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Diversity in International Relations

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Letter from the Editor

Diversity and Inclusion are terms that are commonplace across various industries, including the hiring practices of corporations and in representation at educational institutions. We see diversity and representation play an important role in the democratic nomination race for the 2020 U.S. presidential election, sometimes mentioned only to gain political advantage. Diversity, in terms of whose story gets told and whose doesn't, is a theme that is woven throughout a variety of global issues, but often takes a backseat to the bigger news stories that tend to dominate media outlets. Yet, diversity or lack thereof is often implicated upon closer examination of global issues.

Climate change, development, violent conflict, terrorism, human rights violations, reform of global governance, and problems of democratic representation throughout the globe are closely tied to issues of diversity. Increasingly, questions of diversity and inclusion present a pathway to solutions to many of these problems. For the 21st volume of the Journal, we wished to showcase and champion diversity and representation in academia by bringing the voices of diverse writers and less familiar topics to our readers.

This issue features three articles on indigenous rights. Sheelagh Daniels-Mayes and Kristina Sehlin MacNeil write on the concept of diplomacy, focusing primarily on the lesser recognized diplomacies of First Peoples in Australia and Sweden. Priscila Ribeiro Prado Barros posits that the growing involvement of Indigenous Peoples in Brazil, in the defense of their own affairs, have triggered the emergence of a new organizing logic, which considers rights as more important than territorial authority. Finally, Erica Neeganagwedgin examines the Canadian federal government's 1969 Statement of the Government on Indian Policy and the recent Indigenous Rights Framework that the Canadian government introduced in 2018.

The remaining three articles discuss diversity in employment at the UN, the issue of ethnic diversity in the two Sudans, and how international law affects refugees in the Caribbean. Harold Heredia discusses the importance of diversity at the UN as stated in the organization's charter in Article 101. Luka Kuol examines the case of the two Sudans to argue that ethnic diversity can become a curse when there is a governance deficit that is manifested in social contracts and systems of government that abhor and detest diversity. Westmin James' article asserts that both international treaty law and customary international law may appropriately aid constitutional interpretation and can protect asylum seekers or refugees from being repatriated to their home country.

Our strong desire to provide a platform for less familiar topics was the driving force behind the creation of this issue. We hope you enjoy this issue and the diverse topics that it touches on.

Sushant Naidu
Editor-in-Chief

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The Seton Hall
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Call for Papers

The Journal is pleased to invite articles for the upcoming Spring/Summer 2020 issue

Human Rights: An Uprising

2019 could easily be known as the Year of Revolt. We have witnessed revolutions around the world as people took to the streets demanding their human rights. From Hong Kong to Chile, Sudan to the Czech Republic, Kashmir to Puerto Rico, Lebanon to Algeria, citizens marched for social, economic, and political rights so that they might live the dignified life that is the birthright of every member of the human family.

Around the world, the forces of authoritarianism, repression, and injustice are coming head-to-head with the principles of human rights, democracy, and unity through diversity. In Russia, Yegor Zhukov, a young student falsely accused of extremism for peaceful political dissent was sentenced to three years in prison. In China, Uighurs were sent to reeducation camps because of their religion. In the U.S., asylum seekers were separated from their children, treated as criminals, and detained in conditions which fall well below what is dictated by international law. In Iran, thousands have been jailed or killed for peaceful protest. In India a new citizenship law disadvantages its Muslim population. In Chile, the song *El violador eres tu* protesting gender-based violence went viral and inspired protests in dozens of countries throughout the world.

For our Spring/Summer issue, we are seeking submissions on human rights including but not limited to subcategories such as extrajudicial summary, human rights violations, shared responsibility, international criminal law, gender rights, freedom of religion, reparations, reconciliation, and more. We also encourage authors to examine the causes of revolution as they relate to human rights. Examination of relationships across any of the aforementioned themes is also encouraged.

Submissions should be between 3,000 and 6,000 words and are due **15 March 2020**. For more information regarding submission requirements and deadlines, please visit our website <http://blogs.shu.edu/diplomacy/> or forward all inquiries to:

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EQUITABLE GEOGRAPHIC REPRESENTATION IN THE UNITED NATIONS: AN ASSESSMENT OF THE STATE OF THE INTERNATIONAL CHARACTER OF THE UNITED NATIONS' WORKFORCE

Harold Kent Heredia*

“The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.” (Article 101 of the Charter of the United Nations)

INTRODUCTION

On 4 December 2017, barely a year after assuming the post of the 9th Secretary-General (SG) of the United Nations, Mr. Antonio Guterres unveiled his vision to shift the United Nations (UN) into a new management paradigm. In front of the Administrative and Budgetary (Fifth) Committee of the UN General Assembly (GA), he enumerated his intention to reform how the UN conducts its work on peace and security, development, and internal management activities.¹ Mr. Guterres envisaged these reform proposals would best position the UN to “do the work that Member States asked.”²

Equitable geographic representation is an important component in keeping the international character of the UN. Framers of the UN stated that “If it is to enjoy the full confidence of all Members of the United Nations, the Secretariat must be truly international in character.”³ Aside from serving the purpose of assuring Member States that no culture, language, or practice unduly dominates the discharge of the UN’s mandates by officials under its employ, the UN benefits from having the level of diversity in cultures, practices, and perspectives in catering to the demands of the peoples of the world. Moreover, as how former British Prime Minister and then British Representative to the League of Nations Mr. Albert Balfour ably described what international” entailed in the League’s civil service, “members of the Secretariat once appointed are not longer the servants of

* Harold Kent Heredia currently serves as a Fifth Committee Adviser to the Permanent Mission of the Philippines to the United Nations. The views expressed on this paper are the author’s own and not of the Philippine Mission to the United Nations, the Philippine Department of Foreign Affairs, or the Government of the Republic of the Philippines.

the country of which they are citizens, but become for the time being servants only to the League of Nations.”⁴

Regrettably, equitable geographic representation of the UN has been, and remains to be, an unfulfilled aspiration. Since the emergency appointments provided by Mr. Trygve Lie, the first UNSG and former head of the Norwegian Delegation to the San Francisco Conference that created the Organization, to expeditiously recruit the pioneering cadre of 400 secretariat staff members to facilitate the successful conduct of the First UNGA at its makeshift headquarters in Hunter College at the Bronx, the issue remains contemporary 74 UNGAs later.⁵

The Secretary-General reported that as of 31 December 2018, UN Staff Members from the African Group accounted for 39.3 percent versus 41.4 percent of the total number of UN Staff in 30 June 2015. Moreover, staff members from developed countries continue to outnumber staff members from developing countries at the Director level and above for the past three reporting years.⁶

In the context of the current reform initiatives, Mr. Guterres stated his aspiration in having a “diverse, geographically balanced and gender-balanced, international and multitalented workforce that is truly representative.”⁷ On 15 November 2018, he unveiled the Global Human Resources Strategy for 2019-2021 which aspired to “increase regional diversity of the workforce” through sweeping reforms in the staff recruitment and retainment at the UN.⁸ The 134 Member States of the Group of 77 and China, a block of developing countries that coordinates common positions at the UN including administrative and budgetary issues, highlighted its concern that there has been “slow progress in achieving balanced geographic representation at all levels.”⁹

The current paper will try to provide a linear narrative of the recruitment and appointment activities of the UN Secretariat and the ideological themes surrounding the debates of the General Assembly on the issue of staff recruitment on as wide a geographic basis as possible. From there, the author will attempt to provide the current state of affairs on the aforementioned issue and suggest recommendations on how the aspiration could be reinvigorated and made relevant to the twenty-first century demands of the United Nations Membership.

THE LEAGUE OF NATIONS: THE UNITED NATIONS PRECURSOR

Although the League of Nations (the League) would not hold the title of the oldest intergovernmental organization,¹⁰ scholars agree that it was the first intergovernmental organization that was entrusted with the aspiration to keep international peace and security.¹¹ It was also during the time of the League when the concept and the need to establish an international civil service arose. Likened to a traditional civil servant of the nation-state of the League’s period, where

one swears his loyalty to the flag of his employer, an international civil servant is expected to serve the sole interests of his organization without fear or particular favor to any of its Member States.

Recruiting staff members of great competence was also emphasized by the framers of the League. Among the principles that were conceptualized by the League, the one that was eventually carried over to the United Nations was the Noblemaire Principle. Named after the Chair of the 1921 Committee and French Diplomat Georges Noblemaire, the Noblemaire Principle implied that for the League to be able to recruit the most qualified civil servants across its Membership, the League's salaries should be comparable to the salaries of the highest-paid civil service amongst its members.¹² That is, a British civil servant, the highest paid civil servant of that time, should not be dissuaded to work for the League due to discrepancies in pay between one's civil service and that of the League.

The principle holds that an international organization must remunerate its staff members for the same level of work performed, regardless of the varying pay levels in the various countries to which they were drawn. Moreover, since the salary is comparable to the highest paid civil service, the principle provides a level of remuneration to attract the best candidates.

BIRTH PAINS AT THE UNITED NATIONS

To operationalize the successor of the League, the UN relied on emergency appointments to recruit its initial staff members to serve as its backbone at its temporary Headquarters at Hunter College at the Bronx. During the Second UNGA, Member States expressed the importance of upholding Article 101 of the UN Charter in order to "avoid undue predominance of national practices" in keeping with the international nature of the UN.¹³ After a number of representatives expressed concern that the UN Secretariat had not been representative of the different "cultures and nationalities" of the Membership, the GA also requested the SG to examine the Secretariat's hiring policy with a view of improving the geographic distribution of posts.¹⁴

THE SYSTEM OF DESIRABLE RANGES

It was during the Second UNGA that ideas started to float on using a Member State's financial contributions to the UN as a yardstick for measuring the progress towards achieving Article 101 of the UN Charter.¹⁵ Financial contributions to the UN were considered by some Delegates as more stable indicator as it would primarily be informed by the UN scale of assessments, a formula used to determine a Member State's financial obligation to the organization that is predominantly influenced by one's capacity to pay determined by its economic size relative to

the rest of the UN Membership. The SG also weighed in on the use of financial contributions to inform geographic representation. He stated to wit:

“The whole problem, therefore, is that establishing acceptable criteria which are administratively workable. Any rigid mathematical formula to whatever yardstick it may be related, whether national income, literacy, financial contribution to the budget of the United Nations, or any other criterion, would restrict in an impracticable fashion the flexibility on which the success of any good administration must depend, and is therefore unacceptable.”¹⁶

This ‘yardstick’ was called the System of Desirable Ranges. Using financial contribution as the basis for measuring the application of the principle of geographical distribution in the absence of a more satisfactory formula enjoyed support from the Membership.¹⁷ On the other hand, critics stated that financial contributions would set an undue emphasis on the “wealth and poverty of Member States.”¹⁸ War had just ravaged numerous UN Member States and with the principle-of-capacity-to-pay guiding the level of financial contributions at the UN, the financial contributions of these war-ravaged States were set at a relatively low figure which could adversely affect their ability to be accurately represented using the proposed metric.¹⁹

Following the adoption of GA Resolution 153 (II) of 15 November 1947, the SG conceptualized “desirable ranges” in an SG bulletin 77.²⁰ It classified Member States as being *unrepresented*, *underrepresented*, *within range*, and *overrepresented*. Priority for extending staff appointments was to be given to *unrepresented* and *underrepresented* over *overrepresented* Member States with nationals from *overrepresented* States only being granted appointments should there be no suitably qualified candidates available from *unrepresented* and *underrepresented* States.²¹

The UN was aware of the inherent mathematical rigidity of using financial contributions to measure equitable geographic distribution. At the outset, the UN argued that a degree of deviation and administrative flexibility was required to implement Article 101. The SG argued that “...without some measure of deviation the criterion of budgetary contribution would be as restrictive as any other.”²²

During the Third UNGA, the SG expressed the following opinion:

“Rightly understood, the cardinal principle of geographical distribution is not that nationals of a particular nation should have a specified number of posts at a particular grade or grades, or that they should receive in salary as a group a particular percentage of the total outlay in salaries, but that, in the first place, the administration should be satisfied that the Secretariat

*is enriched by the experience and culture which each Member nation can furnish and that each Member nation should, in its turn, be satisfied that its own culture and philosophy make a full contribution to the Secretariat.*²³

It was only until 1962 that the System of Desirable Ranges added membership and population factors to the sole factor used to determine the desirable range: the financial contribution of Member States to the regular budget of the UN.²⁴ The System continued to evolve, the latest of which was contained in GA resolution 42/220 A that enumerated the following criteria for determining the ranges effective 1 January 1988:

- “(a) The base figure for the calculations would initially be 2,700 posts;*
- (b) The weight of the membership factor would be 40 per cent of the base figure;*
- (c) The population factor, which would be allotted a weight of 5 per cent, would be directly related to the population of Member States, and posts subject to that factor would be distributed among Member States in proportion to their population;*
- (d) The contribution factor would be based on the distribution of the remaining posts among Member States in proportion to the scale of assessments;*
- (e) The upper and lower limits of each range would be based on flexibility of 15 per cent upward and downward from the midpoint of the desirable range, but not less than 4.8 posts up and down, the upper limit of the range being not less than 14 posts;*
- (f) The base figure would be adjusted whenever the actual number of posts subject to geographical distribution increased or decreased by 100, the weights of the three factors being maintained.”*²⁵

GEOGRAPHIC DISTRIBUTION AND REPRESENTATION

From the original 51 founding members of the United Nations in 1945, the UN grew its membership to 99 members in 1960, 154 members in 1980, 189 members in the year 2000, and 193 Member States to date.²⁶ Moreover, the way Member States have funded the UN has dramatically changed through the years. From initially relying solely on the Regular Budget in 1947, the UN at present relies on a mix of assessed (or mandatory contributions paid by Member States using a predetermined formula) and voluntary contributions.

Consequently, the System of Desirable Ranges, being only applicable to posts funded by the UN Regular Budget, not only became mathematically rigid in ensuring equitable geographic distribution of posts vis-à-vis the current realities of the UN membership but also in the overall scope of posts it is applicable to. As of August 1948, there were 979 posts subject to the System of Desirable Ranges.²⁷ By 31 December 2017, there were a mere 3,600 posts out of the total of 15,000 international positions, excluding language positions.²⁸ Since the System of Desirable Ranges remained unchanged since 1988, the distortion not only persisted but was also magnified with the increased mandates and posts at the UN. As of 31 December 2018, there are 76,590 UN staff members serving the UN Secretariat and its related entities.²⁹

Having the references to geographic distribution traditionally refers to the System of Desirable Ranges, Member States notably from the Group of 77 and China shifted their call, from equitable geographic distribution to representation, to also capture the spirit of applying Article 101 of the UN Charter to posts not subject to the current System. Moreover, with the UN also trying to push for gender parity and enhanced performance management, Member States are emphasizing that all such initiatives should not be pursued in a mutually exclusive manner.³⁰

THE WAY FORWARD

The Fifth Committee of the 73rd UNGA was unable to decide on the SG's proposals to reform the Human Resources Management architecture of the UN. Partly caused by the time constraint the Committee had when it met alongside other equally important items such as negotiating the Scale of Assessments for the Apportionment of UN Expenses for 2019-2021 and Management Reform proposals, the lack of immediate budgetary implications to the Organization allowed the Committee to defer the issue. At present, the item also faces a very high likelihood of being deferred consideration until the Resumed Session of the 74th UNGA. Without a clear pronouncement from the GA, Article 101 of the UN Charter will remain a continuing aspiration.

