 politically independent states, and it is probable that in the next few years a small number of additional countries will gain their independence. Still, there is a logical limit to the number of independent states which the international system will be able to recognize. While some of these countries are truly nation-states or national states in

1. This article originally appeared in "Is Universality in Jeopardy?" published by UNESCO, N.Y., 1987. The subtitles are the editor's.
2. Professor at El Colegio de Mexico, Mexico.
3. There is no general agreement among scholars regarding the definition of nations and peoples, and the definitions given here refer to the way the author uses these terms in this paper. Ethnic group is sometimes used interchangeably with "people".

the sense that they are made up of only one nation, most of them are multicultural or poly-ethnic states. Still, only a few states formally recognize their multinational or poly-ethnic nature; most of them maintain the fiction of appearing to be mono-ethnic or uni-national states, or at best they give only lip service to the ethnic pluralism within their borders. The number of nations and peoples which exist in the world is not easy to determine, because there are few systematic treatises dealing with these matters and the United Nations system does not carry detailed statistics on such questions. Educated estimates, based mainly on anthropological and linguistic criteria, would place the number of nations, peoples or ethnic groups at around three to five thousand, the real figure probably being closer to the latter.[4]

Frequently, peoples or ethnic groups which share the territory of a state with other such groups are referred to as minorities when they are either less numerous than other group or groups, or when they occupy a subordinate economic, political or social position in the state, or both. Therefore it is possible to speak of numerical and of sociological minorities. There are numerous criteria used in the definition and classification of minorities, most of which are similar to the critieria which refer to the definition of a "people", the distinguishing factor being precisely the relationship to the majority or to the dominant ethnic group. As we shall see, the specialised organs of the UN have stumbled time and again over the question of the definition of minorities.

A first question to be posed, then, is the following : to what extent does a political assembly of 160 states such as the United Nations Organization do justice to the concerns, interests and aspirations of "We, the (5000) peoples of the United Nations" particularly "in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion", as the Charter so aptly puts it?

Priorities: The individual and the nation-state

That this was indeed a concern of the framers of the Charter is seen in lengthy discussions which were held by the delegates to the San Francisco Conference and then again during the sessions prior to the adoption of the Universal Declaration of Human Rights in 1948. Perhaps in view of the experience of the League of Nations, the founders of the United Nations Organization preferred not to include the issue of the treatment of minorities in the Charter.

The League of Nations had been charged with "guaranteeing" a system of protection of minorities which had emerged from the peace treaties after First World War and which was basically concerned with countries in Central Europe. Inspired by President Wilson's appeal for the self-determination of nations after the defeat of the Central Powers, it became a system imposed by

4. There are many difficulties involved in identifying and classifying ethnic groups who do not coincide with states, and that is why specialists come up with different estimates as to their numbers. For example, are Australian aborigines to be defined as a single people or as a number of disctinct ethnic groups? Are all German-speaking peoples to be classified as one nation or as separate entities in the different countries in which they live? If a correct answer had been given to this question in the nineteen thirties perhaps the world would have been saved a Second World War. Is there one Arab nation or several?

the victors on the vanquished. The defeated states, as well as the successor states to the Austro-Hungarian and Ottoman empires, had been required to sign clauses providing for the protection of national minorities within their borders, or to make a formal declaration to this effect upon applying for membership in the League, but the League Covenant made no mention of minorities as such. The allied powers saw no need to apply the same measures to themselves and the League was in no position to ask them to do so.[5]

Protection of minorities meant that minority national, religious or linguistic groups would receive equal treatment to that of other nationals of a state and that they would enjoy the right to practice their own language, culture and religion, as the case might be. The League of Nations, and in some cases, the Permanent Court of International Justice, were to oversee the system. Observers are agreed, however, that the experience was unsatisfactory and on the whole ineffective.[6] The international community was concerned mainly with maintaining the peace, rather than with the safeguarding of the human rights of minorities. In the end, it was able to do neither.

After the second World War, the question of minorities was dealt with at the Paris peace conference and in a number of bilateral treaties between states, involving mainly European countries. In the extra-European context the treaty between India and Pakistan in 1947 was intended to protect religious and ethnic minorities in each of these states. In general, however, the adopted 'solution' was either partition, territorial exchanges or the massive transfer of populations (usually against the will of the peoples involved). Again, the international community was unwilling to become involved in disputes between states concerning minorities and preferred these to be handled on a bilateral basis. The emphasis was on the interests of the states rather than those of the minority peoples. The latter had usually very little say in the matter.[7]

This tendency was nowhere expressed more clearly than in the work leading up to the adoption of the Universal Declaration of Human Rights, beginning in 1946. There is no doubt that the Universal Declaration is a major achievement for mankind, the result of long years of struggle and debate. For the first time, the world community recognized that individual human rights were no longer merely an internal domestic matter of sovereign states but a concern for all of humanity. Secondly, it was now internationally accepted that human rights and fundamental freedoms as defined in the Declaration were of a universal nature, that is, they applied to men and women everywhere, without any discrimination. Article 2 of the Declaration states clearly that "everyone is entitled to all

5. The countries involved in any of these procedures and over which the League exercised some sort of supervision as regards the treatment of minorities within their juridiction, were : Albania, Austria, Bulgaria, Czechoslovakia, Estonia, Finland, Greece, Hungary, Iraq, Latvia, Lithuania, Poland, Rumania, Turkey and Yugoslavia.

6. See Inis L. Claude Jr., National Minorities, an International Problem, Cambridge, Harvard University press, 1955.

7. Some of the same countries were involved which had already been dealt with by the League of Nations. This time Italy was also included (treaties with Yugoslavia and Austria). In 1955 Germany and Denmark signed an agreement regarding their respective national minorities in each other's country.

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".

Besides basic civil and political rights, the Declaration also includes economic, social and cultural rights to which everyone is entitled as a member of society. The adoption of the Universal Declaration was a triumph for those who considered that the true respect for individual human rights and freedoms would put an end to inequality and discrimination everywhere. They saw no need to go further. The main problem was not the nature of the rights set out in the Declaration, but rather their observance. This was the position adopted in general by the Western countries.

Much has been written about the Declaration, of course, and this is not the place to retrace so many arguments that have been put forth. For our purposes, two issues stand out : one is the so-called Western, individualistic bias of the Declaration, and the other refers to collective or peoples'rights, including the rights of minorities.

As for the first of these issues, it has been said that the Declaration did not fully consider the conception of human rights in the non-Western world, where family, clan, and community are often socially and culturally more relevant than the individual, and where the relation between the individual and the state is often mediated through a number of different kinds of social organizations. Whatever the case may be, fact is that the Declaration makes no reference at all to the collective rights of peoples or groups. This was no oversight, but a clear decision taken by the drafters of the Declaration after years of lively and some-times controversial debate.

During the sessions of the drafting group, of the Human Rights Commission and of the General Assembly which debated the project of the Declaration, the Western countries were adamant that provisions relating to rights of minorities had no place in a declaration of human rights. The American delegate, Eleanor Roosevelt, who had achieved world stature as a promoter and defender of human rights, declared that the question of minorities had no universal significance and referred only to Europe. The Latin American delegations denied that there were any minorities in their part of the world and stated that immigrants to Latin America from other parts of the world would have to assimilate. There was no mention at all, at that time, of Latin America's Indian or indigenous populations. Indeed, the representatives of a majority of States proposed that assimilation into the majority culture would be the best solution to the problems of minorities wherever these existed.

A contrary point of view was put foward by the Soviet Union, Yugoslavia, Denmark and some other countries. They insisted that a human rights declaration should include a statement about the rights of minorities. The USSR presented a draft article to that effect, which was rejected by the Western majority. Whereupon the Soviet Union abstained from voting the Declaration.

The lines were clearly drawn : as one author puts it, the "New World" won a battle for individual human rights and the concept of assimilation, that is, a victory for the idea of a mono-ethnic nation state; whereas the "Old World"'s

concept of collective and communal rights was temporarily removed from the agenda of the United Nations.[8]

Not entirely, though, because the General Assembly did pass a resolution at the same time it approved the Universal Declaration, in which it stated that the United Nations could not remain indifferent to the fate of minorities, but it added that "it is difficult to adopt a uniform solution of this complex and delicate question, which has special aspects in each State for which it arises." The General Assembly therefore proceeded to refer the issue to the ECOSOC which it requested to undertake a thorough study of the problem of minorities, in order that the United Nations might be able to take effective measures for the protection of racial, national, religious or linguistic minorities. This position was reaffirmed in a number of subsequent resolutions, even though, and perhaps precisely because, it had been decided that the Universal Declaration of Human Rights would not include any reference to this issue.[9] Despite these resolutions, however, the work of the UN in the field of protection of minorities has remained scanty to this day. And the fashion in which the issue has been dealt with in the competent UN organs is indicative of the problems and the contradictory interests involved.

