Human Rights Challenges in the Arctic

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Introduction

The headline of the Northern Research Forum (NRF) Conference in Oulu in October 2006 was The Borderless North. It is a statement that constitutes an ambitious goal, certainly desirable and worthwhile, but also optimistic, even romantic. And it's not yet a reality.

Yes, there are several instances of meaningful cooperation, and they are growing in number and scope. The NRF is one prominent initiative. An examination from a legal perspective, looking at both domestic legislation and international standards and their application, nevertheless serves to demonstrate that varying approaches and sharp differences in many instances continue to underline boundaries as barriers - rather than bridges - between

The legal challenges appear in many contexts, and many areas of law are affected. Again and again, real-life practices - when we look at assertions of sovereignty and of territorial integrity, boundary disputes on land and at sea, the treatment of indigenous peoples, the exploration and exploitation of natural resources, the responses to environmental problems, security considerations and military preparedness, transport, communications, and so on - highlight the presence of State borders and the importance attached to them by States.

In this article, with a focus on international human rights law, some recent developments are outlined, with reference to the rights of the people and of the peoples who live in the Arctic. The five issues and events that I'll be looking at are:

1) the evolution of the right to external self-determination and its consolidation as binding law in a decolonization context, as well as the ongoing elaboration of self-government or the internal dimension of self-determination,

2) the adoption of ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries,

3) the UN draft declaration on the rights of indigenous peoples that is pending before the UN General Assembly,

4) the draft Nordic Sami convention that is being circulated for comments from interested parties, and finally

5) Greenland where my argument would be that the Greenlanders are not only an indigenous people but a people or a nation, in a country of their own, entitled to external self-determination and decolonization if and when they so wish.

6) A few concluding observations will follow.

The Right of External Self-Determination (1)

Peoples are entitled to exercise the right of external self-determination. This right is set forth in a series of international instruments, such as the Charter of the United Nations, the two International Covenants on Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples in General Assembly resolution 1514 (XV), and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The right of colonized peoples to external self-determination is confirmed in the consistent practice of States and international organizations, not least the Namibia, Western Sahara and East Timor cases decided by the International Court of Justice.

A people (or a nation) in the self-determination context means the population of a distinct territory, as evidenced by provisions in the UN Charter on non-self-governing

territories (rather than non-self-governing peoples) and in the title of the Declaration on the Granting of Independence to Colonial Countries and Peoples (countries comes first). The territory is geographically separate and preferably overseas from the controlling power. This emphasis on a geographical rather than a popular entity is also firmly rooted in several international law texts and confirmed in State practice.

Through the exercise of the right of external self-determination, a people is able to determine its international juridical status. At least for decolonization purposes, under General Assembly resolution 1541 (XV) which adds selection criteria and procedural formulations to the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, the available options are independence, free association and integration. The choice belongs to the people, and popular support for the outcome as expressed in a referendum or otherwise is essential.

Opposite to the external dimension of self-determination that can lead to independence, autonomy, self-government or internal self-determination are not supposed to bring about such a result. Instead self-government is very much about political participation within a State, without interruption of sovereignty and the territorial integrity of the State concerned. The term 'internal self-determination' is nowadays fashionable in academic literature and in the demands of some minority and indigenous groups, and the lines are not always easily drawn. The term (even with the addition of internal) indeed invites resistance by governments which fear subsequent trouble and even violent conflict relating to secession. Indeed, if we are talking about self-government for groups within State borders, it would be more logical and more productive to refer to self-government or autonomy. Furthermore, the term 'internal self-determination' is not firmly established in the international human rights instruments.

In the Lund Recommendations on the Effective Participation of National Minorities in Public Life, that were drafted under the auspices of the HCNM of the OSCE, the term self-determination is not employed at all. The choice of terminology was very much intentional. Its provisions on self-governance for groups provide for their own institutions and for the handing over of certain internal powers within the State.

The distinction between the external and internal aspects of self-determination is important inasmuch as self-determination comes up relating to all the subsequent issues brought up in this article, that is ILO Convention No. 169, the UN draft declaration on the rights of indigenous peoples, the draft Sami convention, and the status of Greenland.