It is important for the current UN Membership to recall the views exchanged on using financial contributions as a component for measuring progress in achieving Article 101, notably, its 'mathematical rigidity.' Moreover, the expansion of the applicability of the System of Desirable Ranges to posts not paid for by the UN regular budget should be favorably explored. After all, a UN staff member, no matter where his salary is sourced from, serves the same membership and is expected to uphold the same values in his conduct.

It does not help that the issues under consideration of the UN General Assembly has dramatically increased over time. In the Fifth Committee, the move

to consider the regular budget of the United Nations from a biannual to an annual basis necessitated to continuously defer consideration of these pressing issues and proposals from the Main Part of the 73rd Session – where the Committee had to decide on the applicable scale of assessments for the apportionment of expenses of the United Nations for 2019 to 2021 – to the First Resumed Part of the 74th Session – where in the Main Part (October to December) the Fifth Committee decided to again defer the item due to the time constraint faced by it and lack of time to even thoroughly consider the first annual budget of the UN regular budget for 2020.

Admittedly, the issue is also tied with the need to harmonize the UN's funding sources. The trend of the UN's increasing proportion of activities funded by voluntary funding versus its assessed funding creates a situation where the activities overseen by the whole Membership through the Fifth Committee of the General Assembly is getting smaller in scale relative to the activities performed by the UN through its voluntary funding sources. It consequently makes the organization more “donor-driven” than “Member State-driven” on the inherent level of control a donor expects to have over UN activities it funds.

Although the UN membership let alone its Secretariat might have little recourse on how the voluntary funding it receives could be spent as virtually all of it is earmarked to the donor's indicated initiative, it might be high time for the General Assembly to require that voluntary funding that entails recruiting UN staff members should be subject to the principle of equitable geographic representation that is, should it be possible, based on a system of desirable ranges that further refines its methodology that puts less emphasis on financial contributions of Member States and more on population and language factors. After all, if voluntary funds the UN receives is already subject to the organization's financial rules and regulations, recruitment of staff based on a revised system of desirable ranges methodology harmonizes rules for both UN jobs and funds to make the organization truly representative of its membership.

Harold is a United Nations Fifth Committee Adviser for the Permanent Mission of the Republic of the Philippines to the United Nations in New York. He covers international development issues along with responsibilities for administration and budgetary matters within the work of the UN on behalf of the Philippine Government. Before starting his career in multilateral diplomacy, Harold previously held equity research analyst and proprietary trading roles in Asia. He finished his ALM in Finance from the Harvard Extension School in 2015 and his AB in Economics from the University of Asia and the Pacific in the Philippines in 2012.

NOTES

1 Guterres, Antonio. 2017. New York, December 4. Accessed November 30, 2019. https://www.un.org/en/ga/fifth/72/Statements/135.Rev.of.Eff_Reform/C5_72_0m_ST_2017_12_04_Item_135_RevEff_Reform_SG.pdf.

2 Ibid.

3 Report of the Preparatory Commission of the United Nations, PC/20, 23 December 1945 Page 86 accessible online at <https://digitallibrary.un.org/record/519440?ln=en>.

4 Balfour Report, League of Nations Official Journal, June 1920, Page 136-139 (offline copy provided by UNOG Archives in Geneva).

5 United Nations, *Reportory of Practice of the United Nations Organs (1945-1954)*, Volume 5. *Intergovernmental Legal Publication* (New York: UN, n.d.).

6 A/74/82 Composition of the Secretariat, Report of the Secretary-General accessible online at <https://undocs.org/A/74/82>.

7 Paragraph 20 of A/72/492 on Shifting the Management Paradigm of the United Nations.

8 A/73/372 15th Formal Meeting of the Fifth Committee of the 73rd UNGA, 15 October 2019.

9 After Azerbaijan joined the Group of 77 and China in 2019, the Membership increased to 135 Member States

[https://www.un.org/en/ga/fifth/73/statements/135.%20Rev.of.Eff_HR%20placement/C5_73_0m_ST_2018_10_15_Item_135_Rev_of_Eff_HR%20placement_Egypt%20\(G77andChina\).pdf](https://www.un.org/en/ga/fifth/73/statements/135.%20Rev.of.Eff_HR%20placement/C5_73_0m_ST_2018_10_15_Item_135_Rev_of_Eff_HR%20placement_Egypt%20(G77andChina).pdf).

10 The International Telecommunications Union (ITU; formerly known as the International Telegraph Union) was founded in Paris on 17 May 1865, by 20 founding members. The ITU decided to establish its own permanent Secretariat during its second International Telegraph Conference to be located in Bern, Switzerland.

11 Christian Tomuschat, "The Crucial Role of the United Nations in Maintaining International Peace and Security" in *The United Nations at Age Fifty: A Legal Perspective*, edited by Qizhi He (The Hague: Kluwer Law International, 1995), 77.

12 1921 Noblemaire Report LN.

13 United Nations General Assembly, *Resolution 153 (III). Composition of the Secretariat and the principle of geographical distribution* (New York: UNGA, November 15, 1947).

14 1947 Resolution 153 (III) Composition of the Secretariat and the principle of geographic distribution. Document is available at <http://www.undocs.org>.

15 United Nations, *Reportory of Practice of the United Nations Organs (1945-1954)*, Volume 5. *Intergovernmental Legal Publication* (New York: UN, n.d.).

16 United Nations. n.d. *Reportory of Practice of the United Nations Organs (1945-1954)*, Volume 5. *Intergovernmental Legal Publication*, New York: United Nations.

17 Ibid.

18 Ibid.

19 Ibid.

20 United Nations, *Reportory of Practice of the United Nations Organs No. 7: Articles 92-105*, 92-105 (New York: UN, n.d.).

21 United Nations, *Composition of the Secretariat and the Principle of Geographical Distribution* (New York: UN, September 2, 1948).

22 United Nations, *Reportory of Practice of the United Nations Organs (1945-1954)*, Volume 5. *Intergovernmental Legal Publication* (New York: UN, n.d.).

23. Ibid.

24 United Nations, *Assessment of the System of Desirable Ranges in the Report of the Secretary-General*. (New York: UN, September 7, 2018).

25 United Nations General Assembly, *Composition of the Secretariat* (New York: UNGA, December 21, 1987).

26 United Nations, *Growth in United Nations membership, 1945-present* (UN, n.d.). <https://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html>.

27 United Nations, *Composition of the Secretariat and the Principle of Geographical Distribution* (New York: UN, September 2, 1948).

28 United Nations, *Assessment of the System of Desirable Ranges in the Report of the Secretary-General*. (New York: UN, September 7, 2018).

29 A/74/82 <https://undocs.org/A/74/82>.

30 Both the statements of the Group of 77 and China and ASEAN emphasize these points during the 15th Formal Meeting of the Fifth Committee of the 73rd General Assembly. Association of Southeast Asian Nations. 2018. "Statement of Behalf of the Association of Southeast Asian Nations by Ms. Diana Lee, Counsellor, Permanent Mission of Singapore to the United Nations on Agenda Item 141: Human Resources Management at the Fifth Committee, Main Part of the 73rd Session." New York, November 15. Accessed December 3, 2019. Group of 77 and China. 2018. "Statement on Behalf of the Group of 77 and China by Mr. Karim Ismail, First Secretary, Permanent Mission of Egypt to the United Nations on Agenda Item 141. Human Resources Management, at the Fifth Committee during the Main Part of the 73rd UNGA." New York, November 15. Accessed December 3, 2019. [https://www.un.org/en/ga/fifth/73/statements/141.%20142.%20HRM%20JIU/C5_73_0m_ST_2018_11_15_Item_141.HRM_142.JIU_Egypt%20\(G77andChina\).pdf](https://www.un.org/en/ga/fifth/73/statements/141.%20142.%20HRM%20JIU/C5_73_0m_ST_2018_11_15_Item_141.HRM_142.JIU_Egypt%20(G77andChina).pdf).

WHEN ETHNIC DIVERSITY BECOMES A CURSE IN AFRICA: THE TALE OF THE TWO SUDANS

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Abstract: *This article assesses when diversity becomes a curse in Africa. The review of literature on the causation of civil wars shows gaps, weaknesses and lack of holistic framework of analysis. It is argued in this article that the risk of violent conflict is better explained in Africa by absence of social contract as a manifestation of governance deficit rather than the presence of grievances and greed. Recognizing these gaps, this article uses the heuristic social contract framework to assess the drivers of diversity-related conflicts in Africa. Applying this social contract framework to analyze the case of the two Sudans that have been susceptible to recurrent diversity-related conflict, it is argued in this article that ethnic diversity is not a curse and it becomes a curse when there is governance deficit that is manifested in social contract and system of government that abhor and detest diversity. Transforming diversity to become a virtue requires forging a system of government and a resilient social contract that addresses the core conflict issues as well as building inclusive and accountable institutions that promote social cohesion and democratic governance.*

INTRODUCTION: THE COST OF MISMANAGING DIVERSITY

Diversity is a part of any society, particularly in Africa as no country is characterized by a lack of diversity. But the challenge of managing it is detrimental to stability and development in many African countries. There is a consensus that diversity by itself is not a problem, but the way it is managed makes it either a virtue or a curse. Despite its centrality to the discourse of governance, social contract-making and peacebuilding, diversity lacks a commonly agreed upon definition, as it is a broad concept with many dimensions and makers. Deng¹ refers to diversity as the plurality of identity groups that inhabit individual countries, others emphasize ethnicity as a critical element of diversity and a major driver of its management in Sub-Saharan Africa.²

Post-independence African countries have been susceptible to recurrent incidents of diversity-related conflicts and their concomitant high costs. In the case of the two Sudans (Sudan and South Sudan), there have been recurrent ethnic-related conflicts since the independence of Sudan in 1956 and South Sudan in 2011. Diversity has manifested itself as a scourge in the two countries, as they experienced civil wars immediately after their independence and remain bound by internal ethnic-related conflicts that spill over their borders.³ These violent conflicts

have caused enormous human, material, social and psychological costs that can be traced to the colonial and post-independence periods.

The colonial periods of Turco-Egyptian rule (1821-1881) and the Mahdya regime (1881-1898) were characterized by lawlessness and slavery that resulted in famine on a huge scale and massive displacement in Sudan and southern Sudan in particular.⁴ By the early 1880s, almost two-thirds of the population of Khartoum, the capital city of Sudan, was estimated to be slaves from the African ethnic communities in southern Sudan, Nuba Mountains and Blue Nile.⁵ Even during the Anglo-Egyptian regime (1898-1956), the resistance of South Sudanese to heavy taxes was subdued with large scale destruction and devastation and massive confiscation of livestock.⁶

The first Sudan civil war (1955-1972) was characterized by large scale cattle raiding and massive displacement in southern Sudan caused by the government supported Arab nomads counterinsurgency warfare which resulted in a death toll of 500,000 amid recurrent famines in the 1960s.⁷ The second civil war (1983-2005) caused the death toll of about 2 million, 420,000 refugees and over 4 million displaced in Southern Sudan.⁸ Deng estimates the excess death toll from the 1998 Bahr el Ghazal famine to be about 70,000.⁹ Also the violent conflict in Darfur produced a death toll of about 300,000 and 1.5 million displaced.¹⁰ De Waal estimates the crude death rate of the 1984-5 famine in Darfur to about 40 per thousand.¹¹

The first civil war of South Sudan (2013-present) has caused massive forced displacement of almost 4.2 million people including 2.2 million in neighboring countries, with nearly 6 out of 10 people experiencing severe food insecurity or famine. It is estimated about 400,000 have died as a result of civil war with half of the dead killed in fighting and the other half from disease, hunger and other causes exacerbated by violent conflict.¹² Also about 41 percent of people surveyed in South Sudan showed symptoms of post-trauma disorder that are comparable to levels of countries that experienced genocide such as Cambodia and Rwanda.¹³ The economic cost of this first civil war to South Sudan could be as high as US\$158 billion, and the costs to the regional neighbours could rise to nearly US\$57 billion and the costs to the international community in terms of peacekeeping and humanitarian assistance could rise to nearly US\$30 billion.¹⁴

The main argument of this article is that ethnic diversity is a virtue, but it becomes a curse due to system of government and social contract that abhor and detest diversity. This article is organized into this section that provides the cost of mismanaging diversity. The next section provides the framework for analyzing the drivers of diversity-related conflicts in Africa. The framework is employed in section three to analyze the drivers and pattern and trajectory of the recurrent diversity-related conflicts in the two Sudans. The article concludes with opportunities

available for the two Sudans to manage and transform diversity to become a source for peace, development, and justice.

THE FRAMEWORK FOR UNDERSTANDING DIVERSITY-RELATED CONFLICTS

There is a wealth of evidence that shows the virtues of diversity in development and peacebuilding. The nexus between diversity and economic growth on one hand and between diversity and improved performance on the other hand has respectively been observed at a macro-level in developed countries such as the United States of America and Australia and in organizations at the micro-level.¹⁵ It has been found that the performance of an organization is better in a heterogeneous environment than in a homogenous environment.¹⁶ On the causation of civil war, the risk for civil war is less explained by ethnic and religious diversity and it is even suggested that diversity may reduce the risk for violent conflict.¹⁷ Collier refutes the belief that ethnic diversity increases the risk of civil war and argues instead that at a certain per capita income, increased ethnic diversity in fact reduces the risk of violence.¹⁸

Despite such virtues of ethnic diversity, there are recurrent diversity-related conflicts in Africa. There are competing views about the role of ethnic diversity in causing civil wars in Africa. Some argue that violent conflicts are cultural phenomena like other social processes, while many researchers across all disciplines reject any claim that identifies religion or ethnicity as a prime cause of civil war. There is, however, growing but limited empirical evidence that suggests a positive association between ethnic diversity and cultural differences and the incidence of civil wars. In particular the popular thesis of “clash of civilization” attributes the primary source of conflict to cultural and religious identities and some studies have found that the diversity in the religious dimension of ethnicity has a positive effect on the risk civil war.¹⁹

The debate in the literature on the causation of civil war has been focused on greed or grievance rather than ethnic diversity. This debate is almost settled by a wealth of empirical evidence that unequivocally shows violent conflicts are largely caused by grievances over real or perceived relative deprivation.²⁰ There is a long-standing position in political science that attributes the cause of conflict to relative deprivation caused by bad governance and grievance that relative deprivation produces.²¹ As such cultural differences and ethnic diversity per se do not cause violent conflict, but they are used and exploited to sustain such violent conflicts.²²

The grievances that cause diversity-related violent conflict are a manifestation of governance deficit and a failure of public institutions to equitably ensure

access of citizens to various resources including political power.²³ Besides the governance-deficit, there are other drivers of ethnic-related conflicts such as the legacy of pre-colonial empires and colonialism that created the initial conditions for transforming diversity into a source of conflict.²⁴ It could safely be argued that the quality of governance tends to be the main cause of all violent conflicts including the diversity-related conflicts. Yet, there is a debate of whether the *type* or *system* of government determines the quality of governance. While types of government focus on 'power sources' in terms of who rules and participates in government, systems of government focus on 'power structure' in terms of how power is distributed within government.²⁵

Most civil war causation studies have focused on *types* rather than *systems* of government and have undermined the central role played by institutions (power structure) of government in determining the quality of government. The failure of nation-states to deliver quality governance and public goods is more related to institutions and systems of government than to the types of government.²⁶ The system of government is well captured through the concept of "*social contract*"²⁷ that refers not only to a structure of governance but also to institutions that provide the necessary conditions and environment for forging social cohesion between and among ethnic groups. The outbreak of violent conflict is a result of absence of, breach of or deviation from or breakdown of social contract rather than the presence of greed, grievances, and horizontal inequalities.²⁸ The unfinished social contract-making process in Africa may explain the recurrent occurrence of diversity-related conflicts.²⁹

In the case of Sudan and South Sudan, various studies have attributed the drivers of the recurrent civil wars to various factors including colonial legacies, ethnic diversity, absence of national identity grievances and failure of previous peace agreements.³⁰ Other studies highlighted the weak state structure, division within the ruling party, weak state structure, tragedy of ethnic diversity and destructive dynamics of neopatrimonial governance as brute causes of recurrent conflicts in the two Sudans.³¹ Some scholars explain that the two Sudans are trapped in vicious cycle of violent conflict because most peace agreements have prescribed pre-determined solutions rather than diagnosing first the root causes.³²

The real gap in this literature of the causation of violent conflicts in the two Sudan is that these analyses stressed specific driver without providing a holistic framework for understanding the causes and dynamic of violent conflicts. These gaps and weaknesses in existing bodies of literature of the drivers of violent conflict are not peculiar to the two Sudans but they are global.³³ This article is an attempt to provide a holistic framework to understand the causes and dynamics of violent conflict in the two Sudans.