Shortly after the creation of the Human Rights Commission in 1946, a Sub-Commission for the Prevention of Discrimination and the Protection of Minorities was established. Originally, two sub-commissions had been envisaged, one each for each of the fields to be covered. But the Western nations, opposed as they were to dealing with minorities, decided to have only one sub-commis-sion, and its main task was to deal with discrimination. The bias against the so-called minorities question was so strong, that in 1951 the Commission and the ECOSOC proposed to abolish the Sub-Commission altogether and only the General Assembly itself decided that it should continue its work.[10]

After having failed to include an article about the rights of minorities in the Universal Declaration, the Sub-Commission debated the question all during the 1950's but was unable to reach any agreement. At one point, the Secretary General was asked by ECOSOC whether the system of protection of minorities under the League of Nations was still legally valid, and the answer was negative. The Secretary General considered, in 1950, that this system had lost its effectiveness given the changes in the world situation. Many of the discussions of the Sub-Commission were devoted to drafting one article on the rights of minorities, which was to be included in the International Covenant on Civil and Political Rights. The issue was shuttled back and forth between the Sub-Commission, the Human Rights Commission and the Economic and Social Council for several years. Again, the lines were fairly clearly drawn: the Western block, including Latin America, were not in favor of granting any specific rights to minorities, whereas the Eastern block and some Western

8. Felix Ermacora, Der Minderheitenschutz in der Arbeit der Vereinten Nationen, Wien-Stuttgart, Wilhem Braumuller, 1964.
9. Resolution 217/C (III) and others. See ibid., p. 17.
10. Ibid., p. 19.

European states held out for some kind of collective rights to minorities. During those years, the African and Asian countries did not seem particularly concerned with the issue, though when they did intervene, it was usually along the lines of the Western position.

A major argument against the inclusion of the rights of minorities in the International Covenants referred to the fact that no adequate definition of minorities existed. In 1950, the UN had published a small study on the definition and classification of minorities, but it was considered inadequate for the larger objectives which the Sub-Commission had to deal with. But when faced with the task, the Sub-Commission was unable to come up with a workable definition and decided that it was better to undertake an exhaustive study of the question. In 1971, it charged a Special Rapporteur to carry out this study, which was finally published in 1979, and is known as the Capotorti report.[11]

After evaluating a large number of definitions of the concept of minority and submitting his own ideas on the matter to the governments and the members of the UN Sub-Commission, the special rapporteur concludes by suggesting that a minority is: "a group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members, being nationals of the State, possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicity, a sense of solidarity, directed towards preserving their culture, traditions, religion or language." [12]

Nevertheless, the special report did not take the Sub-Commission any farther than it had already gone, and the Human Rights Commission to which the Capotorti Report was submitted, was apparently not entirely satisfied with the defintion profferred. At its session in August 1985, the Sub-Commission considered once again an attempt at a workable definition of minorities, this time presented by its Canadian member, Monsieur Deschenes, who proposes the following : "Un groupe de citoyens d'un état, en minorité numérique et en position non dominante dans cet État, dotés de caractéristiques ethniques, religieuses ou linguistiques différentes de celles de la majoritié de la population, solidaires les uns des autres, animés, fusse implicitement, d'une volonté collective de survie et visant à l'égalité en fait et en droit avec la majorité." [13]

Meanwhile the Human Rights Commission, acting upon a recommendation of the Special Rapporteur, has been discussing the possibility of drafting a declaration on the rights of minorities within the framework of the principles set forth in article 27 of the International Covenant on Civil and Political Rights. A draft declaration has been presented by Yugoslavia, but the Commission, as usual, has referred it to a working group (as of 1985).

Article 27

Indeed, the only tangible result of all those long years of discussions in the various organs of the UN was the drafting of what finally became Article 27 of

11. E/CN. 4/Sub.2/384/Rev.1
12. Ibid.
13. Jules Deschenes, Une définition des minorités, 1985.

the International Covenant of Civil and Political Rights, adopted by the General Assembly in 1966, which states :

> *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 practice their own religion, or to use their own language.

Minority peoples around the world who had hoped that the UN would come up with a strong and clear-cut statement on the rights of minorities, have under-standably felt cheated with the language of this only article in the whole of the International Bill of Rights which deals with minority rights. Critics argue that this article does not constitute an effective basis for a system of protection of minority rights.

In the first place, by introducing the text with the phrase : "In those States in which... minorities exist", Article 27 leaves the whole question of definition of minorities wide open and we have already seen that a number of States deny any minorities at all (even when the opposite can easily be established). Who, and under what circumstances, is to decide whether minorities exist within a certain State? This important question is either left entirely up to the States themselves, or else it should be decided by the competent organs of the United Nations. Up to now, no such action by the UN is envisaged in Article 27 or any other instrument.

Secondly, the article clearly refers to individual rights ("persons belonging to such minorities...") and not to collective rights, even though the Article admits that these rights are to be enjoyed by individuals "in community with the other members of their group." Minorities as groups, however, are not considered. This is a major failing of Article 27, because certain collective social and cultural rights can only be enjoyed by organised communities which are recognized as such. By phrasing Article 27 the way it stands, the General Assembly obviously avoided dealing with the issue of the legal or political status of minorities in order to placate those governments which opposed any formal recognition of such groups. In line with other international instruments of human rights, Article 27 includes the protection of minorities within the general framework of the protection of individual human rights and freedoms. As one author puts it : "Concerning the holders of the rights under Art. 27, no doubts can exist. Protection is not afforded to minority groups as such, but rather to "persons" belonging to minorities. This formulation cannot be viewed just as an accident of drafting. To conceive of minority protection in individualistic terms fits well into the general pattern of the ICCPR (International Covenant on Civil and Political Rights)..." [14]

Thirdly, the rights of minorities are protected negatively ("persons belonging to such minorities shall not be denied..."), and the text does not impose on States any obligation to enhance actively the rights of minorities to enjoy their own cultures and languages or practice their own religions. Even when such

14. Christian Tomuschat, "Status of Minorities under Article 27 of the U.N. Covenant on Civil and Political rights", in Satish Chadra (Editor), Minorities in National and International Laws, New Delhi, Deep & Deep Publications, 1985.

rights are not denied by State, it is clear that minorities will have a difficult time preserving their cultures and identity unless they are able to obtain such support which nowadays is generally only provided by governments. And states may carry out assimilationist policies detrimental to the cultural survival of minori-ties even without an outright denial of minority rights as set forth in Article 27. That is why minority peoples have argued that Article 27 does not guarantee their rights and does in no way obligate States which may have ratified the Convention to carry out policies in favor of the rights of minority groups.

Fourthly, the Article makes no mention of national minorities nor of indigenous peoples. Given the experience of the League of Nations between the two world wars, it may be considered understandable that the General Assembly did not wish to include national minorities under the purview of Article 27. If national minorities were to be given special protection in the International Covenant of Civil Rights, this might lead to constant bickering between states regarding the situation of one nation's minority in the territory of another, just as it occured during the time of the League. The UN considered that this was to be avoided by all means. Still, it is little solace to millions of members of national minorities around the globe, that their rights and aspirations are not envisaged by Article 27. In contrast, indigenous peoples, if they were considered at all, would be included within the framework of minority peoples as dealt with in Article 27. But as we shall see later, this is not the case at present, and the rights of indigenous peoples are being discussed not only within the framework of this article. Still, notwithstanding its limitations, Article 27 does represent a step foward in comparison with the Universal Declaration, and its emphasis on individual freedoms.[15]

The main argument that has been used against widening the scope of clauses dealing with minorities in the UN's human rights instruments is that the general provisions on human rights provide enough protection to all persons regardless of their ethnic status, and that no special protective measures for minorities should be required if these general human rights provisions were adequatly implemented. Minorities, on the contrary, argue that universal human rights are not enough and that without specific provisos obligating states not only to abstain from interfering with the collective rights of minorities, but also to provide active support for the enjoyment of such rights, minority groups will always be disadvantaged within the wider society. Above all, they hold, the existing instruments do not establish the obligation of states to "recognize" minorities legally, and this seems to be a basic point of contention in any system for the protection of minorities.

