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An Analysis of the Current International Legal Regime on the Protection of the Cultural Heritage of Indigenous Peoples

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Abstract

Indigenous peoples have always strived for recognition of the right to their ancestral lands, resources, protection of their language, customs and traditions, all of which in combination constitute their (cultural) identity. This strife for recognition of their cultural rights, even if misinterpreted by some, is justifiable given that indigenous peoples' very survival depend on their cultural ties to lands, customs, traditions etc., passed down from generation to generation. Departing from initial attempts at integrating indigenous peoples into the rest of the society, the current legal regime recognizes distinct cultural rights of indigenous peoples. However, the absence of explicit references to indigenous peoples' right to their own cultural heritage in the relevant human rights instruments casts an uncertainty over the possibility that the cultural rights of indigenous peoples include a right to their cultural heritage over which they will exercise control. This article studies the current situation regarding indigenous cultural heritage right claims and elaborates on the various hurdles preventing the realization of this right. Addressing the uncertainties surrounding the existence of indigenous peoples' right to their own cultural heritage, international treaty law, customary international law and case law are analyzed to make a proposition that there is, indeed, evidence of such a right under international law. Conceding the lack of clarity on this issue, recommendations towards a more effective regime on the protection of cultural heritage rights of indigenous peoples are suggested.

Keywords: Indigenous peoples, Cultural rights, Cultural heritage, International Labour Organization, UNESCO, UN Declaration on the Rights of Indigenous Peoples, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention for the Safeguarding of the Intangible Cultural Heritage, customary international law.

Introduction

Historically, little attention has been paid to the cultural rights of indigenous groups under international law as compared to other rights. However, such groups' cultural rights have gained significant attention over the past few decades. Having gained recognition in legal documents, the debate has shifted to the scope of "cultural rights" rather than the traditional argument on the existence or otherwise of such rights under international law.

Culture includes not only spiritual or artistic aspects [1] of a people but also their everyday lifestyle; habits, means of livelihood, interpersonal relations, traditions [2] etc., which in total form their identity [3]. From this perspective, it has been proposed that indigenous peoples right to their cultural heritage is recognized under international law largely due to cultural rights formulations used under the 1966 Covenants and, particularly, the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP), where it is explicitly stipulated that indigenous peoples have a right to their "cultural heritage".

Skeptics of such a proposition have often cited traditional notions of state sovereignty [4] as a stumbling block to any claims by indigenous peoples of their right and ownership over their own cultural patrimony within the State. Others have also argued that the right to "cultural life" or "culture" as used in the 1966 Covenants is an obligation taken by State Parties to guarantee that right to all persons and groups and not only indigenous groups *per se*. Finally, critics have also expressed the view that granting indigenous peoples such special guarantees, as the right to their own cultural heritage, amounts to discrimination.

With the uncertainty regarding its place under international law in mind, we shall prove in this article the existence of indigenous peoples' right to their own cultural heritage using evidence from treaty law, international custom and case law.

Materials and Method

To establish the existence of the right of indigenous peoples to their cultural heritage international treaty law, customary international law as well as case law were explored.

Article 31 of the UNDRIP was analyzed in its ordinary meaning in order to prove that States recognize indigenous peoples right to their cultural heritage. In addition, Article 31 of the UNDRIP was interpreted in the light of other provisions of the UNDRIP such as the right

to self-determination (Art. 3), right to distinct cultural institutions (Art. 5), right to cultural sites (12.1) etc., which together form the right of indigenous peoples to a distinct cultural identity.

To support the recognition of indigenous peoples' right to their cultural heritage under treaty law, the communal rights of distinct groups to enjoy their own culture and to take part in cultural life recognized under Articles 27 and 15(1) (a) of the ICCPR and ICESCR respectfully were carefully evaluated. Akin to the Human Right Committee's approach in the *Apriana Mahuika* case, a collective right of indigenous peoples to their culture under Article 27 of the ICCPR was recognized. The progressive stance of the Committee on Economic, Social and Cultural Rights was also adopted in interpreting Art. 15(1)(a).

To establish that the cultural heritage of indigenous groups is protected under international customary law, a careful study was conducted to find evidence of the constituent elements of international custom in the current regime. The legislation of States with significant indigenous populations, such as Russia, Canada, Venezuela and Columbia etc., was evaluated to find proof of state practice. As to the existence of *opinio juris* on the cultural heritage rights of indigenous peoples under international law, a study of case law and the practice of relevant publicists of international law was conducted. Here, the opinions of the ILA Committee on the Rights of Indigenous Peoples (in its 2010 Interim Report) and Chief Justice A.O. Conteh of the Belize Supreme Court (in *Aurelio Cal v. Attorney General of Belize*) were relied upon. The general attitude of states towards indigenous cultural heritage rights was also evaluated.