McCandless offers a heuristic *resilient national social contract* framework to better understand and address violent conflict through three postulated drivers; namely: (i) political settlement and social contract-making that addresses the core conflict issues such as diversity, (ii) inclusive institutions that ensure access to resources and representation in government and (iii) social cohesion between and among different ethnic groups as the outcome of the two drivers.³⁴ This framework is used generally in this article for analyzing the drivers of the recurrent diversity-related violent conflicts in the two Sudans.

THE TALE OF TWO SUDANS: THE DRIVERS OF DIVERSITY-RELATED CONFLICTS

Sudan and South Sudan provide a unique case for assessing the drivers of diversity-related conflicts. While the people of South Sudan voted overwhelmingly in 2011 to secede from Sudan because of the mismanagement of its ruling elites of diversity, South Sudan slid paradoxically into ethnic-related violent conflict in less than three years of its independence because of the failure of its ruling elites to make diversity a source of social cohesion.³⁵ The ruling Islamic elites who supported the secession of South Sudan in order to have a homogenous Arab-Islamic Sudanese state were faced after the independence of South Sudan with continued diversity-related violent conflicts in the regions of Darfur, the Nuba Mountains, Eastern Sudan, far Northern Sudan and Blue Nile.

Despite the virtues of diversity touted in the development and peacebuilding literature, the real question is why the ruling elites in Sudan and South Sudan have failed to harness such virtues and instead, ethnic diversity appears to be a source of violent conflict. In an attempt to answer this question, this article assesses the evolution of social contract-making processes and its concomitant quality of governance and institutions as one of the ways to manage ethnic-diversity. Two periods are relevant in assessing the social contract and system of governance in the two Sudans; namely the period of colonialism and the post-independence period.

The Legacy of Colonialism: Planting the Seed of Diversity-Related Conflicts

The genesis of the recurrent diversity-related conflicts that plagued the two Sudans can be attributed to the legacy of colonialism, which planted the early seed of such conflicts. The colonial periods considered in this article for which to assess the legacy of colonialism are: (i) the period of anarchy, assets transfer, and planting the seed of power imbalance and inequality (the Turco-Egyptian regime, 1821-1881 and the Mahdiyya, 1881-1898), and (ii) the period of accentuating power imbalance and uneven development (the Anglo-Egyptian regime, 1898-1956).

Turco-Egyptian and Mahdiyya regimes: Planting the Seed of Power Imbalance and Inequality

The militarily-weak Turco-Egyptian regime in Egypt arrived in Sudan in 1821 with the aim of consolidating its political autonomy from the Ottoman Empire by plundering slaves and ivory through a centralized military system of government.³⁶ The new regime focused its slave raids and assets transfer from southern Sudan and the regions of Nuba Mountains and Blue Nile, which offered docile and loyal slaves.³⁷ Besides being used in the army, these slaves became one of the means of paying the remuneration of the Turco-Egyptian standing army.³⁸

During this period, the Turco-Egyptian authorities and private Arab traders undertook slave raids on a vast scale into southern Sudan, the Nuba Mountains and Blue Nile regions of Sudan. The Arab nomads sponsored by the new regime became engaged in massive raiding of African ethnic communities in Southern Sudan for slaves and cattle and established al-Zubayr Pasha's slave trading empire in the Bahr el Ghazal region of southern Sudan. The Arab nomads of the western regions of Kordofan and Darfur and the petty traders (known as *jellaba*) benefited considerably by indirectly working for the major slave traders or by levying tax for allowing these traders to move slaves across their territory and directly by conducting their own raiding, as a result of which slave-owning was widespread among them by the 1870s.³⁹

This new regime had planted the early seeds of poisoning inter-ethnic relations between the peoples of southern and northern Sudan and created economic disparities in favor of Arab ethnic groups through massive assets transfer. It had also a profound impact on the African ethnic groups and their traditional systems of government along the north-south border of Sudan and changed the local balance of power in favor of Arab ethnic groups. Psychologically, the new regime considered people of southern Sudan as primitive and inferior, while classifying Arabs as superior to the people of southern Sudan. This classification exacerbated the balance of power between Arab and black Africans leading to greater inter-ethnic mistrust.

The Turco-Egyptian regime was replaced by the Mahdiyya regime in 1881 with full support from the slave traders, particularly Arab nomads of Kordofan and Darfur.⁴⁰ This new regime was characterized by chaos, anarchy and scaling up of unprecedented raiding of slaves and livestock in southern Sudan, particularly in the Bahr el Ghazal region. In 1884, the Mahdiyya regime invaded the Bahr el Ghazal region of Southern Sudan with support from various groups with interest in the slave raids: particularly the Arab nomads of western Sudan who took the chance to acquire substantial booty.⁴¹ Unlike the Turco-Egyptian regime period when there was limited efforts to convert people of Southern Sudan to Islam, the

Madhiyya regime had a clear agenda of spreading Islam in Southern Sudan. The way the Mahdiyya regime professed Islam and Arabism in Southern Sudan through barbaric slave raids with support by the Arab nomads left behind complex scars in bitter Arab-African inter-identity relations that plagued Sudan.⁴²

The slave raids by the Turco-Egyptian regime, Mahdiyya regime and Arab nomads deeply affected the prevailing system of traditional authorities in South Sudan.⁴³ For example, the Shilluk Kingdom in southern Sudan enjoyed relative stability until the arrival of the Turco-Egyptian regime in 1821. By 1861, the Turco-Egyptian regime and Arab traders sparked warfare with devastating slave raids against the Shilluk that weakened the Shilluk Kingdom.⁴⁴ This warfare continued and was exacerbated by the chaos of Mahdiyya, which imposed an Islamic assimilationist centralized unitary system, and which decimated the Shilluk's herds and caused carnage that halved the Shilluk population.⁴⁵

The Ngok Dinka of Abyei area, at the border between northern and southern Sudan, offer another example of resilience of a traditional system of government in the face of the imposition of a colonial regime.⁴⁶ The arrival of the Turco-Egyptian regime changed the local balance of power in favor of their nomadic Arab neighbors, the Misseriyia. This led the Ngok to adopt new defensive strategies against their northern neighbors including diplomacy, using age-sets as a 'standing-army,' and electing 'war chiefs' for each village.⁴⁷ Also, the chief of Ngok Dinka, together with other Dinka chiefs in the region of Bahr el Ghazal, accepted a truce offer from the leaders of the Mahdist uprising and forged a temporary alliance to get rid of the Turco-Egyptian regime.⁴⁸

Another ethnic community in Southern Sudan, which adjusted differently to the slave raids and chaos of the Turco-Egyptian and Mahdiyya regimes is the Azande. The socio-cultural flexibility exhibited by the system of government of the Azande helped them to cope with the Turco-Egyptian slave raids, the chaos of the Mahdiyya regime, and to adapt more generally to processes of cultural assimilation and political integration.⁴⁹ This resilience helped the Azande to retain and preserve their values, institutions and political system.⁵⁰

Anglo-Egyptian rule: Accentuating Power Imbalance and Uneven Development

The Anglo-Egyptian regime after defeating the Mahdiyya regime in 1898 had a policy of commitment to suppress slavery, at least in theory.⁵¹ The administration of Southern Sudan was not a priority for the new regime and it adopted instead a system of government based on indirect rule through "native administration" by using local customary structures and law.⁵² The attempt in the early 1900s by the new regime to finance its administrative expenditure in southern Sudan through forced labour and heavy livestock taxes was resisted by people of southern Sudan.⁵³ This

resistance was not only harshly quelled but it also allowed the new regime to soften its commitment to suppress slavery by accommodating and entertaining Arab slave raids in southern Sudan.⁵⁴ In order to appease the people of southern Sudan and to ensure their protection from Arab slave raids, the regime then formulated the native administration into the Southern Sudan Policy of 1930. The main aim of this policy was to protect the people of southern Sudan from slavery, Islamization and Arabization from northern Sudan and to build a series of traditional self-rule based on indigenous customs and beliefs that promoted equity and adherence to the rule of law.⁵⁵

This policy was instrumental in restoring and protecting the systems and institutions of traditional authorities in southern Sudan. The Anglo-Egyptian rule also managed to revive and reinvent the royal installation ritual and royal institutions of the Shilluk Kingdom after they had fallen into abeyance during the slave raids of the Turco-Egyptian regime and the chaos of the Mahdiyya period.⁵⁶ During the Anglo-Egyptian regime, the Ngok Dinka enjoyed relative peace and consolidated their centralized political structure, enhancing the economic position of Abyei as a border point between the African south and the Arab north.⁵⁷

Despite its success in suppressing slavery and strengthening institutions of traditional authorities, the British colonial regime focused its development efforts in northern Sudan and did not invest in southern Sudan. That was left to the Christian missionaries to provide social services such as education. This created uneven development between northern and southern Sudan and planted the seed of social, economic and political disparities. The drastic decision of the British colonial administration to annex southern Sudan to northern Sudan instead of its initial policy of preparing southern Sudan to be annexed to Eastern Africa created a country with immense social, economic and political disparities. The first Sudanese civil war that erupted in 1955 in southern Sudan was primarily attributed to the decision of the British colonial authorities for falsely forging the united Sudan after pursuing a pattern of development during the colonial period that created inequalities and left the south both absolutely and relatively disadvantaged.⁵⁸

For southerners, the independence brokered between the British colonial regime and the northern elite was a mere changing of faces of colonial power from the British to Arabized northerners.⁵⁹ At independence in 1956, the Southern Sudan was not only negligibly represented in the post-independence national government but also the administration of Southern Sudan was virtually handed over to the northern Sudanese. The army, police and employees of the southern Sudan administration immediately after independence became overwhelmingly 'northern', with southerners occupying less than 10 per cent of the total senior positions.⁶⁰ Besides this limited political representation in the post-independence government, there was enormous inequality in access to basic services at the

independence of Sudan. For example, southern Sudan, which constituted one-third of the population of Sudan, had a share at independence of less than eight per cent, four per cent, and five per cent in intermediate, secondary and university education respectively.⁶¹

Besides the colonial legacy of social, economic and political disparities, British colonial rule left the boundaries between northern and southern Sudan improperly defined, which resulted in persistent conflict between northern and southern Sudan. For example, the issue of Abyei area, which was transferred in 1905 to the colonial administration in northern Sudan in order to protect the Ngok Dinka from the slave raids of Arab nomads, was left unresolved by colonial rule.⁶² The vagueness of boundaries was not only in Abyei area, but it is also prevalent along the border between northern and southern Sudan and remained unresolved and a source of conflicts even after the independence of South Sudan. This is reflected in the eruption of war in 2012 between the two Sudans over the border oilfield of *Panthou (Heglig)* immediately after one year of the independence of South Sudan.

Post-independence Sudan: The Trajectory of Mismanagement of Diversity

As discussed in the previous section, the genesis of the current diverse ethnic or national communities living in today's states in Africa is attributed to the colonial period. The European colonialists divided up Africa, partitioning the continent into entirely artificial territorial and geographical units that constitute today most African nations. Due to this creation of artificial states, the process of state creation and nation building in Africa has been most unnatural, leading to very unstable nation-states.⁶³ Many former African colonies got their independence before the nations were formed through an inclusive social contract-making process and that may explain the recurrence of diversity-related conflicts in many post-independence African countries.⁶⁴

The modern African states lack cultural roots as they were fashioned and constructed by colonial authorities in virtual disregard for indigenous values and institutions.⁶⁵ Rather than forging a new social contract, post-colonial African political leaders became more interested in consolidating the inherited colonial state to contain the threat of disunity and fragmentation.⁶⁶ Rather than recognizing ethnic diversity as an unavoidable social phenomenon, many post-independence ruling elites in Africa attempted to forge national identities by suppressing ethnic diversity, arguably leading to more civil conflicts.⁶⁷ While these African political leaders largely succeeded in preserving unity, diversity and disparities within states have remained sources of tension and conflict.⁶⁸

Post-independence Sudan provides a good example of how mismanagement of diversity has caused recurrent diversity-related conflicts and resulted eventually

in its partitioning in 2011. The political history of Sudan is generally characterized by an Islamic assimilationist unitary system or military centralized unitary system adopted by the ruling elite to exclude the large majority of indigenous people from political, social, and cultural life on religious and ethnic grounds. Such a system of governance kindles deep frustrations that largely explains the recurrent civil wars in Sudan.⁶⁹

The mismanagement of ethnic diversity is one of the issues that shaped and continues to shape the dynamics of peace and conflict in Sudan. During the negotiation for independence of Sudan with the British colonial regime in the early 1950s, the elites of southern Sudan wanted the British colonial rule to continue with “Southern Policy” rather than be united with northern Sudan and to prepare them to join East Africa (the initial British policy towards South Sudan). When such demand was rejected by the northern Sudanese elites, the southern Sudanese elites demanded federalism as the only way for their self-rule, suppressing calls for secession and preserving unity in the diversity of Sudan after independence. This quest for federalism was cautiously accepted by the northern Sudanese ruling elites to give it due consideration after independence in 1956.⁷⁰

After independence, the northern ruling elites did not only reject the demand for a federal system, but also considered it treason and adopted instead an Arab-Islamic identity as the only way to create a homogenous society in the Sudan. The main objective of the post-independence northern Sudanese ruling elite was the construction of a united Sudan with Arabo-Islamism as the sole determinant for national unity and citizenship. They saw the religious and cultural diversity of the country as a curse and a threat to unity and Arabo-Islamic hegemony and strove to eliminate such diversity.⁷¹ This system of government based on Arabo-Islamic hegemony has haunted and continues to haunt Sudan with the recurrent diversity-related conflicts.⁷²

The new rulers of Sudan consistently focused on dismantling Southern Sudan Policy, which was based on traditional systems of government, and replacing it with Arabization and Islamization policy. Well-established religious, cultural, and educational norms in southern Sudan were eroded during the early years of independence as a number of steps were taken to Islamize and Arabize cultural life and the system of government in Southern Sudan.⁷³ This new policy caused enormous disruption in the system of government and traditional institutions in Southern Sudan. The rejection of the federal system and imposition of Arab-Islamic culture were among the reasons that caused the eruption of the first civil war in southern Sudan in 1955.

Equally, the post-independence systems of government were never stable due to frequent changes of government systems, ranging from secular to socialist to

Islamic regimes. While the system of government remained largely unitary, the policy choice of devolving powers took the form of either decentralization or de-concentration of powers. Immediately after independence in 1956, the new northern ruling elites adopted a deconcentrated system of power transfer from the central government to local governments to maintain law and collect revenue on behalf of the central authorities.

