The Rule of *Terra Nullius* and the Impotence of International Human Rights for Indigenous Peoples

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The Dispossession of Indigenous Peoples

Over the years I have met many indigenous peoples in places as diverse as Canada, the United States, Guyana, Tanzania, Japan, and at the United Nations Working Group on Indigenous Peoples in Geneva. The people I have associated with commonly emphasize the experiences of loss, and the way in which loss or being lost is a main feature of their lives. Especially traumatic for them are the undignified methods used by governments and corporations to separate them from their lands. The following examples, picked almost at random from my notebooks, articulate a common injustice, one that circles around the confiscation and adulteration of their lands.

> Lake Arjay is a place near here where we used to live. About 40 feet from our camp there is a French Canadian who erected a commercial fishing camp on our land. We went to see this person. He said, 'I like this spot here, and I spent so much money on building the camp I don't want to leave. But, I can promise that whenever I do leave, the camp will be yours.'

Philomene Gregoire, Innu elder[1]

> We eat bush foods and we are not farmers or pastoralists. Our greatest problem now is land. It has been ours since ancient times. It was bestowed upon us by our grandfathers. In these days a large area of land has been taken away and now the animals have gone away. They have cleared the land and cultivated it. Us Hadzabe have been powerless to stop it. Today some Hadzabe have no land. We live on land taken away from us. Some of us have become drunks begging from tourists. We want to keep the land and protect it.
>
> Kidzali Mahweshi, Hadza hunter[2]

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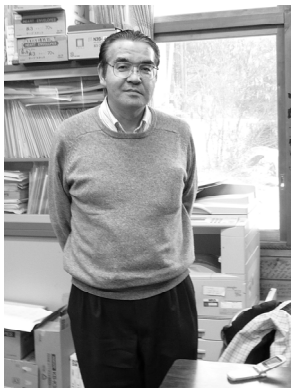
[1] Interview at Matemekush, Quebec, Canada, 4 Apr. 2007.

> My father said that fishing salmon is our way of life, so why do we have to petition for rights to our culture? My father thought that this was not the proper way to do things. Now the only time when we can catch salmon is the traditional day of return…. The government says that this is to preserve the resources. But, this is contradictory since others [non-Ainu] can fish salmon in the sea.



Shiro Kayano, Ainu leader and museum curator[3]

The Hadza are one of the world's last remaining bow and arrow hunters. Many of them continue to live by hunting and gathering in lands that are now part of the state of Tanzania. However, their ability to maintain this way of life is compromised by the presumption of non-Hadza to own Hadza hunting territories. At the decolonization of Tanganyika in 1961, Hadza lands were simply transferred by the occupying state to the state entity created largely by the departing colonial authorities. By recognizing only its own sovereignty within borders inherited from the British, the state of Tanzania has assumed authority over the Hadza and their lands. Some policy measures implemented under this assumed authority have been designed to suppress the mobility of the Hadza and their neighbours the Maasai pastoralists. Hunting and pastoralism are considered to be backward and inferior in new African states like Tanzania, with their focus on nation building and 'modernization'.[4] The lands that Kidzali Mahweshi refer to have been occupied by the Hadza for millennia. When I met with Kidzali and other Hadza in Arusha and London, they observed that parts of these lands were sold by the state to developers for a sports hunting complex. Any Hadzabe that entered what became 'private property' was then liable to arrest. Kidzali and other independent witnesses spoke of dehumanizing conditions and deaths of Hadzabe in custody. They also spoke of the degradation of their lands as farmers were inching into their hunting territories. Many of them had turned to cheap alcohol and reckless abandon as a result.[5] One recent report from the Norwegian Council of Churches referred to the Hadza living on the 'fringes of survival.'[6]

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[2] Statement given at meeting in Moon Room, Conway Hall, London 16 Oct. 2004.

[3] Interview at Nibutani, Hokkaidō, Japan, 13 Jan. 2008.

[4] Frank Marlowe, Why the Hadza are Still Hunter Gatherers, in Sue Kent (ed.), *Ethnicity, Hunter-Gatherers, and the 'Other': Association or Assimilation in Africa* (Washington D.C.: Smithsonian Institution Press, 2002) 247-275 at 267.

[5] Personal testimony by Hadza delegation to World Assembly of Indigenous Peoples forum, Arusha, Tanzania, 9-11 Aug. 2003. See also Diana Vinding, *The Indigenous World, 2002-03*, (Vancouver: University of British Columbia Press, 2003); Indigenous Peoples of Africa Co-ordinating Committee, *Briefing note on the threat to the Hadzabe people of the Yaida Valley, Karatu District*, *United Republic of Tanzania* (Capetown, South Africa: IPCC, 2007) at 8.

