

3. The UN Declaration on the Rights of Indigenous Peoples and African Societies

Karl-Heinz Kohl

Introduction

Alongside the institutions of local, national and international law, the United Nations also plays an important role in currently on-going legal disputes in Ethiopia, as well as in other African nations, even though it does not want to interfere directly in the internal affairs of these states. Since its direct interventions are strictly limited to peace-building activities and involve long and complicated bureaucratic procedures, one of the UN's preferred means of contributing to such and other disputes are through the declarations adopted by its General Assembly. These declarations have the character of recommendations and do not contain any legally binding obligations. In the terminology of the UN, they are only 'documents of intent'.¹ Nevertheless, they try to formulate some principles according to which legal decisions should be taken. This is the case with the UN 'Declaration on the Rights of Indigenous Peoples'. As I will show, its primary intent was to grant more rights to the marginalized and long-disenfranchised indigenous peoples of the former European colonies in North and South America, Australia and New Zealand. But the extent to which its principles can also be applied to African societies remains a controversial point of discussion. On the one hand, the Declaration contains a moral appeal to Africa's political leaders to help their many small-scale local communities to preserve their language and cultural traditions and to protect them from land robbery at the hands of the big international agricultural corporations. On the other hand, there is also the wish of African governments to unify all societies within a given country under one national law.

1 <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/declaration/> (last accessed 28 February 2019)

The UN Declaration on the Rights of Indigenous Peoples

After debating for more than 25 years, the General Assembly of the United Nations adopted the 'Declaration on the Rights of Indigenous Peoples' in autumn 2007. The Declaration grants a special status to indigenous peoples inside the state to which they belong, emphasizing their right to speak their own language, to maintain their social and cultural institutions, to preserve their cultural heritage and above all to control and use their traditionally owned land. Today, more than ten years later, the Declaration is regarded as one of the cornerstones of the international Human Rights Movement.

The Declaration's beginnings go back to the late 1960s and early 1970s, when Native Americans in the United States, First Nations in Canada, Australian Aborigines and New Zealand Maoris joined the worldwide civil rights movement and protested against their on-going oppression and discrimination. Other autochthonous groups, especially in Latin America, followed them. But it was still a long time before the United Nations decided to support their demands. In 1985, the UN set up a Working Group on the Rights of Indigenous Populations. In 1993 this Working Group prepared the first draft of the Declaration. But it had to be revisited more than ten times in the following years because a number of UN member states expressed concern about some of its key issues such as self-determination and exclusive land use. These reservations were also shared by a group of African states, which then prompted a formal decision by the African Union in December 2006 that almost blocked the final adoption of the Declaration.² After new negotiations, on 13 September 2007, 143 members of the UN General Assembly voted for the Declaration;³ 14, including Nigeria and Kenya, abstained; and 4, namely Australia, Canada, New Zealand and the United States, voted against it. But a very high number of UN members, at total of 34, did not participate in the vote at all; of these, 15 were African states, including Ethiopia.

Since then, Australia, Canada and New Zealand have revised their decision and have transposed some of the Declaration's principles into national law. In the US, the situation seems to be more complicated. On December 2010, President Barack Obama declared that the United States would 'lend its support' to the Declaration. Yet, as the recent events in the Lakota Standing Rock Reservation have shown, President Trump is unwilling to fulfil his predecessor's promise. On the African conti-

2 According to Pelican and Maruyama (2015:51) the adoption of the Declaration 'has been particularly problematic for southern African states, such as Botswana and Namibia, which excluded the provision for any differential treatment of their citizens based on race or ethnicity to distance themselves from apartheid politics.'

3 See the United Nations Permanent Forum of Indigenous Issues 2006: *Declaration on the rights of indigenous peoples* (accessible online at <http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf>).

nent too, many governments remain reluctant to accept the Declaration's principles as a basis of policy. What are the reasons for the African States' enduring scepticism?

We may find an answer to this question in the African Union's aforementioned decision from December 2006. Besides noting the many political problems that self-determination and the recognition of indigenous land-ownership may cause for national and territorial integrity, the decision named explicitly 'the lack of a clear definition of indigenous peoples', although it affirms at the same time, 'that the vast majority of the peoples of Africa are indigenous to the African Continent'. This is, without doubt, a contradictory statement. If there is 'no clear definition of indigenous peoples', one cannot contend that almost all African peoples are 'indigenous'. Where does this contradiction stem from?

Actually, how to define indigeneity and indigenous peoples had been one of the biggest problems in the period when the Declaration was being prepared. From an etymological point of view, 'indigenous' means nothing more than having been born in the land or territory where one lives, in contrast to all the people who came later, be they migrants or conquerors. Historically, however, the English word 'indigenous' and other derivations from the Latin word '*indigena*', such as '*indigène*' in French or '*indígena*' in Spanish were derogatory. European colonizers and settlers applied them to the subdued inhabitants of their colonies and associated them with backwardness and primitiveness. Yet, during its long struggle for recognition, which began half a century ago, the international indigenous movement has been very successful in purifying the word 'indigeneity' of these old racist stereotypes. What once was an insult has now become a title of honour. Today, more than 5,000 ethnic groups all over the world share the term 'indigenous' as a common denominator.

