THE RIGHTS OF PEOPLES IN MODERN INTERNATIONAL LAW*

by Ian Brownlie, QC

The subject of this article is essentially that of human rights, with particular reference to the rights of groups and indigenous populations. UNESCO, along with other international organisations, both universal and regional, has been much concerned with the articulation and elaboration of human rights concepts, and within UNESCO a particular subject of debate has been the Rights of Peoples. A number of distinguished Australian colleagues have been associated with this debate and it is my responsibility to contribute to a process already in being. My position is that of a professional lawyer. I am not associated with any pressure group and my role will be that of the chorus in Greek tragedy. That is to say, I shall speak as an 'interested spectator', sympathising with the fortunes of the characters, and giving expression to the legal and moral critique evoked by the action of the play.

The background, the setting, is the subject of human rights. The term "human rights" is relatively new, first appearing in documents on post-war organisation produced within the United States in the war years. However, the concept is much older than the terminology and it reaches back to secular political concepts, such as the Rights of Man, and religious thinking about natural rights. The more traditional term for human rights would be the Rule of Law. However, in the era of the United Nations the concept of human rights has acquired elements which take matters beyond the original notion of the Rule of Law.

In the first place, the concept of human rights places particular emphasis on equality. Thus two of the Purposes of the United Nations set forth in the Charter adopted at San Francisco in 1945 were as follows:

> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Secondly, the idea of human rights involved the checking of the performance of national legal systems against external standards, and the consequent erosion of the reserved domain of the domestic jurisdiction of States.

Thirdly, whilst the Rule of Law in its classical form involved a static model of equality before the law, with the accent on procedural justice and civil rights, the concept of human rights has been at least equally and perhaps more concerned with equal access to resources and education, that is to say, with a more dynamic concept of economic justice and substantial equality. This change of content was signalled by the appearance of the International Covenant on Economic, Social and Cultural Rights alongside the International Covenant on Civil and Political Rights in 1966.

In the years since 1945 the propagation and elaboration of human rights concepts has proceeded at an impressive pace. Not least among the developments has been the appearance of a rich body of case law produced by the national courts of some States, including India and the United States, and also by the European Commission and European Court of Human Rights. In particular, the concepts of equality and discrimination have been, and are being, articulated and refined in the process of application.

Inherent in the concepts of equality and of human rights is the idea that groups may have rights as such. The classical human rights instruments say little or nothing about the rights of groups as such, apart from the right of self-determination. However, in the Covenant on Civil and Political Rights the family is stated to be 'the natural and fundamental group unit of society' (Article 23) and Article 27 provides as follows:

> 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 practise their own religion, or to use their own language.

In a general way, the assumption lying behind the classical formulations of standards of human rights, including the Universal Declaration of 1948 and the two Covenants of 1966, has been that group rights would be taken care of automatically as the result of the protection of the rights of individuals. Thus if it is provided that 'everyone shall have the right to freedom of thought, conscience and religion', then it is to be assumed that the rights of members of a religious community are adequately protected. Moreover, the Covenant on Civil and Political Rights contains a strong guarantee of equality before the law. Article 26 provides that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

However, it is not the case that the rights of groups are taken care of in all respects by the protection of the rights of individuals. Certain claims by groups which are not on their face unreasonable have involved subject matters not adequately covered by the usual prescriptions for individuals. Three types of such claims may be identified, although there may be others.

First, the classical formulations do not cope with claims to positive action to maintain the cultural and linguistic identity of communities, especially when the members of the community concerned are to some extent territorially scattered. It is to be recalled that Article 27 of the Civil and Political Rights Covenant, in dealing with the protection of ethnic, religious or linguistic minorities, formulates a classical static guarantee, namely, that such persons 'shall not be denied the right' to enjoy their own culture, and so forth.

The question of positive action was highlighted by the decision of the European Court of Human Rights in the Belgian Linguistics case of 1968.[1] In that case six groups of applicants from communities of French-speaking

residents of the Flemish part of Belgium were seeking to use Article 2 of the First Protocol to the European Convention in order to increase opportunities for their children to be educated in French, the language of the family. Article 2 provides that:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

One of the complaints presented by the applicants consisted of the fact that the absence of positive action to maintain education in French in the municipalities in which they lived obliged the applicants either to enrol their children in the local Flemish schools or to send their children elsewhere, a cause of hardship and expense.

