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Law and Identity

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By way of preamble, I want to emphasise that indigeneity can be a matter of life and death. Some of you may recall the Nigerian writer Ken Saro Wiwa. He claimed indigeneity on behalf of his people, the Ogoni, and on their behalf went to the UN to promote indigenous rights against the wanton destruction wreaked by Shell Oil. You may also remember that for doing that he was executed by the Nigerian government for treason. Defining indigeneity, then, can be as dangerous as it is important.

To begin this paper I'll make mention of two fairly recent texts on the topic, both of which are outstanding publications. Paul Havemann's 1999 book *Indigenous Peoples' Rights in Australia, Canada and New Zealand*[i] has been hailed by indigenous commentators as a watershed publication in the field of international indigeneity. As potent summaries, I recommend especially his three time lines or Chronologies. Particularly the first two of these lists have proven invaluable in sequencing and contextualising significant events and developments. The first lists significant dates in the historical development of indigenous rights under the Euro-American Law of Nations. The second chronicles twentieth century, public, international law and indigenous peoples.

Another seminal work is S James Anaya's Indigenous Peoples in International Law[ii] Anaya sees the basic struggle of indigenous peoples as the desire to counter the impact of colonisation, and recognises that international law is the most accessible forum for that struggle. Furthermore Anaya cites self-determination as the corner stone of human rights, linking it with the process of decolonisation. There is no doubt that the work is meticulously researched and each point is substantiated with pertinent examples.

As is the case in these two publications, most of the emergent discussion in the field is concerned with the rights of indigenous peoples under international law. An interesting example of this is the current debate about the use of the word *population* rather than *peoples*. Both Havemann and Anaya use *peoples* in the title of their books. Controversy arises because the term *populations* precludes territorial claims and demands for self-determination. *Populations* is the term favoured by the United Nations, whilst the International Labor Organisation uses both. The Kari Oca Declaration on the other hand uses *peoples* exclusively. I'll get back to this point a little later, but at this stage I want to outline my concern that whilst the arguments are necessary they avoid examining who these populations or peoples are that are targeted by either the ILO and UN or the Kari Oca Declaration. Although it is in itself fascinating, isn't so much whether one uses *peoples* or *populations*, it is, in the first instance, who one is referring to. No one I suggest would disagree that the Yanomana from deep within the Amazon Basin are indigenous, and

targeted by protective international law. But are the Basques or the Welsh or the Frisians also indigenous? Richard Griggs of the Centre for Fourth World Studies in Denver certainly thinks so[iii]. And if so, what laws, international or not, are designed to protect their indigeneity?

My purpose in this paper is to ask how indigeneity is defined. What criteria are used to include and exclude people and peoples from the targets of international law? The fundamental question then is whether or not it is actually possible to define an international indigenous identity in any meaningful, practical and internally consistent sense.

The tendency to collectivise, and consequently homogenise, indigenous people has been well documented. We need look only to our own indigenous population to see that. There are Aborigines and Torres Strait Islanders, with Tiwi as a possible third group. But we also know that there exists in every state and territory of Australia contention around the issue of Aboriginality. In my home state of Tasmania, there are some 18,000 people who claim Aboriginality, which means that it is the only state where there are now three times as many Aboriginals as there were pre-invasion. Community leaders such as Michael Mansell object, suggesting that Aboriginality has become a club that anyone thinks they can join[iv]. In simple terms we can state that amongst the people who claim Aboriginality in Tasmania are those who unequivocally are and those that unequivocally are not, and that there are a lot of people in between. Where you slide your own personal marker between those extremes is your own business, but where international law sets it is everybody's concern.

Indigeneity continues to be of interest in the international arena. The United Nations declared 1993 the Year of Indigenous Peoples, and more recently the decade starting 1995 as the Decade of Indigenous Peoples. They appointed yet another "Special Rapporteur on Indigenous Concerns" earlier this year. And well may they be applauded for doing so. But their attempts to provide a universally workable definition of exactly who they are reporting on or even recognising, either for a year or for a decade, have a much longer history. The International Labour Organisation has a parallel history of grappling with exactly whose rights they are working to protect. Whilst these two organisations are by no means the only ones making contributions to the dialectic, they are nonetheless the two biggest and most influential. For the sake of balance, I will add the Kari Oca declaration as a representative indigenous voice.

