

TORTURE, IDENTITY, AND INDIGENOUS PEOPLES:
INDIVIDUAL AND COLLECTIVE RIGHTS

*Marchéta L. Birch**

Marginalization and identity come to the forefront when we consider the plight of indigenous peoples as targets of torture. In general, indigenous peoples were—and still are—the first to be marginalized when issues of an essentially political nature—who gets what—arose. This resultant push to the periphery and the attendant silencing and dehumanizing exacerbates the perception by those in positions of political power that indigenous peoples are expendable—as individuals and communities. Therefore, when oppression and fear become tools of control, indigenous peoples become convenient targets precisely because they have been marginalized. The perception of indigenous peoples by perpetrators is that, as torture victims, indigenous peoples can be used as *examples* with seemingly little risk from the indigenous peoples themselves—or anyone else—coming to their defense.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture)¹ and the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (Convention Against Genocide)² are significant among international human rights instruments insofar as they define and establish criteria and mechanisms for the redress of gross violations of human rights. Adopted by the General Assembly in 1984 and 1951, respectively, each document was drafted at a time when individual human rights

* Associate Professor of Political Science, Canisius College, Director, International Relations Program, Canisius College.

¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85, 113, *available at* http://www.unchr.ch/html/menu3/b/h_cat39.htm (last visited Nov. 21, 2003) [hereinafter Convention Against Torture].

² Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277, *available at* http://www.unchr.ch/html/menu3/b/p_genoci.htm (last visited Nov. 21, 2003) [hereinafter Convention Against Genocide].

were understandably of primary concern. Arguably, the intervening decades saw a legal excursion into balancing individual and collective rights³ with the concurrent drafting of the International Covenant on Civil and Political Rights (ICCPR)⁴ and the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁵ culminating with their adoption by the General Assembly in 1966. This activity to develop international human rights instruments was undertaken virtually to the exclusion of collective or community rights, with the noted exceptions of the Convention Against Genocide and the ICESCR.⁶ With this as a backdrop, we may now turn to a discussion of the nexus of torture, individual and collective human rights, indigenous peoples' identities, marginalization, and international law.

In ever expanding ways, indigenous peoples are finally being recognized and accepted as having a voice and role in global political affairs.⁷ Their political activities vis-à-vis global relations—as well as their political, legal, and socio-economic arrangements—challenge our current assumptions, norms, and practices of protecting and promoting human rights as well as international law in general. More specifically, *individual* as the accepted norm or foundation upon which human rights protection and promotion ought to be based—and, concurrently, our understanding of torture

³ This is arguable because the existence of two separate documents can be interpreted as an escape mechanism for those states not wishing to give equal weight for both individual and collective human rights.

⁴ International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, at http://www.unchr.ch/html/menu3/b/a_ccpr.htm (last visited Nov. 21, 2003) [hereinafter ICCPR].

⁵ International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 6 I.L.M. 360 [hereinafter ICESCR].

⁶ See Convention Against Genocide, *supra* note 2 at 280 (criminalizing acts intended to destroy “a national, ethnical, racial or religious group”); ICESCR, *supra* note 5, at 360 (referring to “peoples” as having rights to self-determination and its own means of subsistence); see also Charles F. Furtado, Jr., *Guess Who's Coming to Dinner? Protection for National Minorities in Eastern and Central Europe Under the Council of Europe*, 34 COLUM. HUM. RTS. L. REV. 333, 338–39 (2003) (postulating that other contemporary treaties had been limited to protection of the individual, as evidenced by language indicating the singular form).

⁷ Descaheh, a Cayuga haudeonesua, began this process with his attempted participation in a session of the League of Nations in 1923. The United Nations has expanded by establishing the following organs, activities, and instruments: the Working Group on Indigenous Populations (WGIP, 1982); the Draft United Nations Declaration on the Rights of Indigenous Peoples (DDRIP); the Working Group on the Draft Declaration (WGDD, 1995); the Permanent Forum for Indigenous Issues (1998); the Year and Decade of Indigenous Peoples (1994 and 1995–2004). Other significant global events include the awarding of the Nobel Peace Prize to Rigoberta Menchu in 1992, the on-going work by OAS to draft a declaration of the rights of indigenous peoples and, finally, the creation of numerous regional bodies by indigenous peoples such as the Inuit Circumpolar Conference and Saami Council.