The Court considered that the facts complained of did not involve either a violation of Article 2 or a violation of Article 8 of the Convention itself, which is concerned with the protection of private and family life. The reasoning rested upon the premise that the legislative history of the Convention did not support the view that positive action was necessary on the part of the State to provide subsidies and other material underpinning to the rights protected. In particular the Court observed:

> The legal provisions in issue ... do not violate Article 8 of the Convention. It is true that one result of the Acts of 1932 and 1963 has been the disappearance in the Dutch unilingual region of the majority of schools providing education in French. Consequently French-speaking children living in this region can now obtain there only education in Dutch, unless their parents have the financial resources to send them to private French-language schools. This clearly has a certain impact upon family life when parents do not have sufficient means to enrol their children in a private school, or prefer that their children should avoid the inconvenience ... which the application of the law entails as regards education received in a private school which is not in conformity with the linguistic requirements of the laws on education. Such children will complete their studies in Dutch in the locality, unless their parents send them to school in Brussels, Wallonia, or abroad.
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> Harsh though such consequences may be in individual cases, they do not involve any breach of Article 8. This provision in no way guarantees the right to be educated in the language of one's parents by the public authorities or with their aid. Furthermore, in so far as the legislation leads certain parents to separate themselves from their children, such a separation is not imposed by this legislation: it results from the choice of the parents who place their children in schools situated outside the Dutch unilingual region with the sole purpose of avoiding their being taught in Dutch, that is to say in one of Belgium's national languages.[2]

So that is the first special aspect of group rights, the claim to positive action. It is not suggested that the problem of positive action is

only associated with the rights of groups, but the claim is more likely to be made in this context.

The second type of claim involving group rights is the claim to have adequate protection of land rights in traditional territories. The view that in certain societies there is a special connection between the indigenous people and the lands and waters of a region was articulated in the course of the Mackenzie Valley Pipeline Inquiry by the communities affected, and accepted in the Report compiled by the Commissioner, Mr. Justice Thomas R. Berger.[3] That is not, of course, the end of the matter, since the land rights question may, and usually does, involve issues of title, historic justice and restitution. The central point, however, is the claim of rights directly related to exclusive rights in respect of specific areas. This sets the land rights issue, and the concept of traditional ownership of a group, apart from the usual prescription of human rights on the basis of individual protection.

The third type of claim specific to groups is based upon the political and legal princple of self-determination, the exercise of which involves a range of political models, including the choice of independent statehood or some form of autonomy or associated statehood.

It follows that in certain important respects the classical approach **via** the protection of individuals is too limited, and additional concepts and principles must be applied. The problems of application are considerable in practice and I shall not, for the moment, follow them up. For the while my focus will be the principle of the equal rights and self-determination of peoples which receives recognition in principle in the text of the United Nations Charter (Article 1, para. 2; Article 55).

The historic roots of the principle of self-determination include the American Declaration of Independence and the decree of the French Constitutent Assembly of May 1790, which refers both to the Rights of Man and to the rights of peoples. In the course of nineteenth century European history the principle of nationality was influential and it was the **alter ego** of the principle of self-determination. These concepts, together with the concept of the protection of national minorities, were prominent in the deliberations of the Allied Supreme Council at Versailles in 1919. It is obvious that the concept of self-determination was not as yet accepted as a general principle. Thus the concept of racial equality was excluded from the Covenant of the League of Nations. Moreover, the Mandates System and the famous Minorities Treaties were conspicuous in their application only in certain cases. The special application of such institutions to defeated or newly established States only testified to the absence of a **general** recognition of the principle of equal rights and self-determination of peoples. However, once the **principle** - in terms of morality and ordinary logic - had been recognised as such, it was in the long run difficult to maintain that it only applied within the Americas and Europe. Thus, during and after the Second World War it was more and more accepted that self-determination was a universally applicable standard.

No doubt there has been continuing doubt and difficulty over the definition of what is a "people" for the purpose of applying the principle of self-determination. None the less, the principle appears to have a core of reasonable certainty. This core consists in the right of a community which

has a distinct character to have this character reflected in the institutions of government under which it lives. The concept of distinct character depends on a number of criteria which may appear in combination. Race (or nationality) is one of the more important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, language, religion and group psychology predominate. The physical indicia of race and nationality may evidence the cultural distinctiveness of a group but they certainly do not inevitably condition it. Indeed, if the purely ethnic criteria are applied exclusively many long existing national identities would be negated on academic grounds as, for example, the United States. In any case the community of States has been prepared to recognise both new States and the existence of legitimate claims by units of self-determination either by institutional procedures within the United Nations or on the basis of general recognition. Bangladesh, for example, was recognised as a State on the basis of general recognition by existing States. Provisions in written constitutions may acknowledge the relevance of self-determination to the affairs of multinational societies.