I have already made mention of the contentious nature of the problem by referring to the dispute over the term indigenous *peoples* or indigenous *populations*. This very contention is reflective of the importance of the differentiation between indigeneity and minority in terms of status within a modern nation-state. Indigeneity confers a benefit over a general minority; particularly in spiritual, emotional and/or material terms. Were it merely the first two, there seems to be no doubt that the law would give it little thought. However as soon as the conversation turns to material benefit, beaks start to sniff. And rightly so, for the law is concerned with fairness and equity. In Australia we have seen a long campaign by Aborigines and Torres Strait Islander to be kept out of multicultural Australia, a campaign that in a sense concluded with the acknowledgment of Native Title. As a comparison, the

on-going struggle for identity and recognition by Australia's other black citizens, the Kanak, is not dependent to any degree on the claim for land rights. The Kanak, whilst they are a black Australian minority, are not indigenous and, with the possible exception of Mal Meninga and Bobbi Sykes, are generally not accepted into their ranks by the ATSIs - even though White Australia seems to have little knowledge of the difference.

So, what are the criteria that a *people* or a *population* need to meet before it is recognised as indigenous in law? I refer to the quite recent case in the USA where in 1976, the Mashpee Wampanoag Tribal Council sued in the federal court for possession of a large tract of land on Cape Cod. Similar earlier suits had resulted in out-of-court settlements, such as that won by the Passamaquoddy and Penobscot tribes in Maine who received $81.5 million in return for them passing authority over to the state, But the Mashpee trial was different. At stake wasn't so much the question of land ownership but whether or not the contemporary Mashpee were in deed an actual Indian tribe. What was at stake was their very identity as indigenes - not to mention substantial amounts of money that were dependent upon the legal judgement thereon.

The Bureau of Indian Affairs raised objection to the claims on the basis that in 1976 the Mashpee are not a tribe. The jury agreed, and the land claim was dismissed. What is of interest to this paper is that like the Miami before them, the Mashpee were, and in deed are still, not recognised as a distinct Indian tribe. The sticking point was cultural continuity: there was no way that it could be indisputably proven that the Mashpee of two hundred years ago were the same people as the Mashpee today. In order to make sense of that judgement we need to understand that it was based on what criteria for tribe-ness are extant in USA federal law. The judgement relied primarily on Montoya v. United States when in 1901 a tribe was defined as "a body of Indians of the same or similar race, united in a community under one leadership, and inhabiting a particular to sometimes ill-defined territory. "[v]

At first glance these four criteria may seem far removed from the UN/ILOs definitions of indigeneity. In broad terms we might substitute the word indigenous peoples for tribes in this instance. In actuality the two sets of defining characteristics are remarkably similar in intent. Both rely on two key factors: a continuation of a distinct culture as well as an uninterrupted occupation of an ancestral domain. The jury specifically agreed that the Mashpee were a tribe in 1834 and in 1842, but not in 1790, 1870 nor 1976. Those years were key dates, but that isn't important here. The jury decided that there was no continuity, and that as the Mashpee were not a tribe at the time they raised their claim, the case could be dismissed. The emphasis here is on continuity: there has to be an on-going, distinct culture evident and there has to be on going occupation of ancestral domains.

Both the UN and the ILO put forward three criteria for indigeneity of a people. The UN lists premier occupation of a defined area; on-going and demonstrably distinct cultural practices and oppression by the dominant society caused by the indigeneity. The ILO concurs with the first two but substitutes self-identification for the third. One needs merely refer to Nunavut to demonstrate that the UN's third criterion is by no means universally applicable to

indigenous peoples. It would take a substantial argument to describe the Inuit as no longer indigenous merely because they have recently achieved a measure of self-determination and autonomy. By the same token it would require substantial argument to prove that any indigenous people can revoke their indigeneity merely by saying so. Patrick Dodson could argue that he is Irish rather than Aboriginal, but who would believe him?

Substantially it is the first and the second criteria that form the basis of the vast majority of legal interpretation of indigenous identity, and as mentioned earlier, the Federal Bureau of Indian Affairs pointed to areas of significant doubt in both criteria in the Mashpee's claim. Firstly the FBI argued that the Mashpee today is a conglomeration of various Indian peoples, Caucasian people, Negro people and Hispanic people, to the point that no one can be said to be generically Mashpee any more. The USA clings to blood quotients for authenticating (and accrediting) individual Indians, and in this case applied those principles to an entire tribe. The FBI argued that there was no longer a dominance of Mashpee in the assembly of people claiming to be Mashpee. Therefore, they were able to argue, the people who had been the traditional owners of the Cape Cod area in the past were no longer manifest in the current Mashpee. In essence they said that whilst they were not denying that the claimants were of Mashpee descent, they were not the same Mashpee who had roamed the area before it was confiscated.