This deconcentrated system of government continued until the socialist regime took power through coup in 1969. The new regime maintained a unitary system but adopted a decentralized system by devolving authority from the central government to local governments in the provinces. In 1981, the regime devolved local government authority to community government in rural areas, and to municipal and town councils in urban areas. These local authorities enjoyed greater autonomy that resulted in improved access to basic social services and greater people's participation in the government.

This new regime also declared the policy of unity in diversity and recognized the right of the people of southern Sudan to have their own self-rule. This policy resulted in ending the first civil war and signing of the Addis Ababa Peace Agreement in 1972 that granted self-rule and regional autonomy to the people of southern Sudan. The provisions of this Agreement were incorporated into the national constitution with the constitutionally devolved authority to the autonomous regional government of Southern Sudan, which exercised legislative and executive authority and with a system of decentralized local government.

During this period of decentralized unitary system, Sudan and Southern Sudan enjoyed relative peace. However, with the discovery of oil in Southern Sudan in the early 1980s, the socialist regime redrew the border between northern and southern Sudan by carving out the areas of oilfields to be part of northern Sudan and that caused tensions between northern and southern Sudan. This was followed by the declaration of Sharia laws, abrogation of the 1972 peace agreement and the division of the autonomous region of southern Sudan into three weaker sub-regions. These factors contributed to the eruption of the second civil war in 1983, led by the Sudan People's Liberation Movement (SPLM) who called for a secular Sudan and unity in diversity.

Despite the political survival efforts of the socialist regime to appease the Islamic parties such as the National Islamic Front (NIF) by imposing Islamic laws, the regime was ousted in 1985 through popular uprising that was followed by a brief period of transitional government and elected civilian government. This elected government was overthrown in 1989 through a coup orchestrated by the NIF that renamed itself later as National Congress Party (NCP) that adopted a very conservative and alien brand of Political Islam as vast majority of Muslims in Sudan follow Sufism that is flexible and adopts Islam to local context. During the 1990s,

the NCP government stepped up Islamization by enforcing Sharia law and using social and political means to mold society into an Islamic state.⁷⁴

As the second civil war intensified in southern Sudan and other peripheral and marginalized regions of Sudan, the Islamic regime became weak and that forced it to sign the Comprehensive Peace Agreement (CPA) in 2005 with its ideological rival, the SPLM. Although the CPA was a compromise between the call for an Islamic state and secular state, it ended 21 years of civil war, recognized and affirmed the diversity of Sudan, adopted a decentralized federal system and granted the people of Southern Sudan not only autonomous self-rule government but also the right of self-determination to decide their political future.

The CPA also granted the people of the border area of Abyei an autonomous self-rule administration and the right of self-determination through a referendum to be conducted simultaneously with that of South Sudan in January 2011. The CPA also granted the people of the Nuba Mountains and Blue Nile special autonomous self-rule and popular consultation that ran short of their demands for right of self-determination to assess how the CPA met their political aspirations and self-rule at the end of the interim period in 2011. In the lead-up to the independence of southern Sudan in July 2011, fighting broke out, starting in Abyei area in May 2008 and May 2011, the Nuba Mountains in June 2011, and Blue Nile in September 2011 due to the refusal of the Islamic regime to conduct a referendum in Abyei, lack of democratic elections in Nuba Mountains and failure to conduct popular consultation in Blue Nile and Nuba Mountains.⁷⁵ As such, the Islamic regime failed and missed the opportunity to implement the CPA and mechanisms for managing diversity that could have addressed the root causes of the diversity-related conflicts in Sudan.

Post-independence South Sudan: A regression from the decentralized federal system

As per the provisions of the CPA, the people of South Sudan voted overwhelmingly to secede from Sudan, resulting in South Sudan becoming an independent country in July 2011. This decision came as a result of the failure of the ruling northern elites to make unity attractive and to transform diversity into a driver for development, unity and social cohesion. While the CPA committed the parties to work together in making the option of unity attractive to the people of South Sudan, the attractiveness of secession prevailed for both parties.⁷⁶ The NCP feared unity might endanger its political Islam agenda, while the SPLM abandoned its 'New Sudan' agenda of united Sudan after the death of its leader, Dr John Garang, and embraced secession as critical for winning its political base in South Sudan.⁷⁷ The international community also saw secession as the only way for managing cultural differences and attaining and sustaining peace in the two partitioned states, and nurtured this option.⁷⁸

Yet, after the secession, violent conflict persists in Sudan and the seceded state, South Sudan, which quickly slid into civil war in less than three years of independence. The real question is what went wrong for South Sudan to slide so quickly into civil war after its hard-won independence?

The Post-Independence Constitution-Making and Political Representation:

The provisions of the CPA that were incorporated into the 2005 Interim Constitution of Southern Sudan (ICSS) guaranteed a decentralized federalism system after the referendum on self-determination. In particular, Article 208 (7) of the ICSS made it clear that if the outcome of the referendum on self-determination favored secession, the decentralized federal system established during the period of the CPA would continue in the independent South Sudan. In preparation for the right of self-determination referendum and transition to the anticipated new state, all Southern Sudan Political Parties (ASSPP) agreed on a national roadmap. This roadmap provides inclusive process for a constitutional review of the 2005 ICSS for independent state in case of secession.⁷⁹

Contrary to these commitments in the roadmap and constitution, President Kiir unilaterally and without consulting other political parties decided to appoint a Constitutional Review Committee to review the 2005 ICSS. All members were from Sudan People's Liberation Movement (SPLM), the ruling political party, with a two-thirds majority and that caused other political parties to withdraw in protest from the work of the Committee. The drafting of the 2011 Transitional Constitution of South Sudan (TCSS) was exclusively carried out by the SPLM with limited participation of other stakeholders, and then passed by the parliament controlled by the SPLM. This process of constitution-making was not only unconstitutional and contrary to the provisions of ICSS, but it excluded the participation of other political parties and civil society in such a critical exercise that would have contributed to the unity of people of the new nation.

The new state was thus built on a constitution that lacks legitimacy and buy-in from key stakeholders – a bad start for building national ownership in the transition process.⁸⁰ Contrary to the provisions of the ICSS, the post-independence Transitional Constitution of South Sudan 2011 (TCSS) adopted instead a centralized and autocratic system of government that exhibits the features of an unitary system with excessive powers given to the president such as dismissal of elected state governors, dissolution of elected state parliament and dismissal of senior judges without due process of law and that undermine the checks and balances.⁸¹

Besides undermining the federal system as the popular demand of the people of South Sudan,⁸² the exclusive process adopted by the post-independence ruling elites for drafting the new constitution for the new state missed the opportunity

of forging a new social contract and system of government that would have put the new state on the path of peace, trust, unity and social cohesion.⁸³ This marked a bad start for forging national ownership and a new social contract during the critical transition process,⁸⁴ as the new state was founded on a fragile constitution that lacked legitimacy and buy-in from key stakeholders. Also, the first post-independence national government of the new nation consisted of 19 ministers that were from one political party, the SPLM, except for three from other political parties with an overwhelming majority of 70 per cent from two major ethnic groups, Dinka and Nuer.⁸⁵

The process of constitution-making and refusal of federalism during the transition to statehood marked the beginning of the failure of the post-independence ruling elites of South Sudan to manage diversity. It also made the new nation susceptible to ethnic-related conflict, which ultimately erupted in 2013. This transitional process created a widespread sense of exclusion that is reminiscent of the feeling of exclusion that made the people of South Sudan want to leave Sudan.⁸⁶ Apparently, the post-independence ruling elites of South Sudan followed the footpaths of the post-independence northern Sudanese ruling elites by rejecting the federal system and establishing exclusive patronage-based institutions.⁸⁷

The Power Struggle, Governance-Deficit and Weak Institutions

The violent conflict that erupted in 2013 could be attributed to the power struggle and deep cleavages within the ruling party; the SPLM, weak state structure and destructive dynamics of neopatrimonial governance.⁸⁸ This power struggle is a manifestation of a governance-deficit and internal demand for democratization within the ruling party. After the independence of South Sudan, the SPLM undertook a process of reviewing its manifesto and its 2008 constitution. The draft 2013 constitution created a rift within the SPLM, between those who demanded democratic governance and those who wanted to maintain the militaristic structure of the party with excessive powers given to the chairperson of the party. Some of the contentious issues included the mode of voting (raising hands or secret ballot), the powers of the chairperson to directly appoint or nominate members of the party to key leadership positions and tenure of the office of the chairperson.

This division and power struggle reached a boiling point when the chairman of the party and president of the country exercised his new constitutional powers less than two years after independence and, without internal party consultation, sacked in July 2013 the entire cabinet including his vice president, and senior leaders of the SPLM and replaced them with a new cabinet.⁸⁹ The members of the new cabinet were a circle of close advisers and confidants drawn mainly from the president's own community, some not even members of the SPLM, and others with suspiciously close ties to the ruling National Congress Party (NCP) regime in Sudan.⁹⁰ This

move resulted in weakening mechanisms for accountability and transparency in the government and the ruling party, as well as vigorous suppression of the freedom of speech and public debate. The disgruntled and dismissed senior members of the SPLM started calling for democratization within the party and accusing their chairman of thwarting the efforts of transforming the SPLM from a liberation movement into a broad-based and democratic political party. This call resulted in the arrest in December 2013 of some of these dismissed members, including the secretary general of the party under the alleged coup, who with the former vice president fled the capital and formed an armed movement against the government in Juba.

This division within the ruling party would have not degenerated into a national crisis if there were strong institutions; particularly in the Sudan People's Liberation Army (SPLA), the former military wing of the SPLM and the post-independence national army. Besides the division within the SPLM, there was a parallel division within the SPLA⁹¹ that was less of a national army than an amalgamation of ethnically affiliated forces mainly dominated by Dinka and Nuer with allegiances and loyalty to their tribal leaders, Salva Kiir, the president and Riek Machar, the former vice president.⁹² Given fragile institutions and lack of professionalism in the security sector, the crisis within the SPLM in December 2013 caused the national army and other law enforcement agencies such as the police to fragment along ethnic lines in fighting the civil war.

CONCLUSION: OPPORTUNITIES FOR MAKING DIVERSITY A VIRTUE

This article has emphasized the centrality of a system of government and social contract-making in understanding the diversity-related conflicts in the two Sudans. It is shown in this article that ethnic diversity by itself is not a problem but the way it is managed can make it a curse or a virtue. The management of diversity and transforming it to become a virtue and source of peace, development and social cohesion can only be achieved through a system of government and social contract-making that addresses the core conflict issues and builds inclusive and accountable institutions rather than a mere focus on the type of government. The case of the two Sudans elucidates that the social contract-making is still a work in progress in Africa and that necessitates a compelling case for reviewing the current systems of government and the inherited colonial constitutions to forge a new social contract that would transform diversity into a virtue.

Despite the depressing account of diversity mismanagement in the two Sudans as demonstrated in this article, there are opportunities for transforming diversity into a virtue in the two Sudans. In particular, the 2018 South Sudan peace agreement provides a golden opportunity for forging a new social contract and constitution-making that would embrace a decentralized federal system that would transform

diversity, enabling it to become a source of peace, development, justice and social cohesion. In Sudan, the uprising and revolution that ended the 30 years of misrule by the NCP with its autocratic and corrupt political Islam system of government provides an unprecedented opportunity for adopting a new constitution and social contract-making that would move away from Arabo-Islamic hegemony and political Islam to a decentralized federal system that embraces diversity as a virtue and a source for freedom, peace, and justice—the revolutionary slogans of the Sudanese uprising.

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NOTES

- 1 Deng, F., "Identity, Diversity, and Constitutionalism in Africa." Washington D.C.: United States Institute of Peace Press (2008).
- 2 UNECA. "Diversity Management in Africa: Findings from the African Peer Review Mechanism and a Framework for Analysis and Policy-Making." Addis: United Nations Economic Commission for Africa (2011) and Appiah, E., Arko-Achemfuor, A. and Adeyeye, O. "Appreciation of diversity and inclusion in Sub-Sahara Africa: The socioeconomic implications." *Cogent Social Sciences*, (2018) 4:1-12.
- 3 Deng, F., and Deng. Daniel. "Constructive Management of Diversity: A Strategy for Conflict Resolution and Nation-Building." In *The Struggle for South Sudan: Challenges of Security and State Formation*, edited by L. Kuol, and S. Logan. London, UK: I.B. TAURIS (2019).
- 4 Keen, D. *The Benefits of Famine: A Political Economy of Famine in South-West Sudan, 1983–1989* Princeton, NJ: Princeton University Press (1994).
- 5 Sanderson, L., and Sanderson, N. *Education, Religion and Politics in Southern Sudan, 1899-1964*. London: Ithaca Press (1981) and Spaulding, J. "Slavery, Land Tenure and Social Class in the Northern Turkish Sudan," *International Journal of African Historical Studies*, (1982) Vol 15(1).
- 6 Alier, A. *Southern Sudan: Too many agreements dishonoured*. Exeter, United Kingdom: Ithaca Press (1990) and Keen, *The Benefits of Famine: A Political Economy of Famine in South-West Sudan, 1983–1989*.
- 7 Johnson, D. "Political Ecology in the Upper Nile," *Journal of African History*, (1989) Vol 30 (3) and Deng, L. "Famine in the Sudan: Causes, Preparedness and Response: A Political, Social and Economic Analysis of the 1998 Bahr el Ghazal Famine," *IDS Discussion Paper 369*. Brighton: Institute of Development Studies, Sussex University (1999).
- 8 UNECA, "Diversity Management in Africa: Findings from the African Peer Review Mechanism and a Framework for Analysis and Policy-Making."
- 9 Deng, L., "The Sudan Famine of 1998: Unfolding of the Global Dimension," (2002) *IDS Bulletin* 33 (4).
- 10 Qugniwet, N. "The Report of the International Commission of Inquiry on Darfur: The Question of Genocide," *Human Rights Review*, (2006) Vol. 7 (4): 38-68.
- 11 De Waal, A. *Famine That Kills: Darfur, Sudan, 1984-1985*. Oxford: Oxford University Press (1989).
- 12 Checchi, F., Testa, A., Warsame, A., Quach, L., and Burns, R. "South Sudan: Estimates of Crisis-attributable mortality." London: London School of Hygiene and Tropical Medicine (2018).
- 13 UNDP. "Search for a New Beginning: Perceptions of Truth, Justice, Reconciliation and Healing in South Sudan." Juba: United Nations Development Program (UNDP) (2015).
- 14 Breckenridge, A. "South Sudan: The Cost of War." *Frontiers Economics* (2015).