It is my opinion that the heterogeneous terminology which has been used over the years - the references to "nationalities", "peoples", "minorities", and "indigenous populations" - involves essentially the same idea. Nor is this view based upon a theoretical construction. Once a member of a people or community is expressing political claims in public discourse in Geneva, New York, Ottawa or Canberra, and using the available stock of concepts so to do, it seems to me that the type of political consciousness involved is broadly the same. The external participation of culturally distinct groups in the political process is essentially the same as that of individual States in respect of the Law of Nations. By this I mean that in order to obtain recognition of the claim to cultural identity, or to statehood, the claimant must accept the terms of the dialogue. This may sound rather obvious but it is in this context that I want to make the point that the opposition which appears in the sources between the definition of indigenous populations "by themselves" and their definition "by others" is a false dichotomy.

At this point I would like to stress that in practice the claim to self-determination does not necessarily involve a claim to statehood and secession. There are various models of "self-government" or "autonomy" -- neither of these are terms of art. It is true that some models, such as Trusteeship, are related to the purpose of an ultimate transition to independence. However, there are a variety of other models, including that of 'Associated State' (as in the case of the Cook Islands and New Zealand), the regional autonomy of Austrians in the South Tyrol, the Cyprus Constitution of 1960 and the various arrangements within the Swiss and other federal constitutions. There can be little doubt that federalism as a system provides a special capacity and a flexibility in facing cultural diversity. Federalism is probably better able than any other system to provide a regime of stable autonomy which provides group freedoms within a wider political cosmos and keeps the principle of nationality in line with ideas of mutuality and genuine co-existence of peoples.

In fact, there is a sort of synthesis between the question of group rights as a human rights matter and the principle of self-determination. The recognition of group rights, more especially when this is related to territorial rights and regional autonomy, represents the practical and

internal working out of the concept of self-determination. Such recognition is therefore the internal application of the concept of self-determination.

In practical terms the recognition of group rights usually takes two forms. In the first place, there is the prescription of a basic standard of equality or non-discrimination. The general standard of non-discrimination is prescribed in both the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights of 1966. The issue of racial discrimination is dealt with more comprehensively in the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. Australia is a party to all three instruments, and the Racial Discrimination Convention is implemented by means of the Commonwealth's Racial Discrimination Act of 1975.

The second form which recognition of group rights takes is the guarantee of the maintenance of group identity. This is the underlying issue addressed by Article 27 of the Covenant on Civil and Political Rights. With the assistance of the Australian Law Reform Commission, Australia is grappling with the difficult and important issues which the implementation of the international standards necessarily presents.[4] It is not my business, nor my expertise, to offer advice to Australians on **how** they should solve Australian problems. However, I can point to the **nature** of some of the problems which are to be solved. At least in the Australian context the background is encouraging. But in many countries the lack of adequate resources, the feebleness of the administrative system, and the absence of the rule of law, mean that the protection of human rights gets off to a bad start.

In the case of the protection of group rights, precisely because a very delicate balance of interests is called for, the existence of an efficient and sensitive legal system is immensely important. When the problems themselves are approached they are seen to be in many cases essentially difficult. The legal preservation, especially by positive action, of cultural identity may run the risk of appearing to erect principles of discrimination and the problem then becomes, when is discrimination tolerable on grounds of special need?

The difficulties may be compounded by the fact that one set of principles may come into conflict with another. I shall give two examples of such conflicts. The environmental or conservationist ethic may conflict with the life-style of indigenous peoples. The Dogrib Indians of the North West Territory of Canada, whose normal avocation is fur trapping, are presently concerned about the activities of conservationist groups. Again, the life-style of indigenous peoples, like that of other groups, may in particular respects be incompatible with contemporary standards of human rights. The status of women and resort to traditional punishments are controversial areas in this respect.

Particular problems arise from the existence of legal institutions which identify and protect the group concerned. The establishment of a definition of membership, the analogue of nationality, is a delicate matter. Moreover, the question which must be faced is whether expatriation is to be permitted. Some of the proponents of the rights of indigenous peoiples would erect constraints which, whatever the motivation, would be in effect a form of **apartheid** enforced by the law, with constraints upon assimilation and movement.