Behind such formal arguments there are, of course, a number of sociological and political factors involved. As pointed out above, states like to think of themselves as nation-states, that is, as mono-ethnic collectivities, and they have always been uneasy with minorities within their borders. In case of national minorities which may have majority kin in neighboring states, the

15. Article 27 may be considered as a step in the transition from individual to collective rights in the work of the UN.

threat of irredentist demands is always present, and the European experience between the two world wars is there to remind us of the dangers involved. Then there is the possibility that if minorities are given too much leeway, collective rights may lead to demands for autonomy, self-government, self-determination and even political secession or independence, and this may threaten the territorial sovereignty or even the very survival of a state. Furthermore, one of the great task of our time, particularly in the Third World countries, is the struggle for economic and political viability of the new states, that is, the task of nation-building. For the groups in power, this means integrating and assimilating the minority peoples who do not share the dominant or majority culture, whether these are tribes, immigrants, territorial minorities, linguistic enclaves or indigenous or aboriginal peoples.

Frequently, the smaller and weaker states feel especially vulnerable to external pressures from neighboring and rival states or colonial or neo-colonial powers through problems and conflicts arising out of demands made by minorities. And of course there is no lack of evidence which shows that minority demands are quite often used or manipulated by outside powers or third parties for their own geopolitical purposes.

But whatever the position taken by states or by the dominant ethnic groups within such states, minority peoples are increasingly looking towards the international community for protection when they feel that their basic human rights qua collectivities are being threatened. And recent world history provides plenty of evidence that minority peoples are indeed under constant pressure from the dominant society, so that not only their cultural survival but sometimes even their physical existence is endangered.

Whereas genocide has been declared an international crime by the United Nations,[16] the cultural destruction of an ethnic group, also termed ethnocide, has not been considered in any international protective instrument. Article II of the Convention on the Protection and Punishment of the Crime of Genocide (adopted by the General Assembly en 1948), defines the crime of genocide as meaning "any of the folowing acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) imposing measures designed to prevent births within the group; or e) forcibly transferring children of the group to another group." At the time of the drafting of the Convention, there was talk about including an article on "cultural genocide", but this was not finally taken up. The Genocide Convention refers exclusively to the physical destruction of ethnic groups.

Whereas individual members of minority groups may wish to assimilate into the dominant society, and other minorities may be different to their own continued existence, experience shows that most ethnic minorities (except perhaps immigrant minorities) in the world resist forced assimilation and integration

16. The Convention on the Prevention and Punishment of the Crime of Genocide was approved by the General Assembly on 9 December 1948.

and prefer to maintain and live by the values of their own cultures. Against the arguments of the ethnocratic state,[17] minorities argue that demands for secession or independence are only raised when the state or the dominant ethnic group denies a minority its basic collective human rights. In the historical process of state formation ethnic groups are frequently incorporated into the larger society against their will, or at least, without their explicit consent, sometimes in most brutal fashion. In this way, many peoples and nations have disappeared, others have amalgamated into new social and cultural formations, and yet others, once free and sovereign, have been reduced to a "minority" status of discrimination and marginalization by the dominant ethnic groups. Indeed, what for some is "nation-building", for many minority peoples around the world is in fact "nation-destroying".[18] This is the basic contradiction which Article 27 of the ICCPR has not been able to solve and which crops up again with increasing frequency in the debates of the Sub-Commission.

Other norms

To be sure, the UN has adopted other international instruments which have bearing on the rights of minorities even though they do not directly refer to them. The many activities which the Organization has carried out with the purpose of eliminating discrimination, prejudice and intolerance are of course also designed to protect the basic human rights of ethnic, linguistic, racial and religious minorities. In this respect, it is important to mention the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Committee on the Elimination of Racial Discrimination, established by the Convention, the Decade for Action to Combat Racism and Racial Discrimination (1973-1983), and the two World Conferences to Combat Racism and Racial Discrimination, held in Geneva in 1978 and in 1983, as well as the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief (1972).[19]

A detailed analysis of these instruments and activities in the field of racial discrimination would show that they are true to the principles of the International Bill of Rights, particularly as regards the full enjoyment of the universal individual human rights which are the backbone of the Universal Declaration and the International Covenants. But as regards the specific rights which minorities are always claiming, especially insofar as these would require affirmative action by the states in which these minorities live, the international instruments relating to racism and racial discrimination are widely regarded as being insufficient.

Another set of international norms, developed by the UN, which has a direct bearing on the question of minorities, is the principle of the self-determination of peoples. While this principle is mentioned in the Charter, it was not included in the Universal Declaration, perhaps because at that time it

17. In the "ethnocratic" state a dominant ethnic group (whether majority or minority) controls political power exclusively.

18. See Walker Connor, "Nation Building or Nation Destroying?", in World Politics, 1972.

19. United Nations, The United Nations and Human Rights, New york, 1984.

was not yet considered a "human right". Still, the right of peoples to self-determination developed rather rapidly in the UN. In 1952 the General Assembly recognized that "the right of peoples and nations to self-determination is a prerequisite of the full enjoyment of all fundamental human rights".[20]

A historic step further was taken en 1960 when the General Assembly adopted Resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples, which solemnly states that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". Furthermore, the Declaration states that the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights. Commenting on the scope and impact of the Declaration, the Special Rapporteur states: "The Declaration and the principles proclaimed in it were interpreted as calling for the immediate abolition of the domination of any people by an alien people in any form or manifestation; it was held that the abolition of domination by the granting of independence should be complete, and should prevent for ever any attempt to revive any alien influence on peoples who had acheived independence; that independence should not mean only political independence, but also economic and cultural independence, free from any direct or indirect influence or exercise of pressure of any kind on peoples or nations, in any form or on any pretext; that the principles of the Declaration should be universally applicable to all the peoples of the world, without limitation of time or geography, or limitation as to race, creed or color, not only for the achievement, but also for the preservation of their full and absolute independence; and that independence should depend solely on the free will and determination of the peoples themselves and not on any other influence." [21]

A further step in the development of the right of peoples to self-determination was taken in 1966, when the General Assembly adopted the two International Covenants of Human Rights. Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, proclaims again that "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

In the Declaration of 1960 the right to self-determination was to be applied exclusively to peoples subject to alien occupation, that is, to colonies, and as such it has been interpreted for a long time. Yet, by virtue of its inclusion as Article 1 in the International Covenants on Human Rights, it is now understood that this right applies to all peoples, regardless of whether they live in colonies or not. The right of peoples to self-determination is considered a right belonging to the human person, as a pre-condition or a ncessary pre-requisite for the real existence and enjoyment of all other human rights and fundamental

20. General Assembly Resolution 637 (VII).

21. Aurelio Cristescu, The Right to Self-Determination, United Nations, 1981, p. 7, (E/CN.4/Sub.2/404/Rev.1)

freedoms.[22] Mr. Aurelio Cristescu, Special Rapporteur of the Sub-Commission, holds that : "The principle of equal rights and self-determination should be understood in its widest sense. It signifies the inalienable right of all peoples to choose their own political, economic and social system and their own international status. The principle of equal rights and self-determination of peoples thus possesses a universal character, recognized by the Charter, as a right of all peoples whether or not they have attained independence and the status of a State". And also, "Consequently, the right of peoples to self-determination has the same universal validity as other human rights." [23]

The question of definition

It is clear from the UN texts that there is a distinction to be made between "peoples", "nations" and "States". That the right of self-determination applies to existing States is obvious, and has been proclaimed many times, among them, in the Declaration on Rights and Duties of States, adopted by the General Assembly in 1974. In its 1952 declaration, quoted above, the General Assembly distinguishes between "peoples" and "nations". By the time the principle of self-determination had been included as a human right in Article 1 of the International Covenants, the word "nation" had been deleted, since "peoples" was considered to be the more comprehensive term and was used in the Preamble to the Charter.[24]

The right to self-determination has now become an integral part of international law, if we are to judge by the Resolutions of the General Assembly. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Resolution 22625 (XXV) of 1970, affirms: "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter." Here again, it is clear that the resolution refers to the territory of a colony or other non-self-governing territory which has a status separate and distinct from the territory of the State administering it. The Declaration states strongly that "nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of government representing the whole people belonging to the territory without distinction as to race, creed or color." The General Assembly went on to declare that "the principles of the Charter which are embodied in this Declaration constitute basic principles of interna-

22. Hector Gros Espiell, El Derecho a la Libre Determinación, Naciones Unidas, 1979, (E/CN.4/Sub.2/405/Rev.1)

23. Cristescu, p. 31

24. Cristescu, p. 9

tional law..." Thus, the Special Rapporteur concludes : "Hence, it is clear that self-determination, having been classified as a right by the Charter, is a legal concept which finds expression both as a principle of international law and as a subjective right." [25]

From the foregoing discussion it is clear that a pivotal question regarding the right of peoples to self-determination is that of the definition of a people: who are the peoples who enjoy the human right of self-determination?