- 15 Chigudu, D. "Strength in diversity: An opportunity for Africa's development." *Cogent Social Sciences* (2018) Vol. 4: 1-5.
- 16 Dadfar, H. and P. Gustavsson, "Competition by effective management of cultural diversity: The case of inter- national construction projects." *International Studies of Management and Organisation*, (1992) 22(4), 81-92 and Ludlum, M. "Management and marketing in a New Millennium." *Mustang Journal of Management and Marketing*, (2012) 1, 1-153.
- 17 Fearon, J. and Laitin, D. "Ethnicity, Insurgency, and Civil War," *American Political Science Review* (2003) Vol. 97 (1), pp. 75-90, and Collier, P., and Hoeffler, A. "Greed and grievances," *Oxford Economic Papers* (2004), 56, pp. 563-595.
- 18 Collier, P. (1998) The political economy of ethnicity. *CSAE Working Paper Series* 98-8. [Online]. Available at <https://www.csaee.ox.ac.uk/workingpapers/pdfs/9808text.pdf>.
- 19 Huntington, S. *The clash of civilizations and the remaking of world order*. New York, NY: Simon and Schuster (1996) and Reynal-Querol, M. "Ethnicity, political systems and civil wars." *Journal of Conflict Resolution*, (2002) 46(1): 29-54.
- 20 UNECA, "Diversity Management in Africa: Findings from the African Peer Review Mechanism and a Framework for Analysis and Policy-Making."
- 21 Gurr, T. (ed.). *Why Men Rebel*, Princeton: Princeton University Press (1970).
- 22 Deng, L. "The Challenge of Cultural, Ethnic and Religious Diversity in the Peace Building and Constitution-Making in the Post-conflict Sudan," *Journal of Civil Wars*. (2005) 7 (3), pp. 258-269.
- 23 UNECA. "Diversity Management in Africa: Findings from the African Peer Review Mechanism and a Framework for Analysis and Policy-Making."
- 24 UNECA, "Diversity Management in Africa: Findings from the African Peer Review Mechanism and a Framework for Analysis and Policy-Making."
- 25 Kuol, L. "Federalism-Decentralization-Peace Nexus in South Sudan." In *The Struggle for South Sudan: Challenges of Security and State Formation*, edited by L. Kuol, and S. Logan. London, UK: I.B. TAURIS (2019).
- 26 Acemoglu, D., and Robinson, J. *Why Nations Fail: The Origins of Power, Prosperity and Poverty*. Crown Publishing Group (2012).
- 27 Social Contract is defined as "a dynamic national agreement between state and society, including different groups in society, on how to live together, and notably, around how power is distributed and exercised" McCandless, (2018).
- 28 Murshed, S. "Conflict as the Absence of Contract." *The Economics of Peace and Security*. (2009) 4 (1): 31-38.
- 29 Kuol, L. "South Sudan: The Elusive Quest for a Resilient Social Contract." *Journal Intervention and State Building* (2019).
- 30 Sefa-Nyarko, C. "Civil War in South Sudan: Is It a Reflection of Historical Secessionist and Natural Resource Wars in "Greater Sudan"?" *African Security* (2016), Vol. 9 (3), pp. 188-210, Kalpakian, J. "Peace agreements in a near-permanent civil war: Learning from Sudan and South Sudan." *South African Journal of International*

Affairs (2017), Vol. 24(1), pp. 1-19, and Vries, L., and Schomerus, M. "South Sudan's Civil War Will Not End with a Peace Deal." *Peace Review* (2017), Vol. 29, pp. 333-340.

31 Rolandsen, O. "Another Civil War in South Sudan: the failure of Guerrilla Government?" *Eastern African Studies* (2015), Vol. 9(1), pp. 163-174, De Waal, A. "When Kleptocracy becomes insolvent: Brute causes of the civil war in South Sudan," *African Affairs* (2015) 113 (452) pp. 347-369, Onditi, F., Sabala, K., and Wassara, S. "Power-sharing consociationalism in resolving South Sudan's ethno-political conflict in the post-Comprehensive Peace Agreement era." *African Journal on Conflict Resolution* (2018), Vol 18 (1) and Wassara, S. "South Sudan: state sovereignty challenged at infancy." *Eastern African Studies* (2015) Vol. 9(4), pp. 634-649.

32 Johnson, D. *The Root Causes of Sudan's Civil Wars: Old Wars and New Wars*. 3rd ed (2016). Suffolk, UK: James Currey.

33 McCandless, E. "Forging Resilient Social Contracts for Peace: Towards a Needed Re-conceptualisation of the Social Contract." Working Paper. Witwatersrand University (2018:48).

34 McCandless, E. "Forging Resilient Social Contracts for Peace: Towards a Needed Re-conceptualisation of the Social Contract." Working Paper. Witwatersrand University (2018).

35 Kuol, L. "South Sudan: The Elusive Quest for a Resilient Social Contract," *Journal of Intervention and Statebuilding* (2020), 14 (1), pp. 64-83.

36 Deng, L. "Famine in the Sudan: Causes, Preparedness and Response: A political, social and economic analysis of the 1998 Bahr el Ghazal Famine," *IDS Discussion Paper* 369, Brighton: Institute of Development Studies (1999).

37 Spaulding, J. "Slavery, Land Tenure and Social Class in the Northern Turkish Sudan," *International Journal of African Historical Studies*, (1982) Vol 15(1).

38 Sanderson, L., and Sanderson, N, *Education, Religion and Politics in Southern Sudan*.

39 Deng, "Famine in the Sudan: Causes, Preparedness and Response: A political, social and economic analysis of the 1998 Bahr el Ghazal Famine."

40 Holt, P., and Daly, M. *A History of the Sudan: From the Coming of Islam to the Present Day*. London and New York: Longman (1981) and Keen, *The Benefits of Famine: A Political Economy of Famine in South-West Sudan, 1983-1989*.

41 Keen, *The Benefits of Famine: A Political Economy of Famine in South-West Sudan, 1983-1989*.

42 Deng, "Identity, Diversity, and Constitutionalism in Africa."

43 Kuol, "Federalism-Decentralization-Peace Nexus in South Sudan."

44 Udal, J. *The Nile in darkness: Conquest and exploration, 1504-1862*. Norwich, United Kingdom: Michael Russell (1998).

45 Graeber, D. "The divine kingship of Shilluk: On violence, utopia, and the human condition, or, elements for an archeology of sovereignty." Edinburgh, United Kingdom: University of Edinburgh (2011).

46 Kuol, "Federalism-Decentralization-Peace Nexus in South Sudan."

- 47 Beswick, S. "The Ngok: Emergence and Destruction of a Nilotic Proto-state in Southwest Kordofan." In *Kordofan Invaded: Peripheral Incorporation and Social Transformation in Islamic Africa*, edited by Endre Stiansen and Michael Kevane, 145–164. Leiden: E.J. Brill (1998).
- 48 Johnson, D. "Why Abyei matters: The breaking point of Sudan's Comprehensive Peace Agreement?" *African Affairs*, (2008) 107(426): 1-19.
- 49 Evans-Pritchard, E. "The ethnic composition of the Azande of Central Africa." *Anthropological Quarterly*, (1958) 31(4): 95-118.
- 50 Evans-Pritchard, "The ethnic composition of the Azande of Central Africa," 24.
- 51 Keen, *The Benefits of Famine: A Political Economy of Famine in South-West Sudan*, 1983–1989.
- 52 Johnson, D. *The root causes of Sudan's civil wars: Peace or truce*. Suffolk, United Kingdom: James Currey (2011).
- 53 Collins, R. *The Land Beyond the Rivers: The Southern Sudan, 1889-1918*. New Haven and London: Yale University Press (1971).
- 54 Henderson, K. "A Note on the Migration of the Messiria Tribe into South West Kordofan," (1939) *Sudan Notes and Records*, 32.
- 55 Henderson, "A Note on the Migration of the Messiria Tribe into South West Kordofan," 165.
- 56 Graeber, "The divine kingship of Shilluk: On violence, utopia, and the human condition, or, elements for an archeology of sovereignty."
- 57 Johnson, "Why Abyei matters: The breaking point of Sudan's Comprehensive Peace Agreement?"
- 58 Deng, F. *War of Visions: Conflict of Identities in the Sudan*. Washington, DC: Brookings Institution Press (1995).
- 59 Deng, *War of Visions: Conflict of Identities in the Sudan*, 13.
- 60 Oduho, J., and Deng, W. *The Problem of the Southern Sudan*. Oxford: Oxford University Press (1962).
- 61 Oduho, J., and Deng, W. *The Problem of the Southern Sudan*, 46.
- 62 Kuol, L. "Political violence and the emergence of the dispute over Abyei, Sudan, 1950-1983." (2014) *Journal of Eastern African Studies*, 8(4): 1-17.
- 63 Deng, "Identity, Diversity, and Constitutionalism in Africa."
- 64 Bob, A. "Islam, the State and Politics in the Sudan." *Northeast African Studies*. (1990) Vol. 12 (2): 201-220.
- 65 Deng, "Identity, Diversity, and Constitutionalism in Africa."
- 66 Laremont, R. *The Causes of War and the Consequences of Peacekeeping in Africa*. Portsmouth: Heinemann (2002).
- 67 Deng, "The Challenge of Cultural, Ethnic and Religious Diversity in the Peace Building and Constitution-Making in the Post-conflict Sudan."
- 68 Deng, "Identity, Diversity, and Constitutionalism in Africa."
- 69 Deng, "The Challenge of Cultural, Ethnic and Religious Diversity in the Peace Building and Constitution-Making in the Post-conflict Sudan."
- 70 Alier, A. *Southern Sudan: Too many agreements dishonoured*.

- 71 Khalid, M. *The Government they Deserve: The Role of the Elite in Sudan's Political Evolution*. London: Kegan Paul (1990).
- 72 Deng, L. "The Challenge of Cultural, Ethnic and Religious Diversity in the Peace Building and Constitution-Making in the Post-conflict Sudan."
- 73 Alier, A. *Southern Sudan: Too many agreements dishonoured*.
- 74 ICG. *God, oil and country: Changing the logic of war in Sudan*. International Crisis Group Press (2002).
- 75 Deng, L. "Managing Diversity and Peace in the Post-conflict Sudan," in Deng, F., 2010 (eds.), *New Sudan in Making*, London: Routledge Inc. (2010).
- 76 Kuol, "Political violence and the emergence of the dispute over Abyei, Sudan, 1950-1983."
- 77 Kuol, "Political violence and the emergence of the dispute over Abyei, Sudan, 1950-1983."
- 78 Kalpakian, J. "Peace Agreements in a Near-Permanent Civil War: Learning from Sudan and South Sudan." *South African Journal of International Affairs*. (2017) 24 (1): 1–19.
- 79 Akol, L. "Critique of the draft Transitional Constitution of the Republic of South Sudan." *Sudan Tribune* (2011), April 30.
- 80 Jok, J. "Diversity, Unity, and Nation Building in South Sudan." *Special Report* 287. Washington: US Institute of Peace (2011).
- 81 Kuol, L. "Federalism-Decentralization-Peace Nexus in South Sudan." *The Struggle for South Sudan: Challenges of Security and State Formation*, edited by L. Kuol, and S. Logan. London, UK: I.B. TAURIS (2019).
- 82 Johnson, D. "Federalism in the History of South Sudanese Political Thought." *The Struggle for South Sudan: Challenges of Security and State Formation*, edited by L. Kuol, and S. Logan. London, UK: I.B. TAURIS (2019).
- 83 Kuol, *The Struggle for South Sudan: Challenges of Security and State Formation*.
- 84 Jok, J. "Diversity, Unity, and Nation Building in South Sudan." *Special Report* 287. Washington: US Institute of Peace (2011).
- 85 Kuol, *The Struggle for South Sudan: Challenges of Security and State Formation*.
- 86 Jok, "Diversity, Unity, and Nation Building in South Sudan."
- 87 Kuol, *The Struggle for South Sudan: Challenges of Security and State Formation*.
- 88 Rolandsen, O. "Another Civil War in South Sudan: The Failure of Guerrilla Government?" *Journal of Eastern African Studies* (2015) 9 (1): 163–174 and De Waal, A, 2014.
- 89 Johnson, *The Struggle for South Sudan: Challenges of Security and State Formation*.
- 90 Johnson, D. "Briefing: The Crisis in South Sudan." *African Affairs* (2014) 113 (451): 300–309 and Kuol, "Federalism-Decentralization-Peace Nexus in South Sudan," 302.
- 91 Johnson, "Briefing: The Crisis in South Sudan," 2019 and Kuol, "Federalism-Decentralization-Peace Nexus in South Sudan."
- 92 Kuol, *The Struggle for South Sudan: Challenges of Security and State Formation*.

DISRUPTING ASSIMILATIONIST RESEARCH PRINCIPLES AND PRACTICES IN AUSTRALIA AND SWEDEN: SELF-DETERMINATION THROUGH THE ENACTMENT OF INDIGENOUS DIPLOMACIES

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Abstract: *Embedded with pre-existing meaning and a complex set of core principles and practices, “diplomacy” is a term familiar to most. Simply put, diplomacy is the established methods of influencing the decisions and behavior of foreign governments and peoples through dialogue, negotiation, and other measures to resolve conflict and maintain peace.¹ In this article, we review the literature pertaining to the concept of diplomacy, focusing primarily on the lesser recognized diplomacies of First Peoples² in Australia and Sweden. Through the telling of three significant events, historical and contemporary, drawn from many possible examples of the two nations, we demonstrate that Indigenous diplomacies are not new but rather newly recognized.³ We argue for the utilization of Indigenous diplomatic practices to realize self-determining research with, and by, First Peoples. In doing so, centuries of colonization that have resulted in power imbalances, which sought to assimilate and benefit settler/colonizer privilege through its governing institutions, may be disrupted and transformed.⁴ According to the literature search undertaken, this is an approach to Indigenous research that has received scant attention. Our discussion is guided by two key questions. First, can research informed by Indigenous diplomatic practices disrupt assimilationist research agendas set predominantly by society’s governing institutions? Second, can recognition of Indigenous diplomatic principles and practices facilitate self-determining research? We draw on our experiences as Indigenous and non-Indigenous researchers to suggest that the enactment of Indigenous diplomatic practices when undertaking our research ‘proper ways’ with First Peoples, according to Indigenous ways of knowing, being, and doing, has facilitated its success.*

INTRODUCTION

The term ‘diplomacy’ is familiar to most, embedded with pre-existing meaning and a complex set of core principles and practices. Simply put, diplomacy, is the established methods of influencing the decisions and behavior of foreign governments and peoples through dialogue, negotiation, and other measures to resolve conflict and keep the peace.⁵ By the 20th century, diplomatic principles

and practices developed in Europe for centuries, had been adopted globally, with the art of diplomacy establishing rules of governance in a myriad of cross-cultural situations.⁶ In modern times, diplomacy has come to be associated with a profession that involves the enactment of activities or skills governing international relations, with a diplomat typically being a country's representative abroad.