—is shown to be limited and limiting. These challenges make it clear that the Convention Against Torture and the Convention Against Genocide have significant constraints with respect to protecting the human rights of indigenous peoples as such.⁸ The United Nations Draft Declaration on the Rights of Indigenous Peoples⁹ could potentially minimize these strictures if it retains a core orientation of collective rights as it makes its way through the Commission on Human Rights and, eventually, the General Assembly.

Of initial relevance is that the Convention Against Torture, in Article 2, stipulates that the perpetrator be a public official or agent thereof.¹⁰ Historically, as well as today, indigenous peoples on virtually every continent have experienced torture by such perpetrators and therefore would be covered as individuals under the terms of the Convention Against Torture. In more recent decades, however, non-state actors also have engaged in torture against indigenous peoples. In situations of armed conflict many parties to the conflict essentially are unaffiliated militarized groups. For example, the various Bambuti peoples located in the eastern Democratic Republic of the Congo and numerous indigenous peoples of South America—such as the Kogi of the Sierra Madre de Santa Marta in Colombia—are being victimized because they are essentially in the wrong place at the wrong time. The Bambuti are being subjected to human rights violations including cannibalism by various parties to the armed conflict.¹¹ The Kogi—perhaps the only people in South America adhering to pre-Columbian cultural practices on a daily basis—are being forced to relocate from areas which they have occupied since the beginning of their civilization.¹²

⁸ See generally Convention Against Torture, *supra* note 1, at 113 (defining “torture” as an act being committed on “a person”); Convention Against Genocide, *supra* note 2, at 280 (defining “genocide” only in terms of the intent to destroy a “group,” rather than recognizing the fact that indigenous peoples view the destruction of the individual as the destruction of the group).

⁹ Draft United Nations Declaration on the Rights of Indigenous Peoples, U.N. ESCOR, 46th Sess., 36th mtg., U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at <http://www.unhcr.ch/huridocda/huridoca/nsf/2848af408d01ec0ac1256609004e770b/e4fc6deefb3b06c802566cf003bea66?OpenDocument#res45> (last visited Nov. 21, 2003) [hereinafter Draft Declaration].

¹⁰ See Convention Against Torture, *supra* note 1 at 114 (requiring that to be classified as genocide, the acts in question be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”).

¹¹ Interview with Stephan Ilundu Bulambo, Charge de Projets for Programme d’Integration et de Developpement du Peuple Pygme au Kivu, in Geneva, Switz. (Sept. 23, 2003).

¹² See THE LAW OF THE MOTHER 136, 138 (Elizabeth Kemf, ed., 1993) [hereinafter Kemf]; Videotape: From the Heart of the World (Mystic Fire Video 1991) (on file with author).

In both cases instances of psychological and/or physical torture exist. In addition, transnational and multinational corporations' activities vis-à-vis indigenous peoples provide further evidence of human rights violations perpetrated by non-state actors. There are increasing numbers of reports by international human rights monitoring organizations of corporate intimidation, torture, and murder of labor organizers, including those who are indigenous individuals.¹³

Some would argue that such situations can be addressed under existing international law including labor law and ILO conventions. However, reliance on international labor law provides only minimal expansion on the limitations of the two conventions. Alternatively, recent developments in international law might suggest that states can be held accountable for actions within their borders even when the perpetrator is a non-state actor.¹⁴ A potential problem here is the conundrum presented by the territorial separation of some indigenous peoples and the surrounding dominant society. It is not inconceivable that states would find it convenient to recognize that separateness for the purpose of avoiding accountability and/or responsibility for human rights violations of indigenous peoples. Ultimately, the shortcomings of the Convention Against Torture, ILO conventions, and several other international human rights instruments rest not with their enumeration of rights, prohibitions, and corrective measures *per se*, but with a more fundamental flaw of a conceptual nature. Each of them retains the *individual* as the recognized victim and ignores the relevance of—and impact on—the community.