This is precisely where we encounter serious theorical and practical difficulties. There is no legal definition of a people. There is not even a generally accepted sociological or political definition of a people. The UN has carefully avoided to define "people" even as it has conceded all peoples the right of self-determination.[26] The 1960 Declaration on Decolonization referred to peoples under alien domination (that is, colonies), but it rejected explicitly any attempt to determine the national unity or the territorial integrity of a country. Some of the governments consulted by the Special Rapporteur, Mr. Gros Espiell, for his study on the right to self-determination made a distinction between "people" and "minorities", and the Special Rapporteur himself holds that international law applies to peoples and not minorities.[27] Mr. Cristescu, also a Special Rap-porteur for the question of self-determination, feels that the discussions on this subject in the United Nations lead to the conclusion that a people should not be confused with ethnic, religious or linguistic minorities.[28]

If this is indeed the case, then ethnic minorities the world over can expect very little from the United Nations. There are few outright colonies left, and soon the Special Committee on Decolonization—created in 1961 with regard to the Declaration on the Granting of Independence to Colonial Countries and Peoples—may have to close its doors. At that time, the concept "peoples" will become synonymous with "nations" and "States". And minorities will have to accept that the international community does not consider them to be peoples.

Many minority peoples, however,—and I use the term advisedly—do not accept happily the way the UN has disposed of their human rights. A close look at today's world shows that many independent states—as was pointed out at the beginning—are made up of a number of ethnically and culturally distinct peoples. The "people" who accordingly to the UN have a right to self-determination are not only ethnically and culturally distinct from those of the colonial metropolis, but are usually geographically distant from the metropolis. Is the criterion for the self-determination, then, a geographical one? That would be a *reductio ad absurdum* of the whole question. In fact, many minorities in independent states consider themselves to be the historical victims of earlier colonizations or simply the result of the way a modern post-colonial state has been artificially carved out of the old colonial administrative units. This might be the case in dozens of the new states of Africa and Asia which have achieved independence since the second world war.

25. Cristescu, p. 13 and 22
26. Cristescu, p. 39
27. Gros Espiell, op. cit.
28. Cristescu, p. 41

Many of the ethnic, religious or linguistic conflicts which are taking place in so many countries all over the world these days relate to the question of self-determination. It is unfortunate that in the various UN instruments relating to the decolonization process the concept of self-determination is generally considered to mean only accession to political independence by colonial territories, or else the free and sovereign decisions of independence states and the non-interference of one state in the affairs or another. That is why the UN finds it so difficult to deal with the problems of minorities within the framework of the right to self-determination. However, according to numerous scholars as well as the internal practice of a number of States, self-determination has many facets, only one of which implies political independence, or secession.

Contradiction. An example: the indigenous peoples

Self-determination may be internal and external, and its components range from simple self-determination at one extreme, to full self-government at the other. Between the extremes, different forms of self-determination may be iden-tifed, the applicability of which will depend in each case on particular historical circumstances.[29] Until now, the UN has preferred not to move into the finer complexities of the problem of self-determination, and that is why there exists an obvious contradiction between the proclamation of the right to self-determi-nation of "all peoples" on the one hand, and its restrictive application to the specific field of decolonization, on the other. From the study of some recent cases of ethnic and national conflict, it would seem that only when a "minority" adopts a strategy of armed struggle and becomes a "national liberation move-ment" will it be recognized as a "people" by the United Nations. There are numerous examples of this and there is no need to detail them here. But this is certainly a self-defeating attitude of the UN and stands in open contradiction to the universal principles proclaimed in the International Bill of Rights.[30]

A particularly illuminating issue regarding these questions refers to the way the problematique of indigenous peoples has been dealt with in the UN. At an earlier stage, when the human rights of indigenous populations were discussed, these generally referred to all of the inhabitants of the colonial non-self-governing territories (designated as indigenous or natives). Upon attaining independence, these populations ceased to be "indigenous" and became citizens of their respective independent states. But the question did not end there, for indigenous peoples existed in a number of independent states.

It will be recalled that during the earlier discussions on minorities, the Latin American delegations denied that any minorities existed in their countries, and if at all, these were foreign immigrants. No mention was made of the Indian populations in Latin America. The first UN specialized agency to recognize the urgency of dealing with the question of indigenous populations was the Inter-

29. Jose A. de Obieta Chalbaud, El derecho humano de la autodeterminacion de los pueblos, Madrid, Tecnos, 1985.
30. For a detailed study of specific applications of the rights to self-determination in UN practice, see Gros Espiell, op. cit.

national Labor Organization, which in 1957 adopted Convention no. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent countries. This Convention applies to:

(a) Members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) Members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their decent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.

Article 2 of the Convention states that governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries. Some of the articles in the Convention reject the "artificial assimilation of these populations" and provide guarantees for the protection of cultural and religious values. Nevertheless, the general thrust of the Convention is paternalistic and integrationist and represents the viewpoints of States rather than the populations concerned. In recent years the Convention has come under increasing criticism among others, by representatives of indigenous organizations the world over. In 1986 the ILO General Conference decided to undertake an extensive review of the Convention in the light of new circumstances.

In 1970, the Sub-Commission examined a special report on racial discrimination, which recommended that further study should be undertaken on the question of discrimination against indigenous populations.[31] The Sub-Commission then charged another Special Rapporteur, Mr. Martinez Cobo, to undertake such an investigation. With the active participation of the UN Secretariat, chapters of this report have been presented to the sessions of the Sub-Commission over the years, and the final version was presented ten years later and has been recommended for publication by the Sub-Commission at its last session in 1985.

The Sub-Commission has considered that the question of indigenous populations should be dealt with in a different way than matters relating to minorities in general, considering the special circumstances of indigenous peoples. In 1977 and 1981 two conferences of non-governmental organizations of indigenous peoples took place in Geneva, which posed some basic issues regarding the indigenous. Finally, the Sub-Commission decided to create a working group on indigenous populations, which met anually between 1982 and

31. Hernan Santa Cruz, Estudio especial de la discriminacion racial en las esferas politica, economica, social y cultural, Naciones Unidas, 1971.

1985.[32] Its task is to examine the situation of indigenous peoples in the world and to suggest possible international standards, including the drafting of a declaration of rights of indigenous peoples.

Indigenous peoples themselves, whose non-governmental organizations expound their views at the sessions of the working group, hold that their situation is different from that of minorities in general and must be given special attention. For one, in some Latin American countries the indigenous are not minorities at all, but a numerical majority. Secondly, the indigenous are the descendants of the original inhabitants of a country settled or colonized by immigrants or conquered by force. Thirdly, they have been the victims of certain processes of economic and political development which have placed them in a situation of subordination and dependence with respect to the dominant society in their own lands. The indigenous peoples argue that they are the original or first nations and that their human rights have been systematically violated by the dominant states, the legitimacy of which they do not recognize in some cases. In North America the indigenous peoples were originally dealt with as sovereign nations by the settler societies and signed treaties as equals with the newly independent states; these treaties, they now claim, have been broken unilaterally by governments.

Based on these and other arguments, the indigenous claim the status of "peoples", and not minorities or simply populations, as they are sometimes described, and they demand the right to self-determination in accordance with international law. Their organizations have presented draft declarations of principles of indigenous rights to the Working Group and the Sub-Commission. In the Programm of Action adopted by the Second World Conference to Combat Racism and Racial Discrimination, held in August 1983 at Geneva, which was endorsed by General Assembly later that year, it was proposed that Governments should recognize and respect the basic rights of indigenous populations:

—to call themselves by their proper name and to express freely their own identity;

—to have official status and to form their own representative organizations;

—to maintain within the areas where they live their traditional economic structure and way of life; this should in no way affect their right to participate freely on an equal basis in the economic, social and political development of the country;

—to maintain and use their own language, wherever possible, for administration and education;

—to enjoy freedom of religion or belief;

—to have acces to land and natural resources, particularly in the light of the fundamental importance of rights to land and natural resources to their traditions and aspirations; and

—to structure, conduct and control their own educational systems.

