SELF-DETERMINATION AND CIVIL SOCIETY ADVOCACY

The acceptance of human rights standards and procedures to enforce them has always been a lengthy and challenging process. It took over five years for civil society organizations to take up at the First International Conference on Self-Determination the concrete proposals I had made for an international legal process to determine claims for self-determination. Four years on the recommendations sent to the Office of the High Commissioner for Human Rights arising from that Conference have not yet been considered by the UN.

The question thus arises under what political-legal circumstances would the right to self-determination be recognized or encouraged.

My purpose in this reflection is not to consider issues associated with any specific claim for self-determination – either in Kashmir or by specific indigenous groups – but rather to look a little more broadly at the nature of self-determination, particularly in the context of globalization and the economic dimensions of the struggle for human rights.

Neither do I want to review the debates that were so extensively canvassed at the First Conference and in the many forums that preceded and followed it. These included

- the nature of collective rights versus individual rights,
- the difference between internal and external self-determination,
- the failures or otherwise of the decolonization process after Word War II,
- the arbitrary establishment of national borders that have disenfranchised entire populations,
- the nature of the representativeness of the term “peoples”.

When I provided the background reading to the last Conference, I attempted to trace the history of the usage of the term “self-determination” in the formulation of the six major human rights instruments at the time (the Covenants and the four Conventions).

That background paper was originally prepared in a world vastly different from the one we live in today. It was written only three years after the second World Conference on Human Rights in Vienna and shortly after the establishment of the Office of the High Commissioner for Human Rights. The role of the High Commissioner as an honest broker and arbiter of standard-keeping was then only beginning to evolve but already showed considerable promise for the protection of human rights and fundamental freedoms.

Sadly, since then, we have seen a retreat from multilateralism by some of the dominant world powers, the undermining of civil and political rights in the so called ‘war on terror’, and a return to the use of human rights in a highly politicized manner that has ignored the basic human rights principle of universality.

It is not all that surprising, therefore, that there has been so little movement within the UN system to take up the recommendations of the First International Conference on self-determination.

While we all justifiably deplore the inaction of the UN on the resolutions of that First Conference and on the recommendations to establish a High Commissioner for self-determination and a self-determination Commission of representatives of UN member states, we need to acknowledge firstly the structural reasons for this inaction and, secondly, to ask whether the nature of the advocacy strategies adopted by civil society organizations might have played a role in any lack of action on the issue of self-determination.

We must also recognize that the history of human rights is one of struggle, of building alliances, of collaborative pressure to bring about change. It is a common-place in human rights discourse that no matter how good an idea is, it will have little uptake without concerted pressure. This pressure may come from academic and legal experts or from domestic and international NGOs or even, at times, from concerned governments, but in all cases it is only through the sustained campaigning of civil society organizations that we can ensure that our proposals are turned into reality, that governments are forced to listen.

My approach in this paper is very much geared to exploring further tools that can contribute to the continuing advocacy on self-determination.

In examining the existing UN instruments that can be used to further the cause of self-determination, it will not be a great revelation that there exist only a very few such instruments that are enforceable under international law and that – because of the lack of definitional clarity – governments have successfully ignored those references to the right to self-determination in the Covenants and elsewhere.

Take the example of the International Labor Organization's Convention 169 that deals with indigenous peoples. This Convention has not been ratified by many states. Furthermore, in the age of globalization that is so much governed by economic rationalism, 'market logic' in Professor Richard Falk's term, and privatization, the ILO Conventions and the complaints processes under them have lost their bite and power.

Similarly, the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities does not provide a legal means of petition since the Declaration is an expression of intent rather than an enforceable treaty.

The periodic reporting process mandated by the two Covenants and the fours major human rights conventions do provide further tools for advocacy, but only the Optional Protocols under the ICCPR, the CRC and CEDAW provide for individual or collective complaints mechanisms and many states have refused to ratify these.

These documents are undoubtedly useful in peoples' campaigning: they provide essential tools for advocacy. However, they should be seen in a changing twenty-first century geo-political context in which legal precision and precedent have been critical in order to effectuate change in the practices of governments.

Some of the regional mechanisms also refer specifically to self-determination if not directly then by extension. Thus, the African Charter of Human and Peoples Rights,

states in Article 20 “All peoples have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely pursue their political status and shall pursue their economic and social development according to the policy they have freely chosen.”

The Council of Europe’s Framework Convention for the Protection of National Majorities that came into force in 1998 is not quite as specific, but since it asserts in Article 53 that nothing in the Convention “shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under …any agreement to which it is a Party”, and since Article 1 of the ICCPR on self-determination has been ratified widely in Europe, this results in self-determination having an enforceable dimension under the European Convention.

However, even in both of these cases, legal precedent is clouded by debates – both among the petitioners and among government legal experts – about what constitutes ‘indigenous’ and about who can be described as a ‘minority’.

Within the UN system, it is the International Covenant on Civil and Political Rights that offers the foremost source of precedent on the right to self-determination. This could be seen as somewhat surprising since self-determination is a collective right, whereas the First Optional Protocol under the Covenant only provides for individual petitions. Thus the committee charged with overseeing compliance with the Covenant, the Human Rights Committee, is supposed to only consider petitions from individual victims or, in exceptional circumstances, from a third party.

However, the Committee has gradually become considerably more flexible and inventive in its Concluding Observations on states’ periodic reports. The Committee allows that NGOs ‘can act on behalf of an individual plaintiff, if they can substantiate their representation’. And the Committee will consider communications sent by groups if they all claim to be the victims of the same violation of the Covenant.