[6] Hans Petter Heggum, *The Batwa and the Hadzabe: An NCA Assessment* (Oslo: Norwegian Church Aid, 2002) Occasional Papers 4/02 at 31.

The Innu and their ancestors have occupied the Labrador-Quebec peninsula for possibly up to 6,000 years. It was only in the mid-twentieth century that these nomadic hunters were settled in villages by the Canadian government. The industrialisaton of their lands quickly followed settlement.[7] The Innu now living in the village of Matemekush refused to sign the first modern land claims treaty in Canada because they did not want their hunting territories flooded. Although they would have received material compensation, flooding was the price to pay for a hydroelectric dam project planned by the Quebec Provincial government. The James Bay and Northern Quebec Agreement in 1977, which was signed by three other aboriginal groups with overlapping territorial claims, resulted in the officially recognized aboriginal title to lands occupied by the Innu peoples being unilaterally extinguished and much of it rendered unusable by dams. The areas of the Innu territories that were not flooded still came under the James Bay agreement by which their title was extinguished. This means that there are few impediments to the actions of the French Canadian mentioned by Philomene Gregoire. In my conversation with Philomene and her husband Leon McKenzie, I could see that the area in question, Arjay Lake, held a special place in their hearts. They had camped there for many years. It had supplied them with abundant fish, geese and ducks in the spring, and occasionally caribou. Not being able to speak English or French, Philomene was locked out of the communications by which a solution could be achieved. Later, when asked if she expected any justice, she replied, 'We won't see anything in our lifetime. It will be a long, long time before we see anything. It's like a galaxy a long way away.' This sense of hopelessness is evident in the palpable torpor of the village, the ubiquitous drinking and high rates of suicide and ill health.

The Ainu are groups of indigenous peoples who occupied Hokkaidō, Sakhalin island and the Kurile islands before the colonization of these areas by the Japanese and Russian authorities. In 1899 the 'Protection Act' of the Japanese occupying authorities deprived the Ainu of Hokkaidō of many of the main pillars of their way of life, including the right to educate their children, live along the rivers and fish for salmon. At the time, the measures mandated by the Act were justified by a Darwinian view of the Ainu in which they were constituted as an 'inferior race' destined to be supplanted through the natural processes of 'survival of the fittest'.[8] The prohibition against salmon fishing remains until today, as the government has built fences to stop salmon spawning naturally, sending them into pools for commercial salmon farming by non-Ainu. It is illegal for Ainu to catch salmon in the rivers, yet large-scale commercial salmon and sea salmon fishing by non-Ainu is permitted. Like the other two cases above, their rights are inferior to those of non-indigenous peoples within the legal order of the state. While the Ainu are clearly not as threatened by the hopelessness, ill-health and violence that surround groups like the Hadza and Innu, in some respects Shiro Kayano and fellow Ainu activists with whom I spoke envy the Hadza and Innu. At least the Hadza and the Innu still speak their own languages and, even under pressure, are able to hunt, fish and gather. The assimilation campaign on Hokkaidō was so effective that only vestiges of their way of life remain, but without recognition of their rights to salmon fishing, the prospects for maintaining or reclaiming their distinctive identity are slim.

These three groups of indigenous peoples are by no means isolated cases. The comments of their members echo an omnipresent despondency. They are all descendants of formerly autonomous inhabitants of regions invaded by what became dominant ethnic

[7] See Colin Samson, *A Way of Life That Does Not Exist: Canada and the Extinguishment of the Innu*, (London: Verso Press, 2003).

[8] See Richard Siddle, *Race, Resistance and the Ainu of Japan* (London: Routledge, 1996) at 88-92,

populations.[9] Indigenous peoples now find themselves enclosed under the authority of a host of non-indigenous institutions that restrict their independence and devise and implement policies directed at them. Apart from Bolivia, where indigenous peoples comprise over half the national population, and parts of Chiapas, Mexico, under Zapatista control, indigenous groups have virtually no influence in national politics anywhere in the world. The Hadza, Innu and Ainu illustrate a global pattern by which certain peoples have been deemed unworthy of rights either to their lands or way of life. This has been evident from the beginnings of European and other state expansions and is sanctified by a legal doctrine that has proved remarkably resilient.