32. The 1986 session of the Sub-Commission and its working groups was suspended by the secretary General due to budgetary limitations.

Some states have taken important steps to grant self-determination and/or autonomic rights to their indigenous peoples. Others maintain a firm assimilationist position and reject the concept of specific indigenous rights. Still others deny the existence of "indigenous" peoples within their territories, arguing that the majority and ethnically distinct population is itself indigenous to the country. This is the stance most commnoly taken by a number of Asian countries with respect to their tribal populations. Others, however, maintain that tribals are the indigenous peoples of Asia, akin to the Indians of the Americas, and that their situation should be dealt with in the same fashion.

In the Sub-Commission, there is no consensus among the members regarding the indigenous populations. Some would deal with the indigenous *problématique* within the framework of the protection of ethnic minorities in general; others are willing to give special attention to the problems of the indigenous peoples in the world. Still others maintain the traditional position that the true observance of universal human rights would make any special treatment of indigenous or minority rights superflous.

From the foregoing we may conclude that the problem of human rights and peoples'rights with respect to ethnic minorities and in general with regard to peoples who are ethnically distinct from a dominant ethnic group (which may ot may not be a numerical majority) within the framework of an independent state, is far from solved within the United Nations system.

Conclusion

The traditional concept of human rights (both the civil and political ones as well as the social, cultural and economic ones) applies predominantly to individuals. On the other hand, collective rights apply primarily to states, and in some exceptional cases to peoples struggling for national liberation and recognized as such by the international community. But between individual rights and states'rights there are millions of human beings in dozens of countries in every part of the world who claim their own identity, their own right to an existence according to their values and forms of social organization, and in many cases, their right to self-determination.

Can they expect from the international community something more than lip service, something more than general principles which are usually not applied to them? If the United Nations Organization is to become some day truly an assembly of nations and peoples, rather than a conglomerate of states, then it must face up to this challenge.

A new agenda for human rights activists: The Collective Rights of Native People[1]

by MICHAEL JACKSON [2]

This conference has been convened with the idea of celebrating the 40th anniversary of the Universal Declaration of Human Rights. Such celebration, however, is a rather difficult thing for aboriginal peoples to do. This evening I would like to explain why this is.

Although I hope by the end of this presentation to emerge in the light and with a spirit of hope, I'm going to begin in the darkest recesses of this country in its maximum security prisons.

I received earlier this week a letter from a group of women imprisoned in the Prison for Women in Kingston.

I grieve on my own behalf and on behalf of the other (68) inmates whose signatures appear on the attached sheets.

On March 7, 1988, at approximately 9:40 p.m., I was distracted from the television program I was watching in the common room of "A" range by a long deep scream... I learned later, it was from the slashed throat of Eileen

1. Text of keynote address at a conference, held in Vancouver, B.C. on May 27-28, 1988 and organized by AMSSA (Affiliation of Intercultural Societies and Services of B.C.), the B.C. Human Rights Coalition, The United Native Nations, the Union of B.C. Indian Chiefs, the Gitksan—Wet 'suwet'en Tribal Council. His text was first published in the Conference Proceedings Universal Human Rights: an aboriginal dialogue. The purpose of the Conference was to: 1) celebrate the 40th Anniversary of the Universal Declaration of Human Rights; 2) Provide awareness amongst various cultural groups, of Aboriginal Culture and issues; 3) provide an exchange between the groups and people represented.
2. Professor at the Faculty of Law, University of British Columbia.

Y. (a young Native woman) while she lay handcuffed and shackled on a stretcher in "B" range...

The following is an estimate of events which occurred.

Approx. 8:00-8:30 p.m. *Eileen is in crisis. She has barricaded her room against invaders. She is asking to see her girlfriend. She calls her name over and over. She is denied. Sounds of breaking are heard. Custody staff lock her door.*

8:45-9:00 *Custody calls another friend to speak with Eileen. The friend asks for the door to be unlocked ensuring that no harm will come to her. Custody refuses (Eileen has one isolated incident of assault on a prisoner). C.X.B. stated "I have to see to the safety of my officers". The friend attempts to calm Eileen through the door.9:00-9:15 Eileen breaks a glass and slashes both sides of her throat, very deeply. Guards call for assistance and equipment. They cuff her hands behind her back and shackle her legs. She is told to walk and passes out in the tunnel. A stretcher is brought and she is carried into segregation up two flights of stairs. A nurse is brought into segregation and realizes she needs prompt medical attention. Eileen is taken to the hospi-tal area. The nurse cannot treat her and calls in a doctor. Eileen is given no pain killers. She is held down on one arm by C.X.B. On the other side by C.X.R. and her legs by a male C.X. staff.*

9:40-10:40 *It takes about 30 minutes for a doctor to arrive... He calls an ambulance.*

10:40-11:20 *Ambulance arrives and Eileen is treated inside the ambulance for about 30-minutes and then taken to outside hospital... 10:30 The range is locked down for the night.*

Tuesday, March 8 *Eileen has been returned to P4W hospital in the early morning. She is transferred to segregation later in the morning...*

Thursday, March 10 *Seen in segration. Eileen is still disoriented.*

At no time during this crisis was there any attempt to ease the concern of the population. The rumours spread quickly. Vivid accounts of her throat hanging down, on the bloody hall way, the horror. I thought she might be dead...

This was the second slashing on March 7, 1988. Some of us slept very little that night. Many of us prayed. This is the fifth violent incident in this building since the beginning of 1988. In 67 days, we have seen two prisoners denied protection and suffer assaults, we have seen three slashings, all due in part to inappropriate decisions made by senior custody staff. We have suffered a six day lock down and currently are weighted down by a record number of "bogus" charges ensuring a high degree of tension.

The population in this building have been reclassified under the new security classification matrix and the majority—approximately 63%—are medium security, 25% are minimum security and less than 12% are maximum security. Yet high security measures are implemented at every turn. The reasons given for lack of access to programs is security. Outside contractors decry

the security hassles. Every road to programming can be blocked at ease with a disciplinary charge.

The 18 foot high wall and the 2, 592 cell bars serve as reminders that indeed this is a high security prison... But these reminders pale beside the mindset of the security decision made for the 112 prisoners occupying this space. There seems to be no emergency deemed first medical. Every incident is deemed security first... The quickness to use force, to threaten, to charge, to segregate is demonstrated in the absolute example of a young woman who gashed her neck in a life threatening way and immediately was cuffed shackled and taken to segregation...

Segregation at P4W still has no hot water, cells have no flooring, only concrete, toilets are rusted out and putrid, bars are painted black in keeping with the punishment theme. The psychological damage done to the women in segregation is beyond the punishment of the prison sentence, the separation from one's family. It is straight torture for any human person to be subject to cages such as these.

Eileen is a native woman. But there are other women in the Prison for Women who have also experienced the horror of slashing their bodies in order to focus the pain of enduring imprisonment, in many cases thousands of miles away from their families and homes. It is not only Native women who today in Canada endure the rigors of solitary confinement.

In 1842, over 140 years ago, Charles Dickens had this to say about that experience:

I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body; and because its ghastly signs and tokens are not so palpable to the eyes and sense of touch as scars upon the flesh, because its wounds are not on the surface and it extorts few cries that human ears can hear; therefore I denounce it as a secret punishment which slumbering humanity is not roused to stay.

The Universal Declaration, Article 5 provides that "No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment". Eileen Young can take little comfort in the protection of Article 5. Neither she nor her sisters and brothers in solitary confinement across this country. They have no cause for celebrating the 40th anniversary of the Universal Declaration.

I would like to read a second letter I received from the Native Sisterhood at the prison for Women.