The Committee has made explicit reference to self-determination in its Concluding Observations on a range of countries that include Australia, Canada, Denmark, Norway and Sweden, and in a number of instances has included concerns on the economic dimensions of self-determination, notably in the Sami reindeer herding case. To quote a member of the Committee, Martin Scheinin, on individual versus collective petitioning, “the Committee’s case law under the minority rights provision of Article 27 and in particular the notion of “culture” in that provision has been able to incorporate much of the substance of the right to self-determination … even the right to development”

I believe that in the context of globalization where the international financial institutions as well as corporate actors are widely criticized for their negative impact on the protection and promotion of human rights, we also need to take issue with different actors and duty bearers that have been and are continuing to be implicated in the denial of the right to self-determination.

All too often debates on self-determination have focused almost exclusively on the political and cultural dimensions of the right to self-determination. This approach tends to overlook the holistic description proposed in the major human rights

instruments and declarations. It might be worthwhile to remind ourselves of the two last paragraphs of Article 1 of the Covenants,

> "All peoples may for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international cooperation, based upon the principles of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." Article 1(2)
>
> and
>
> "The States Parties to the present Covenant … shall promote the realization of the right to self-determination …" Article 1(3)

These are, of course, guided by the first paragraph that states that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their *economic*, *social* and cultural development" (my emphasis).

This leads me to consider that other highly-contested collective right, the right to development. I don't want to engage here with the arguments about the nature of the right to development – they are complex and fall outside the context of this discussion – but it seems to me that an over-riding objective in the struggle for self-determination is precisely to achieve a level of development that enables peoples to live in dignity and fulfilment.

Indeed, the 1986 Declaration on the Right to Development – reaffirmed at the Vienna Conference and other UN Conferences of the nineteen-nineties – provides that the right to development is an inalienable right through which all human rights and fundamental freedoms can be realized, and Article 1, paragraph 2 of that Declaration states that

> "The human rights to development also implies the full realization of the rights of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources."

Why is this useful for advocates of self-determination?

- Because development is the dominant discourse in this period of globalization
- Because many if not all of the UN development agencies have adopted the so-called "human rights approach to development"
- as has almost every bilateral donor
- Because even the World Bank President has acknowledged that the Bank would have to take the human rights approach to development into consideration
- And because dialogues on development can incorporate the principles of self-determination, since peoples have the inalienable right to full sovereignty over all their natural wealth and resources

It may seem strange to bring up the World Bank in this context as a target for advocacy given its checkered record with regard to self-determination and the rights of indigenous peoples. And indeed, the Operational Policies (the short statements that establish the parameters for the conduct of the Bank's operations) do not include one on human rights or self-determination, although Operational Directive 4.2 on Indigenous peoples includes reference to "full respect for [Indigenous people's] dignity, human rights and cultural uniqueness".

Yet we should remember that the World Bank is a specialized agency of the UN and its implementation of a 1991 Operational Directive, which imposes special requirements on certain World Bank projects affecting indigenous peoples, as Miriam Aukerman points out in a Human Rights Quarterly article in 2000, has had a significant impact on development and lending practices by bilateral and multilateral donors.

The Bank also has its Inspection Panel that provides avenues for complaints when its programmes can be shown to breach its own operational guidelines. Of the numerous cases brought before that Panel, many have related to the rights of minorities and indigenous peoples.[1]

A further avenue for advocacy is the almost universal focus on poverty reduction and the conditions placed on governments for debt relief and loans. NGOs have been very critical of the PRSP process but at the same time international campaigning is beginning to bear fruit and the Bank has had to respond to the criticisms.

It is important to recall that many of the changes of policies in the Bank have been the outcome of focused and coordinated lobbying by civil society organizations and there ought to be opportunities for advocacy on self-determination as well.

If we look back at the successful campaign for the establishment of a High Commissioner for Human Rights, this too was the result of civil society advocacy, notably the sponsorship of such international NGOs as Amnesty International.

We should also not forget the twenty-three year campaign for East Timor freedom that used advocacy, international diplomacy, exposure of violations, alliance building to eventually succeed.

In response, therefore, to the question as to what are 'the political-legal circumstances for the right to self-determination to be recognized or encouraged' we need to accept that they are contingent on a variety of factors dependent on effective peoples' advocacy.

The recommendations of the first Conference should be pursued by forming new alliances and finding new sponsors that may be acceptable to the UN members. This agenda should be promoted through advocacy targeting development actors –

[1] For example in the *India: Ecodevelopment* case in which the Panel found for the tribal peoples who argued that their basic rights "to determine our future and to oppose a project that we think will have a negative impact on our lives, livelihood and the survival of our people".

multilateral and bilateral donors, trans-national corporations and international organizations.

There is also a permanent role for the naming and shaming strategy that brought about the human rights standards that we have learnt to depend on. A Civil Tribunal on Self-Determination might be just the forum for this strategy, providing that it is truly representative of the numerous claimants for self-determination – national and sub-national groups, indigenous peoples and minorities from all the Continents. Without a genuinely participatory process that overcomes the perception of single issue politics, such a tribunal will not have any international credibility and will only serve to undermine the cause of self-determination.

However, such a tribunal has no chance of producing an international consensus on a mechanism for determining claims for self-determination. The need remains for the pursuit of such a mechanism as outlined in calls for the establishment of a Commission on Self-Determination. This will require coordinated campaigning, alliance building and the involvement of all national and sub-national groups involved in such claims. Without an alliance involving the many stakeholders, there is little chance for civil society to effect genuine progress.

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