Yet, there is such a great diversity between these groups that one may ask oneself what main features the Kwakwaka'wakw of the American Northwest Coast, who live mainly from fishing, share with the Aranda hunters and gatherers of the Australian Desert, the crop-growing Yanomami of the Amazonian rain forest, the Pokot pastoralists of Kenya or the Sami reindeer herders of Finland? This was exactly the problem that the UN's suborganizations were confronted with when they looked for a clear and distinct definition of indigeneity. It proved to be very difficult, indeed, almost impossible. Instead of defining in legal terms what indigenous peoples are, they could only give a description of what most of them have in common. One of the most cited of these descriptions or working definitions was drafted by José Martínez Cobo, the former Special Rapporteur on the Problem of Discrimination against Indigenous Populations in 1986. It reads as follows:

Indigenous communities, peoples and nations are those, which, having a historical continuity with pre-invasion and pre-colonial societies considers themselves distinct from other sectors of the societies now prevailing in those territories or part 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 systems.⁴

Since then, a number of other characteristic features, such as their strong maintenance of their cultural traditions, language and belief systems have complemented José Martínez Cobo's description and found their way into the final version of the Declaration adopted in 2007. The most important of these new features concerns the indigenous peoples' 'distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas', as expressed in Article 25 of the UN Declaration. This 'distinctive spiritual relationship' is so important because it also legitimizes those peoples' right 'to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership'. Actually, this passage contains political dynamite, because it grants to indigenous peoples not only absolute usage rights of the territories they live in, but could also be used as a legal basis to claim back from the majority population the land once stolen from their ancestors. This was, without any doubt, one of the main concerns and reasons why four former British colonies voted against the UN Declaration in 2007.

Indigenesness (or indigeneity) and African society

Against this background, we can understand better the reluctance of so many African states to adopt the UN Declaration, as well as the contradictions in the text of the African Union's decision of 2006 mentioned above. On the one side, the African Union states that 'the vast majority of the peoples of Africa are indigenous to the African Continent' because they were born there and became victims of European colonization. On the other side, however, all of them have also regained their freedom to live according to their pre-invasion and pre-colonial tradition

4 UNCHR (Sub-Commission), 'Report of the Special Rapporteur on the Problem of Discrimination against Indigenous Populations' (1986) UN Doc E/CN.4/Sub.2/1986/7/Add. 1-4, quoted by Lidetu 2016:6. Cobo is also the author of 1986's important three-volume *Study on the problem of discrimination against indigenous peoples*, 'where he promotes the use of the word ethnicity and group rather than race' and 'initiated a shift in focus away from mainly biological definitions of indigenous peoples' (Lidetu 2016:25).

after the fight for independence and the end of the European rule. The corollary of this is: if all African peoples are indigenous, all of them also stand in a special spiritual relationship to their homeland and it is *not* necessary to protect and privilege some of them.

The inherent logic of this argumentation shows where that the problem lies in the difficulty of applying the UN Declaration's categories of 'indigenous', 'indigeneity' and 'indigenous peoples' to African societies. These difficulties stem from the fact that these categories grew out of the historical experiences of the aboriginal inhabitants of the former British colonies in North America, Australia and New Zealand, as well as the Spanish and Portuguese conquests in Latin America. Not only some small parts but all of the land of these vast continents and islands belonged to them before the arrival of European conquerors and settlers. It is largely forgotten that the biggest genocide in history of humankind happened after Columbus's so-called discovery of the New World. According to recent estimations, between 7 and 20 million native people lived in the territory of what is now the United States of America before the arrival of the Europeans. At the end of the nineteenth century their number had decreased to 500,000, while the total population of the US had grown to 62 million. Today less than 1 per cent of the US population identify themselves as Native Americans (United States Census Bureau 2011). In Australia, the aboriginal population rate is 2.7 per cent, and in Canada 4.3 per cent. This means that in those countries, in which the indigenous movement came into being in the early 1970s, indigenous peoples had been reduced to very small and unimportant minorities, living at the margins of a white majority society, strongly discriminated against and denied full citizenship. Indeed, in Australia, Aborigines remained under state guardianship until 1976. Their rights to the small territories and reservations in which they had lived for generations were recognized by the national governments only after decades of struggle.