Generally, torture is accepted to be the violation of an individual human right. Such a conceptual orientation is problematic for indigenous peoples in part because of the symbiotic relationship between the individual and the community which is at the heart of their identity. This reaches far deeper than what is captured by the

¹³ See, e.g., *Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 431, 432–33 (5th Cir. 1987) (describing the conflict between a Texan lawyer who was the president of a Guatemalan bottling company and a newspaper journalist who reported the suspicious deaths of various union organizers at the plant which, the reporter asserted, were part of a campaign to suppress union activity); *Estate of Valmore Lacarno v. Drummond Co.*, 256 F. Supp. 2d 1250, 1253–54 (N.D. Ala. 2003) (describing a suit brought by the heirs of several Colombian union organizers murdered while working at the defendant's mines).

¹⁴ An illustration of this is the arguments made by Spain in its extradition request for General Adolfo Pinochet. See *Ex Parte Pinochet*, 38 I.L.M. 581, 584 (H.L. Mar. 24, 1999) (explaining that Spain was requesting extradition of Pinochet for conspiring to take over Chile and committing various acts of genocide, murder, and torture).

phrase *it takes a village to raise a child*. A multigenerational approach to living and to community forms one component of the individual/community interconnection. A brief consideration of the Haudenosaunee¹⁵ peoples illustrates the intricacy and complexity of identity for indigenous peoples. The Haudenosaunee apply the Seventh Generation concept when contemplating courses of action.¹⁶ They consider themselves to be held accountable to the next seven generations for any and all consequences of current policy making. Similarly they look back seven generations to have a full understanding of current community dynamics. Thus, a true mutual dependency between the indigenous individual and indigenous people or community exists in a broad, sweeping, temporal context.

In addition, the Haudenosaunee work towards *being of one mind* in political decision-making: they rely on consensus rather than majoritarian based principles.¹⁷ Decisions taken by the clan, council of chiefs of each people, and/or Grand Council result from carefully inclusive discussions which permit individual voices and concerns to be heard and encompassed by the final outcome.¹⁸ Further, clan identity, stemming from the maternal line, reaches across various Haudenosaunee peoples; that is, the same clans exist in more than one Haudenosaunee people.¹⁹ This extends the symbiotic relationship of individual and community at the core of Haudenosaunee identity. Another illustration of the dynamics of indigenous peoples' identity comes from the eighth session of the United Nations Working Group on the Draft Declaration on the Rights of Indigenous Peoples, held in December of 2002.²⁰ A Lakota woman asserted that being Lakota was more central to her identity than being a woman. Finally, in indigenous peoples' communities, every person has a vital role in or contribution to the community. Concurrently, the individuality of each person is respected and

¹⁵ Called by the English the Six Nations and by the French the Iroquois, this confederation of six different peoples—the Mohawk, Oneida, Onondaga, Cayuga, Seneca and Tuscarora live primarily on territories surrounded by southern Ontario and Quebec provinces of Canada and northern, central and western New York State in the United States. See *Where Are the Haudenosaunee National Territories?*, http://www.sixnations.buffnet.net/Great_Law_of_Peace/?article=territories (last visited Nov. 21, 2003).

¹⁶ Interviews with Bernard Parker, Snipe Clan Haudeanesua, Tonowanda Seneca, in Tonawanda Seneca Territory (1991–1996); Interviews with Arlene Logan, Bear Clan Acting Clan Mother, Tonawanda Seneca, in Tonawanda Seneca Territory (1992–1993).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Draft Declaration, *supra* note 9.

valued as such by the community.²¹ The Kogi people have men and women who are *mamas* and *cabos*.²² In addition, there are well-defined gender roles, some aspects of which are exclusive to women or men. For the Haudenosaunee, there are clan mothers, Chiefs/Sachems, and “young men who carry the burden of the bones of the people.”²³ Identity, then, is intimately linked to the community and conversely, the community is defined by the individuals—past, present, and future—of which it is comprised. The consequences and implications of such a dynamic conceptualization of identity for indigenous peoples are quite profound. Because of the symbiotic nature of the individual and community relationship, human rights and the violation thereof do not neatly and precisely fit into the *individual* versus *collective* dichotomy.