The practical difficulties involved may be illustrated by two recent episodes, the first from Canada, the second from South Australia.

The first took the form of a decision by the Human Rights Committee which has supervisory powers in respect of the International Covenant on Civil and Political Rights in accordance with the Optional Protocol to that Covenant. Canada, but not Australia, is a party to the Optional Protocol. The decision resulted from a communication from a Canadian Indian which put in issue the interpretation of Article 27 of the Covenant. Sandra Lovelace, a registered Maliseet Indian, lost her status as an Indian under the Indian Act 1970 (Canada) when she married a non-Indian. An Indian man who married a non-Indian woman would not have lost his status in this way. Subsequently her marriage broke up and she returned to live on the reserve, contrary to the Act. She was only saved from eviction from the reserve by threats made on her behalf against anyone attempting to remove her. She claimed violation of her rights under Article 2 of the Convention (on the basis of the sexually discriminatory rules defining Indian status), and under Article 27 (on the basis that the Indian Act prevented her from enjoying her own culture in common with other members of the tribe). The Human Rights Committee took the view that, at least after she ceased to live with her husband and returned to the reserve, the provisions of the Indian Act violated Article 27. It was not necessary, therefore, to decide on the application of Article 2 in this case.[5] The relevant Law Reform Commission Research Paper has this to say about Article 27:

> It is clear that one effect of Article 27 is to oblige a State to allow someone who is in fact a member of an ethnic minority group to associate with that group, even on reserve land, and that to this extent it imposes affirmative obligations. At least, legal impediments must not be placed in the way of the exercise of rights under Article 27, unless these have a "reasonable and objective justication and [are] consistent with the other provisions of the Covenant". It is also arguable that the **failure** to make equivalent legal provision for members of minority groups could contravene Article 27 in particular cases, although it may be doubtful to what extent Article 27 imposes obligations on States to provide resources as distinct from legal rights or faculties.[6]

The second episode, from South Australia, illustrates the way in which protective land rights legislation may be in danger of falling foul of human rights obligations arising under major international conventions, **at least as these are interpreted by the Australian courts.** The case concerned is **Gerhardy** v **Brown**, decided by the High Court of Australia on 28 February 1985.[7] The issue was the meaning of discrimination under the Commonwealth Racial Discrimination Act of 1975, which implements the International Convention on the Elimination of All Forms of Racial Discrimination of 1966. The key provision of the Act, section 8(1) provides, as follows:

> This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of sub-section 10(3).

By paragraph 4 of Article 1 of the Convention it is provided:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The issue was whether the access to land provisions of the Pitjantjatjara Land Rights Act 1978 (S.A.) were racially discriminatory under the Commonwealth Act and the Convention. Their effect was to prevent any person other than a Pitjantjatjara (or a police officer etc. in the course of official duties) entering the Pitjantjatjara land in the north-west of South Australia without a permit from the corporate body of the Pitjantjatjara. Brown, the defendant in the case, was in fact himself an Aborigine, though not a Pitjantjatjara. The High Court held unanimously that there was no conflict between the South Australian provisions and the Commonwealth Act, on the ground that the South Australian Act (including its permit provisions) was a "special measure" within the meaning of Article 1(4) of the Convention, and section 8(1) of the Act. However, six of the seven judges (Dawson J. not deciding) held that, in the absence of Article 1, para. 4, the provisions would have been discriminatory, because they made a distinction between Pitjantjatjara and non-Pitjantjatjara, one element of which was the proposition that to be a Pitjantjatjara was to be a member of a race. All the judges rejected the argument that the Act merely recognised traditional ownership and gave it effect within the general legal system, and that it was therefore not a discrimination based on race but a reasonable response to a traditional nexus to land. Accordingly, they treated Article 1 para. 1 of the Racial Discrimination Convention, as implemented by sections 9 and 10 of the Act, as being very much a prohibition on any formal discrimination by reference to a criterion containing any element of race irrespective of its "legitimacy". It follows that any provision containing notions of Aboriginality will be **prima facie** discriminatory unless it can be saved under Article 1, para. 4.

The issues raised by **Gerhardy** v **Brown** are familiar to the international lawyer and the international law materials have a particular value. No doubt the problems are to be examined very much in terms of their own time and social setting. However, the international experience indicates certain points of general technique. The experience of international tribunals and other national jurisdictions justifies the following as such points of general approach or technique.

