



Minority Rights and Reconciliation in the Commonwealth

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Indigenous Peoples' Rights in the Commonwealth

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Introduction

This presentation is based on the findings of a three year research based advocacy programme which I have coordinated on Indigenous Rights in the Commonwealth, at the CPSU during 2001-2004.

Much of the information that this presentation is based upon was gathered during a series of visits to Geneva where I had the opportunity to attend the annual sessions of the United Nations (UN) Working Group on the Draft Declaration on the Rights of Indigenous peoples. The Working Group was entrusted with the task of achieving a consensus on the Declaration before the end of the International Decade of the World's Indigenous People (1995-2004), due to end this year.

During these sessions, I was able to analyse the process of consensus-building and examine the role played by Commonwealth member states in this process. In particular, I was in a position to witness the interventions made by different Commonwealth member states on the most critical Article of the Declaration, namely Article 3, dealing with the right to self-determination. The Working Group therefore provided an ideal forum in which to understand the position of different Commonwealth states on the issue of indigenous self-determination and collective indigenous rights in general. Moreover, the forum has enabled indigenous peoples to elaborate clearly what they consider self-determination to mean.

For Indigenous peoples the right to self-determination is the cornerstone of the Draft Declaration, underpinning their collective rights, without which many of the other articles of the Draft Declaration would have little meaning. It is from this right that many of their other rights flow.

However, a number of states remain unwilling to recognise the right of indigenous peoples to self-determination and Article 3 has proved to be one of the most difficult and sensitive issues of the Draft Declaration. Indeed, the failure of states to agree on the wording of Article 3 is threatening to unravel the entire process. It is the concept of collective indigenous rights, in particular

the right of self-determination, which is the biggest challenge to the adoption process. To date, only 2 of the 45 Articles of the Draft Declaration have been adopted.

At the forefront of those countries opposing the inclusion of the right to self-determination in the Draft Declaration, as currently drafted, are 3 Commonwealth countries, namely, Australia, Canada and the UK. Along with the US, Russia and China, this block of states is largely responsible for obstructing the adoption of the Draft Declaration.

Support for the right of indigenous self-determination at the Working Group is coming mainly from the Nordic States, in particular Norway, which is playing a mediating role in the negotiation process, and the Latin American States. Very few Commonwealth states have declared their unqualified support, notably Fiji and South Africa. Indeed, only a handful of Commonwealth countries are even participating in the discussions at the Working Group.

New Zealand has traditionally supported the right of indigenous peoples to self-determination at the Working Group and has recently found caught between Australia, Canada and the UK on one hand, and those states eager to see the Draft Declaration adopted on the other.

With the end of the International Decade imminent, there remains only one more session for states to reach a consensus on the thorny issue of Article 3, as well as the many other articles of the Draft Declaration which have not been accepted. It is clear that the Working Group will not be given a mandate to continue discussing the Draft Declaration after 2004, if significant progress is not made this year.

It is uncertain therefore whether the Declaration will be adopted within the framework of the Decade, and, if this is not the case, what the next step should be. This is the question that indigenous peoples, and those states that sincerely wish to see a Declaration on the Rights of Indigenous peoples accepted, have to address.

While the process of adopting the UN Draft Declaration is an important one, since the adoption of the Declaration will provide Indigenous peoples around the world with a mandate to take states parties to task if they fail to uphold the principles of the Declaration, it is of course just one aspect of a larger process taking place at the international, national and local level, by which Indigenous peoples are at last beginning to secure their rights.

There have been several significant international developments in the field of Indigenous rights over the past few years. These include: the establishment of the Working Group on the Rights of Indigenous People/ Communities in Africa in May 2001; the appointment of the United Nations Special Rapporteur on the Situation of the Human Rights of Indigenous peoples in July 2001; the World Conference against Racism (UNWCAR) Declaration and Plan of Action, Durban, August - September 2001 (which recognised discrimination against indigenous peoples); the first Permanent Forum on Indigenous Rights,

held in New York, 13th – 24th May 2002; and the World Summit on Sustainable Development (WSSD) Declaration and Plan of Action, Johannesburg, August-September 2002 (which recognised the critical role of indigenous peoples in sustainable development).