An evaluation of the *Aurelio Cal v. Attorney General of Belize* case (Belize Supreme Court), the *Apriana Mahuika* case (the Human Rights Committee) was made to establish the positive approach towards the protection of indigenous cultural heritage rights under case law.

Results and Discussion

Undoubtedly, the most comprehensive answer to indigenous peoples' cultural needs is the 2007 UNDRIP. Article 31 of UNDRIP explicitly stipulates that "indigenous peoples have a right to maintain, control, protect and develop their cultural heritage..." Apart from this explicit reference to the right to "cultural heritage", Article 31 addresses 3 different subject matters. Firstly, it refers to "cultural heritage, traditional knowledge and traditional cultural expressions" as well as "manifestations of their sciences, technologies and cultures." It then

accords indigenous peoples the right to “intellectual property” over such knowledge, expressions and heritage. Finally, it enjoins states to “take effective measures” in combination with indigenous peoples to ensure such rights are fulfilled [5].

This holistic approach of Article 31 underscores culture as a core component of indigenous peoples’ identity. It follows that Article 31 has to be interpreted in light of other provisions of the UNDRIP. For starters, the focus on cultural heritage aside, Article 31 stipulates the right to intellectual property and the right of indigenous peoples to “maintain”, “control”, “protect” and “develop” such heritage. In the context of cultural heritage, to “maintain” can be said to refer to the idea of conserving, enjoying, practicing, having access to and participating in manifestations of one’s culture, while “develop” may be understood as making innovations, modifications etc. to cultural heritage. The right to control and protect their cultural heritage and the right to intellectual property over such heritage connote, respectively, the adoption of policies regarding their culture by indigenous peoples themselves and an exclusionary right of indigenous peoples to their works or inventions [6]. Thus, the UNDRIP takes a more progressive approach as compared to other human rights instruments by not only explicitly recognizing indigenous peoples right to their cultural heritage but also their right to control over such legacy. On a more general scale, the cultural rights of indigenous peoples find their reflection in other provisions of the UNDRIP. Such provisions include the right to self-determination (Art. 3), a right to distinct cultural institutions (Art. 5), right to cultural sites (12.1), right to the practice and revitalization of cultural traditions and customs (11.1) etc. These rights holistically reflect the more general right of indigenous peoples to their distinct cultural identity which has arguably attained customary status.

Despite being hailed as a major victory for indigenous empowerment the UNDRIP's effect under positive law must be scrutinized further. Like almost all UN declarations, it has no binding effect but rather considered a recommendation. However, when a declaration reflects pre-existing custom or creates such law in future, it is binding on States which have not been persistent objectors of such law [7]. Further, a declaration may become binding if its provisions are supported by conforming state practice and *opinio juris*. As we have observed above that Art. 31 is a component of the right of indigenous peoples to their cultural identity which is of customary nature and as it shall be proven subsequently that there exist conforming state practice and *opinion juris* to the UNDRIP, a case can be made that the UNDRIP is legally binding.

Under treaty law, the 1966 Covenants have played an enormous role in recognizing indigenous peoples' right to cultural heritage. Article 27 of the ICCPR states that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." Since indigenous peoples are not dominant groups in a state, they form part of such "minorities" referred to in Art. 27. Also, the use of "in community with others" suggests recognition of the cultural right of indigenous peoples under this provision as a collective one. Thus, Article 27 of the ICCPR follows the approach of the UNDRIP by endorsing the collective rights of indigenous peoples to "enjoy their own culture". The position that the right to the enjoyment of culture can only be meaningfully realized "in a community" has also been consistently held by the Human Rights Committee in its jurisprudence. In the *Apriana Mahuika* case, for instance, the HRC upheld that Article 27 includes an aspect that protects indigenous peoples' collective culture. Article 15(1)(a) of the ICESCR guarantees the right of everyone to take part in cultural life. It must be admitted that this provision appears to show State Parties' resolve to protect individual rights to culture rather than collective rights of particular groups. However, it has been interpreted by respective treaty bodies as a collective right. In paragraph 37 of its 2009 General Comment No. 21 on the Right to take part in cultural life, the Committee on Economic, Social and Cultural Rights imitated the approach under Article 31 of the UNDRIP, stating, *inter alia*, that "Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage."

