

THE CHALLENGE OF TIME AND RESPONSES OF INTERNATIONAL HUMAN RIGHTS LAW

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Introduction

There are some special characteristics, when we talk about truth-seeking and reconciliation to deal with injustice against Indigenous Peoples. These characteristics appear as big challenges, which are difficult to grapple with, even difficult to broach and discuss in public policy today, whether through the techniques of the relatively new field of truth, justice and reconciliation or otherwise. These challenges have one thing in common: they have to do with **time**.

Questions that have to do with truth and seeking truth have always been a philosophical, practical, political and profoundly existential challenge for human beings and societies. Adding the time element to truth seeking complicates the question further. The issue of time regarding Indigenous Peoples' access to justice is often different from other situations that truth, justice and reconciliation processes address, the latter referring, more often than not, to more recent circumstances that need to be addressed

The first of those time-related challenges relevant for Indigenous Peoples is **settler colonialism**,¹ the usually long time since Indigenous Peoples were first subjected to colonization and its devastating physical, cultural, economic, social and moral repercussions that last to-date.

1 According to the Settler Colonial Studies website: "Settler colonialism is a global and transnational phenomenon, and as much a thing of the past as a thing of the present. There is no such thing as neo-settler colonialism or post-settler colonialism because settler colonialism is a resilient formation that rarely ends. Not all migrants are settlers: settlers come to stay, and are founders of political orders who carry with them a distinct sovereign capacity. And settler colonialism is not colonialism: settlers want Indigenous people to vanish (but can make use of their labour before they are made to disappear). Sometimes settler colonial forms operate within colonial ones, sometimes they subvert them, sometimes they replace them. But even if colonialism and settler colonialism interpenetrate and overlap, they remain separate as they co-define each other."(<http://settlercolonialstudies.org>).

Moreover, as has been amply demonstrated in studies, including that of the UN Permanent Forum on Indigenous Issues, the “doctrine of discovery” is still having a negative impact on Indigenous Peoples’ human rights today.² And a major question is how can a settler society or descendants of settlers and Indigenous Peoples find just solutions for these injustices?

The second time-related challenge that affects access to justice is that many Indigenous Peoples were subjected to **genocide and genocidal practices** at the time of colonization, settlement or subjugation, and there are also contemporary cases where Indigenous Peoples are threatened with extinction. However, this topic is still almost a taboo word in current international and national public affairs *precisely* because of its contemporary implications, namely the fact that there are survivor Indigenous Peoples, who are making considerable claims within a post-World War II human rights framework. After all, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is the only international instrument, after the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute of the International Criminal Court that mentions genocide.³ In addition, the UNDRIP is the international instrument that contains the most extensive recognition of cultural rights, as one of the remedial measures for genocide sustained by Indigenous Peoples.⁴

Although the formal international legal definition of “genocide” is contained in the 1948 Anti-Genocide Convention,⁵ its subtle

2 Tonya Gonnella Frichner, Study on the Impact on Indigenous Peoples of the International Legal construct known as the Doctrine of Discovery, which has served as the Foundation of the Violation of their Human Rights, UN doc. E/C.19/2010/13, www.un.org/esa/socdev/unpffi/documents/E.C.19.2010.13%20EN.pdf

3 Article 7, paragraph 2, states that: “Indigenous Peoples have the collective right to live in freedom, peace and security as distinct Peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.”

4 See Elsa Stamatopoulou, “Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples”, in The UN Declaration on the Rights of Indigenous Peoples, 2011, Stephen Allen and Alexandra Xanthaki eds., Hart Publishing Ltd., Oxford and Portland, Oregon. pp 387–412.

5 Article 2 states: “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national,

understandings continue to be the object of debate and analysis today.⁶ Genocide committed against Indigenous Peoples has both to do with the past, but also with the present and the future. In addition to its well-known political sensitivity, the topic raises some time-related questions within a legal framework as far as genocides committed in the distant past are concerned: Can the definition of genocide as captured in an international treaty of 1948 apply to circumstances five centuries before that and, if so, with what legal implications?

The above-mentioned underlying time-related challenges regarding Indigenous Peoples' access to justice must be addressed in any truth, justice and reconciliation process.