This argument was supported by the contention that there were in fact no longer any on-going and distinct cultural practices that identified the claimants as traditional Mashpee. There was no language, no dances, no ritual and no world-view that made the claimants distinctly and identifiably Mashpee. All such activity currently practiced by the claimants were shown by the FBI to be a mish-mash of various cultural practices acquired during the last fifty years or less, and drawn from disparate sources. Even the most neutral observer, with the best will in the world, would be hard-pressed to uphold the claim of cultural continuity, and it comes as no surprise that it was dismissed. However, neither does it mean that the Mashpee have abandoned their claim:

> The Mashpee Wampanoag Tribal Council Inc. of Massachusetts has lived in the same area of Cape Cod for hundreds of years. The Native American Rights Fund (NARF) has represented the Tribe since the mid-1970s in seeking federal recognition. Most recently, NARF responded to alleged deficiencies pointed out by the Bureau of Indian Affairs (BIA) in the Tribe's petition for federal recognition. The BIA has now placed the Tribe on "ready for active consideration" status, a stage prior to the BIA actively considering their petition. In the meantime, NARF is assisting the Tribe in revising its constitution to strengthen its tribal government.[vi]

The Mashpee case provides an interesting springboard to what exactly is meant by the term indigenous peoples during this Decade of Indigenous Peoples. Indigenous peoples themselves support both the UN's and the ILO's definitions. In Brazil in 1992, at the first World Conference of Indigenous Peoples on Territory, Environment and Development, nearly one thousand people, representing indigenes from all parts of the globe wrote and signed a 109 point Earth Charter called the Kari-Oca Declaration. The charter insists on the

term indigenous *peoples* as opposed to indigenous *populations*. There are one or two other interesting points in the charter that will be revisited later in this paper, but the point here is that it serves as a reasonable justification for using the UN and ILO definitions of indigeneity as benchmarks because the charter specifically mentions those two organisations, and recommends that their definitions be adopted. It isn't unreasonable then to assume that in general indigenes themselves see the criteria of on-going occupation of traditional domains and an on-going and distinct culture as the keystones of international indigenous identity. And those keystones do not seem to fit the arches constructed by the Mashpee.

They do however fit the bill for the Frisians. In Australia Frisians are better known as cows, and in the USA people mostly will think that you are referring to horses, but in the Netherlands, Germany and Denmark, they are first and foremost people. They are tall, blue eyed, blond haired and have always lived in Fryslan. The Frisian Museum claims that they have lived there for more than fifty thousand years. Be that as it may, the Romans called Frisii and were at pains to keep out of their long coppery hair because they were in those days, a little wild. Eve when Boniface went preaching there in the Middle Ages, the Frisian response was a little extreme: they killed him. Strangely enough a few centuries later, they adopted Protestantism, producing the Mennonites and the Amish, both of who are renown for the gentleness. After that, the political turmoil in Europe saw their domains split between The Netherlands and Germany, with a few islands and a narrow coastal strip grabbed by Denmark. The Frisian settlement around The Wash in England became absorbed into the local population. But instead of assimilating into their new countries, the Frisians maintained their language and their fierce independence, particularly in the Dutch parts. There they still don't sing the National Anthem of The Netherlands. Instead they sing the Frisian Folksong.

The Frisians are a thoroughly modern, contemporary people. They are also indigenous. No one but the Frisians have ever live in Fryslan. The 50,000 years of occupation suggested by the Frisian Museum may be in dispute, but such dates and time lines are not actually required by the definitions. Certainly the Frisians have been in Fryslan since time immemorial; certainly Fryslan is their ancestral domain. Not only that, but there is little argument with the statement Frisians have always been there and continue to be there this day. The first criterion is, in any meaningful sense, indisputably satisfied.

The second criterion centres on an on-going and distinct culture. This criterion can make itself manifest in several ways, one of which, universally accepted, is the maintenance of a separate language. The Frisian language, recognised as a minority language by the UN and the EC, is mutually unintelligible with either Dutch or German. Of the 700,000 people living in Fryslan, 600,000 are passably fluent or better. I could add the traditional customs, sports and festivals. I could refer to the unique way of seeing the world, evident in the very peculiar humour, but the point has been made; the second criterion has also been satisfied[vii].