The desecration of Janice Neaudorf's prayer bundle has been one of the heartbreak and hurt to all Native women in Kingston Prison for Women. On May 3, 1988, the residents on 'A' range where 97% of the Native population resides went through strip searches and cell searches... Janice's sacred medicines and artifacts such as sweet-grass, wiki root and sage are kept in a wooden box. This box has her Indian name on top of it. The box is beautifully hand made with a feather carved on top of it with delicate closure fixtures and a tiny feather turn button which keeps the lid closed... She discovered the box broken in half, the hinges were ripped right off the box. Ashes from

the burnt sweet-grass must have been thrown in the garbage because they were still on top of the garbage can in the cell... These actions by security staff is a direct action of hatred, direct action of racism against Native people, against Janice Neaudorf and against all Native women in prison. The Native Sisterhood protests the violation of the prayer bundle, we protest this violence and protest these acts of racism and discrimination. We are hurt by the ongoing attacks to our persons... but we are not broken.

Article 18 of the Universal Declaration provides that "Everyone has the right to freedom of... religion, this right includes freedom... to manifest [her] religion ... in worship and observance". Janice Neaudorf can take little comfort in the protection of article 18. Janice Neaudorf and the Native sisters in Kingston Prison for Women have no cause for celebrating the 40th anniversary of the Universal Declaration.

I don't know Eileen or Janice other than through the words in these terrible letters, but I do know and I have sat with other Canadian prisoners, both men and women who have slashed themselves, who have been driven quite mad in solitary and I have known people who reached that point in their lives where they let the light in their eyes go out. The inhumanity, the arbitrariness, the absence of anything which we on the outside would recognize as justice is a continuing feature of life in Canadian prisons. These abuses and the strategies to change them, are classic examples of human rights issues and our strategies are very much geared to redress them at the level of individual human rights. We know that in dealing with the problems of abuse of authority in prisons, we have to entrench in law and legislation procedures and principles which reflect justice. We have to make sure the courts are prepared to enforce those rules, we have to make sure the legal profession is prepared to stand by and extend its mandate to people behind prison walls. The public and human rights groups have an important role here—to insist upon their rights to know and monitor what happens inside prison walls. That becomes very important in this particular time in our history where the mood is toward greater repression, where more people are being placed in prison for longer periods of time. It is important that Human Rights organizations, such as yours, stand together and point to the terrible cost and tragedy of using the prisons the way we do in this country.

Now Eileen and Janice are not just prisoners, they are also Native prisoners and as the letter from the Native Sisterhood indicates, while the desecration of Janice's prayer bundle could be approached conventionally as an example of the abuse of an individual's right to practice her religion, Native prisoners view it as more than that, they view it as an assault on the collective rights of Native people, they view it as an example of systematic racism.

Nor is it the only example of systematic racism in the criminal justice system; 13% of the prisoners in the Prison for Women are Native prisoners, while Native people represent only 2% of the population of Canada. In some provincial prisons the figures are far worse. A study done in Saskatchewan a few years ago showed that the chances of a young Native boy of 16 ending up in prison before he was 25 was 70%. For Native people, prison has become the

promise of a "just society" which high school and university represents for the rest of us.

Addressing the issue of the human rights at the individual level, in taking steps to prevent the abuse of authority, will not change the over-representation of Native people in Canadian prisons. Nor is it sufficient to say the reason why there are so many Native people in prisons is because they are underprivileged and poor and we all know there is a correlation between lack of economic opportunity and criminality. The poverty of Native communities has resulted from a particular historical process—the process of colonialism. It is important to understand that process because in its reversal lies the real solution to the statistics and behind the statistics to the tragedy revealed in the letters from the Prison for Women.

In the Canadian context the process of colonianism, with the advance first of the agricultural and then the industrial frontier, has left Native people in many parts of the country dispossessed of all but the remnants of what was their homelands. That process, superintendented by missionnaries and Indian agents armed with the power of the law, has systematically undermined the foundations of many Native communities. The Native people of Canada have over the course of the last centuries been moved to the margins of their own territories and of our just society .

Crimes of violence, alcoholism and the suicide of young Native people are linked to the process dispossession, the process of colonialization. The reversal of that process requires the recognition of the collective rights of Native people to the lands and resources upon which their distinctive societies and economics are integrally related and of their rights to determine the shape and nature of their own future. The recognition of those collective rights is directly linked to the lives and futures of women like Janice and Eileen in the Prison for Women.

Thinking about collective rights, the collective rights of Native people, as opposed to thinking about individual human rights such as we have in the charter, such as we have in the Universal Declaration, seems to be a new agenda for human rights activists. This is particularly so in British Columbia, where ever since the first days of Confederation, the governments of the day, whatever their political stripes, have continuously refused to acknowledge that the Native people had any collective rights. It comes to many as a surprise that the idea of collective rights has in fact a very deep and long tradition. It is important to understand the deep historical and intellectual roots of the collective rights of Aboriginal peoples because with that understanding it is possible to appreciate what is happening in British Columbia, and in other parts of Canada and the rest of the world today.

We must go all the way back to the very earliest days, when Europeans came to the Americas, to find the roots of collective rights. In the sixteenth century, distinguished jurists debated before the Court of Spain the question of the rights of the Indians of Central and South America. Fancisco de Vitoria, one of the founders of International Law, affirmed that the Indians, though not Christians, were entitled to enjoy civil or political rights and were true owners

of their lands. In 1539, Pope Paul III issued the Papal Bull proclaiming that "Indians are truly men... they may and should freely and legitimately enjoy their liberty and the possession of their property;... should the contrary happen, it shall be null and of no effect". These sentiments were reflected in the Spanish Law of the Indies. When we roll back the historical process and come to what is now North America, we find that the foundations of European settlement on the shores of North America were made on the basis of recognition of the fundamental principle that the rights of Native people to their homelands and their rights to political integrity within those homelands could not be changed except with Native consent. That consent was expressed through the protocol of treaty-making. The treaty-making process lay and lies as foundations of European civilization in North America.

Now most of us when we think of treaty-making, think of it almost as a sham, as a mockery of any kind of real negociation. It's important to understand that the original treaty-making which took place in North America was anything but a sham, and it's important to understand that the terms under which it took place were in large measure dictated by Indian nations themselves.

I want to share with you what is in fact the paradigm of treaty-making in the 17th and 18th centuries, that is the treaty-making between the American colonies of what is now United States and parts of Canada and the Six Nations of the Iroquois Confederacy. We are used to thinking of empires as being English and French. The first empire in North America was an Indian empire. The Iroquois controlled a vast area and entered into military alliances and trade partnerships with many other Indian nations and they were indeed a formidable force. The early treaty-making which took place in North America between the Iroquois and the European colonizers observed the diplomatic language and conventions of the Iroquois. The Iroquois treaty-making goes under the general name of the "Covenant Chain" Treaties. The Covenant Chain represented for the Iroquois the nature of their relationship with the Europeans; it represented their willingness to link their nation's destinies with Europeans; it represented their willingness to enter into mutually binding covenants with the Europeans for the mutual recognition of each other's territorial and political integrity. It was, if you like, a paradigm of confederation. We all know that in 1763, the struggle for power between the British and the French came to an end with the British victory. What we don't generally know as Canadians, those of us who are non-Native, is that British control of North America was achieved in 1763 because of the British willingness to accept as bedrock principles, the recognition of the collective rights of Native people. The Royal Proclamation of 1763 entrenched the principle that the territories belonging to the Indian nations, could not be acquired except by treaty, except by Indian consent and that any changes in the political relationships between the Indian nations and the British could not take place witout Indian consent. Those principles that lay at the heart of the Covenant Chain were the condition precedent for Indian participation as allies in the war with France. Without the recognition of these principles the outcome of the struggle for imperial domination in North America would have been very different. The Iroquois were in the

position in terms of their diplomatic and military abilities to compel adherence to those fundamental principles. It is very important to realize that the recognition of the collective rights of Native people was a foundation stone, cementing as it were, what we now know as Canada.

The concept of Aboriginal rights to lands, Aboriginal rights to self-government was also something which occupied the attention of courts in the 19th century. In the series of cases before the U.S. Supreme Court, the Court sought to identify the fundamental principles of justice underlying the North American experience as between Europeans and the Indian nations. In a series of judments, the Supreme Court affirmed the rights of Native people to their own territories, affirmed that those territories could not be taken without treaties, without their consent and while characterizing Indian Nations as being in a state of "protection" with the European nations, it recognized their rights to internal self-government, their rights to jurisdiction within their territories.