The notion that there exist certain lands to which no one other than colonizers have rights is termed *terra nullius*. An important source of this idea is Christian dogma in the context of geographical expansion. One of the questions that the English Puritan colonizers of North America had to ask themselves when they encountered American Indians was: how can this land that they are occupying become ours? Upon surveying the vast cultural differences between the Indians and themselves, their answer was that it was both a law of nature and God's law that what they called 'New England' should be theirs, as an extension of the England they had just left. Soon, the map would be pockmarked with names such as Sudbury, Ipswich, Worcester, Boston and Colchester.

To the Puritan flock, Indian land was *vacuum domicilium*, to which Indians had, according to John Winthrop, the first Governor of Massachusetts Bay Colony, only a 'natural right' that did not, however, extend to ownership. This was justified on the grounds that 'they enclose no Land, neither do they have any settled habytation, nor any tame Cattle to improve the land by and soe have noe other than a Naturall Right to those Countries.'[10] Because in their own estimation the English improved the soil by farming, they considered that they had the right to appropriate it as private property because only they would have been fulfilling God's mandate to 'go forth and multiply'. The point was made succinctly in John Cotton's sermon of 1630, 'God's Promise to His Plantations'. Quoting from the scriptures, Cotton told his congregation:

> …in a vacant soil, he that taketh possession of it, and bestoweth culture and husbandry upon it, his right it is. And the ground of this is, from the grand charter given to Adam and his posterity in Paradise, Gen. 1:28: 'multiply and replenish the earth and subdue it'.[11]

The idea of *terra nullius* was reinforced by the 17th century English thinker John Locke, whose own Puritan origins helped him formalize what was already in the teachings of the mass of believers. Although elevated to the status of philosophy, some of Locke's statements in the *Second Treatise on Government* are almost carbon copies of the New England Puritan sermons. Like them, Locke's thinking emphasizes improvement of the soil as the gold standard of property ownership. This, in combination with labour, gives a

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[9] The mostly widely used definition of indigenous peoples is from former Special Rapporteur Jose Martinez Cobo, 'Study of the Problem of Discrimination against Indigenous Populations,' Vol. 5. UN doc. E/CN.4/Sub. 2/1986-7/Add. 4 (1987), whose definition is: 'Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.'

[10] Quoted by William Cronon, *Changes in the Land: Indians, Colonists and the Ecology of New England* (New York: Hill and Wang, 1983) at 56.

[11] John Cotton, 'God's Promise to His Plantations' in Russell Nye and Norman Grabo (eds.), *American Thought and Writing*, Vol. One, The Colonial Period (Boston: Houghton Mifflin, 1965) at 66.

right of private property. Even though he did not visit the American colonies and was unaware of the wide variations in indigenous relationships to the land, Locke conceived of American Indians as all hunters who had a right only to the animals they killed, and not the lands that they occupied.[12] Jean-Jacques Rousseau is generally regarded as being far more sympathetic to American Indians than other Enlightenment figures, yet in *The Social Contract*, first published in 1792, even he argued that 'occupancy' and 'possession' were 'not vain ceremony, but by labour and cultivation, as they are the only proofs of a man's being a proprietor...'.[13]

The distinction between cultivated land and unimproved land was widely used in the English colonies to justify the seizure of land, and the influential eighteenth century Swiss legal theorist and father of international law, Emmerich de Vattel, subsequently elevated it into a principle of international law. Nations that did not cultivate the soil, he said, 'may not complain if other more industrious nations, too confined at home, should come and occupy part of their lands'.[14] He went on to argue that 'the cultivation of the soil…is…an obligation imposed upon man by nature.'[15]

These assumptions, appearing out of the religious culture of Europe, were elaborated as the bedrock of law by the 18th century jurist Sir William Blackstone. Indeed, Blackstone effectively naturalized private property by citing it as one of God's prescriptions, and bolstered this further by assigning to government the role of protecting the institution under the law.[16] Thus the justification for the seizure of unimproved land was constituted as a universal law, an advance which led to its enactment in laws applied throughout the vast expanse of the British Empire, binding all those who came under its rule. Indeed, it has been extrapolated from its original application to one cultural, European, group, to bind all of humanity.

With the force of violence, the spread of disease and the insistence that all intercultural conflicts with indigenous peoples be negotiated on the terms of colonizers, this is precisely what has occurred. In fact, the original pretexts for indigenous dispossession such as cultivation of the land, labour and the enclosure of parcels of land that formed the early expressions of *terra nullius* have been expanded to include other criteria that are deemed to exempt indigenous peoples from the rights to own and possess land. A common articulation of these criteria of dispossession is drawn from cultural evolutionism and Darwinism and holds that indigenous groups must have sufficient social organization or other cultural attributes of 'civilization' in order to merit rights of possession under the same terms as civilized colonizers.[17] In the 20th century this idea was asserted most forcefully in the *In re Southern Rhodesia* case involving a dispute between the indigenous Ndebele and Shona and the British South Africa Company over

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[12] John Locke, [1689], *Two Treatises of Government*, Revised Edition, (New York: New American Library, 1965).