But of course, something has been left out here. Do the Frisians think of themselves as

indigenous? Well, that depends on what you mean. And it depends on which language you ask the question in. Because Fryslan is now mostly under the jurisdiction of The Netherlands, and the Dutch tried very hard to eradicate the Frisian language during the last three hundred years, most academic discourse is in Dutch. The Dutch language doesn't have one word for indigenous. Instead they have a word for autochtonous; another for primitive and a third for native. Any one or all three of those words are translated as indigenous. Of course English has those three words as well, as well as a few more. But Dutch doesn't have a single word for indigenous. Were you to ask the Frisian man in the street if he is indigenous, you would have to choose which one you meant. Autochtonous would get you a hundred per cent positive response. Native would probably also be universally acceptable. But primitive may well get you run out of the place. Frisians, whilst certainly accepting that they are indigenous, are not primitive.[viii] Primitiveness, in this sense and at this time, carries the meaning of peoples of foreign climes considered to be less sophisticated in a military/technological/economic/rational sense. Such an assessment was often originally made on a religious basis, and is now generally considered to be erroneous, insensitive and politically incorrect. Regardless of whether we still secretly harbour such thoughts, we need to ask if indigeneity equates with primitiveness without descending into the murky depths of anthropological views of cultures made static by colonialism.

Unlike the Dutch, the Frisians have only one word for indigenous:- ynlansk, someone or something that comes from within the land. With due reference to the argument that all but a handful (or even one) peoples came from somewhere else, Frisians see themselves and are seen as uniquely native to their ancestral domains. It seems reasonable to assume that by satisfying the criteria of indigeneity put up by the UN and the ILO, and ratified by the Kari Oca Declaration, and publicly seeing themselves as indigenous, Frisians are in deed, indigenous.

The Basques and the Sami, amongst others, will also fit the bill. The Sami are often the only ones invited to international conferences on indigeneity, probably because they look "primitive" in their traditional garb. The fact that they now track their reindeer by satellite is seldom referred to when the Circumpolar Council meets to discuss traditional land rights on the Kola Peninsula. The indigenous world may applaud the Basques for their struggle to regain sovereignty over their ancestral domain, but the others see them as murdering terrorists. Nonetheless the Mashpee are not indigenous and the Frisians are. So, this decade has been assigned to further the Frisians the Basque, the Sami causes but not the Mashpee.

Of course, nothing is that simple. Two points stand out. The UN isn't targeting Frisians, and all of this is contingent on the co-operation of the governments involved. Taking the second point first, in 1993 the Dutch Government, through the Netherlands Ministry of Foreign Affairs/ Development Cooperation, published a statement entitled Indigenous Peoples in the Netherlands Foreign Policy and Development Cooperation. The Frisians aren't mentioned once. Nor are the Sami or the Basques. It makes use of the UN definition as outlined by Martinez Cobo[ix]:

Indigenous communities, peoples and nations are those which, having a historical continuity

with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

I have already demonstrated that this definition isomorphically fits the Frisians, but I have also suggested that in the main, they are not the intended targets. In deed, the Dutch Government's statement clearly states, continent by continent, which peoples it is referring to, and Europe doesn't rate a mention at all. In fact, the lists of indigenous peoples seem to have one main common factor: they are all militarily/technologically/economically less sophisticated.[x] Could it be that the Dutch are implying that the UN are targeting primitive peoples but are reluctant to cal them that? At least the ILO referred to Indigenous and Tribal Peoples.[xi] The UN's attempt to pinpoint who they are referring to is principally the notion of being oppressed by the dominant society, but that would mean that if the oppression was removed they would no longer be indigenous. We would have had to remove the Inuit from the list the minute they achieved autonomy in Nunavut last year, and that is patently ridiculous.

Ultimately we might have to agree with David Maybury-Lewis[xii] who suggests that there are no hard and fast distinction between indigenous peoples and other kinds of localised ethnic groups. Admittedly he also mentions that American Indians are *truly* indigenous because they were there first, but he does make a very substantial point when he suggests that indigenes are often defined as much by their relationship to the state as by any intrinsic characteristic. I am assuming that he is taken the two main criteria of ancestral domains and on-going cultural difference as given, when he states that indigenes often live in isolation and manage their own affairs as much as possible without interference from a centralised authority. Indigenes, he claims, "are always marginal to their states and they are often tribal." He defines tribal as pre-industrial and small scale. We could point to the Maori and ask if they are marginal to their state; or the indigenous Fijians, but that point has already been made. What is more relevant is that Maybury-Lewis too equates indigeneity with primitiveness without letting the word pass his lips.