In this brief essay, I will first explore what international human rights theory and practice can contribute to the time-related challenges mentioned above. Then I will try to bring out the dynamics that the experiences of the past 40 years have created, namely through the birth and growth of the international Indigenous Peoples' movement and its interface with the UN: what special conditions has this interface created that need to be taken into account in any Truth, Reconciliation and Justice process concerning Indigenous Peoples?

Social media networks of Indigenous Peoples almost daily reflect the profound desire of Indigenous Peoples to grapple with historical injustice as it is reflected in their lives today. Indigenous Peoples are also concerned about and examine critically the gestures of States to deal with such injustice, including truth and reconciliation processes, apologies and similar acts.

Apologies have been a trend in the past couple of decades. The United States, for example, adopted the Apology Bill (Public Law 103-150, signed by President Bill Clinton) on 28 November 1993, to

ethnical, racial or religious group, as such:

Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.”

⁶ See for example Bartolome Clavero, Genocide or Ethnocide, 1933–2007: How to make, unmake and remake law through words, Milano, Giuffrè Editore, 2008.

See also the essay of Alexandra Xanthaki in this volume.

acknowledge the 100th anniversary of the 17 January 1893 overthrow of the Kingdom of Hawai'i, and to offer an apology to Native Hawaiians on behalf of the United States.⁷ In Australia, the first day of the new Parliament in February 2008, saw the declaration of a formal apology to the Lost Generation of Aboriginal Peoples due to the boarding schools policies. This was followed by a similar apology in spring 2008 by Canada, again regarding boarding schools, and, in June 2008, Japan recognized the Ainu people of Hokaido as the Indigenous Peoples of the country. In 2010 came the apology of the government of El Salvador to the Indigenous Peoples there. Is apology enough? Is any form and process of apology enough?

One of the recent stories is about the little-known USA apology of 2010. In December 2012, an article became known entitled "Navajo man wants the nation to hear its official apology." The article essentially critiques the 2010 apology that the US Congress passed in paragraph 45 of the 2010 Defense Act. The apology says that the United States, acting through Congress recognizes that there have been years of official deprecations, ill-conceived policies, and the breaking of covenants by the federal government regarding Indian tribes; and apologizes on behalf of the people of the United States to all native peoples for the many instances of violence, maltreatment, and neglect inflicted on native peoples by citizens of the United States. Little publicity was given to this apology. And the Navajo person, Mark Charles, says in the article circulated "...I don't believe it's an accident that our people are marginalized. Our country is so undereducated in Native American history that most people don't even know why the country is apologizing."⁸

Another story was also circulated in December 2012. It is about a bill proposed in Australia,⁹ the article's title is "Anderson Says

7 See publication of Hawaiian Affairs, Apology Bill, also www.OHA.org

8 Moni Basu, CNN, Dec. 19th 2012, CNN – IN AMERICA, <http://inamerica.blogs.cnn.com/2012/12/19/native-american-apology/>

9 Indigenous Portal, <http://www.indigenousportal.com/Politics/Australia-Anderson-Says-Act-Of-Recognition-Is-An-Insult.html>, 6 December 2012. http://indigenousPeoplesissues.com/index.php?option=com_content&%3Bview=article&%3Bid=16878%3Aaustralia-anderson-says-act-of-recognition-is-an-insult&%3Bcatid=24%3Aaustralia-indigenous-Peoples&%3BItemid=57#.
UL_FLvZ5q_U.twitter

Act of Recognition Is An Insult.” Aboriginal rights campaigner, Michael Ghillar Anderson slams the Act of Recognition introduced by Minister Jenny Macklin as an absolute insult to First Nations Peoples. He says that Aboriginal people have been denied human rights since the invasion under military rules in 1788...He asks for the government to withdraw this Act of Recognition immediately and first consult Aboriginal people nationwide whether they approve of this type of action.”