While the Draft Declaration, if and when it is adopted, will not be legally binding on states, it will nevertheless have great moral force and will provide minimum standards to guide states in their dealings with Indigenous peoples. It is imperative therefore to examine the rationale of those countries that are opposing the right to self-determination of indigenous peoples, including Australia, Canada and the UK.

However, I want to address a much broader and fundamental question, is the opposition demonstrated by Australia, Canada and the UK to indigenous self-determination and collective indigenous rights in general, reflective of a wider reluctance on the part of the Commonwealth association as a whole to acknowledge the rights of indigenous peoples, and if so why? In this presentation, I argue that the Commonwealth is lagging far behind current international thinking on this issue and that it is time that the association formally acknowledged the rights of its more than 150 million indigenous peoples.

Firstly, however, it is necessary to ask: what is indigenous self-determination?

What is indigenous self-determination?

The unqualified right to self-determination, set out in common Article 1 of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), is a basic principle of international law, and the foundation of the international human rights system.

Over the past two decades Indigenous peoples worldwide have been lobbying tirelessly to ensure that the right to self-determination, is applied uniformly and universally, i.e., to all 'peoples', including indigenous peoples.

Indigenous peoples have the same right of self-determination as other 'peoples', as is made clear in Article 3 of the Draft Declaration, which uses identical language to that used in common Article 1 of both the International Covenants:

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

Since the establishment of the UN Working Group on Indigenous peoples (WGIP) in 1982, Indigenous peoples have routinely asserted the collective dimension of their rights as 'peoples', as well as the crucial importance of identifying Indigenous peoples as 'peoples' in the work of the United Nations.

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Indigenous peoples see themselves as 'peoples', with distinct collective rights and distinct historical, political, social, cultural and spiritual identities that unite them. It is through the collective exercise of their right to self-determination that their languages, laws, values, customs, practices, traditions and institutions are maintained and manifest themselves. Their very identity as indigenous peoples is shaped by the dynamic balance between and linkage of their collective and individual rights. Exercise of their collective rights is not only critical to indigenous spirituality, but also to maintaining the inter-generational nature of all of their social, cultural, economic, and political rights. Indigenous peoples maintain that to omit or deny their collective rights in the Draft Declaration would serve to severely undermine their most basic rights and status, as well as their integrity as indigenous peoples. It would contribute to the dispossession, exploitation, cultural genocide and genocide of indigenous peoples.

For Indigenous peoples, self-determination is a pre-requisite for the exercise of their spiritual, social, cultural, economic and political rights, as well as their practical survival.

So, how is indigenous self-determination exercised?

How is indigenous self-determination exercised?

Part V11 of the Draft Declaration, which deals with 'Self-Government and Indigenous Laws', relates to the exercise of self-determination. Article 31 notes that as a form of self-determination, Indigenous peoples have the right to self-government in relation to their own affairs. These include culture, religion, education, media, health, housing, employment, social security, economic activities, land and resources management, environment and entry by non-members. Articles 32 to 36 affirm the rights of Indigenous peoples as follows:

- to determine their citizenship in accordance with their customs and traditions;
- to develop and maintain their institutional structures and (legal) juridical customs, procedures and practices;
- to determine the responsibilities of individuals to their communities;
- to maintain and develop relations and cooperation with other peoples across borders; and
- to the recognition and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors.

According to indigenous peoples there can be no qualification of self-determination. They argue that it would be unacceptable and discriminatory to

restrict Indigenous peoples' self-determination to internal self-determination only - this is the proposal being made by the US at the Working Group and which is being supported by some Commonwealth states, such as the UK. Although the vast majority of Indigenous peoples choose to implement their right through autonomy and self-government arrangements, the right cannot be limited *a priori* to such arrangements.