[13] Jean Jacques Rousseau, *The Social Contract* (New York: Hafner Publishing Co., 1947) at 20.

[14] Francis Ruddy, *International Law in the Enlightenment: The Background of Emmerich de Vattel's 'Le Droit des Gens'* (Dobbs Ferry, NY: Oceana, 1975) at 148.

[15] Jérémie Gilbert, , 'Nomadic Territories: A Human Rights Approach to Nomadic Peoples' Land Rights,' (2007) 7 *Human Rights Law Review* 4, at 686.

[16] See the excellent discussion of Blackstone by Daniel Boorstin, *The Mysterious Science of the Law* (Gloucester, Mass: Peter Smith, 1973), especially at 168-169.

[17] For the operation of this principle in Australia see Stuart Banner, 'Why *Terra Nullius?* Anthropology and Property Law in Early Australia,' (2005) 23 *Law and History Review* 1, 95-132, and B. O. Okere, 'The Western Sahara Case,' (1979) 28 *The International and Comparative Law Journal* 2, 296-312, shows how Western legal scholars adhered to these principles well beyond the mid 20th century.

the ownership of land. Supporting the claims of the company over the indigenous groups, Lord Sumner declared:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low on the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged.[18]

This indicated that peoples that fell short on a European yardstick of civilization were not entitled to retain their lands if this conflicted with the interests of colonizers. Such a policy remained in place in Canada until the last decade and was used as a safeguard against aboriginal land claims against the state.[19] Without specifically mentioning 'civilization', although proxy terms such as 'modernization' or 'development' are often cited instead, states continue to operate and uphold *terra nullius* policies. This is the context for the contemporary struggles of indigenous peoples for the recognition of their rights to land, language, religion, and all those things they group under their way of life.

Although the future of ways of life not based entirely on permanent settlements, the wage labour economy, or other structures linked to state sovereignty is obviously imperilled, a wide range of types of hunting, pastoralism and transhumance is still practiced today by numerous groups. The largest of these groups include the Navajo in the US, the Saami in Scandinavia, the Maasai in East Africa and the Eveny of Russian Siberia. Through international indigenous rights activism these and many other groups are currently attempting to protect much loved ways of life. Importantly, these ways of life provide a measure of the full range of human adaptability and ecological knowledge that will be needed if humans are to address environmental devastation and avoid drifting into Western-dominated monoculture.[20]

If these and other groups look either to the law of the states within which they are encased or to international human rights to protect their ways of life, what are the chances that some of these goals could be realized?

The Extension of Terra Nullius and International Law

With no sense of embarrassment, European colonial powers holding most of Africa and much of Asia under their dominion were signatories to the 1948 Declaration of Human Rights. Although the United Nations later set up principles for decolonization and self-determination, it has side-stepped such principles when there were large state interests at stake. For example, in the 1975 Western Sahara case,[21] the International Court of Justice (ICJ) invalidated the notion of *terra nullius*, which was used as an implicit justification to expropriate indigenous peoples' lands in North America and Australia. The ruling also declared that indigenous populations could not be transferred from a colonial power to another state with no consent from the population unless there were significant legal and

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[18] Quoted by Emma Cunliffe 'Anywhere but Here: Race and Empire in the Mabo Decision,' (1997) *Symposium Issue of Social Identities*, Autumn, at 13-14, available at http://ssrn.com/abstract=1002209

[19] See Michael Asch, 'Errors in *Delgamuukw*: An Anthropological Perspective', in Frank Cassidy (ed.), *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, (Vancouver: Oolicahn Books, 1992) 221-243.

[20] In *Tristes Tropiques* Claude Levi-Strauss reflects on how in his own lifetime the disappearance of indigenous distinctiveness comes about as a consequence of the spread of agriculture and urbanization. This, he believes, creates a kind of cultural inertia into which all of humankind becomes locked. See Claude Levi-Strauss, [1955], *Tristes Tropiques*, translated by John and Doreen Weightman, (Harmondsworth: Penguin, 1973) at 543.