Thus, when torture is committed against the individual indigenous person it is not just a violation of an individual human right but also the violation of a collective human right. When the community structure is artificially altered through the torture of its individuals, the community as a whole suffers: in essence, the community has effectively been tortured. The problem, then, is that the language of the Convention Against Torture pertains to individuals: communities have no standing. Exemplary language may be found in Article 14:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.²⁴

²¹ This includes but is not limited to sexual orientation. Many indigenous peoples explicitly recognize this as a vital part of the individual's identity. In some cases there are not just two or three but five or six recognized distinctions. See generally Wesley Thomas, *Navajo Cultural Constructions of Gender and Sexuality*, in *TWO-SPIRIT PEOPLE: NATIVE AMERICAN GENDER IDENTITY, SEXUALITY AND SPIRITUALITY* 156 (Sue-Ellen Jacobs et al. eds., 1997); WALTER L. WILLIAMS, *THE SPIRIT AND THE FLESH: SEXUAL DIVERSITY IN AMERICAN INDIAN CULTURE* (1986).

²² *Mamas* are the spiritual leaders of the community and responsible for assisting with each person's transition from youth to adulthood. *Cabos*, in part, are responsible for organizing the work of the community. See Videotape, *supra* note 12; Kemf, *supra* note 12.

²³ See Audrey Shenandoah & Janet McCloud, *Women: Sustainers of Life*, *TURTLE QUARTERLY* Summer, 1990, at 5, 9 (postulating that women in the Haudenosaunee society are in positions of political significance).

²⁴ Convention Against Torture, *supra* note 1, at 116.

It is clear, then, that only the individual may claim compensation: not even family members may be compensated unless death occurs, and the community does not receive anything under any circumstances. Moreover, the Convention Against Torture, in Article 22, specifies that the Committee against Torture may “receive and consider communications from or on behalf of *individuals* subject to its jurisdiction who claim to be victims of a violation *by a State Party*”²⁵ Again, the explicit provision is for the redress of grievance for individuals but not the communities of which they are a part. Article 22 also underscores earlier observations regarding perpetrators, namely the state.

At this point one inclination is to turn to the Convention Against Genocide which does address collective human rights. It also indirectly references torture, in Article 2(b), as acts “[c]ausing serious bodily or mental harm to members of the group.”²⁶ The problem with this convention rests with the need to demonstrate the “intent to destroy, in whole or in part.”²⁷ Proving intent is difficult under the best of conditions. When discussing an act of torture of an indigenous person, it would be virtually impossible to demonstrate, under the current individual rights orientation, that torturing a person is being done with the intent to destroy the community.

Ultimately, then, some forms of torture against indigenous peoples are not covered by the Convention Against Torture because of the conceptual limitations that link it exclusively to individuals, as well as the limitations regarding the perpetrator. Concurrently, the Convention Against Genocide is inadequate because of the intent standard that must be met.

Currently the United Nations and the Organization of American States are in the process of drafting their respective declarations on the rights of indigenous peoples. Torture is indirectly referenced in Article 6, paragraph 2 of the United Nations Draft Declaration on the Rights of Indigenous Peoples: “In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.”²⁸ Unfortunately there is no explicit use of the term *torture* and this language remains linked to the individual. Article 7 explicitly states that “indigenous peoples have the

²⁵ *Id.* at 120 (emphasis added).

²⁶ Convention Against Genocide, *supra* note 2, at 280.

²⁷ *Id.*

²⁸ Draft Declaration, *supra* note 8.

collective and individual right not to be subjected to ethnocide and cultural genocide”²⁹ Additional language of this article includes the phrasing that “. . . [a]ny action which has the aim or effect”³⁰ Thus, it may mitigate the limitations found in the Convention Against Genocide regarding intent.

The human rights of indigenous peoples ought to be as fully protected as the rights of others—in particular protected against torture and genocide. It is, therefore, imperative that international legal instruments, whether they are aspirational or legally binding, move beyond western, individualistic conceptualizations of human rights to a more inclusive orientation that respects collective and community rights as equally relevant and meaningful as those of the individual. The Draft Declaration, while not explicitly commenting on torture, nonetheless, if adopted, may begin the process of recognizing a broader conceptualization of torture and/or genocide—and human rights in general.

²⁹ *Id.*

³⁰ *Id.*