For the majority of Indigenous peoples, self-determination is not about separatism, but autonomy or self-government. In the exercise of the right to self-determination, few, if any, Indigenous peoples seek to dismember existing states. Instead, most take a functional approach, expressing a preference for recognition and constitutional reform within states, in order to develop indigenous political institutions and determine their development in accordance with their own values.

Indeed Article 45 of the Draft Declaration protects the territorial integrity of the state:

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

While there is no general agreement on the definition of 'self-determination' for Indigenous peoples, a useful working definition has been provided by the International Work Group for Indigenous Affairs (IWGIA). According to IWGIA, it means:

*The right to control over their institutions, territories, resources, social orders, and cultures without external domination or interference, and their right to establish their relationship with the dominant society and the state on the basis of consent.*¹

Indigenous peoples variously describe self-determination as a way to strengthen the capacity of Indigenous peoples to chart their economic, social, cultural and political destinies, to lessen conflict between Indigenous peoples and states, to promote peaceful co-existence, and to enable Indigenous peoples to bring about sustainable development.

So how might indigenous peoples' right to self-determination be recognised?

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Indigenous self-determination is about ensuring good democratic governance that requires responsiveness by the state and participation in the state, both planks in the Indigenous self-determination case and generally agreed by all governments as elements of good governance. The debate on Indigenous

¹ Howard Berman (1993), 'The Development of International Recognition of the Rights of Indigenous peoples', in Document 74, IWGIA and the Centre for Development Research, Copenhagen, reproduced in *Indigenous Affairs*, IWGIA, 4/01, p. 17.

self-determination at the United Nations is about how the balance can be struck between state or national self-determination and Indigenous self-determination, without over privileging the state, as has been the case since decolonisation. This new paradigm requires a big shift in thinking and policy-making.

Best practice

Some Commonwealth states have found ways of achieving this balance. On April 1st, 1999, a new and unconventional political entity called Nunavut came into being, according the Inuit the right of self-government, as part of a land rights settlement between the Inuit and the Canadian government. Canada's newest entity is carved out of the Northwest Territory, and is equipped with its own government. This is an expression of Indigenous self-government, and is a case of good practice from which other Commonwealth states could learn.

So why is indigenous self-determination resisted by so many Commonwealth countries?

Why is indigenous self-determination resisted by so many Commonwealth countries?

It is clear that many Commonwealth states are reluctant to acknowledge the right of Indigenous peoples to self-determination. This reluctance stems in part from a fear that recognition of the right of self-determination for Indigenous peoples could endorse secession. This could have implications for ethnic minorities claiming independence on the basis of self-determination (however, of the many Indigenous groups in the Commonwealth which are claiming the right to self-determination, only the Nagas in Northeast India, are claiming the right to secede from India).

Moreover, states are concerned that if the definition of Indigenous peoples were merely based on self-identification, as currently stated in Article 8 of the Draft Declaration, the principle of self-determination would become a blank cheque, thus enabling any group which sees itself as 'Indigenous' to claim Indigenous rights.

The reluctance of many Commonwealth states to engage in the deliberations on the issue of Indigenous self-determination at the UN also has to be due, in part, to the fact that many Commonwealth governments which came to power at independence have tended to stress cohesive nation-building, at the expense of the recognition of ethnic or other differences. They have also been committed to the retention of colonial boundaries which, particularly in Africa, had cut through the traditional territories of Indigenous and other ethnic groups.

But what are the particular reasons for Australia, Canada and the UK's opposition to the current language of Article 3 of the Draft Declaration and

why are they calling for a qualification of the rights of indigenous peoples to self-determination?