Most of the considerable literature pertaining to diplomacy has approached it in terms consistent with this dominant, historical understanding of what diplomacy is, what it is for, and who its practitioners may be.⁷ However, we are living in a time when the world of diplomacy is understood to be rapidly changing. As recently observed by Kuus, accounts of these trends present a picture of diplomacy as increasingly sped up, open, networked, and flexible.⁸ In this article, our discussion is guided by two key questions. First, can research informed by Indigenous diplomatic practices disrupt assimilationist research agendas set predominantly by society's governing institutions? Second, can the enactment of Indigenous diplomatic principles and practices in research facilitate self-determining research? We suggest a novel conceptual approach that borrows and bends the principles and practices of Indigenous diplomacies of Australian Aboriginal peoples and Sámi in Sweden to achieve self-determining research. Beier asserts:

inquiry into Indigenous people's diplomacies could seem like an add-on, a curiosity. In point of fact, however, the opposite is true. What many may be accustomed to thinking of as 'diplomacy' is actually a very narrow slice of human possibility in the interaction between political communities.⁹

The dominant understanding of diplomacy is therefore but one narrative among a plethora of complex core practices, among which are the many enactments of Indigenous diplomacies. The use of the plural is significant, as Indigenous peoples are not a homogenous group, with Rose asserting that today's Australian Aboriginal peoples "form a quilt of nearly five hundred separate and sovereign nations that cover the entire land."¹⁰ Conversely, Sápmi, the Sámi homeland, spans a substantial geographical area. Despite residing within the borders of Norway, Sweden, Finland, and Russia, Sámi are considered one people. Since the construction of the nation-states, Sámi people have been political underdogs within state borders.¹¹ However, as Indigenous peoples on an international political arena, Sámi people insist on being represented as one people rather than different regional groups, aiding more effective organization, mobilization and the construction of pan-Sámi political bodies.¹² Therefore, in its singular form, diplomacy reduces a diverse array of historical and contemporary human experiences into a single narrative that has become associated with the dominant understanding of state-centered diplomatic practice.¹³ Consequently, 'other diplomacies' are marginalized, rendered silent, and made invisible, including those of the Australian Aboriginal and Sámi in Sweden.¹⁴

RESEARCH APPROACH

In undertaking a literature review, the phrases “Indigenous Diplomacy,” “Cultural Diplomacy” and “Aboriginal Diplomacy” were entered into the Indigenous Collection Database (Informit) with the result of zero occurring for each of these searches. When the terms were entered not as a phrase, such as terms Aboriginal AND Diplomacy, three items were found; Indigenous AND Diplomacy yielded one result. The AIATSIS Catalogue Online returned 100 results for the term “Indigenous diplomacy” and 104 results for “Aboriginal diplomacy,” with the majority referring to tourism, mining, climate change and Native title. A general Google search for “Sámi diplomacy,” or “Samisk diplomati” in Swedish, generated only two hits related to actual Sámi diplomacy, both news articles in the *Sámediggi*’s, or the Sámi Parliament’s, web archive. The literature search revealed a myriad of synonyms, including: ethics-led practice; dispute resolution; conflict resolution; peace studies/building; protocols; and cultural diplomacy. However, while such terms may lend some understanding, they do not speak to Indigenous diplomacies and their enactment as we understand it in self-determining Indigenous research. In the following sections, we unpack the meaning of Indigenous diplomacies, which frames our exploration of Australian Indigenous diplomacies followed by a discussion of Sámi in Sweden diplomacies. We will demonstrate that Indigenous diplomacies, applied to research, have the potential to redress the power imbalance that tend to benefit the settler/colonizer and silence Indigenous peoples. First, we must introduce ourselves in accordance with Indigenous diplomatic practices.

POSITIONING OURSELVES

Positioning ourselves in our research observes and enacts cultural protocols. It is what Indigenous scholar Margaret Kovach, refers to as “relational work.”¹⁵ By introducing ourselves, we are honoring the Aboriginal protocols of: ‘who are you’ and ‘where do you come from?’¹⁶ The significance of explicitly introducing oneself and situating oneself culturally, is an important diplomatic practice for many First Peoples and therefore, critical in Indigenous research.¹⁷

Sheelagh is an Australian Aboriginal/Kamilaroi woman whose work is focused on Aboriginal education and Indigenous Studies and research. Her work borrows and bends the theoretical frameworks of cultural responsiveness and Critical Race Theory and uses the principles of the Indigenous storying methods of yarning¹⁸ and Storywork.¹⁹ This approach provides a pathway for doing research “proper ways,” an Aboriginal English term meaning the research is mindful of working in socially, ethically and culturally responsible ways, locating the research within the cultural ways of knowing, being and doing of participants and researcher.

Kristina is a Swedish researcher with a professional and research background in the fields of peace work, ethnology, conflict resolution or transformation and anti-discrimination work. Her passion for conflict transformation brought her into contact with Indigenous peoples in Australia and Sweden in the early 2000's as they could share interesting insights into conflict resolution. Kristina has worked extensively with Indigenous peoples in several countries on topics related to conflict, power relations and different forms of violence. Her research with Indigenous peoples is guided by Indigenous methodologies and, similar to Sheelagh, she is committed to doing research "proper ways."

UNDERSTANDING INDIGENOUS DIPLOMACIES

Despite centuries of colonization in its various forms, today Indigenous peoples represent over 5,000 languages and cultures in more than 70 nation-states on six continents.²⁰ First contact between Indigenous peoples and settlers/colonizers saw both sides grappling to negotiate cross-cultural encounters, bringing their own distinct worldviews embedded with pre-existing meaning with them, alongside a complex set of core principles and practices. It was in these encounters, albeit enacted differently in Australia and Sweden, that both settler/colonizer and First Peoples performed their own rituals of diplomacy.²¹ Increasingly, as the acquisitive objectives of European colonizers became entrenched, both sides sought forms of allegiance and co-existence. What follows is a look at such distinct practices, some more successful than others. First we turn to Australian Aboriginal peoples and then to Sámi in Sweden.

AUSTRALIAN ABORIGINAL DIPLOMACIES

The diplomatic processes of establishing peace and alliances between the hundreds of Aboriginal and Torres Strait Island Countries, which have existed for thousands of generations, have been continuously practiced on the Australian continent.²² These practices governed relations pre- and post-invasion. While policies and practices of dispossessing colonization have disrupted these practices throughout Australia,²³ they have nonetheless adapted and survived, relying on the well-established ways in which peoples interact with one another, maintaining balance for both the collective and the individual within. In this section, I have chosen three examples that illustrate how diplomacies, Indigenous and colonizer, have been enacted in pre-colonization, in early contact, and in contemporary times.

Pre-colonization: Trading with the Makassans

Prior to British invasion in 1788, a number of peoples visited Australia over many centuries. For example, since at least the 1500s, Makassan sailors visited Australia to trade with the Yolngu people of East Arnhem land, mostly for the

harvest of sea trepang.²⁴ The Makassans were seasonal visitors who came to trade but did not stay; it was a relationship that reportedly worked well, socially and economically, for both peoples.²⁵ The relationship and subsequent trade relied on an ethos of mobility that gave rise to a system of trade and dispute resolution.²⁶ This system of protocols and observances were grounded in Indigenous peoples' own ways of knowing, being, and doing.²⁷ According to International Relations (IR), such transactions and interactions are referred to as "People's diplomacy," meaning a historically continuous process of communication, mutual knowledge, influence, and enrichment of cultures and people.²⁸ However, in the late eighteenth century, relations changed radically.

By the time the British arrived in Australia and the Pacific region in the eighteenth and nineteenth centuries, the principles and practices that underpinned the making of colonial empires were well-established, being honed from the fifteenth century in other imperial locations such as the Americas.²⁹ Settler/colonial rule had come to be variously initiated through rituals, ceremonies and symbolic acts. Historian Patricia Seed evocatively refers to these acts as the "habits of history" that included: the practice of erecting crosses and flags or burying coins to record a European presence on new territories; issuing verbal and written proclamations to Indigenous peoples; and enacting imperial diplomacy through the ritual use of objects like ornaments, medals, foodstuffs, blankets and, at times, guns.³⁰ Although these formalities implied the ideal of equivalent exchange, colonial authority and sovereignty were asserted through negotiation or, in Australia's case, force when reciprocity did not occur. These "habits of history" are evident in the encounters between colonizers and Australia's Indigenous peoples, beginning in the late eighteenth century.

The British Crown's formal instructions to Governor Arthur Phillip, who established the first colony in Sydney Cove in 1788, were to "endeavor by every possible means to open an intercourse with the natives [sic], and to conciliate their affections, and to enjoin his British subjects to 'live in amity and kindness with them.'"³¹ But Governor Phillip also had the authority to punish when deemed necessary.³² Phillip's approach to the Eora people is recorded as positive and outgoing from the start, 'A true man of the Enlightenment, he had a distinct concept of a civilized society and, hoped 'to cultivate an acquaintance with them without their having an idea of our great superiority over them, fixed.'³³

By no means the only successful mediator in the region, Woollarawarre Bennelong is arguably the most recognized mediator between the Aboriginal peoples of the Sydney region and the early colonists; in retrospect, he is also the most misrepresented and underestimated. Captured in November 1789 on the orders of Arthur Phillip, first governor of the convict colony of New South Wales, Woollarawarre Bennelong formed an unlikely friendship with his captor.

Despite this friendship, in May Bennelong escaped, and he was not seen until September when he was among a large assembly of Indigenous peoples at Manly, one of whom wounded Phillip with a spear. Bennelong expressed concern for Phillip and frequently appeared near Sydney Cove to inquire after the governor's health. The encounter served to re-establish contact with Governor Phillip and, when assured that he would not be detained, Bennelong began to frequent the settlement with many of his compatriots, who made the Government House yard their headquarters.³⁴

A highlight of Bennelong's diplomatic career was his visit to England between 1792 and 1795 with his kinsman Yemmerrawanne.³⁵ Smith argues that Bennelong was a master politician, and despite resistance and difficulties, he brokered alliances with both his own people and with the British colonizers. From his earliest negotiations with Governor Phillip, Bennelong's 'constant endeavour', in the words of Clendinnen, 'was to establish his clan, as embodied in his person, in an enduring reciprocal relationship with the British – the relationship of profitable intimacy and mutual forbearance'.³⁶ The next section will illustrate how Bennelong's struggle for reciprocity, relationship and mutuality between Aboriginal and non-Aboriginal peoples continues to be sought by Aboriginal Peoples in contemporary times.

Contemporary Times: Statement from the Heart, 2017

The Statement from the Heart came after generations of Indigenous struggles for recognition, and calls for a stronger voice in determining Indigenous affairs. In 2017, a constitutional convention of 250 Aboriginal and Torres Strait Islander delegates was held at the foot of Uluru, a massive, sacred, sandstone monolith in the heart of Australia, on the lands of the Anangu people. Overall, the Uluru Statement from the Heart was a national Indigenous consensus position on Indigenous constitutional recognition. The statement called for the establishment of a "First Nations Voice" enshrined in the Australia Constitution and the establishment of a Makarrata³⁷ Commission to supervise agreement-making and truth-telling between governments and Aboriginal and Torres Strait Islander peoples. The Statement was the culmination of 13 regional dialogues held around the country.³⁸

The statement is placed at the center of over 250 delegates' signatures who attended the conference, who had reached consensus on the issue. 100 First Nations are represented in the statement by signatories who included the name of their nation. The official painted and signed canvas of the Statement was presented to Malcolm Turnbull, the then Australian Prime Minister, and Bill Shorten, the then-leader of the opposition, on August 5, 2017, at the Garma Festival in northeast Arnhem Land in the Northern Territory.³⁹ On October 26, 2017, Turnbull issued a joint statement with the attorney general, George Brandis, and the Indigenous Affairs Minister, Nigel Scullion, rejecting the statement.⁴⁰ The

Statement remains unresolved and joins other important statements calling for recognition and sovereignty that Aboriginal peoples have made throughout the decades.

Similar to the examples shared in the next section from Sámi in Sweden, the aforementioned examples of Indigenous diplomatic practices have not always been successful, yet they persist and have potential for disrupting Indigenous research agendas governed primarily by society's dominant institutions, whose focus is predominantly on assimilation rather than self-determination.

SÁMI DIPLOMACIES

Sámi people are also involved in long-standing, continuous acts of diplomacy. Following Heininen⁴¹ Sámi people have practiced regional as well as interregional and international collaboration on a daily basis for thousands of years. Sámi people have populated the North Calotte region for a couple of thousand years.⁴² During this time Sámi have also been subjected to painful intrusions such as race biology, dislocation, forced conversion to Christianity, and a continuous loss of their traditional lands due to extractive activities and, more currently, climate change.⁴³ Despite this, Sámi people have repeatedly managed to mobilize and use diplomatic measures to be heard in a number of different arenas. The following examples are only a few of very many that illustrate this.

The Reindeer Keeper System – Reindeer Diplomacy?

One of several Sámi livelihoods is reindeer herding. Furthermore, the reindeer holds a central position in Sámi culture, history, and society for reindeer-herding and non-reindeer-herding Sámi alike.⁴⁴ Brännlund has investigated reindeer husbandry resilience and writes that the reindeer keeper system, or *skötesrensensystem* in Swedish, provided flexibility and enabled Sámi to keep their herds intact even though they might need to be elsewhere, as someone else could care for their animals.⁴⁵ The reindeer keeper system also had another effect, evidenced by the work of Nordin, who has studied the reindeer keeper system in Gällivare parish in Northern Sweden. According to Nordin, the Swedish settlers who colonized the area at the end of the 1800s struggled in the new and unfamiliar territory; as a result, they depended on the Sámi. The reindeer keeper system meant that a settler or farmer could own a number of reindeer and that a Sámi family would care for and herd the animals.⁴⁶ This system showed components of both conflict management and reciprocity, key concepts in the dominant narrative of diplomacy.

Nordin writes that the “settlers were invited to participate in the system of *skötesrenar*, and hence a relation based on mutual interdependence and trust soon developed.”⁴⁷ The system worked as a form of relationship guarantee, where

a Sámi family could give a reindeer and an identifying reindeer mark to a settler family in return for storage space or accommodation. The reindeer would then be cared for as part of the Sámi family's herd but the meat after slaughter belonged to the settler family, in accordance with long-established ways of knowing, being, and doing.⁴⁸

Nordin demonstrates the importance of the reindeer keeper system for Sámi people as it “made life easier for them,” as well as minimizing the risk of conflict between Sámi and settlers since it involved economic interdependence.⁴⁹ Therefore, the reindeer keeper system constitutes an important act of diplomacy between Sámi and settlers.

Elsa Laula Renberg – Sámi Activist and Politician

Another version of Sámi diplomacy was demonstrated by Sámi activist and midwife, Elsa Laula (later married Renberg). Elsa Laula was born into a reindeer farming Sámi family in Hattfjelldal in Nordland. At the turn of the nineteenth century, when Sámi mobilization culminated, the first Sámi national association was formed, as well as several local associations and a Sámi women's association and Elsa Laula published a document called *Inför lif eller död?* – in English *Facing life or death*.⁵⁰ Elsa Laula Renberg is known as a pioneer in the history of Sámi mobilization.⁵¹ Where the reindeer keeper system was designed to stave off conflict before it started, Laula Renberg was not afraid of speaking candidly about the issues Sámi people faced as a result of colonization. Because of this she became the driving force behind the first Sámi Congress in 1917.⁵²

Laula Renberg resisted the idea of Sámi as only reindeer herders; instead, she focused her struggle on Sámi people's rights to their lands and thus their rights to cultivate any form of livelihood on the lands that they owned. She also pointed to the poignant problems that Sámi faced at the time and today, including land conflicts with settlers and ever-shrinking reindeer grazing lands.⁵³

Elsa Laula Renberg carried a message of internal diplomacy at a time when the political situation facing Sámi in all four nation-states was one of divide-and-conquer. Sámi were to remain nomadic reindeer herders or become assimilated by the respective nation-state.⁵⁴ Laula Renberg saw and argued for a dynamic and developing Sámi society where Sámi would also have the right to other livelihoods than reindeer herding and where Sámi would have the rights to their traditional lands as a united people. This way, Sámi people would be able to maintain Sámi knowledge, education, and the variety of livelihoods.⁵⁵ Elsa Laula Renberg was an important diplomatic force in her active days and has remained an iconic figure in Sámi society today, igniting hope and wills to work for Sámi rights.