Were I an etymologist I would argue that historically speaking being primitive is not necessarily a bad thing because the criterion upon which the judgement is based usually comes from some sort of canon-based religious world-view, the relevance of which in today's world may well be questionable. That, however, is unlikely to remove the patronising air with which the word is tainted. Indigeneity is good, primitiveness is bad. The problem is that most international consideration of indigenous peoples, including international law, seeks to address the inequities that indigenes suffer because of their indigeneity. It demonstrably wrong to suggest that all indigenes actually suffer such inequities. So, how can the UN and ILO target those indigenes who warrant their support? How can any support organisation do that without creating further divisions? Are we to have category A and category B indigenous peoples, with sub-categories according to

appearance?

I mentioned Tasmania earlier on. The Aboriginal community there has been described as a bunch of mainland Aborigines and white people squabbling over Federal funding. Whilst the implication that there are no Tasmanian Aborigines is demonstrably untrue, Michael Mansell's comment that they seem to have become a club that anyone can join is also not far from the mark. When asked what criteria he uses to assess someone's Aboriginality, he answers that they know who they are and they don't need such guidelines. Others disagree. Garry Maynard, a Tasmanian member of the Stolen Generation, casts doubt on Mansell's opinion (pers comm. 12.12.00). Maynard suggests that less than a tenth of those claiming Aboriginality actually are. Kaye McPherson[xiii], an Aboriginal elder with no recognised genealogical links whatsoever, suggests that there are many more than eighteen thousand. Whatever the truth of the situation, it does seem that at the rate the general population of the island state is shrinking and the Palawa rate is increasing, Tasmania might soon become an entirely Aboriginal state. What would be an interesting exercise is to judge whether or not the Palawa satisfy the criteria for indigeneity. Any of the traditionally living nations, the Yolgnu, the Tiwi, the Pitantjatjara as examples, are clearly indigenous, but are the Palawa, the Bunjil or the Eora? Are the Frisians akin to the Pitantjatjara whilst the Palawa are akin to the Mashpee? Is the conclusion to this paper really questioning the indigeneity of some Aborigines?

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[i] Havemann, P, 1999, *Indigenous Peoples' Rights in Australia, Canada and New Zealand*, London, Oxford University Press

[ii] Anaya, S. James, 1996 *Indigenous Peoples in International Law,* New York, Oxford University Press

[iii] Actually he mentions the Frisians, the Basques and the Sami as indigenous Europeans http://www.cudenver.edu/fwc/Issue8/europe-1.html

[iv]Michael Mansell is quoted as saying that Aboriginality isn't a club you can apply to join in an article written by Georgia Warner under the headline "Battle of the Clans", published in the Mercury dated 7/9/99, p17.

[v] Federal reporter, 1979, 592F.2d 575, p582

[vi] http://www.narf.org/cases/caseupdates.html (Updated 03/20/01, accessed 24/9/01)

[vii] I shan't mention the geneticists who use the Frisians as test cases because you don't have to go back very far to find a common ancestor: that's way to close to the bone for a Frisian who made his home in Tasmania.

[viii] Onsman A, current, *Frysk en Frij: defining a contemporary indigeneity*, Daykeeper, Denver

[ix] Cf J.R. Martinez Cobo, 1987, Study of the Problem of Discrimination Against Indigenous Populations UN Doc. E/CN. 4/Sub.2/1986/7/Add.4

[x] Post Modernism has decreed that reason is context and culture dependent and therefore too vague to be a factor in anything at all.

[xi] The Convention Concerning Indigenous and Tribal Peoples in Independent Countries

(ILO No 169), 72 ILO Official Bulletin 59, entered into force Sept. 5, 1991

[xii] Maybury-Lewis D, 1997, *Indigenous Peoples, Ethnic Groups and the State*, New York, Allyn & Bacon

[xiii] Cf The Lia Pootah community, particularly http://tasmanianaboriginal.com.au/familyhistory.htm and http://tasmanianaboriginal.com.au/voting2001/index.htm (accessed 6/11/01)