Australia

The case of Australia is particularly interesting, since it was the first state to support the unqualified inclusion of the principle of self-determination in the Draft Declaration. Indeed, the Australian government was at the forefront of the international community in recognising the right to self-determination of its Indigenous population. However, with the election of the Howard Liberal government in 1996, Australia's position on the right to self-determination at the Working Group changed dramatically. Since then, Australia has been categorically opposed to the inclusion of Article 3, as currently drafted.

Today, Australia is the most uncompromising of all governments on the issue of self-determination, arguing that for many people it implies the establishment of separate nations and separate laws. In other words, the Australian government is linking the right to self-determination strictly and only to a process of decolonisation.

Canada

The case of Canada is also intriguing. Canada traditionally opposed Indigenous rights reforms at the international level, lest they became precedents for Quebec separatism. However, in 1996, Canada did a u-turn and announced that it accepted a right of self-determination for indigenous peoples that respects the political, constitutional and territorial integrity of democratic states.

As far as Canada is concerned, the exercise of the right of self-determination involves negotiations between states and the various Indigenous peoples within those states to determine the political status of the peoples involved, and the means of pursuing their economic, social and cultural development. Canada's position on Article 3 is reflective of its domestic practice of negotiating agreements with its Indigenous peoples on land and self-government.

The position of **New Zealand** is similar to that of Canada's. It is also prepared to accept the inclusion of the right of self-determination for Indigenous peoples in the Declaration, if the meaning of the term is clearly elaborated in a manner consistent with New Zealand domestic understanding of the relationship between Māori and the Crown. In other words, New Zealand is willing to accept Article 3, if it implies the right to 'internal' self-determination and includes a respect for the territorial integrity of democratic states and their constitutional frameworks, specifically an existing treaty with an Indigenous people, which meets current international human rights standards.

According to New Zealand, the language of the Draft Declaration needs to be clarified to ensure consistency with the Treaty of Waitangi (1840) settlement

processes and policies, international understandings and domestic New Zealand law, before the government can accept it.

UK

The UK is particularly reluctant to recognise the concept of Indigenous collective rights on the grounds that this could challenge or override internationally recognised individual rights. Indeed, the UK is still reluctant to adopt the 's' when referring to 'indigenous peoples', preferring instead to speak of 'indigenous people'. The UK has been vocal in its opposition to Article 3 as currently drafted at the Working Group and is spearheading the demand for the right to indigenous self-determination to be qualified, and for Article 3 to be redrafted so that it refers to the right to internal self-determination only.

It is interesting to note that the UK, which does not have an Indigenous population (as defined by the Special Rapporteur for the United Nations Sub-Commission, José Martínez Cobo, 1986), is taking a much firmer line on the issue of Indigenous self-determination than those States with Indigenous populations, many of whom are working hard towards building a consensus on this issue at the UN Working Group.

It is difficult to understand why the UK is adopting this hard line position at the UN, when at home it has recognised forms of self-determination for the Irish, Scottish and Welsh, with the establishment of the Northern Ireland Assembly, Scottish Parliament, and the National Assembly for Wales in 1999.

Interestingly, the UK is currently in the process of revising its policy on indigenous rights, and over the past two years, the CPSU, along with other NGOs involved with indigenous rights in the UK, have been engaged in a consultation process with the FCO on the question of indigenous collective rights.

Unfinished business of decolonisation?

The reluctance on the part of many Commonwealth states to accept the right of indigenous self-determination is surprising given that the modern Commonwealth, originating mostly in the 1960s, with the independence of former colonies, has been built on the principle of the self-determination of peoples. Indeed, certain countries such as Tuvalu and Vanuatu in the Pacific, are in reality 'indigenous'. There was an element of luck in the colonisation and independence process, by which some groups came to have recognised statehood, while others became minority and often marginalised indigenous peoples within larger polities.