[21] See Tony Hodges, *Western Sahara: The Roots of a Desert War* (Westport, Conn: Lawrence Hill Books, 1983) at 350, 372, and Toby Shelley, *Endgame in the Western Sahara: What Future for Africa's Last Colony?* (London: Zed Books, 2003) at 150.

cultural ties between that population and the state in question. When Spain decolonised in 1975, the ICJ was asked by Morocco and Mauritania to rule on the status of the territories of the Western Sahara and the Sahrawi people within them. Spain handed over authority to Morocco and Mauritania, but it also maintained that it did not cede sovereignty, which was vested in the Sahrawi people. The court ruled that there existed insufficient historical and ethnic ties to prove that either state had sovereignty over Western Sahara and that therefore there were no pressing ties which would affect the application of UN resolution 1514 (XV) on decolonization of Western Sahara and the application of self-determination.

Since no international body or state attempted to enforce the measure, shortly after the ICJ ruling the Moroccan state embarked upon what became known as the 'green march', implanting Moroccan settlers in Western Sahara to establish a demographic advantage and thus creating 'facts on the ground'. Hence, the 'green march' simply reinvokes the supposedly discredited *terra* nullius. Although *terra nullius* can no longer be invoked without political embarrassment, it can easily become an unspoken default position overriding the protests of the occupied peoples concerned. There is little to differentiate policies based on *terra nullius* from naked land grabs.

Under the *Western Sahara* principles, Britain handed over indigenous territories to its own settler population in Canada and Australia under the assumption of *terra nullius*. This occurred as recently as 1949 in the case of Newfoundland and Labrador, which joined the Canadian confederation via a referendum of the settler population, but with neither consultation with nor mention of the indigenous Innu and Inuit inhabitants of the Labrador-Quebec peninsula.[22] Canada has continued to operate a tacit *terra nullius* policy through the unilateral extinguishment of aboriginal title, as in for example, the James Bay and Northern Agreement mentioned earlier, as well as through contemporary land claims agreements that require aboriginal peoples to extinguish pre-existing aboriginal title or, as in the new 'certainty' clauses, forfeit future exercises of land and other rights.[23] While the *Mabo v. Queensland* ruling in Australia is widely trumpeted as challenging the theory of *terra nullius*, stating that it could not be a basis for aboriginal rights, this is slim compensation for the fact that it was the widely accepted rationale for dispossession. Furthermore, the criteria for proof of native title established following the court case disqualify all currently dispossessed aboriginal groups from claiming native title and the requirements for those still on their ancestral lands are so restricted that few aboriginal groups have been able to do so. Given this, it seems clear that *terra nullius* is still in effect. By making the rules for the recognition of native title so onerous, *Mabo* and the subsequent Native Title Act actually legitimate the occupation of aboriginal territories

[22] I have commented on this in Colin Samson, 'Sameness as a Requirement for the Recognition of the Rights of the Innu of Canada: the Colonial Context', in Jane Cowan, Marie-Benedicte Dembour and Richard Wilson (eds.), *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001) 226-248 at 230.

[23] See for example former Assembly of First Nations and Grand Council of the Crees attorney Andrew Orkin's commentary on this, Andrew Orkin, 'When the Law Breaks Down: Aboriginal Peoples in Canada and Governmental Defiance of the Rule of Law,' (2003) 41 *Osgoode Hall Law Journal*, 2 & 3, 445-462. Almost identical policies of unilateral extinguishment are apparent in the practices of the US Indian Claims Commission from the 1940s onwards, see Richard Clemmer, '"The Legal Effect of the Judgment": Indian Land Claims, Ecological Anthropology, Social Impact Assessment and Public Domain', (2004) 63 *Human Organization* 3, 334-345 at 34-42.

by farmers and resource extraction industries. As Short argues, 'not one millimeter of non-indigenous land was at risk from the principles laid down by *Mabo*.'[24]

Practices based implicitly on *terra nullius* continue to occur across the globe. The San groups of Bushmen made the central Kalahari region a centre of their hunter-gatherer civilization well before either the Southern African states or the British Empire asserted claim to it. Despite an ancient and close relationship between San and Kalahari (and, apropos of *Western Sahara*, few ties with the ruling state established by the British), Botswana has forcibly expelled San from their lands and relocated them to settlement camps. At the same time the government has issued licenses to multinational corporations for diamond mining, backed by World Bank start-up capital.[25] In the initial evictions, many San were loaded onto trucks and removed, while soldiers destroyed their huts. San who resisted were beaten and tortured, according to many sources. In 2002, basic services including food, water, food rations, and health services were removed from those San that would not leave their lands. Soldiers have destroyed water boreholes in an attempt to drive the San out by thirst. Those who have tried to return have been arrested. The relocation camps have now become dominated by alcoholism, HIV/AIDS and prostitution.