ILO Convention No. 169 (2)

The Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169, from 1989) now has 17 ratifications. It is still a low number, but a few more country ratifications are in the pipeline. In the Arctic region it is only Norway that has come forward with a ratification. Denmark has also done so with regard to Greenland but with a declaration saying that land rights should belong to the permanent population and not specifically the indigenous people. This declaration presumably extends land rights to ethnic-Danish residents, thus rendering the acceptance less meaningful.

Perhaps the most significant provisions in ILO Convention No. 169 are article 7 on the right of indigenous peoples to decide their own priorities for the process of development as it affects their way of life, article 14 on indigenous property rights to traditionally occupied land, and article 15 on partial property and participatory rights concerning natural resources. In case-law under article 27 of the International Covenant on Civil and Political Rights, the treaty monitoring body under UN auspices, that is the Human Rights Committee, has come to similar conclusions inasmuch as land is essential to maintaining the culture of an indigenous people.

Provisions in ILO Convention No. 169 concerning management of land and the exploitation of natural resources clearly foresee input on behalf of the indigenous peoples, as groups, which requires some sort of representative and autonomous institutions. We are therefore talking about self-government or internal self-determination. It's not external self-determination because the Convention is about the rights of the groups within States; furthermore, in article 1, paragraph 3, it is spelled out that the "use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law".

Draft Declaration on the Rights of Indigenous Peoples (3)

In June 2006 the new UN Human Rights Council, after some 20 years of drafting, adopted a draft declaration on the rights of indigenous peoples. It was not done by a consensus vote as is frequently the case with the adoption of international human rights instruments: the vote was 30 in favor, 2 against and 12 abstentions. As to countries in the Arctic region, Finland voted in

favor of the draft declaration in the Council, but Canada and Russia cast the two negative votes. When the draft declaration came up for a final vote in the UN General Assembly in December 2006, it was decided not to take action on the text pending further consultations.

It is mainly provisions on the right of self-determination that have been the source of disagreement in the elaboration and voting on the draft declaration, and one has to admit that in that respect there are somewhat good reasons for the non-approving votes. In particular, when it comes to self-determination, the draft declaration is ambiguous since the text does not clearly distinguish between its external and internal dimensions.

The main thrust of the draft declaration is on internal self-determination, as is inherent in an instrument dealing with the enjoyment of rights within States. Draft article 4 says that "Indigenous peoples, in exercising their right of self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions". In several other articles, the draft declaration constructs or refers to autonomous functions of an internal character, for example in articles 14, 18-20, 23, 26, 31-34, and 36.

On the other side, draft article 3 reads: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." This wording is derived from common article 1 of the two International Covenants on Human Rights and can be seen as having an external dimension. That same sentiment is reflected in the 16th and 17th paragraphs of the draft declaration's preamble, with a listing of the main sources of self-determination in general and with a reference to parameters of international law that are still under evolution.

If adopted and if accompanied by a serious monitoring mandate, the new declaration with a wide range of substantive provisions would on many fronts significantly strengthen the rights of indigenous peoples. This would be welcome, also as a tool for harmonizing national practices. Nevertheless, it is unfortunate if this human rights instrument were to create unrealistic expectations as to its self-determination aspects and even the potential for violent conflict.

The Draft Nordic Sami Convention (4)

The draft Nordic Sami convention has been circulated for comments in the three countries involved, Finland, Norway and Sweden, and among the Sami. Many aspects of the draft text are progressive and highly praiseworthy, not least in terms of an increased role for the Sami and their own institutions and self-governance on political, economic and cultural matters, as well as for the idea of adopting a treaty with the indigenous peoples as partners.

Nevertheless, a few provisions in the draft convention may give rise to concern. Article 34 on land rights, providing for both individual and group rights, looks like falling below the standard set in article 14 of ILO Convention No. 169 that extends land rights to the groups only so as to prevent the splitting up of indigenous lands which in turn would harm their pursuit of identity and culture.