The most important point is this. The fact that a primary criterion involves a reference to race does not make the rule discriminatory in law, provided the reference to race has an objective basis and a reasonable cause. It is only when the reference to race lacks a reasonable cause and is arbitrary that the rule concerned becomes discriminatory in the legal sense.

Some examples can be given. Suppose that in a particular country, in an area of mixed population, special arrangements were made in State hospitals,

prisons and so forth, to meet the particular dietary requirements of a racial or religious group. Two criteria would be relevant here: the membership of the racial or religious group and the dietary requirements. Again, in the context of sexual discrimination, it is obviously not discriminatory to make arrangements which are necessary to make allowance for the needs of women who are pregnant. The reference to the sex of the subject of the special provision is coupled with the second criterion, which is pregnancy.

Thus the question of discrimination is that of the **relevance** of the reference to race, or religion, or sex. Only women can become pregnant, but that does not mean that making special arrangements for pregnant women is in legal terms discrimination on grounds of sex. In the case of the recognition of the traditional ownership rights of the Pitjantjatjara the reference is similarly to a double criterion: that of tribal origin and that of traditional ownership. The fact that traditional ownership is peculiar to aborigines does not make recognition of such land rights discriminatory **in law.** The legal recognition has an objective basis; it is not arbitrary and is discriminatory only in the sense that a reasonable and legitimate policy **coincides** with racial origin, in the same way as pregnancy coincides with womanhood.

Thus the first principle to apply is to ask whether the differentiation in the legal sense has a reasonable cause and relates to a legally relevant basis for different treatment.

The second principle is that the modalities of the different treatment must not be disproportionate in effect or involve unfairness to other racial groups. This is very much a factual issue but the facts must themselves reflect some delicate nuances as to what is in local terms reasonable. In the case of the recognition of land rights, the restriction on freedom of movement, linked with such recognition, raises the issue of proportionality. In other words, even when the different treatment is not discriminatory in a legal sense, the modalities, the method, of implementation may be unreasonable and hence discriminatory at the second level.

It is in the context of the principle of proportionality that the concept of affirmative action or reverse discrimination is to be seen. When a law prescribes for affirmative action, in effect the principle of proportionality is being explicitly set aside and normally this will only be done on carefully defined terms, one of which will be a time-limit or other condition subsequently placed on the measures concerned. Article 1, para. 4, of the Convention on Racial Discrimination provides a justification for 'special measures' and stipulates that such measures 'shall not be continued after the objectives for which they were taken have been achieved'.

It was this clause in the Convention, as reflected in the Act of 1975, which was the basis of the reasoning of the High Court in **Gerhardy** v **Brown.** The difficulty is that the High Court appears to treat the 'special measures' clause as legitimating what would otherwise be discriminatory in law, since they view the legislation without that clause as being discriminatory. This approach is a further development of the original faulty premise, which is the assumption by the High Court that the protection of traditional land rights is discriminatory in the first place.

There are many reasons, both legal and non-legal, for not conducting the inquiry in terms of the category of discrimination but rather in terms of the reasonableness of the objectives, the proportionality of the means employed, and the question whether a special measure involves unfairness as between one group and another. The term 'discrimination' should only be applicable when the measure either favours or discriminates against a racial group without reasonable cause.

The decision in **Gerhardy** v **Brown** is only one of many in various jurisdictions dealing with the problems of implementing special regimes to protect group rights.

I have completed the survey of what I have chosen to call group rights, and can now move on to the concept of the Rights of Peoples which is the object of study under the sponsorship of UNESCO. The concept is not intended to be simply a re-run of notions of human rights, but represents a desire to provide reinforcement and further development of the existing stock of concepts of human rights. The origin of the Rights of Peoples could be said to be the United Nations Charter, which makes prominent reference to "peoples". Indeed, the preamble is actually formulated in the name of "the peoples of the United Nations". However, the more recent origin is to be found in the Universal Declaration of the Rights of Peoples adopted during a conference at Algiers in 1976. The meeting was not a diplomatic conference but an **ad hoc** gathering of lawyers, political scientists, politicians, and others. The document produced by that Conference, known as the Algiers Declaration, is a work of high idealism and a fairly high level of abstraction.[8] It was the product of a conference which did not reflect the views of governments and which was not composed of legal experts, but it has had a certain influence. This influence can be seen in the multilateral agreement adopted by the Organization of African Unity in 1981 and entitled the Banjul Charter on Human and Peoples' Rights.[9]

Of course, if any group of persons get together and produce a statement of moral or political principles said to govern a certain subject matter, then that is their right. The difficulty with documents like the Algiers Declaration is that they are offered in the language of law. Indeed, the Declaration contains a section devoted to "Guarantees and Sanctions".