The CPSU maintains that recognition of the rights of indigenous peoples is part of the unfinished business of decolonisation. It is argued here, that the Commonwealth, which was founded on the principle of self-determination, has a particular responsibility to recognise and protect the right of Indigenous peoples to self-determination. Today, many of the fifty-four member states of

the Commonwealth, which were themselves the beneficiaries of the right to self-determination, are denying Indigenous peoples within their borders the right to self-determination.

The persistent refusal of many Commonwealth states to acknowledge the unqualified right of self-determination for Indigenous peoples has enormous negative consequences across a range of areas that directly affect the lives and well-being of Indigenous peoples from control over Indigenous land and resources to community involvement in the planning and delivery of health, welfare, and education services.

The Commonwealth and indigenous peoples

Current estimates put the number of indigenous peoples worldwide at more than 300 million people (approximately 7,000 indigenous societies or cultures) – five per cent of the global population (Centre for World Indigenous Studies (CWIS), 1999). A third of the worlds' indigenous peoples, approximately 150 million, live in the Commonwealth (85 million live in India alone).

Research conducted by the Commonwealth Policy Studies Unit's (CPSU) Indigenous Rights in the Commonwealth Project, reveals the extraordinary similarity of experiences of indigenous peoples across the Commonwealth. Wherever they may live, in an industrialised country or a developing one, in a rural or urban area, from the Aborigines and Torres Strait Islanders in Australia, to the Twa in Uganda, indigenous peoples routinely suffer from social, economic and political marginalisation, discrimination, and poverty.

The recently published Report of the Commonwealth Expert Group on Development and Democracy, entitled 'Making Democracy Work for Pro-Poor Development', prepared for the consideration of Commonwealth Heads at their meeting in Abuja, 2003, recognised that indigenous peoples in the Commonwealth "frequently suffer discrimination, intolerance and prejudice, and violation of their land rights."

Since the early 1980s, the situation of indigenous peoples and the enjoyment of their human rights has become a key issue in the international arena. This development is reflected in the different initiatives taken by inter-governmental and regional associations to address their concerns, such as the UN, the European Union, the African Union, the Caribbean Community (CARICOM), and the Organisation of American States.

Inter-governmental Commonwealth

However, the Commonwealth, by contrast with other regional and inter-governmental associations, still has no official position on the rights of indigenous peoples. The Human Rights Unit (HRU) at the Commonwealth Secretariat has stated informally that the Commonwealth has no consensus or policy as such on indigenous rights, and that it is left up to each government to respond to indigenous people's concerns in the context of their own national policies. It is expected, of course, that such policies would be

consistent with the Commonwealth's fundamental political values and international human rights standards. While a number of countries have developed individually specific policies to recognise and protect their indigenous peoples, the reality is that indigenous peoples' rights are routinely being ignored and violated by many Commonwealth member states.

To date, there is no official Commonwealth publication descriptive of the social, economic, political and cultural status of indigenous peoples in member states (there has been no attempt on the part of any division within the Commonwealth Secretariat to collect and collate data on indigenous peoples), and there is no administrative mechanism within the Secretariat to channel specific enquiries, advocacy or support relating to indigenous peoples.

Commonwealth Declarations

The key statement on indigenous issues by Heads of Government was made at the Lusaka CHOGM, 1979. In the Declaration of the Commonwealth on Racism and Racial Prejudice, they stated:

We recognise that the history of the Commonwealth and its diversity require that special attention be paid to the problems of indigenous minorities...

We agree that special measures may in particular circumstances be required to advance the development of disadvantaged groups in society. We recognise that the effects of colonialism or racism in the past may make desirable special provisions for the social and economic enhancement of indigenous populations.

Since 1979, Commonwealth Heads have not addressed the issue of indigenous rights at any of their biennial summits. The Harare Commonwealth Declaration, 1991, which saw a commitment by member states to protecting and promoting human rights, made no reference to the rights of indigenous peoples.