Another international treaty worthy of mention is the International Labour Organization's Indigenous and Tribal Peoples Convention (ILO C 169). As reflected in its preamble, this convention not only recognizes indigenous peoples' aspirations to exercise control over their way of life and identities but also draws inspiration from, *inter alia*, the ICCPR and ICESCR. It, therefore, employs similar formulations on cultural rights of indigenous groups. Article 2(2)(a) of ILO C 169 binds State Parties to take measures for the "full realization" of the "cultural rights" in order to ensure "respect" for their "cultural identity". Again, akin to the 1966 Covenants, States are not only under an obligation to respect the cultural rights of indigenous peoples but are also mandated to take positive action to ensure the realization of these rights. Other relevant instruments on the present subject matter are the UNESCO Conventions such as the 2003 Convention for the Safeguarding of

the Intangible Cultural Heritage, the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage and the 2001 Convention on the Protection of the Underwater Cultural Heritage. Said Conventions while defining certain kinds of cultural heritage, emphasize its value and significance and enjoins States Parties to undertake measures to safeguard such heritage, including their identification, documentation, research, preservation, protection, promotion, enhancement or transmission. Art. 2 of the Convention on Intangible Cultural Heritage, for example, provides a list of possible elements and further states that intangible cultural heritage is to be defined through recognition of something as forming part of such heritage by “communities, groups and, in some cases, individual[s]”. In addition, it envisages, in Art. 11 (b), that when identifying and defining “elements of the intangible cultural heritage present in its territory” States Parties shall do so “with the participation of communities, groups and relevant non-governmental organizations.”

One of the legal issues has also been whether indigenous peoples' cultural heritage rights form part of the customary international law. As discussed above, an affirmative posture to this claim cannot be dismissed. The reason for such a proposition is simple. Be it the right to their ancestral lands, to continue their inherited ways of life, to self-government etc., the threat to the survival of indigenous peoples' culture is what motivates them to strive for such rights. Thus, cultural preservation and flourishing are at the root of the claims as recognized by the states. In this broad sense, all the rights of indigenous peoples' border on their cultural identity; *id est*, they are cultural rights. Hence interpreting these rights, whether in UNDRIP or other human rights instruments ought to keep this *telos* in mind [8]. Therefore, to the extent that the cultural identity of indigenous groups is considered a customary norm, indigenous peoples' cultural heritage which is a component of this “identity” should be regarded in the same light. Apart from the above, one can argue that there exist requisite elements in the current international practice regarding the cultural heritage of indigenous peoples to warrant it customary status. According to Article 38 of the Statute of the International Court of Justice, a customary norm consists of two key elements; (i) general practice of states and (ii) *opinio juris*. The practice of states is the objective element and may be deduced from varying sources such as decisions of courts, legislation, administrative acts, activities on the international front like treaty-making, etc. *Opinio juris sive necessitatis* is the psychological (subjective) component, the conviction a state that behaved in a particular way that it was bound by a legal duty to act that way. We shall demonstrate below that the right to

cultural heritage of indigenous peoples is of customary nature since this norm wields the pre-requisite elements discussed supra.

There is a widespread state practice on the protection of cultural heritage rights of indigenous peoples in the form of national laws and policies following progressive developments in international law. Article 69 of the Constitution of the Russian Federation, for instance, guarantees the rights of indigenous small peoples in accordance with universally proclaimed principles and norms of international law as well as international treaties of the Russian Federation [9]. Moreover, Art. 72 (1)(l) stipulates the protection of the “traditional living habit and traditional way of life of small ethnic communities” as a duty of both the Russian Federation and the subjects of the Russian Federation. Despite that Russia is not a Party to ILO C 169 or any of the ILO Conventions before C 169 and had previously abstained during the adoption of the UNDRIP, the wording of its Constitutional provision clearly indicates Russia recognizes its duty under international law to respect cultural heritage rights of indigenous peoples. Perhaps, the treaty obligations alluded to in Art. 69 of Russia’s Constitution is a reference to its obligations under the 1966 Covenants or customary international law. Whatever the case may be, the Constitution has served as a legal foundation for the emergence of over 100 documents geared towards preserving and maintaining the cultural heritage of indigenous peoples by the year 2000 [10]. A noteworthy example of such documents is the Federal Law “On Guarantees of the Rights of Indigenous Minorities in the Russian Federation”, adopted on 30.04.1999. This legislative act not only provides a definition of the indigenous minorities in Russia but also lays a legal framework for the protection of the socio-economic and cultural development, means of subsistence as well as the traditional habitat of indigenous minorities in the Russian Federation [11].

Similarly, Canada boasts a well-developed legal framework which protects indigenous peoples’ rights. As one of the first to enshrine indigenous peoples’ rights its Constitution proclaimed the “aboriginal” and “treaty rights” of the Indian, Inuit and Metis people of Canada. Thus, the Constitution safeguards aboriginal title which arises from historical occupation, treaty and culturally important activities.