Conclusion

At its core, talking of indigeneity and indigenous peoples is a Eurocentric construction. Both categories are meaningful in states that grew out of colonial settler societies in which the progeny of the foreign invaders represent the vast majority, while the descendants of the aboriginal landowners have become small and insignificant minorities. But it is hard to transfer this dichotomous model to most African states, because – with some exceptions – there was no such overwhelming dominant or racially different sector of society that succeeded in the course of history in subduing all other ethnic and linguistic units under its rule. And there is still another, even more important, difference. In the U.S., Australia, Canada and New Zealand, the aboriginal populations' traditional forms of life and even their

languages were largely destroyed under the pressure of the white majority. Among most African peoples identifying themselves as indigenous, such a radical rupture never took place.

In the final analysis, however, it is not only a question of terminology whether you call these local communities indigenous peoples or not. Although indigenous political activists in the former colonies have appropriated the term, it has gained international political recognition and became an effective weapon in the worldwide fight against oppression and ruthless exploitation. The African local communities with their own languages and traditional ways of life share their fate with marginalized indigenous populations in Asia, South America and other parts of the world. In Africa, their situation seems to be even harder because national politicians and urban elites regard them as an obstacle to development and modernization. Instead of recognizing their traditional land rights, they ban them from their ancestors' lands and support the activities of international agricultural agencies exploiting it for commercial purposes. This happened to the pastoralist and semi-sedentary societies in Southern Ethiopia, where Government officials tried to force them to give up their traditional way of life in order to transform them into agriculturalists and wage labourers, as we can see in Human Right Watch's staggering report on 'Abuses against the Indigenous Peoples of Ethiopia's Lower Omo Valley' (2012). As already stated in 2006 by the African Commission on Human and Peoples' Rights already, the cultures of African indigenous peoples are also

under threat, in some cases to the point of extinction. A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional lands and the natural resources thereon. They suffer from discrimination as they are regarded as less developed and less advanced than other more dominant sectors of society. They often live in inaccessible regions, often geographically isolated, and suffer from various forms of marginalization, both politically and socially (African Commission on Human and Peoples' Rights (ACHPR 2006:11).

While indigenous peoples in Australia, Canada, New Zealand and the US remind the white majority society of their forefathers' sins, and measures taken to protect their customs and reinstall their rights can be regarded as making amends for the crimes done to them, Africa's indigenous peoples have another, more important, significance and deserve protection even more, because they stand in a continuous relation to the contemporary African societies whose great cultural and social heritage they represent. Leading African politicians of the independent movement in the 1960s and 1970s, such as Jomo Kenyatta or Léopold Sedar Senghor, and leading intellectuals, such as Chinua Achebe or Amadou Hampâté Bâ, were convinced that the true African values and norms, with their complete governance and restorative dispute settlement institutions, could still be found in the

villages. But this was almost two generations ago. Since then, things really have fallen apart. The urbanization process is speeding up considerably, and modern techniques are infiltrating agriculture in some rural areas. Nevertheless, there are still many semi-autonomous, small-scale societies, subsistence farmers, pastoralists, hunters and gatherers who have shown an astonishing resilience to the seductive power of modernity and have succeeded in maintaining central parts of their traditions. And obviously, they did it by their free will, because they are so far out of our world that they do not know the possible alternatives to their way of life. I freely confess that my view may be a deeply romantic one. But who knows: if the endeavours to solve the continent's economic problems by a globally oriented neo-liberal policy should fail, a new African Renaissance may come, comparable to what happened fifty years ago. And then, everybody will be glad that not all of these small-scale societies have been sacrificed on the altar of modernity.

References

- African Commission on Human and Peoples' Rights (ACHPR), 2006 *Indigenous peoples in Africa: The forgotten peoples? The African Commission's work on indigenous peoples in Africa*. Banjul, The Gambia: ACHOR and Copenhagen: International Work Group for Indigenous Peoples Affairs
- COBO, José R. Martínez, 1985/86 *Study of the problem of discrimination against indigenous populations* (3 Volumes). New York: United Nations
- Human Rights Watch, 2012 "What will happen if hunger comes?" Abuses against the indigenous peoples of Ethiopia's Lower Omo Valley", in: *Human Rights Watch* June 2012 (accessible online at <https://reliefweb.int/report/ethiopia/what-will-happen-if-hunger-comes-abuses-against-indigenous-peoples-ethiopia's>, last accessed 22 October 2018)
- LIDETU Yimer Ayele, 2016 *Definition and rights of indigenous peoples: The case of Ethiopia*. Addis Ababa: Addis Ababa University (MA thesis)
- PELICAN, Michaela and Junko MARUYAMA, 2015 "The indigenous rights movement in Africa: Perspectives from Botswana and Cameroon", in: *African Study Monographs*, 36 (1):49–74
- UNITED NATIONS PERMANENT FORUM OF INDIGENOUS ISSUES, 2006 *Declaration on the rights of indigenous peoples* (accessible online at <http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf>)
- UNITED NATIONS CENSUS BUREAU, 2011 *Overview of race and Hispanic origin: 2010* (accessible online at <https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>, last accessed 6 July 2012)

Websites

<http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/declaration/> (last accessed 28 February 2019)