Contemporary Times: Policy Regarding Research and Project Collaboration with Sámiid Riikkasearvi

Like the Australian Aboriginal examples shared, the examples of Sámi diplomacies have not been without consequences. Sámi activism, diplomacy and strategic know-how can be seen in contemporary policy documents such as the “Policy regarding research and project collaboration with Sámiid Riikkasearvi.”⁵⁶ Sámiid Riikkasearvi is a national Sámi organization in Sweden founded in 1950 with the mission to oversee Sámi issues. Members include both Sámi associations and Sámi reindeer herding communities. The work of Sámiid Riikkasearvi includes a whole range of issues impacting Sámi; however, reindeer husbandry is the organization’s main concern.⁵⁷

The aforementioned policy document was developed by Sámiid Riikkasearvi to help both researchers, Sámi associations, and reindeer herding communities. Importantly it formulates a list of questions to be asked by the potential researcher or project worker prior to contact with Sámiid Riikkasearvi. This ensures that research or collaborations are founded on equal terms and not on outdated notions of Indigenous peoples as objects to be studied. In a situation where many Sámi communities and associations are all too often expected to participate in projects—research and other—without compensation or any guarantees for beneficial outcomes, these guidelines can provide some relief. The fact that the guidelines are designed to help both potential researchers and research participants also holds potential to build bridges and extend and develop the Indigenous research field in Sweden.

DISRUPTING RESEARCH THROUGH ENACTING SELF-DETERMINING INDIGENOUS DIPLOMACIES

Like the term “diplomacy,” the term “research” is familiar to most, saturated with pre-existing meaning and a complex set of core practices be they quantitative, qualitative or mixed-method. Both diplomacy and research function in highly ritualized ways, honed through centuries by the “habits of history.”⁵⁸ Martin evocatively writes of “terra nullius” styled research:

*In this research, we are present only as objects of curiosity and subjects of research. To be seen but not asked, heard nor respected. So the research has been undertaken in the same way Captain James Cook falsely claimed the eastern coast of the land to become known as Australia as terra nullius.*⁵⁹

Terra nullius-styled research, embedded with racialized narratives of inferiority and superiority, excluded Australian Aboriginal peoples from knowledge construction as defined by western thought.⁶⁰ Unfamiliar Australian Aboriginal knowledges and

methodologies were not, and are typically still not, valued or seen as legitimate ways of producing knowledge by society's governing institutions.⁶¹

Similarly, for Sámi in Sweden, the struggle to be heard on equal terms with the majority population remains an uphill battle. In the late 1800s, race biology became increasingly popular amongst some Swedish scientists, resulting in a governmental research institute for race biology, founded in 1922 in Uppsala, led by Herman Lundborg.⁶² Lundborg's methods included measuring skulls and photographing Sámi persons for the purpose of studying the Sámi 'race', which he was convinced would be detrimental to the Swedish 'race' if mixed.⁶³ His methods and studies were racist and intrusive and long since declared invalid by most people; however, a foundation for a deficit perspective was laid down and those scars still affect Sámi people today. Sámi communities and Sámi people are subjected to cultural, structural and extractive violence in interactions with organizations and companies, often in situations not only related to land conflicts⁶⁴ but also education.⁶⁵ This racialized attitude is one very important reason for furthering research undertaken in accordance with Indigenous principles and practices.

For example, when conducting research with Australian Aboriginal communities, it is necessary to understand that protocols, or diplomatic practices, are embedded in distinct Aboriginal epistemologies and ontologies. Australian Aboriginal kinship systems, for example, are based on "the principles of reciprocity, obligation, care and responsibility"⁶⁶ applied to both the individual and the collective as well as to land which they must protect as they would protect themselves.⁶⁷ One protocol is that of Welcome To and Acknowledgement of Country described to Sheelagh by her Elders, summarized here:

Long before colonisation we lived within our Country that the Ancestors had created in the beginning. All that we needed to live and survive were located within our Country's boundaries. However, at times we interacted with our neighbours, for ceremony or trade. But we would not just simply cross the boundary. Instead we would set up camp and wait. Our neighbours would see our campfires smoke and approach, observing us; determining our intentions. 'Did we mean harm?' If not, then we were Welcomed into our neighbours lands.⁶⁸

This diplomatic practice of Welcome to Country has survived policies and practices of dispossessing colonization. With colonization, Aboriginal peoples were forced to live on their neighbors' lands without protocols being enacted. As a result, the diplomatic practice of Acknowledgement of Country developed, enabling "foreigners" to fulfil the obligations of reciprocity, care and responsibility, that had protected land, individuals and the community for thousands of generations.

As an Aboriginal/Kamilaroi researcher, Sheelagh was highly aware of the need to undertake her research “proper ways.”⁶⁹ Sheelagh’s research sought to reveal a counterstory of Aboriginal education success through a critical ethnography at two sites in metropolitan Adelaide, South Australia, borrowing and bending the theoretical frameworks of cultural responsiveness and Critical Race Theory.⁷⁰ Sheelagh would “set up camp” within research sites. Conversation took place through yarning, buttering bread for school gatherings, providing gluten-free brownies at school events, and so on. Once “Welcomed to Country” these encounters enabled research participants to co-design the research, nominate participants, and help analyze findings. However, undertaking her research ‘proper ways’, was frequently met with resistance from within the academy. As so eloquently argued by Indigenous scholars Kovach and Wilson, much of the energy of Indigenous peoples has been trying to ‘fit in’ to the western system or resist assimilationist research practices.⁷¹

Kristina works to include Indigenous knowledges from the point of designing the research through to analysis and dissemination of results, thereby ensuring that Indigenous voices are “released into the research arena.”⁷² As a Swedish researcher, working with Indigenous communities on several continents and being mentored by the Sámi organization Sámiid Riikkasearvi as well as Adnyamathanha Elders in Australia, Kristina’s research processes have been enactments of diplomacy – where mutual Respect, Reciprocity and Relationships have been key in undertaking her research ‘proper ways’.

Underpinning our acts of research diplomacy illustrated above, we are ever-mindful of the words of wisdom from our Knowledge-Holders from across the globe. For example, Indigenous researcher Shawn Wilson, advises that “research is not just something that’s out there: it’s something that you’re building for yourself and for your community.”⁷³ Similarly, Brayboy and Maughan teach that “Indigenous Knowledges requires responsible behavior, and this is often achieved by considering the ramifications of actions before they are taken.”⁷⁴ Finally, educator and scholar, Tyson Kaawoppa Yunkaporta, proposes “The protocol we follow in this work is, ‘If you take something, put something back.’”⁷⁵

By borrowing and bending the concept of diplomacy and applying it to research with and by Indigenous peoples, we argue that long-established ways of knowing, being, and doing disrupt the dominant understanding of what research is, what it is for, and who its practitioners may be. Collaboration between Indigenous nations, both locally and globally, enables and strengthens the research process. By contrast, westernized research methodologies proceed with the assumption that if economic and social conditions were the same for Indigenous and non-Indigenous peoples, Indigenous peoples could “pull themselves up” and close the gap between Indigenous and non-Indigenous peoples.⁷⁶ We argue that enacting Indigenous diplomacies when undertaking research has the power to disrupt

dominant assimilationist research agendas governed by society's institutions. New relationships based on reciprocity and respect rather than superiority and force, borne out of settler/colonizer diplomacies, can be negotiated and established. The emergence in recent decades of policies and guidelines that govern how society's institutions and the corresponding individuals, can conduct Indigenous research are evidence of a new way forward being enacted.

The Sámiid Riikkasearvi policy document discussed above is not the only one of its kind. For example, both Sámi Parliaments in Norway and Sweden have documents regarding research ethics underway or already completed; furthermore, there is ambition expressed to continue this work. These initiatives follow an international trend where ethical guidelines for research with Indigenous communities have been used and developed for years, with Australia being one such example. In Australia, the Aboriginal Medical and Research Council NSW Ethics Committee set out ethical requirements for research that focuses on or includes Aboriginal peoples.⁷⁷ Similarly, the Australian Institute for Aboriginal and Torres Strait Islander Studies, Guidelines for Ethical Research in Australia lay out how research is to be conducted with and by researchers in Indigenous spaces. Society's governing institutions, including universities, are obliged to adhere to the principles and practices stated.⁷⁸ The NHMRC and AIATSIS guidelines comprise a number of principles including: rights respect and recognition; negotiation, consultation, agreement and mutual understanding; participation, collaboration and partnership; benefits, outcomes and giving back; and managing research.

The need for Indigenous-led guidelines for researchers with ambitions to conduct research with Indigenous peoples is important for many reasons. Notably, mainstream academia's ongoing struggle to understand the value of Indigenous epistemologies and ontologies poses great risk for achieving successful outcomes,⁷⁹ and are at time problematic for meeting research or funding demands. Additionally, the way that research can be undertaken, and what researchers can expect from Indigenous communities, varies greatly. For instance, Sámi reindeer herding communities are always at the mercy of weather, today more than ever as extractive activities on reindeer herding lands are continuously increasing, thus shrinking the areas available for grazing. A researcher may want to book meetings or schedule interviews ahead and. However, with unpredictable weather conditions, meetings are likely to be rescheduled. Without a firm understanding of how Sámi reindeer herding communities work and prioritise, a researcher runs the risk of becoming increasingly frustrated. Similarly, in Australia, research progress can be slowed with the need to build reciprocal relationships. Additionally, cultural protocols, such as "Sorry Business" following a death in the community, takes priority and may mean meetings are cancelled last minute and cannot be rescheduled for weeks or months. As research diplomats, we need to enact ways of knowing, being, and

doing through respectful dialogue, negotiation, and other measures to resolve such issues for the benefit of the community and the research.

CONCLUSIONS

In this article, we have illustrated that Indigenous peoples have practiced diplomacies through their ways of knowing, being, and doing for centuries, long before contact with settlers/colonizers. However, Indigenous diplomacies have gone largely unacknowledged, or only recently recognized. In recent decades, First Peoples from around the globe have been pushing back against terra nullius-styled research with seminal work being published like Smith, L-T 1999, *Decolonising methodologies: Research and Indigenous peoples*, Zed Books Ltd, London and New York leading the way for change.

We as researchers with Australian Aboriginal and Sámi in Sweden First Peoples, have shown that doing research “proper ways” has the potential for disrupting traditional westernized research typically governed by society’s dominant institutions, including universities. We are not claiming Indigenous research diplomacies as necessarily “better”—though in some instances and respects they may well be—but, rather, as equally valid.⁸⁰ Moving away from the historical and dominant ways of research by enacting the principles and practices of Indigenous diplomacies, has the potential to redress the long-established power imbalance between Indigenous peoples and colonizers/settlers and working towards self-determination of First Peoples and the decolonization of governing institutions.

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NOTES

1 Alison Holmes, “Global diplomacy: Theories, types, and models,” *Taylor and Francis*, New York, (2018); Marshall Beier, “Indigenous Diplomacy,” in the SAGE Handbook of Diplomacy, (SAGE Publications Ltd, 2016).

2 We use a variety of terms to identify culturally diverse peoples who are, generally speaking, the First Peoples or Indigenous peoples of a nation. In Australia, officially, the term ‘Indigenous Australians’ refers to Aboriginal peoples from Mainland Australia, the Torres Strait Islands and, more recently, the Tiwi Islands. However, for many the term “Indigenous” has a painful history. Therefore, the term “Aboriginal” is generally preferred as an overarching term of distinct cultural identification. As Sápmi, the Sámi homeland, covers parts of four nation states and the Sámi are one Indigenous people in four countries, we use “Sámi in Sweden” rather than “Swedish Sámi.” These are often deemed “more appropriate” terms; however, we recognize that people may choose other ways of identifying.

3 Marshall Beier, “Indigenous Diplomacy,” in the SAGE Handbook of Diplomacy, (SAGE Publications Ltd, 2016).

4 Sheelagh Daniels-Mayes, Valerie Harwood, and Nyssa Murray, “On Settler Notions of Social Justice: The Importance of Disrupting and Displacing Colonising Narratives.” *In Higher Education, Pedagogy and Social Justice: Politics and Practice*, Palgrave Macmillan, Cham, (2019): 37-54; Kristina Sehlin MacNeil, “Shafted: a case of cultural and structural violence in the power relations between a Sami community and a mining company in Northern Sweden.” *Ethnologia Scandinavica* 45 (2015): 73-88.

5 Alison Holmes, “Global diplomacy: Theories, types, and models,” *Taylor and Francis*, New York, (2018); Marshall Beier, “Indigenous Diplomacy,” in the SAGE Handbook of Diplomacy, (SAGE Publications Ltd, 2016).

6 Ibid.

7 Beier, *Indigenous Diplomacy*, 642.

8 Merje Kuus, “Diplomacy and audit: Technologies of knowledge in Europe.” *Geoforum* 68 (2016): 4.

9 Beier, *Indigenous Diplomacy*, 642.

10 Mark Rose, ‘The ‘silent apartheid’ as the practitioners blind spot, in *Aboriginal and Torres Strait Islander education: An introduction for the teaching profession*, ed. Kaye Price and Jessa Rogers, (Cambridge University Press, Melbourne 2019), 76.

11 Patrik Lantto, *Lappväsendet: Tillämpningen av svensk samepolitik 1885 – 1971*. Centre for Sami Research, Umeå University, 2012. 13-14.

12 Douglas Sanders, “Preface,” in *Conflict and Cooperation in the North*, ed. Kristina Karppi and John Eriksson, (Norrlands Universitetsförlag i Umeå AB, Sweden, 2002), 20.

13 Beier, *Indigenous Diplomacy*.

14 Marshall Beier and Lana Wylie, “Canadian foreign policy in critical

perspective,” ed. (Oxford University Press, 2010).

15 Margaret Kovach, “*Indigenous methodologies: characteristics, conversations and contexts*,” (University of Toronto Press, Toronto, 2010), 13.

16 Karen Martin, and Booran Mirraboopu. “Ways of knowing, being and doing: A theoretical framework and methods for indigenous and indigenist research.” *Journal of Australian Studies* 27, no. 76 (2003): 203-214; Tyson Yunkaporta, and Melissa Kirby, ‘Yarning up Aboriginal pedagogies: A dialogue about eight Aboriginal ways of learning’, in *Two Way Teaching and Learning: Toward culturally reflective and relevant education*, ed. eNola Purdie, Gina Milgate, Hannah Rachel Bell (Victoria, Australia: ACER Press, 2011), 205-213.

17 Martin, ‘*Ways of Knowing, Being and Doing: A theoretical framework*’; Kovach, “*Indigenous methodologies: characteristics*”; Kristina Sehlin MacNeil and Jillian Marsh, “Indigenous research across continents: a comparison of ethically and culturally sound approaches to research in Australia and Sweden,” in *Finding Common Ground: Narratives, Provocations and Reflections from the 40 Year Celebration of Batchelor Institute*, ed. Henk Huijser et al., (Batchelor NT: Batchelor Press, 2015), 119–126; Rauna Kuokkanen, *Reshaping the University: Responsibility, Indigenous Epistemes, and the Logic of the Gift* (Vancouver: UBC Press, 2007); Jo-ann Archibald, *Indigenous Storywork: educating the heart, mind, body, and spirit* (Vancouver: UBC Press, 2008); Åsa Nordin-Jonsson, Årbediehtu. In Årbediehtu: samiskt kulturarv och traditionell kunskap, ed. Åsa Nordin-Jonsson (Kiruna: Sametinget and Uppsala: Centrum för biologisk mångfald, 2010); Shawn Wilson, *Research is Ceremony: Indigenous research methods* (Fernwood Publishing, Black Point Canada, 2008).

18 Dawn Bessarab and Bridget Ng’andu, “Yarning about yarning as a legitimate method in Indigenous research,” *International Journal of Critical Indigenous Studies*, vol. 3(1), (2010): 37–50.