In December 2006, a Botswana Federal court ruled that the government's eviction of the Bushmen was 'unlawful and unconstitutional', and that they have the right to live on their ancestral land inside the Central Kalahari Game Reserve. The court also ruled that the Bushmen applicants have the right to hunt and gather in the reserve, and should not have to apply for permits to enter it. However, in February 2007 six San were arrested, starved and held for six days after police and wildlife guards accused them of hunting in the Central Kalahari Game Reserve. According to Survival International, over fifty San have been arrested for hunting since the Court verdict in their favour.[26] They were then released without charge. Since the ruling, government workers have blocked off boreholes for the water supply in the area and hunting permits have not been issued to the San, making it virtually impossible for them to return to their homes. Given the devastation of the relocation camps, separation from their lands and the attrition of knowledge, it could now be extremely difficult for the evicted Bushmen to resume a hunter-gatherer lifestyle. What is more, without water from boreholes the indigenous way of life may well be impossible, especially during the dry months.[27] This is another example of how the creation of 'facts on the ground' may be used as a technique to place indigenous peoples in such a situation that, even if state laws allowed and international laws were enforced, they would not be in a strong position to exercise their human rights.

A final case is worth looking at, as it demonstrates how the rule of *terra nullius* is extended in the face of international human rights judgments to the contrary. The

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[24] Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Aldershot: Ashgate, 2008) at 39. See also Damien Short, 'Reconciliation, Assimilation and the Indigenous Peoples of Australia', (2003) 24 *International Political Science Review* 4, 491-513, at 497-98.

[25] Nicholas Olmsted, 'Indigenous Rights in Botswana: Development, Democracy and Dispossession,' (2004) 3 *Washington University Global Studies Law Review* 799-866 at 805-06. Diamond prospecting in the Central Kalahari has since proceeded, with DeBeers selling their stakes to Gem Diamonds for $34million, see http://www.survival-international.org/tribes/bushmen/diamonds

[26] The indigenous rights NGO Survival International has closely monitored the situation of the San relocations and extensive information about their contemporary circumstances can be found at http://www.survival-international.org/tribes/bushmen . Information is also available through the First People of the Kalahari organisation website, http://www.iwant2gohome.org/index.htm

[27] Robert Hitchcock and Wayne Babchuk, 'Kalahari San Foraging, Land Use, and Territoriality: Implications for the Future,' (2007) 3 *Before Farming* article 3, 1-14.

Western Shoshone of the Southwestern United States have brought complaints to international courts with regard to a number of environmentally damaging projects such as the entombment of nuclear waste, bomb testing and cyanide leech gold mining that have been authorized on ancestral lands guaranteed to them under the 1863 Treaty of Ruby Valley but considered by the US as 'public domain' lands. A report by the Inter-American Commission on Human Rights in 2003 in the *Dann* case found the US in violation of Western Shoshone rights of property, and not attending to due process in gaining control over Western Shoshone Lands.[28] The final report issued two recommendations to the US; that it have a legislative or judicial hearing on the issue of land title and that it review all US law and policy on Native American rights to property.[29]

Ignoring these rulings, the US government has only so far agreed to pay compensation via the Western Shoshone Distribution Bill. This follows attempts to compensate the Western Shoshone through the Indian Claims Commission procedures. In 1979 the Shoshone declined $26 million awarded to them by the US Treasury because under the procedures the compensation amounted to an extinguishment of aboriginal title and hence their treaty rights under Ruby Valley.[30] Those procedures fail to comply with international human rights norms, because the unwanted and unclaimed monetary compensation acts as a unilateral abrogation of property rights guaranteed by a treaty that the state is party to. This means that indigenous peoples in the US have no clearly defined rights to property. The US government procedures also violate the Inter-American Commission ruling, which is binding on the US as a member of the Organization of American States and a signatory to its Charter. In March 2006, stressing the urgency of the Shoshone situation, the UN Committee on the Elimination of Racial Discrimination (CERD) urged the US to desist from taking any further action in regard to the disputed lands, which consist of 60 million acres claimed by the Shoshone and not ceded by treaty. The US was warned that its activities disregarded the spiritual and cultural significance that Shoshone gave to their homelands and amounted to racial discrimination in violation of property rights.[31] The Western Shoshone case demonstrates that neither state nor international laws can ensure respect for the human rights of indigenous peoples.