According to the Study on Indigenous Peoples’ Access to Justice by the UN Expert Mechanism on the Rights of Indigenous Peoples, a particular dimension of access to justice relates to overcoming long-standing historical injustices and discrimination, including in relation to colonization and dispossession of Indigenous Peoples’ lands, territories and resources. Injustices of the past that remain without remedies constitute a continuing affront to the dignity of the group. This contributes to continued mistrust towards the perpetrators, especially when it is the State that claims authority over Indigenous Peoples as a result of that same historical wrong.¹⁰

In the same study the Expert Mechanism also stated that the right to a remedy and related procedural and substantive rights essential to securing a remedy are protected in a wide range of international instruments. The United Nations treaty bodies have found that, when providing for remedies, they should be adapted so as to take account of the special vulnerability of certain categories of persons. Moreover, without the provision of reparations, the duty to provide remedies has not been discharged. Reparations can take the form of restitution, rehabilitation and measures such as public apologies, public memorials, guarantees of non-repetition and changes in the relevant laws and practices and bringing to justice the perpetrators of human rights violations. The Expert Mechanism has recommended previously that, in providing redress to Indigenous Peoples for the negative impacts of State laws and policies, States should prioritize the views of indigenous Peoples on appropriate forms of redress.¹¹

10 UN doc.A/HRC/EMRIP/2013/2

11 A/HRC/21/53, para. 23.

Time, law and human rights norms and practice

How does international law, including human rights law, dealt with the issue of **time**? And what can be learned from this when it comes to truth, justice and reconciliation processes?

Law, including international law, as a social science, is indeed concerned with time. In some instances, law is concerned with history, for example about accountability for international crimes, or about reparations. One of the questions law has to grapple with is how far back is too far back to make a legal issue out of something? I mean a *legal* issue instead of a *political or social* issue. To be provocative, one can ask, isn't history made up of wars and conflicts, some people occupying the lands of others and all that this entails? How do we deal with the desire of society to lay conflict to rest? But, how can we lay conflict to rest if we don't grapple with old yet open wounds that injustice has inflicted on people, in this case, the Indigenous Peoples, and that underlie the fine grain of society, in this case, of both Indigenous and non-Indigenous society? How do we bring together, in a new spirit of justice, the descendants of the original oppressors with those of the originally oppressed? What is the role of law in all this? Hasn't the purpose of the law included the mission of dealing with the time element as well, i.e. saying when a dispute can no longer be litigated and has to stop so that social peace can ensue? Unless, of course, it's an imprescriptible crime, like genocide, a crime against humanity.

The issue of remedying historic injustices looms high in Indigenous Peoples' concerns and in their political and legal discourse. I would like to make special mention of cultural rights in this context. Groups claim cultural rights as collective rights vis-à-vis the majority society, with corresponding obligations, which are necessary to preserve and develop the cultural integrity of the group, often in order to remedy historical injustices.¹² The fact of past injustice does not necessarily lead to an automatic legal obligation to remedy all those injustices, but it is clear that from a moral, political and societal point of view, the

¹² Anaya finds that in the case of Indigenous Peoples, the norm of cultural integrity has developed remedial aspects in light of their historical and continuing vulnerability. S. James Anaya, *Indigenous Peoples in International Law*, 1996, Oxford University Press, New York/Oxford, p. 102.

State and society have to find mechanisms to deal with such injustices. In common criminal or civil cases, modern national legal systems normally provide for a statute of limitations, for example twenty years, so that beyond that time behavior that the law considers illegal will not hover in perpetuity as an unsolved matter in society. It is known that some traditional legal systems, including those of Indigenous Peoples, place strong emphasis on reconciliation and re-socialization so that the social fabric will be mended sooner rather than later.¹³

However, when it comes to *historic injustice vis-a-vis a group that continues to suffer discrimination* and disempowerment by the dominant society, the issue of dealing with such historical injustice gets even more complex. Questions arise as to what can constitute fair moral or material remedies that will restore social justice for the victimized/survivor group; how far back in history should a state go to deal with historic injustices; how to deal with the competing rights and needs of other populations, majority and minority, who did not commit these injustices, but are descendants of those who did, and their demands on public resources; what action should a “well-meaning state” take in various public areas simultaneously so that the effect will be harmonious and peaceful relations among various ethnic, racial, religious and linguistic communities in society.¹⁴

Since every society is unique in its history, culture and political circumstances, there do not seem to exist easy or homogenous answers to such questions. A key element, however, for the response is whether or not the descendants of groups to whom historic injustice

13 A good example is cited by the Special Rapporteur on human rights and fundamental freedoms of Indigenous Peoples regarding Greenland Home Rule (E/CN.4/2004, para 55). The Greenland the justice system, although based on the Danish system and administered by the Danish authorities, is responsive to the standards and values of Greenlandic society and traditional Inuit legal practice and customary law, with extensive lay participation. The judicial system differs significantly from the Danish system to which it is attached. Citizens are called to act as district judges, lay judges and defense counsel while local police handle the prosecuting function. In 1994, the Justice Review Commission recommended, inter alia, that local judges must have knowledge of the local community and its cultural values, and language skills in Greenlandic.