As a professional lawyer I find the Algiers Declaration odd from a legal point of view. It confuses peoples with States, and in doing so collides with a large number of instruments, subscribed to by Third World States, in which it is clear that, apart from the cases of illegal occupation resulting from aggression or other usurpation of rights and unfulfilled claims to self-determination, international law applies as between States and the principle of non-intervention forbids going over the heads of States to the populations. Moreover, the plea of assisting oppressed minorities has been used in attempts to legitimate policies of intervention. Recognition of governments has not hitherto been contingent upon their democratic character.

If the Algiers Declaration is assumed to apply to States, and to peoples as such only in the exceptional cases I have indicated, then it does not add very much to existing positions. If it is intended to refer to 'peoples' and not to States (as representing their peoples), then it refers to a series of principles not recognised by the international community as applicable to peoples as opposed to the recognised governments of those States.

Finally, it is characteristic of the appallingly abstract nature of such exercises that those of us who are engaged in the practical solution of problems relating to group rights can find no assistance in their provisions. In particular, no attempt is made to define peoples or, in the case of the Algiers Declaration, to define "minorities", to which subject some of its articles refer. The very problems which stand in need of careful study are left blandly on one side.

The reference to the Rights of Peoples in the Algiers Declaration and the Banjul Charter is in truth simply a part of the proliferation of academic inventions of new human rights and the launching of new normative candidates by anyone who can find an audience. I have to confess that, when I was suffering from a particularly bad attack of norm-fatigue, I found Philip Alston's "proposal for quality control" in the human rights context very therapeutic. Alston has this to say:

> Writing in 1968, the year of the 20th anniversary of the adoption of the Universal Declaration of Human Rights, Richard Bilder concluded that "in practice, a claim is an international human right if the United Nations General Assembly said it is". Fifteen years later, ask the 35th anniversary is celebrated, the authoritative role that Bilder correctly attributed to the General Assembly is in serious danger of being undermined. The problem has manifested itself in three ways. First, the General Assembly has, on several occasions in recent years, proclaimed new rights (i.e. rights which do not find explicit recognition in the Universal Declaration of Human Rights or the two International Human Rights Conventions) without explicitly acknowledging its intention of doing so and without insisting that the claims in question should satisfy any particular criteria before qualifying as human rights. Second, there has been a growing tendency on the part of a range of United Nations and other international bodies, including in particular the UN Commission on Human Rights, to proceed to the proclamation of new human rights without reference to the Assembly. Third, the ease with which such innovation has been accomplished in these bodies has in turn encouraged or provoked the nomination of additional candidates, ranging from the right to tourism to the right to disarmament, at such a rate that the integrity of the entire process of recognising human rights is threatened.[10]

Having recovered from my norm-fatigue with this help, I was able to make a study of the lecture by Stephen P. Marks entitled **Emerging Human Rights: A New Generation for the 1980s?** Marks has, of course, disarmed the reader early on by announcing that he is only offering a prospectus of the good bets for the 1980s, that is, the newly "emerging" human rights. This set of new runners is described as the "third generation of human rights", the first two generations consisting of the civil and political rights and, subsequently, the economic and social rights. Programmatic though it may be, the Marks prospectus of emerging human rights is interesting and comprehensive and, unlike the Algiers Declaration, it is not offered as though it were **lex lata.** His candidate rights are as follows.

First, there is the right to food. Marks refers in this connection to Article 25 of the Universal Declaration of Human Rights, and in his recent

stimulating essay on the subject[12] Alston refers to Article 11 of the International Covenant on Economic, Social and Cultural Rights, which provides as follows:

> 1. The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent.
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> 2. The States Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
>
> (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources;
>
> (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Secondly, there is the right to a decent environment, in which connection Marks invokes the Stockholm Declaration of 1972. Thirdly, Marks states that "the right to development as a human right has been the subject of extensive reflection and proposed formulations for nearly a decade and is well advanced in acquiring the status of an internationally recognised human right".[13] Fourthly, the author announces the right to peace which, he says, "is not difficult to deduce from the U.N. Charter, the Kellogg-Briand Pact, the Declaration on Principles of Friendly Relations, and many other basic documents".[14] The nature of the law seeking and law finding involved is exemplified by the following passage which is remarkable in various ways. Having asserted the existence of the right to peace, Marks has this to say:

> A brief word about the content of the right to peace: it is the right of every individual to contribute to efforts for peace, including refusal to participate in the military effort, and the collective right of every state to benefit from the full respect by other states of the principle of non-use of force, of non-aggression, of peaceful settlement of disputes, of the Geneva Conventions and Additional Protocols and similar standards, as well as from the implementation of policies aimed at general and complete disarmament under effective international control. What I have just said is no more than an illustration of the sort of considerations that should go into the definition of this right. No authorised formulation exists, but I am convinced that this right will be increasingly refined in the coming years.[15]

This type of thinking is completely unhelpful. It overlays existing and generally accepted principles with a layer of novelty. It confuses several distinct areas of law and it suggests that the writer is unaware that the items he refers to have received very considerable refinement already.

It is, of course, easy to be sceptical about experimental views and forward thinking. However, the type of reasoning depoloyed in some of the 'forward thinking' literature may have results which are negative in terms of the practical advancement of good purposes. I should make my own position absolutely clear. As policy goals, as standards of morality, the so-called new generation of human rights would be acceptable and one could sit round a table with non-lawyers and agree on practical programmes for attaining these good ends. What concerns me as a lawyer is the casual introduction of serious confusions of thought, and this in the course of seeking to give the new rights an actual legal context. Many points could be made, one of which would be the tendency of what may be called the enthusiastic legal literature to develop as an isolated genre, with the select few repetitiously citing one another and the same materials, completely outside the main stream of diplomacy and international law.

But it will be said that we always have to start somewhere and pioneers are by definition isolated. Quite so, but that is not what is happening here. The type of law invention about which I have reservations involves a tendency to cut out the real pioneering - the process of persuasion and diplomacy - and to put in its place the premature announcement that the new settlement is built. I would like to take the article by Roland Rich on the right to development as an example of this process.[16] The article is, if I may say so, a strong and fluent statement of the case for the recognition of the right to development with much documentation. However, Rich gets rather carried away. He cites writers, such as Maurice Flory, and judges, such as Judge Bedjaoui, who assert the existence of a right to development. But he omits to warn the reader that the major texts of international law as yet contain no recognition of such a right. Moreover, Rich takes a wholly unacceptable view of what is State practice and invokes material which cannot be said to provide any evidence of a sense of legal obligation in this context.

This kind of approach is, in my view, actually inimical to the recognition of the right of development. It is rather like a commander in the field who announces victory on the basis that the enemy has made a partial withdrawal. For, if Rich and others are correct in their legal assessments, we can now rest, since the battle is won. Much more rigour is called for in the handling of legal materials. The elements of the formation of rules of general international law - international custom - are not some esoteric invention but rather they provide criteria by which the actual expectations and commitments of States can be tested. International law is about the real policies and commitments of governments, it is not about the incantations of secular or religious morality.

A related problem is the tendency to fragmentation of the law which characterises the enthuisastic legal literature. More or less in passing, the assumption is made that there are discrete subjects, such as "international human rights law" or an "international law on development". As a consequence the quality and coherence of international law as a whole are threatened.

Thus, for example, points are made as though they are novel propositions of human rights law when in fact the point concerned had long been recognised in general international law.

A further set of problems arises from the tendency to separate the law into compartments. Various programmes or principles are pursued without any attempt at co-ordinating. After all, enthusiasts tend to be single-minded. Yet there may be serious conflicts and tensions between the various programmes or principles concerned. It may happen that the life style of indigenous peoples, like that of any other group, may conflict with human rights principles. Thus the "preservation" or "autonomist" ethic in respect of indigenous people may conflict with current standards of human rights. It is typical of the low quality of debate in this field that, when I made that point at another gathering, I was accused of paternalism by one of the enthusiasts. But it is obvious that it may be really paternalist to take the line that indigenous populations cannot adapt to standards of human rights. Many other examples of potential conflict could be given, amongst which is the tension between human rights and the development concept itself.