At a broader level, the United Nations Declaration on the Rights of Indigenous Peoples contains a vast array of articles respecting indigenous autonomy and protecting indigenous peoples from the arbitrary domination of states.[32]

In the forty-six articles of the UN Declaration on the Rights of Indigenous Peoples indigenous peoples are treated as:

- being entitled to collective rights to all human rights and fundamental freedoms (Article 2),
- having the right to self-determination and the freedom to determine their own political status (Article 3),

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[28] See Zia Akhtar, 'Human Rights and American Indian Land Claims,' (2007) 11 *International Journal of Human Rights* 4, 529-534.

[29] Verónica Gómez, 'The Inter-American System,' (2003) 3 *Human Rights Law Review*, 127-133 at 133.

[30] See Richard Clemmer, n. 23 above, at 342.

[31] The decision is reproduced at http://www.wsdp.org/us_western_shoshone_decision-1-68.pdf

[32] The Human Rights Council (HRC) recommended the adoption of the Declaration to the General Assembly in 2006 (with only Canada and Russia voting against it). It then passed through the UN General Assembly (GA) in September 2007. Only Canada voted against it in both the HRC and GA. The others voting against in the General Assembly were the US, Australia and New Zealand. The full text of the Declaration is at: http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/07-09-13ResolutiontextDeclaration.pdf

- having the right to maintain and strengthen their distinct political, legal, economic and cultural institutions (Article 5) and to maintain and develop their institutional structures and their distinctive customs, spirituality, traditions, and juridical systems (in accordance with international human rights standards) (Article 34)
- having the right not to be subjected to genocide or violence, including forcible removal of children (Article 6)
- having the right not to be subjected to forcible assimilation (Article 8)
- having the right not to be forcibly relocated (Article 10)
- having the right to practice and revitalize their cultural traditions and customs (Article 11), including their spiritual and religious traditions (Article 12), languages, oral traditions, philosophies and literatures (Article 13)
- having the right to control and establish their own educational systems (Article 15)
- states have a duty to consult in good faith and obtain free, informed and prior consent before implementing any policy towards them (Article 19)
- having rights to their traditional medicines and health systems (Article 24)
- states shall implement fair, independent and impartial processes recognizing indigenous laws, traditions and customs to recognize indigenous land claims (Article 27)
- having the the right to conservation and protection of their environments (Article 29)
- having the right to be free of military activities (Article 30)
- having the right to the recognition, observance and enforcement of treaties and agreements with States or their successors (Article 37)
- states shall take measures to enforce the Declaration (Article 38)

However, Article 46 undercuts all forty-five preceding articles by stating that no part of the Declaration can 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'. Article 46 further states that:

> the exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.[33]

The contradictions in this document between the enunciations of rights in Articles 1-45 and the limitations on them in Article 46 mean that states can continually point to Article 46 in order to trump any aspirations of indigenous peoples to determine their own political status, regain confiscated lands, establish their own laws, or be free of militarization of their lands. The main shortcoming of the Declaration is its failure to question the relationships of power and authority between states and indigenous peoples. This is crucial, since the grievances of indigenous peoples stem from their own loss of autonomy and the assumption that they are subject to state authority. The Declaration will only help indigenous peoples regain an autonomy that is hardly worthy of the name, since it is still constrained by the multiple and capricious acts of power that

[33] Ibid.

operate under the umbrella of state sovereignty and are expressed in *terra nullius*. Meanwhile, symbolic attentiveness to the human rights of indigenous peoples is attractive to states that are concerned about international perceptions and humanitarian reputations. But, as long as rights are non-legally binding or enforceable and the Declaration has no retroactive or historical applications, as insisted upon by the British delegation, what remains is indeed largely symbolic. Symbolism may well be useful in garnering support for efforts to help maintain indigenous languages and practices, but it does not guarantee that those efforts will bear fruit.

An Alternative Conclusion

With international, national and human rights laws so woefully powerless to halt the loss of indigenous territories, practices and values, perhaps the law is not the answer, or at least, it cannot be relied upon to fulfill the aspirations that many groups have for cultural continuity. This is in part because the problems faced by indigenous peoples are at root political. Laws are themselves manifestations of configurations of power and no better example of this exists than the doctrine of *terra nullius*. The power driving *terra nullius* is principally that of the state and the business interests that most states do their utmost to represent. It is expressed in the history of 'internal homogeneity', the drive to standardize all facets of the activities of populations that have a bearing on their administration. Hence, the independence of groups within states has been the object of continual attack by governments, which undermine, ban and suppress the local laws, languages, religions and customs that make people distinct.[34]