Now that was all in place in the law 150 years ago. What has happened from that time is that Aboriginal rights has gone into a state of eclipse and I want to explain why it went into that state, because in many ways, the state of eclipse reflects the progress of colonialism in North America. Starting in the19th century, fundamental changes took place in the way Indian Native people were conceived. The early literature and the early treaty negociations are full of references to Indian nations as being the equal of European civilizations. In the 19th century, a major transformation took place in which the Enlightenment philosophy of human equality was replaced with Darwinian theories of evolution, a view of the progressive nature of history and the superior destiny of some peoples and nations over others. This was a perceived fitness and inevitability that Indian nations would go in to a state of eclipse as they became incorporated and assimilated into the mainstream of "civilization". It was inevitable that they should become farmers not hunters. It was inevitable and appropriate that they should become Christians instead of adhering to shamanism and holistic spirituality. It was inevitable and apporpriate that they should become individualistic instead of maintaining their communal institutions. It was inevitable and appropriate that their tribal holdings should be individualized, that collective rights should give way to individual property interests and their collective participation in tribal governments should give way to their participation as individuals in nation states not of their own making. It was to facilitate this process that laws were passed, that the original theories of collective rights were undermined, that colonial governments assumed that they had the legitimate right to interfere in tribal governments. Indian agents were given the rights to depose Indian chiefs; tribal holdings became subject to individual allotment; institutions fundamental to Native societies, such as the Sun Dance and the Potlatch, were placed under the prohibition of the criminal law. There was an attempt to systematically undermine the very foundations of Native communities. That process took place throughout the balance of the 19th century and it continued to take place well into the 20th century. In the minds of many Native people it is still taking place.

The Universal Declaration of Human rights came at a time when just twenty years before in Canada, legislation was passed making it an offense, punish-

able by imprisonment, to raise money for the purpose of pursuing Indian land claims. The idea that Indian people could have collective rights had so far disappeared from Canadian consciousness that it was thought appropriate to prohibit the very attempt to assert those rights. It is no wonder, therefore, that generations of lawyers went through law school without any knowledge that there was such a thing as aboriginal rights, with no knowledge of Vitoria in the 16th century, with no knowledge of the Iroquois Covenant Chain of the 17th and 18th centuries, with no knowledge of the decisions of the Chief Justice of the Supreme Court in the 19th century and with no knowledge of the extent to which Canada had engaged in systematic racism of the most blatant kind.

Into this picture, we then find the proclamation of the Universal Declaration. It asserts that our common humanity endows us with individual rights. It's also important to realize that the Universal Declaration was part of a whole initiative associated with the foundation of the United Nations. Part of that initiative was bringing an end to colonization, particularly in Africa. A significant part of the United Nation's Charter is devoted to speeding up the works started by the League of nations after the First World War, in which there was placed a "sacred trust of civilisation" on colonizing countries to bring an end to their colonization of third world countries and restore to those they had colonized the rights to self-determination. Those rights were further entrenched in the UN Charter. A process to speed up de-colonization was put in place.

It would seem, therefore, that the scene was set for a returning to the roots of the original collective rights of Native peoples, not only in Canada, but other parts of the world. Unfortunately this was not to take place quite so quickly. The Universal Declaration evolves from mainstream liberal ideology and it is directed to the protection of individual human rights. It is not directed towards the collective rights of indigenous peoples. The initiatives of the United Nations have been directed to efforts such as the elimination of racial discrimination measured against a standard of quality before the law. It is a noble aim, it is a noble aspiration, one to which most of the people in this room subscribe. But the recognition of equality has to be measured against a standard of equality. We are now just learning that women do not wish necessarily to subscribe to a male biography as their standard of equality. The rights of Native people when they are assessed in the context of equality also tend to be measured against the standards of the dominant non-Native society. Let me just give you an example: The Convention on the Elimination of all Forms of Racial Discrimination (1965) provide that:

> States parties shall, when the cicumstances 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 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 of the different racial groups, after the objectives for which they were taken have been achieved.

In other words, you adopt special measures for Native people (because they are unequal) until they are like us then there is no need for special measures

because they are then equal. The distinctiveness of Native societies is not protected by this approach of recognizing individual human rights. The International Labour Organization has tried to grapple with recognition of the rights of indigenous peoples, but listen to how Convention, ILO 107 reads.

The title is the Protection and Integration of Indigenous and Other Tribal and Semi-tribal Minorities in Independent Countries. Its introductory article provides:

> Governments shall have the primary responsibility for developing coordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.

For the last 150 years, "progressive integration" has been the very thing which has undermined the collectivities of indigenous peoples. It was not out of hatred which missionaries sought to convert, it was not out of hatred that Indians were placed on small reserves and given the tools of agricultures and lessons of education. It was out of the sense that this was part of the inevitable progressive integration of uncivilized people into the pale of civilization. And so it is not surprising that Native groups had great difficulty in celebrating ILO 107 and to the credit of the International Labour Organization, it is now drafting a new Covenant which more appropriately reflects the collective aspirations of native people.

What of the other part of the United Nations initiatives in terms of the decolonization process and International Covenants recognizing rights to self-determination? The Native Peoples of Canada, the Maories of New Zealand, the Aboriginal of Australia, the Sami of Scandinavia, the Indians of Central and South America, all thought perhaps in the covenants recognizing self-determination lay the seeds for a realization of their collective aspirations. What happened however, was that the self-determination convenants were restrictively interpreted by some of the new nation states that had emerged from decolonization. African and South American nations, in particular were concerned that the recognition of the right of self-determination for tribal groups within their boundaries would result in their dismemberment. They saw the argument made by some European countries, for example Belgium, that all peoples were entitled to the right of self-determination as a way for the former colonial countries who had lost their colonies to dismantle them and to render the new African countries impotent as members of the world community. It was in the interest of countries like Canada, the United States, Australia and New Zealand to agree with the theory that self-determination only applied to overseas colonies because it meant that indigenous populations within their own boundaries also would not be protected by the covenants of self-determination. What developed was called the "Blue-Water" theory to self-original country, then you have a right to self-determination, but if you are landlocked, if you are trapped within the boundaries of the colonizers, you don't have the same rights. So the people who have been internally colonized, the Aboriginal peoples of Canada and other Aboriginal peoples of the former British Colonies of Australia, and New Zealand and Indians of the U.S. and Central and South America were excluded from the United Nations' mandate and the process of decolonisation.

Now this has not been the first time that indigenous people have found that their access to what is supposed to be open forum has been closed to them. It should be a source of national pride to realize that Canadian Native people have played a very significant role on the international scene in seeking to make self-determination a reality for all indigenous people. George Manual, whom many of you know, was one of the founders and the first president of the World Council of Indigenous Peoples which held its first meeting in 1975 in Port Alberni. This was a major step foward in which indigenous peoples from around the world came together and formed an organization designed to lobby at the international level for recognition of the right to self-determination for indigenous peoples. The World Council has done pioneering work in drafting what is hoped will become an international covenant recognizing the collective rights of indigenous peoples in international law. There are now a number of Native groups who lobby in Geneva as Non-Gorvernment Organizations (NGO's) before the United Nations. They have formed, as it were, a new Covenant Chain with Aboriginal peoples around the world to try and bring pressure upon the world community.

It is important that we recognize that the colonization is not at an end. It may be coming to an end in Africa or at least in some part of Africa. But it is not just in South Africa where the progress has been arrested; in Canada and the United States, in Australia and New Zeland, colonization and the attitudes it spawned is deeply entrenched. If anyone has any doubts about this, read Dara Culhane Speck's book *An Error in Judgment*. That book documents the nature of internal colonialism in Canada. It demonstrates the extent to which colonialism and racism are not ideas of the past, the extent to which they still live with us.

As a result of the work of groups as the World Council, there is now the emerging on the international scene a renaissance, meaning the rebirth of some of the original theories of Vitoria. The recognition that indigenous peoples indeed do have rights in their homelands. The recognition that they have not only the right to participate as individuals in free and equal societies, but that they also have the right to determine their own futures as distinct collectivities building on histories far deeper than our English and French colonial roots in North America.

It is not only on the international scene where this effort is taking place. The Gitksan and Wet'suwet'en case before Supreme Court of British Columbia is a very significant event not just in the history of the Gitksan and Wet'suwet'en nations, but in the history of Native peoples all around the world because it seeks to go to the roots of Native rights. It is not simply a case designed by lawyers; it is not simply an elusive celebration of the mind in terms of the law; it is an attempt to reflect the struggle of Native people to decolonize. It is an attempt to ask a Canadian court to use the law to decolonize itself. It is an attempt to assert, or rather reassert, the rights which the Gitksan and Wet'suwet'en had never given up, their rights to their homelands, their rights to their ownership and their authority over those homelands.