While in the Cyprus CHOGM Communiqué, 1993, Commonwealth Heads "expressed their appreciation for the proclamation of 1993 as the International Year of the World's Indigenous People", there was no follow up on this issue. Moreover, Commonwealth Heads gave no declaratory support to the International Decade at the Millbrook CHOGM, 1995. The Aso Rock Declaration, Abuja CHOGM, 2003, was also silent on the issue of indigenous peoples.

The Peoples' Commonwealth

The unofficial Commonwealth or the Peoples' Commonwealth, by contrast, has over the past decade, placed the issue of the rights of indigenous peoples firmly on its agenda. This is partly due to the extensive lobbying of

Commonwealth Civil Society Organisations by the Commonwealth Association of Indigenous peoples (CAIP), established in 1999.

The Civil Society Meeting Statement, which was issued in Abuja, Nigeria, December 3rd, following the three-day meeting of representatives of civil society organisations from across the Commonwealth, included a paragraph on 'The rights of Indigenous peoples and the right to Self-determination', as follows:

In this, the penultimate year of the UN Decade for Indigenous peoples, we ask the Commonwealth to acknowledge that many Indigenous peoples in the Commonwealth continue to be significantly disadvantaged and that special measures should be encouraged to overcome the continuing effects of racism, colonialism, or globalisation, with their full participation and consent. Further, we urge the establishment of mechanisms to guarantee the rights to self-determination of people in the overseas territories of member countries.

Domestic Law

At the country level the position on indigenous rights in the Commonwealth is kaleidoscopic.

Five Commonwealth countries, namely Bangladesh, Ghana, India, Malawi and Pakistan have signed the International Labour Organisation's (ILO) Convention No. 107 on Indigenous and Tribal Populations (1957). However, only Fiji and Dominica among Commonwealth countries have signed the much stronger ILO Convention 169 (Sri Lanka is presently considering accession to ILO 169).

Few countries in the Commonwealth have specific ministries or departments responsible for indigenous affairs, these include; Australia, Bangladesh, Canada, Dominica, Fiji, Guyana, India, Malaysia and New Zealand.

Few Commonwealth member states provide specific constitutional or legislative guarantees to indigenous peoples, fewer still have provisions for land claims agreements with indigenous peoples, and few measures have been taken by Commonwealth member states to provide for indigenous participation and representation in national decision-making processes.

Conclusion and Recommendations

The Indigenous Rights in the Commonwealth Project, which concludes in March 2004, was designed to encourage the Commonwealth to include in its human rights programme a commitment to Indigenous rights. The Project carried out research on Indigenous rights issues in twenty Commonwealth countries and, in association with Indigenous peoples and organisations in the Commonwealth, lobbied the association to address the needs of its Indigenous peoples.

As part of its bid to urge the Commonwealth to accept its responsibility to protect and promote the rights of Indigenous peoples, the Project prepared a Memorandum to the Commonwealth Heads of Government Meeting, Abuja, Nigeria, in December 2003.

A set of Recommendations, drafted in consultation with Indigenous peoples and organisations in the Commonwealth was also submitted to the Commonwealth Heads of Government Meeting.

In this Memorandum, Commonwealth member states were urged to recognise Indigenous peoples as 'peoples' with the right to freely determine their own future, one free from discrimination and where all peoples are equal. In this context, they were called upon to endorse the right of Indigenous peoples to self-determination. The CPSU called on Commonwealth member states to adopt Article 3 of the Draft Declaration, as currently formulated, and ensure that the Draft Declaration is finalised this year.

Unfortunately, Commonwealth Heads of State did not make a commitment to Indigenous rights at the Abuja summit.

However, it is unlikely that the Commonwealth can continue to turn a blind eye to the serious economic, social, and political marginalisation, discrimination and poverty, faced by its indigenous peoples. The CPSU urges Commonwealth Heads of Government to make a commitment to the promotion and protection of the rights of indigenous peoples by including a statement of support in their 2005 Commonwealth Declaration, taking note of recent developments at the UN and at other international and regional fora.

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