14 Elsa Stamatopoulou, Cultural Rights in International Law, Article 27 of the Universal Declaration of Human Rights and Beyond, Leiden/Boston, Martinus Nijhoff Publishers, 2007, pp 163–225.

was done continue or not to suffer discrimination, marginalization and disempowerment by the dominant society.

How does international human rights law and practice respond to historically-linked injustices?

One of the responses has been to create new norms that will help avoid repetition of atrocious acts and promote processes to rehabilitate the victims. The Convention on the Prevention and Punishment of the Crime of Genocide is one international instrument responding to this need. The list includes others such as the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the International Convention for the Protection of All Persons from Enforced Disappearance and last but not least the UN Declaration on the Rights of Indigenous Peoples.¹⁵

By examining international practice, we see that the UN Human Rights Council, and its predecessor, the Commission on Human Rights, has, over a long protracted period, and not without meeting political difficulty, tried to grapple with human rights violations that were “old”, i.e. that took place even before the creation of the United Nations or before establishment of those human rights bodies and their complaints procedures. An example was the issue of the Korean “comfort women,” who were subjected to slavery-like practices and prostitution by the Japanese army during WWII or with the human rights situation of Indigenous Peoples.¹⁶ The first approach of the Commission on Human Rights over decades was a more legalistic one, i.e. that the Commission on Human Rights could not deal with cases that took place before its establishment, before the establishment of its complaints procedures or before the establishment of the UN. However, we have seen an increased openness of the Commission

15 For the texts of international human rights instruments, see website of the Office of the UN High Commissioner for Human Rights, www.ohchr.org.

16 The first testimony at the CHR was in 1992 by the International Education Development (E/CN.4/1992/SR.30/Add.1). The Special Rapporteur on Violence against Women reported on the case in 1996 (see OHCHR website). Japan has not issued an apology.

on Human Rights and now the Human Rights Council to deal with “older” situations.

International legal thinking developed, however, by formulating and analyzing the *concept of continuing violations of human rights*, i.e. injustice that stems from far back, but the effects of which still continue in the present¹⁷. The Human Rights Committee that monitors the implementation of the International Covenant on Civil and Political Rights, has defined a continuing violation as an affirmation by act or by clear implication, of the previous violations of the State party.¹⁸

Another major normative concept that was devised was to promote *positive measures (positive action/affirmative action)*. For example, the Convention on the Elimination of All Forms of Racial Discrimination adopted in 1965, boldly recognizes positive measures to deal with past discrimination.

The third normative concept devised was *imprescriptibility for crimes against humanity and gross and systematic violations of human rights and humanitarian law*.

The fourth, both normative and policy-oriented, measure is the one on *truth commissions and transitional justice*.

At the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the issue of reparations occupied center stage at the negotiations. That moment was the boldest in terms of the recognition of past wrongs at a massive scale. The controversy had also to do with the fact that this became a major North/South conflict over the ills of colonization and slavery, with the North fearing major demands for reparations for colonialism and slavery. Finally, the text adopted condemned slavery and slave trade as an international crime and said that it should have always been viewed as such (implying that it was not viewed as such at the time of colonialism, also implicitly, saying that there is no justiciable legal demand, strictly speaking, that can be raised for reparations in a contemporary timeframe).

17 Before that, the International Law Commission had long debated and finally adopted a definition of a “continuing act”.

18 *Simunek vs. Czech Republic*, Case No. 516/1992, para. 6.4, fifty-fourth session.

The declaration at the World Conference made a pronouncement both about the past and about the present. Indigenous Peoples figured prominently in these texts.

The World Conference also addressed cultural rights eloquently, recommending policies on Indigenous Peoples, minorities, Afro descendants, migrants and Roma/Sinti/Travelers,¹⁹ in other words, groups that had suffered profoundly from racial discrimination, colonialism and slavery in the past.