In view of this, perhaps indigenous peoples' largely unheralded efforts to maintain cultural continuity in spite of all the adversities in their path are better protections than international human rights laws. I know from my own experience over the last fourteen years that Innu activities such as hunting, camping, storytelling, travelling on the land, and transmitting Innu knowledge and history are almost universally experienced positively. These activities build confidence and transform even the most despondent Innu youth. They are certainly taken up with more enthusiasm than travelling to land claims meetings in Ottawa, where their human rights to their culture and land are supposedly being negotiated. Their efforts to exercise their human rights by maintaining links with the land are often the result of self-initiatives by Innu hunting families or through groups of hunters formed in, for example, the Tshikapisk Foundation.[35] As I write, a group of Innu people from Natuashish, Labrador, are making a 300 km trip across tundra and through forests from Ashuapun to the community on foot, hunting along the way, and setting up camp. When they get lost, they use satellite phones to call elders and ask directions.

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[34] See Edward Spicer, 'The Nations of a State' in Karl Kroeber (ed.), *American Indian Persistence and Resurgence* (Durham, NC: Duke University Press, 1994) 27-49.

[35] See http://www.tshikapisk.ca/home/

Across the globe, there are signs that indigenous groups are reclaiming past practices and adapting them to contemporary circumstances as a means of moving forward to more positive futures. Some have claimed that indigenous peoples across North America are experiencing a cultural renaissance or revitalization.[36] Some elements of this revitalization are undoubtedly symbolic, amounting to simulations of past practices that can only partially be resuscitated because land, languages and knowledge have all died or been eroded. But in certain locations, particularly regions of the Far North such as Nunavut and Labrador-Quebec in Canada, Greenland, Alaska, and the Saami territories in Scandinavia, lands are more abundant, indigenous languages are still widely spoken, and the encroachments of non-indigenous populations have not been so concentrated. Despite all the adversities to hunter-gatherers in Amazonia and parts of Africa, links with the land are still abundant in those locations also.

As evidence rapidly accumulates of the toxic consequences of the contemporary western diet based on industrialized agriculture with its concentrations of saturated fats and carbohydrates, indigenous peoples fortunate enough to have wild foods available to them may enhance their chances of physical and cultural survival.[37] Often efforts to reclaim indigenous diets are also twinned with recovery of medical systems, natural pharmacies, and educational systems.[38] Indigenous groups also need to find an economy to support revitalization. Some have been able to tap into state and international donor funds. Others have taken an entrepreneurial approach, opening up ecotourism ventures, educational projects, trekking, fishing camps and wildlife viewing.[39]

Because of the legacies of *terra nullius* and the ability of states to veto or ignore international laws and standards on the human rights of indigenous peoples, the best that can be expected is for states to respect revitalization efforts. If this is the case, then there is some hope that the human right to an indigenous identity will be preserved. If on the other hand, the principal priority of states remains to turn indigenous lands over to rapacious resource extraction companies, the settlement of non-indigenous populations, or the extension of agriculture and industry, there is little hope that indigenous human rights will be recognised. Such a hope, however, will be more realistic if indigenous peoples have the physical and mental vitality, derived from their own vast storehouse of knowledge and skills, to be in a position to fight for their lands and livelihoods, and to be able to draw upon the assistance of the many outsiders who see worth and value in indigenous ways of life.[40]

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[36] Wendell Oswalt, *Bashful No Longer: An Alaskan Ethnohistory, 1778-1988* (Norman, OK: University of Oklahoma Press, 1990) 188-193, and Joanne Nagel, *American Indian Ethnic Renewal: Red Power and the Resurgence of Identity and Culture* (New York: Oxford University Press, 1996).

[37] See Colin Samson and Jules Pretty, 'Environmental and Health Benefits of Hunting Lifestyles and Diets for the Innu of Labrador,' (2006) 31 *Food Policy* 6, 528-553; Siri Damman, Wanche Barth Eide and Harriet Kuhnlein, 'Indigenous Peoples' Nutrition Transition in a Right to Food Perspective, (2008) 33 *Food Policy* 135-155. See also Jacob Epstein, 'A New Way to Think about Eating, (2008) 55 *New York Review of Books* 4, 20 Mar., 23-24.

[38] One such example in East Africa is the Aang Serian organization based in Arusha, Tanzania, see http://www.aangserian.org.uk/

[39] As well as Aang Serian and Tshikapisk mentioned above, a few diverse examples include the Kiana Lodge in British Columbia, see http://kianalodge.com/about.html, Maniilaq Association in Kotzebue, Alaska, see http://www.maniilaq.org/flash.html, and the Ka'ala Cultural Learning Center in Hawaii, see http://www.k12.hi.us/~waianaeh/HawaiianStudies/kaala.html

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