Under article 3 of the draft convention, the Sami would have the right of self-determination as a people in accordance with international law and the provisions of the convention, and to the degree allowed they could decide on their economic, social and cultural development and control their natural resources. While again the thrust of draft article 3 and subsequent articles of the text is on internal self-determination, the references to international law as well as wording in the accompanying explanatory notes leave the door open to varying interpretations and therefore uncertainty.

In my opinion, albeit to a lesser degree, the draft convention may suffer from the same type of ambiguity as the UN draft declaration, blurring the lines between external and internal self-determination. One must keep in mind that this convention, if adopted, would likely serve as a model for other countries and indigenous peoples. In the drafting of human rights instruments every effort should be made, both as to internal consumption and external precedent, to employ crystal clear language and terminology so as to avoid misleading messages and unrealistic expectations.

The Status of Greenland (5)

As to the people of Greenland, they meet all the criteria which have been laid down in the course of the decolonization process as conditions for the exercise of the right of external self-determination:

- they live in a distinct overseas territory with an ocean separating them from Denmark, meaning the so-called salt-water theory of decolonization is applicable. The Greenlandic situation is thus quite different from that of groups which live within metropolitan boundaries. Accordingly, in a 1998 case, the Supreme Court of Canada found that Quebec does not meet the threshold of colonial or other criteria pertinent to the right of external self-determination;

- they possess subjective and objective identity and culture, with distinct identity, history, language and other national characteristics that differ significantly from those of the administering power and often result in separate status or different treatment (like non-membership in the European Union, exclusion in some Danish treaty ratifications, a flag and postage stamps of their own, etc.);

- they have come under long-standing colonial control, as confirmed by Denmark with the inclusion of Greenland on the list of non-self-governing territories under the UN Charter from 1946 to 1954. The termination of this listing in 1954 was seriously flawed under international law standards of that time; the consultation was minimal and did not extend to the whole people, the Greenlanders were not given the required options like independence or free association and, unlike the population of Denmark, they were not able to vote in the referendum on the amendment to the Danish constitution which brought about their supposed integration; and

- In Danish reports to the United Nations during the period 1946-54, the information submitted was seriously flawed and misleading, including statements to the effect that there were no Eskimos left in Greenland because of the mixing with Danish blood and that the Greenlanders had accepted integration when approved in a municipal council which did not represent the whole island, did not have a mandate for deciding on constitutional issues, did not receive information about the full implications of the process, and was not given any other choices than integration.

A people in the pursuit of the right of external self-determination, should be entitled to leveling the playing field with the controlling State, with the aim of equal footing in negotiations. International law considerations have an impact, and this applies not least to legitimate decolonization claims where the solidarity of newly independent States and peoples will enter the picture. Accordingly, the mandate for ongoing negotiations between Denmark and Greenland, in a joint parliamentary Self-Governance Commission which is scheduled to complete its work in 2007, encompasses both international law and Danish constitutional law.

Relying on decolonization constitutes the strongest claim to external self-determination under international law. The decolonization argument, no matter how mild and modern the colonization setup may be, is therefore an avenue which in my view is open to the Greenlanders as a people. It will be interesting in the years ahead to follow the debate in Greenland and to see what decision the Greenlandic people eventually will take.

Concluding Observations (6)

It's time for a few concluding observations. The human rights picture now drawn up presents a series of human rights challenges that are pending in the Arctic. Still the list is by no means an exhaustive one. A survey of the indigenous peoples in the Arctic region shows differences in State responses as to the scope of self-governance or autonomous arrangements, with some of them generous and others more restrictive. Similar differences exist as to the active protection of identities and cultures and, in particular, the rights to lands and natural resources.

These challenges will be difficult to deal with. That is so not because the legal solutions are missing or because the international standards are unclear, but because of political opposition by States and population majorities when it comes to sharing power and natural wealth. One must hope and expect that the rich and democratic countries of the far North can do better. They should be willing and able to undertake significant human rights improvements that would lead to better living conditions for their indigenous peoples in dignity and without discrimination and to consistency of treatment, not least in relation to self-governance and land and resources rights, also when new arrangements would result in multi-layered governance and increased cross-border cooperation.

Notes

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