Today considerable attention is being paid by the UN human rights system to righting the wrongs of the past, and certainly the increasing discussions at the UN Human Rights Council on impunity, transitional justice and truth and reconciliation commissions bear witness to this. The most recent action of the Human Rights Council is the establishment in 2011 of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.²⁰

A perusal of the website of OHCHR devoted to the Special Rapporteur contains a list of 22 “core international instruments relevant to the mandate”, and this demonstrates the solid normative framework that surrounds truth, justice and reconciliation processes from the point of view of human rights.

The international Indigenous Peoples movement and its interface with the UN: what results for past and present injustices?

How did the international Indigenous Peoples’ movement’s interface with the UN bring into relief the historical injustices that Indigenous Peoples sustained and what can this interface signify for truth, justice and reconciliation processes?

Stories of political and cultural resistance of Indigenous Peoples to colonialism, domination and exploitation abound, but these did not find resonance at the international level for a long time. In the post-World War II era, questions of ethnicity and minorities were viewed with suspicion.

19 See detailed account of the conference outcome in Chapter I.C above; the full text of the outcome appears in UN doc. A/CONF.189/12.

20 Human Rights Council resolution 18/7.

States changed their stand *vis-a-vis* Indigenous Peoples over the years. In the 1970s, when the issue of gross violations of human rights was brought up in the human rights bodies, States viewed this issue mostly as a humanitarian one, one of “kindness,” so to speak, to disappearing civilizations, in the process of assimilation. Anti-colonial values were predominant in the era of decolonization, the 1950s and 1960s, therefore this international ethic, in a certain sense, fed the guilt of States, of colonial States and their successors. One could, therefore, see some permissiveness on the part of governments in UN processes. States allowed the birth of exceptional, unprecedented and extensive participatory procedures for Indigenous Peoples—which, in turn, increased the numbers of Indigenous representatives at the UN as well as their overall political impact.

The adoption of UNDRIP in 2007 can be seen as a way that States and Indigenous Peoples try to mend the hurt of the past and seek constructive solutions for the future. In this context, it is “still ongoing work and the UN Declaration calls on us to work together.”²¹

The three main pillars of the Declaration should be integrated in truth, justice and reconciliation (TJR) processes regarding indigenous Peoples. Those 3 pillars are a) the right to self-determination, b) the right to lands, territories and resources and c) cultural rights. What do these pillars mean for truth, justice and reconciliation processes? As other articles in this collection discuss each of the three in detail, I will only outline their significance in brief:

- a. The right to self-determination: In terms of TJR processes this means that Indigenous Peoples will have to have ownership and be full partners around the table, with their own representatives, that any measures taken should be meaningful to Indigenous Peoples themselves, and should respect Indigenous Peoples’ right to self-determination.
- b. Indigenous Peoples’ cultural rights, including language, custom, traditional knowledge and traditional legal systems: in TJR processes, cultural rights of Indigenous

21 As stated by International Chief Wilton Littlechild during the Expert Seminar on Access to Justice for Indigenous Peoples, including Truth and Reconciliation Processes, Columbia University, New York, New York, 27 February to 1 March 2013.

Peoples should be addressed boldly, since cultural integrity is crucial for survival. I agree with James Anaya who finds that for Indigenous Peoples cultural integrity has developed remedial aspects in light of their historical and continuing vulnerability.

- c. The right to lands, territories and resources: In any TJR process, recognition of Indigenous Peoples' land rights should be dealt with as part of the concept of equality and non-discrimination.

Conclusion

In conclusion, in order to have good processes of truth-seeking, justice and reconciliation to deal with injustice against Indigenous Peoples given the complexities identified above, there are particular substantive, normative and strategic points to take into account. What are those three points?

- a. The historic aspect of injustice that goes far back into time and that is linked to settler colonialism, genocide, devastation, discrimination and their continuing legacies to-date;
- b. The creation and growth of a robust international Indigenous Peoples' movement and its productive interface with the UN, especially through human rights. This implies that Indigenous Peoples are particularly aware of human rights issues and the normative framework of the UN Declaration on the Rights of Indigenous Peoples and that any discussion of how to mend the grave injustices of the past will have to bring the Declaration to the table.
- c. The UNDRIP underpins three main areas that any TJR process must encompass: i) self-determination, which, among many things, implies that Indigenous Peoples should participate substantively through their own representative institutions in any TRJ process, so that such process can be effective; ii) discussion of lands, territories and resources, including fair redress, and iii) a broad array of cultural rights described in the Declaration, whose respect, protection and fulfillment would provide a significant response to such historic injustices.