The case also seeks to bring about a new form of the Covenant Chain. It represents an attempt to start a process whereby, as a result of court ruling,

British Columbia and Canada will be forced to enter into a new Covenant Chain with the Gitskan and Wet'suwet'en and with other Indian nations in British Columbia. It is an attempt to be radical in the true sense of the word, to go back to the roots, to reassert fundamental principles which should organize the relationships of a truly just society, a truly equal society which does not require Native peoples to measure up to a non-Native mirror of equality but recognizes and celebrates Native differences and diversities.

What does all this mean to Eileen and Janice sitting in the segregation cells in the Prison for Women? Can they find any comfort in the land claims trial? In fact the kind of work which the Native Sisterhood in the Prison fo Women is doing, the work which Native Brotherhoods and Sisterhoods across the country are doing in prisons reflects their attempts to decolonize their experience. They suffer the effects of that experience worst of all. The work of these Native prisoners groups is their struggle to reassert their collective identity. They have used in particular the common spirituality which links many Native religions. They are trying also in their own way to return to their roots. They also have tried to make new Covenant Chains, both with themselves in the prisons, and with members of Native communities outside of the prisons and they are seeking to regain for themselves a sense of dignity, a sense of collective well-being, something which will guide them through the experience of being in prison.

But of course, thas is not enough. When Janice and Eileen come out of prison and hopefully they will come out of prison, where will they go? Unless they can return to communities which are strong and self-reliant, with sufficient economic resources to sustain them and with the political authority to chart their own destinity within the framework of Canadian confederation, their freedom will be very short lived. Despair on the outside may very well replace the despair they now experience on the inside. And that is why, ultimately, it is the recognition of the collective rights of Aboriginal peoples which is linked to destinities of peoples like Eileen and Janice locked away in the deepest recesses of our penitentiaries.

Now what does this mean for other groups who are seeking to struggle for the recognition of human rights? It certainly does not mean that the struggle based upon the Universal Declaration—the struggle based upon the recognition of individual human rights—should take a back seat. What it does mean, however, is that in your struggle, you have to form your own Covenant Chains. You have to link up with Native groups, you have to support and celebrate, not simply the Universal Declaration, but you have to support and celebrate the struggle of the Native people to obtain recognition of their collective rights. Because on that hinges the futures lives of peoples like Janice, people like Eileen. If we can join together and win this struggle, it will ensure that I won't read and I won't have to read to you letters like the ones from the Prison for Women. If we as Canadians can come to understand where superiorist assumptions and stereotypes has led us, and where the recognition of the rights of the indigenous peoples of the world can lead us, our children may indeed have something to celebrate.

Comments & Questions following Dr. Jackson's address:

Question: Commenting from his perspective as a specialist in Latin American Native Indian histories and movements, he said that the "internal colonization" which Native people are resisting is much more difficult to deal with than the "foreign colonization" of past eras. He mentioned that there is a new "Indian ideology" which has developed in the South American countries among the Andean Indian nations which is the equal of the other existing ideologies: Liberalism, Christianity, Marxism. It is also different from these other ideologies. In Central America also, Indians were following their own path, not necessarily in opposition to other movements, but different.

Jackson: One of the things the Gitksan and Wet'suwet'en are trying to do during their case is to expose the court to that "Indian ideology". There are enormous problems in this because it refuses to be compartmentalized into religion, philosophy, economics. One of the difficulties the court is experiencing is taking on an intellectual framework which permits it to hear that which the Indian people are saying. An example arose early in the trial when a question arose as to whether the elders, the custodians of the history, could relate the stories and the histories of their homeland—where they came from, the way their institutions were formed, the evolution their laws and the foundations of their society. The court questioned whether or not this was admissible. It was not written down and could only be admissible if it were the facts of history. These histories which related to events which were spiritually founded, the intervention of enormous spiritual forces which brought retribution on those who failed to show respect for the spirit animals. There was a long debate about whether or not that which Indian people hold to be the foundation of their society was really history or whether it was myth. Right at the beginning of the trial we encountered this view of Western history in which only men and women, and mainly men, move the world. The idea that there are animals, that "all our relations" includes "other than human" interventions, that was something that was so outside the pale of liberal thought that it could not possibly be the stuff of history. As Dr. Berdichewisky said, there is an Indian ideology and an Indian way of viewing the world and the Gitksan and Wet-suwet'en are struggling not simply to explain to the court the basis for their collective rights but also the philosophical and intellectual foundations for these rights.

Question: Do you agree that this is a new Indian ideology, or is it just that we are more receptive to listening to it?

Jackson: I'm not sure it's a new ideology. It's new to us, but its underpinnings are ancient. But it is an ideology which changes. One of the things we are also struggling with in the court case is to get over

the stereo-typed view of Indian Nations that somehow they are trapped, somehow they are static and caught in the past. These societies are enormously adaptive. They have their foundations, the bedbrock principles which underline their systems but they are adaptive and their intellectual traditions can adapt as well. So I think the answer to your question is that they are ancient and they are new, and as contemporary as the philosophical foundation of our own civilization.

Question: You said that it was the 19th century that changed attitudes towards Native peoples. What exactly changed and why?

Jackson: If you go back and look at the end of the 18th century we have the age of the so-called "enlightenment". We had the French Revolution and the American Revolution forged in a spirit of the rights of men to freedom, to dignity and to liberty and to a celebration of equality. In that time, equality was framed in many ways in terms of collective rights and it was therefore possible to give Indian nations equality within that framework. It was very much the advent of the Darwinian view of the world which replaced the idea that all nations were equal. We subscribed then to the notion, and it's something that we still live with, that all nations are not created equal. There is an "inevitability" that in fact some nations will wither. There was a horrifying speech of Andrew Jackson in the 1840's in the wake of a Supreme Court of the United States decision which confirmed the rights of the Cherokee to independence within their homeland, and denied the right of the State of Georgia to dismember their tribal territories and to outlaw their tribal assemblies. The State of Georgia, with the approval of the President of the United States, approved the refusal to recognize the Supreme Court decision. The Cherokees were in fact marched forcibly to Oklahoma. Ten thousand Cherokees died on what is called the "trial of tears". Andrew Jackson, commenting on that, used almost chil-ling language in which he says, "We shouldn't bemoan the fact that a race of Indians has in fact gone back to dust, it's appropriate in realizing the fullness of civilization, that nations will wither and die, one generation will succeed to the rights of another generation". That's how it was viewed; that it was appropriate that Europeans succeed the rights of the Native people. That is the ideology which lies at the heart of British Columbia. In the early days of British Columbia, those who forged Indian policy did so on the basis that the Indians had no rights to their lands because they made no use of them, they were "uncivilized", it was "right" and "proper" that we, who turn the soil to agriculture, and turn our lives to Christ, should inherit the earth. There was an intellectual justification for these acts of dispossession.

Question: Is there any historical evidence for a basis going back into International Law to support the case of the Indians of Canada?

Jackson: One of the problems is that International Law arose, in some ways, to legitimate European discovery and conquest, so-called, of North America. International lawyers have given justifications for what has been done, so it's often very difficult for Native people to find in International Law the seeds of their own justice. That's part of the struggle in the courts, one of the great difficulties in going to law when you are seeking to decolonize yourself when you have to resort to the laws of the colonizers. What we're trying to do in the Gitksan Wet'suwet'en case is to say, "If you go back far enough, if you look at a time when Indian Nations were powerfull, when first principles were developed on the basis of some reciprocity and equality, you find these principles which have contemporary relevance for a just society today and you, the court, should recognize and affirm them as a way to do justice to Native people.

Question: A general question about collective human right: What impact do you think it will have on the rest of society if collective rights are clained and recognized if that is a future trend? Would there be some implications for other minorities?

Jackson: I would like to defer my judgement, as this is a question which could be appropriately directed to some Native leaders tomorrow who are going to be leading presentations. They're people who could best answer you; if there is a recognition of the collective rights of Native people to their homelands, their rights to self-government, what does that mean to other Canadians? I don't have the answer to that, but they are the ones who would be able to provide those answers.

Comment: I believe that the message just given by Prof. Jackson was very informative and I recommend that it be given a wider distribution by means of publication so we can take this message back to our own communities, and we can make efforts to publish it in our own newspapers.