Also, while it remains true that many States have adopted implementing legislation for the 2003 Convention discussed above, the Venezuelan Law of the Cultural Heritage of the Indigenous Peoples and Communities of December 11, 2008, is of particular relevance since it is specifically devoted to the recognition and protection of indigenous cultural heritage. Likewise, the Columbian Decree No. 02941 of August 6, 2009, deserves to be mentioned;

Art. 7 of this decree envisages, that, among other entities, indigenous community authorities can set up their own independent “representative list of immaterial cultural heritage” and thus establish their own and proper heritage.

Following the “global indigenous revolution” there have been significant changes in national legislation, policies and practices of states with significant indigenous populations. The underlying factor for such changes is the recognition of indigenous peoples’ rights to preserve their distinct identity and to control their own affairs - whether it is the San of Botswana, the Shaman from Ecuador or the Oroks of Russia. Furthermore, most States with a large indigenous population are either Parties to treaties dealing with indigenous cultural heritage or have not opposed adoption of such instruments. The ICCPR and ICESCR have 169 and 165 States Parties respectively, including states like the USA, Australia, Canada, Bolivia, Mexico, Peru, Russia, Kenya, Brazil, Sweden, Norway etc., who all have significant indigenous populations. Even the UNDRIP was passed at the General Assembly by 143 affirmative votes, 4 States opposing, while 11 abstained. The USA, New Zealand, Canada and Australia were opposed while Russia abstained [12]. However, all the opposing States have since declared their support for the declaration, the last endorsement coming from the USA in 2010. Thus, the UNDRIP enjoys an almost universal support. The creation of a custom requires not complete, but rather substantial uniformity in state practice, including that of States, whose interests are specifically affected. As demonstrated above, there is uniform state practice on the recognition and protection of cultural heritage rights of indigenous peoples by States who are affected by the issue. Hence, the objective element is manifest.

As to the existence of the subjective element, let me add that the 2010 Interim Report of the ILA Committee on the Rights of Indigenous Peoples has not only supported that there is *opinio juris* on the right to recognition and preservation of cultural identity but also reaffirmed that it is of customary nature. Similarly, in *Aurelio Cal v. Attorney General of Belize*, Chief Justice A. O. Conteh of the Belize Supreme Court held that, ‘...that both customary international law and general international law would require that Belize respects the rights of its indigenous people to their lands and resources. *Opinio juris* may also be deduced from States attitude towards the relevant human rights instruments on indigenous cultural heritage. As observed earlier, the UNDRIP’s support is almost universal, States Parties to the ICCPR and ICESCR are 169 and 165 respectively, while the C 169 was ratified by States with major indigenous populations. Finally, with a widespread state practice on recognition and protection of the cultural identity of indigenous groups, one may conclude

that States have a firm believe that they are under an obligation to behave as such. Thus, it can be concluded that cultural heritage rights of indigenous groups are a part of international customary law.

Conclusion

Claims by indigenous peoples on their rights to land and natural resources, self-determination etc. are often misunderstood as an attempt to be accorded undeserved privileges and preferential treatment. However, in order to properly understand these claims it is important to link them with their underlying purpose; *id est*, the cultural and physical survival of indigenous peoples. Considering that indigenous peoples' existence, as well as their sources of livelihood, are often inextricably linked with their ancestral lands, their cultural rights should not be therefore narrowly interpreted. In this regard, the current progressive approach taken within the international legal framework on indigenous cultural heritage rights is a step in the right direction.

However, a lack of clarity on the existence of such rights still remains largely because of 2 main reasons. Firstly, States fear that granting indigenous peoples' the right to a distinct cultural heritage, self-determination, land and resources etc. will compromise their sovereignty. However, such fears need not be considered well-founded since indigenous peoples' strive is geared towards their survival as a threatened group and not necessarily political separation from their States. The second reason involves the lack of clear formulations on the right to cultural property of indigenous peoples in human rights instruments. The clearest reference to this right is arguably the approach under Article 31 of the UNDRIP.

Recommendations

Considering the aforementioned challenges regarding the realization of indigenous cultural heritage rights, it will be most prudent to strive towards an understanding of indigenous cultural right claims in light of their *raison d'être*. In this way, States will become more brazen in their granting of such rights knowing that their sovereignty and territorial integrity will not be at risk.

The second step towards a more effective regime on the protection of indigenous cultural heritage rights is to strive towards the adoption of a treaty on this subject matter where such terms as "cultural heritage", "cultural property", etc. of indigenous peoples will be explicitly defined and addressed. This will be particularly helpful in that, States Parties

obligations under such a treaty shall not be in doubt as compared to the uncertainty surrounding the UNDRIP since international law mandates states to fulfill their obligations under treaties once their consent to such treaties has been expressed.

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