I have been speaking of dividing the law, and the debate, into compartments. This process is visible also in the institutional structuring of the debate about the rights of groups. Thus the United Nations Commission on Human Rights has commissioned separate studies, with different special rapporteurs, on the rights of persons belonging to ethnic, religious and linguistic minorities (Capotorti), the problem of discrimination against indigenous populations (Martinez Cobo and Asbjorn Eide), the implementation of United Nations resolutions relating to the right of peoples under colonial and alien domination to self-determination (Gros Espiell), and the right of self-determination (Cristescu).

As I have stated already, the issues of self-determination, the treatment of minorities, and the status of indigenous populations, are the same, and the segregation of topics is an impediment to fruitful work. The rights and claims of groups with their own cultural histories and identities are in principle the same - they must be. It is the problems of implementation of principles and standards which vary, simply because the facts will vary. The point can be expressed by saying that the problems of the Lapps, the Inuit, Australian Aboriginals, the Welsh, the Quebecois, the Armenians, the Palestinians, and so forth, are the same in principle but different in practice.

This association of categories is not generally accepted, but the implications of the separation of categories include the hesitant approach to the definition of "peoples" or "minorities" or "indigenous populations". It is unsatisfactory but nonetheless significant to see, in Cristescu's report on self-determination, the dogmatic assertion that the concept of "people" is not to be confused with "ethnic, religious or linguistic minorities".[17]

In concluding, I would like to stress two points. In the first place I have attempted to present the issues and my own doubts as frankly as possible because this seemed to be the best way of opening up these questions for discussion. On technical grounds I have been critical of those I have called enthusiastic. It is necessary to be hard-headed and practical but, of course, without the enthusiasts, those who seek to raise the level of consciousness, there would be no questions to be hard-headed and practical about.

The second point is to stress, once more, the need to advance by means of studies which are not conducted at a high level of abstraction and which are not isolated from other areas of legal development which are substantially relevant. The areas on which empirical studies are called for are easily defined. They are:

. First, the identification of those group rights not adequately recognised or protected in the context of existing principles and standards of human rights.

. Secondly, the study of the concept of discrimination in the light of the wealth of material available.

. Thirdly, the study of the concept of a "people" or group with a cultural identity of its own.

In this general setting I would offer the final observation that the separation of the topic of indigenous populations from the questions of self-determination and the treatment of minorities is not justified either as a matter of principle or by practical considerations. Whilst the term "minority" is an unhappy one, the experience which has been gathered under the heading is highly relevant.

Notes

* This text is based upon addresses given in the University of Adelaide on 27 March 1985 and at a seminar organised by the Australian National Commission for UNESCO held in Sydney on 28 and 29 March 1985. Professor James Crawford deserves my thanks for his assistance in obtaining some of the materials referred to.

1. European Court of Human Rights Ser. A No. 6 (1968).

2. Id, 43.

3. **Northern Frontier, Northern Homeland: Report of the Mackenzie Valley Pipeline Inquiry** (Ottawa, 1977).

4. See Australian Law Reform Commission, Aboriginal Customary Law Reference, Research Paper 9, **Separate Institutions and Rules for Aboriginal People: Pluralism, Equality and Discrimination** (1982); Research Paper 10, **Separate Institutions and Rules for Aboriginal Peoples - International Prescriptions and Proscriptions** (1982).

5. Views of the Human Rights Committee under Art. 5(4) of the Optional Protocol concerning Communication No. R.6/24, 30 July 1981: Report of the Human Rights Committee, GAOR 36th Sess., Supp. No. 40 (A/36/40), Annex XVIII, 166.

6. ACL Research Paper 10 (above n.4), 15.

7. (1985) 57 ALR 472.

8. For the text of the Declaration see A. Cassese & E. Jouve (eds.), **Pour un Droit des Peuples** (1978) 27-30.

9. Text in: (1981) 21 **International Legal Materials** 58.

10. P. Alston, Conjuring up New Human Rights: A Proposal for Quality Control (1984) 78 **AJIL** 607.

11. (1981) 33 **Rutgers LR** 435.

12. In P. Alston & K. Tomaskevi (eds.), **The Right to Food** (Nijhoff, The Hague, 1984).

13. Marks (above n.11), 444.

14. id, 445.

15. id, 446. The other new human rights chronicled by Marks are the right to benefit from the common heritage of mankind, the right to communicate, and the right to humanitarian assistance.

16. R. Y. Rich, 'The Right to Development as an Emerging Human Right' (1983) 23 **Virginia JIL** 287.

17. E/CN.4/Sub.2/404/Rev.1, para. 279.