19 Jo-ann Archibald, *Indigenous Storywork: educating the heart, mind, body, and spirit* (Vancouver: UBC Press, 2008).

20 James (Sa’ke’j) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon, Canada: Purich Pub, 2008).

21 Henderson, *Indigenous Diplomacy and the Rights of Peoples*.

22 Marcia Langton and Lisa Palmer, ‘Treaties, Agreement Making and the Recognition of Indigenous Customary Polities’, in *Honour Among Nations?: Treaties and agreements with Indigenous People*, ed. Langton et al., (Carlton, Victoria: Melbourne University Press, 2004), 36–44.

23 Sheelagh Daniels-Mayes, “Culturally responsive pedagogies of success: Improving educational outcomes for Aboriginal students,” unpublished PhD thesis, Adelaide: UNISA (2016).

24 Bruce Pascoe, *The Little Red Yellow Black Book: An Introduction to indigenous Australia* (Aboriginal Studies Press, Canberra, ACT, 2009).

25 Ibid.

- 26 Ravi De Costa, "Indigenous diplomacies before the nation-state," in *Indigenous Diplomacies*, ed. Marshall Beier (New York: Palgrave Macmillan, 2009), 61–77.
- 27 Martin, *Ways of Knowing, Being and Doing: A theoretical framework*.
- 28 Holmes, *Global diplomacy: Theories, types, and models*; Beier, *Indigenous Diplomacy*.
- 29 Kate Darian-Smith, and Penelope Edmonds, *Conciliation on Colonial Frontiers: Conflict, Performance, and Commemoration in Australia and the Pacific Rim*, (New York: Routledge, 2015).
- 30 Patricia Seed. Ceremonies of possession in Europe's conquest of the New World, 1492-1640. (Cambridge University Press, 1995), 149.
- 31 Ann Moyal, "Arthur Phillip: 1788. The Foundation Year," *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, August 21, 2017, Accessed December 9, 2019, <http://adb.anu.edu.au/essay/21/text34967>; Keith Vincent Smith, "e," *Aboriginal History*, Vol. 33, (2009).
- 32 Moyal, "Arthur Phillip: 1788. The Foundation Year."
- 33 Ibid.
- 34 Ibid.
- 35 Rita Metzenrath, *The Bennelong Letter – Voice of a Wangal Diplomat*.
- 36 Smith, *Bennelong among his people*, 24.
- 37 *Makarrata* is a word from the language of the Yolngu people in Arnhem Land. It means two parties coming together after a struggle, to heal the wounds of the past, and to live again in peace.
- 38 Uluru statement from the heart [online]. 2017, Indigenous Law Bulletin, Vol. 8, No. 29, Apr/Jun 2017: 8. Availability: <https://ulurustatement.org/>. Pat Anderson, "Aboriginal and Torres strait islanders peoples from across Australia make historic statement." *Indigenous Law Bulletin* 8, no. 29 (2017).
- 39 Helen Davidson, "Indigenous Recognition: Turnbull Refuses to Commit to Referendum Council's Proposal." *The Guardian*, August 5, 2017, accessed November 2019, <https://www.theguardian.com/australia-news/2017/aug/05/indigenous-recognition-turnbull-and-shorten-eaccused-of-empty-platitudes-at-garma>.
- 40 Michelle Grattan, "Turnbull Government Says No to Indigenous 'Voice to Parliament.'" *The Conversation*, October 26, 2017, accessed May 2, 2019, <https://theconversation.com/turnbull-government-says-no-to-indigenous-voice-to-parliament-86421>.
- 41 Lassi Heininen, "The Saami as a pan-national actor," in *Conflict and Cooperation in the North*, ed. Kristina Karppi and Johan Eriksson, (Norrlands Universitetsförlag i Umeå AB, Sweden, 2002), 224.
- 42 Lennart Lundemark, *Stulet land: svensk makt på samisk mark*. (Stockholm: Ordfront, 2008).
- 43 Sehlin MacNeil, Kristina. Extractive Violence on Indigenous Country: Sami and Aboriginal Views on Conflicts and Power Relations with Extractive Industries (PhD dissertation). Umeå Universitet, Umeå. 2017.

- 44 Kristina Sehlin MacNeil and Niila Inga, "Extraktivt våld och urfolks koppling till mark." *Kulturella perspektiv - Svensk etnologisk tidskrift*, 1-2 (2019), 42–51.
- 45 Isabelle Brännlund, "Histories of reindeer husbandry resilience: land Use and social networks of reindeer husbandry in Swedish Sápmi 1740-1920." PhD thesis, Umeå University. 2015, 324.
- 46 Åsa Nordin-Jonsson, *Relationer i ett samiskt samhälle*.
- 47 Ibid, 197.
- 48 Nordin-Jonsson, *Árbediethu*; Martin, *Ways of Knowing, Being and Doing: A theoretical framework*.
- 49 Nordin-Jonsson, *Relationer i ett samiskt samhälle*.
- 50 Elsa Laula, *Inför oteller död? Sanningsord I de lappska förhållandena* (Wilhemssons Boktryckeri, Stockholm, 1904).
- 51 Patrik Lantto, Ett historiskt möte: protokollet från samernas landsmöte i Östersund 1918. (Vaartoe-- Centrum för samisk forskning, Umeå universitet, 2018), 8.
- 52 Ibid, 9.
- 53 Israel Ruong, *Samerna i historien och nutiden*. (Stockholm, Bonnier Fakta, 1982), 184-185.
- 54 Lantto, *Lappväsendet: Tillämpningen av svensk samepolitik 1885 – 197*, 16.
- 55 Laula, *Inför lif eller död? Sanningsord*.
- 56 Sámiid Riikkasearvi, 2019. <https://www.sapmi.se/samarbeta-med-ssr/> : 12 December 2019.
- 57 Ibid.
- 58 Seed, *Ceremonies of possession in Europe's conquest*, 149.
- 59 Martin, *Ways of Knowing, Being and Doing: A theoretical framework*, 1.
- 60 Kovach, *Indigenous methodologies: characteristics*.
- 61 Victor Hart, Susan Whatman, "Decolonising the Concept of Knowledge," Paper presented at the *HERDSA Annual International Conference*, Auckland, July, vol. 6. 1998.
- 62 Lundmark, *Stulet land: svensk makt på samisk mark*, 214-220.
- 63 Ibid.
- 64 Sehlin MacNeil and Marsh, *Indigenous research across continents*; Åsa Össbo, "New Waters, Reflections of Obscurity. Industrial Colonialism through the Swedish Hydropower Development in the Reindeer Herding Areas 1910-1968," PhD thesis, (Umeå University, 2014).
- 65 Charlotta Svonni, "At the Margin of Educational Policy: Sámi/Indigenous Peoples in the Swedish National Curriculum 2011," *Creative Education* vol. 6, no 9: (2015): 898–906.
- 66 Groome, H 1992, 'Developing appropriate pedagogies for Aboriginal studies,' *Kaurua Higher Education Journal*, vol. 2, pp. 37–44.
- 67 Irene Margaret Watson, *Looking at you looking at me: An Aboriginal culture and the history of the South-East of South Australia* (Volume 1, Nairne, Australia, Watson, 2002).

- 68 These stories have been collected by researchers by way of oral traditions over a span of time.
- 69 Borrowed from Aunty Nangala, personal communication, 23 June 2013.
- 70 Daniels-Mayes, *Culturally responsive pedagogies of success*.
- 71 Kovach, *Indigenous methodologies: characteristics*, 31; Wilson, *Research is Ceremony*, 127.e
- 72 Cheree Dean, "A yarning place in narrative histories," *History of Education Review* 39, no. 2 (2010), 12.
- 73 Shawn Wilson, "What is an Indigenous research methodology?," *Canadian Journal of Native Education*, 25. No. 2 (2001), 179.
- 74 Bryan Mckinley Jones Brayboy and Emma Maughan "Indigenous Knowledges and the Story of the Bean." *Harvard Educational Review*, vol. 79, no. 1, (2009). 12.
- 75 Yunkaporta and Kirby, "Yarning up Aboriginal pedagogies," 205.
- 76 Wilson, *Research is Ceremony*, 20.
- 77 AHMRC Guidelines for Research into Aboriginal Health: Key principles. Sept 2016, <http://www.ahmrc.org.au>.
- 78 "Guidelines for Ethical Research in Australian Indigenous Studies." *Australian . Institute of Aboriginal and Torres Strait Islander Studies*, 2012, accessed April 4, 2018, <https://aiatsis.gov.au/research/ethical-research/guidelines-ethical-research-australian-indigenous-studies>.
- 79 Beier, *Indigenous Diplomacy*.

THE COMING TIDE: PROTECTION OF THE RIGHTS OF REFUGEES IN THE COMMONWEALTH CARIBBEAN IN ABSENCE OF LEGISLATION

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Abstract: *The article will discuss the rights of refugees in the Commonwealth Caribbean. It will first discuss the legal categorization of a “refugee” under international law and the extent to which the rights of the asylum seeker and a refugee particularly the principle of non-refoulement exist as customary international law. The article will then evaluate how Commonwealth Caribbean courts treat international law with respect to domestic law and within the State’s constitutional paradigm. Thereafter, the article will examine the ways in which Commonwealth Caribbean courts may appropriately use both international treaty law and customary international law not only as an interpretive tool but also as a means to restrict the scope of the statutory provision. The article will finally demonstrate how international law and customary international law can be used to establish substantial protection in domestic law for those seeking asylum or for refugees in a situation where there are no domestic refugee regulations but where there is a written constitution.*

INTRODUCTION AND BACKGROUND

The ‘Commonwealth Caribbean’ are those independent states in the Caribbean Sea and in Central and South America that were formally British colonies and include Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines and Trinidad and Tobago. Although recent focus from the regional and international community has been on the exodus of Venezuelans to other South American countries, the movement of Venezuelan nationals to Commonwealth Caribbean jurisdictions raises profound political and legal questions. The lack of implementing regulations or legislation on asylum policies in many Caribbean countries leaves the ever-increasing population of people claiming refugee status in a greater legal limbo. Yet the lack of formal implementation need not leave refugees without legal protection in Caribbean jurisdictions. This article aims to demonstrate that both international treaty law and customary international law may appropriately be used as aids to constitutional interpretations that can in turn protect asylum seekers or refugees from being repatriated to their home countries. The article will discuss the rights of refugees and discuss the legal categorization of a “refugee” under international law and the extent to which the rights of the

asylum seeker and refugee exist as customary law, particularly regarding the principle of *non-refoulement*. Furthermore, the article examines the way in which Caribbean courts treat international law with respect to domestic law and within the State's constitutional paradigm. That examination demonstrates that international law currently plays a role in two ways: as an interpretative tool, and of direct application. In this section, the article will explore the use of customary international law not only as an interpretive tool but also as a means to restrict the scope of the statutory provision, rather than to clarify the content. The article will then evaluate whether the customary international law can be used to establish substantial protection in domestic law for those seeking asylum or for refugees in a situation where there are no domestic refugee regulations but where there is a written constitution.

Regionally, the Commonwealth Caribbean is confronted with an increasingly complex phenomenon of mixed migration that includes asylum-seekers, refugees, victims of human trafficking and stateless persons. Several countries in the Commonwealth Caribbean are hosting increasing numbers of Venezuelans, in circumstances where the small size and limited absorption capacity of the concerned countries has particularly negatively impacted these host nations. Following global and regional trends, the number of new asylum-seekers in the Commonwealth Caribbean has significantly increased, with refugees from 32 countries from across the world, including Venezuela and Cuba, entering the Commonwealth Caribbean. The deteriorating situation in Venezuela has led to a significant increase in the number of Venezuelans seeking asylum in 2017 and the first half of 2018 in the Americas, including Trinidad and Tobago. The United Nations High Commissioner for Refugees (UNHCR) is working with an estimated 40,000 Venezuelans in Trinidad at the end of 2017.¹ The UNHCR considers all Venezuelans to be persons of concern and in need of protection.² The Commonwealth Caribbean, with their small populations and constrained economies, are challenged in facilitating the volume of people seeking asylum. This new state of affairs highlights the inadequacy of the domestic legal frameworks for refugee law in the region.

THE RIGHTS OF REFUGEES

The definition of “refugee” in the 1951 Refugee Convention has dominated the landscape of refugee law for the past three decades. The definition states that the term “refugee” applies to any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual

*residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*³

In 1984, this definition was expanded in the Americas by Conclusion III of the 1984 Cartagena Declaration. While it is technically non-binding, it is incorporated in the domestic legal framework of many countries in Central and South America. It adds to the definition of refugees:

*persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.*⁴

In addition to the 1951 definition from the Refugee Convention, the UNHCR recognizes refugees as “individuals who are outside their country of origin and who are unable or unwilling to return there owing to serious threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.”⁵

One of the most fundamental principles of asylum and international refugee protection is the principle of *non-refoulement*.⁶ The 1951 Refugee Convention prohibits contracting states from expelling or returning a refugee in any manner to the frontiers or territories from which they seek protection.⁷

Being recognized as a refugee in international law is vital, as it brings a host of other internationally binding rights, including civil and socio-economic rights. These rights include the provision of housing, welfare and travel documents.⁸ A refugee has the same rights as any other foreigner who is a legal resident of the state.⁹ Human Rights Council Resolution 30 further outlined that states are obligated to guarantee equality between citizens and non-citizens to enjoy their civil, political, economic, social and cultural rights recognized under international law. These rights are articulated especially in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.¹⁰

In the Commonwealth Caribbean, there are three types of jurisdictions: countries with refugee legislation; countries that have signed the Refugee Convention but do not have any domestic refugee laws; and those who have not signed or ratified the Refugee Convention and have no domestic refugee laws. Only Belize has domestic legislation incorporating the Refugee Convention, while Trinidad and Tobago and Jamaica are parties to the Refugee Convention and the 1967 Protocol but never incorporated the Convention into domestic law but have refugee policies. Since Belize possesses effective legislation for the protection of

asylum seekers and refugees, this article will consider the second and third types of jurisdiction mentioned above. It is significant to note that in 2014, Trinidad and Tobago's government adopted a national policy to address asylum and refugee matters. The policy states that recognized refugees should be entitled to a series of rights including travel documents, identity papers, authorization to work, and right to education. In practice, those who apply for asylum or are granted refugee status are not allowed access to legal employment, leaving many vulnerable or destitute with limited access to the education system.¹¹ The question of the enforceability of this policy raises the intractable tensions that are present in dualist systems. The definition of the term "refugees" and the concept of *non-refoulement* taken from the Refugee Convention do not establish any direct rights in domestic law. The primary claims of refugees in these countries will rather have to be either that the Refugee Convention and the principle of *non-refoulement* is constitutionally guaranteed or that the concept of *non-refoulement* has become a norm of customary international law and has been incorporated into the law of the country.

COUNTRIES THAT HAVE SIGNED THE CONVENTION BUT HAVE NO DOMESTIC LEGISLATION

The countries in the Commonwealth Caribbean are dualist states, meaning unincorporated treaties do not automatically become part of domestic law. Further steps are needed to incorporate these international treaties into national law. Unlike monist legal systems, where international law is incorporated directly into the domestic legal system, in the Commonwealth Caribbean, the state normally needs to pass domestic legislation to change the domestic law to the rules of law accepted in treaties.¹² However, there are cases that have established that even if an international convention is not expressly incorporated into domestic law, its provisions are justiciable.¹³ In this regard, the Refugee Convention therefore can be used to construe the constitutional provisions or legislation regarding asylum and immigration and to review the policy and individual decisions of the immigration officials.

The constitutions in the Caribbean generally declare themselves to be the supreme law of the land and state specifically that any other law which conflicts with them is void to the extent of its inconsistency with the constitution.¹⁴ The constitutions of Commonwealth Caribbean countries also guarantee the enjoyment of various fundamental human rights. The fundamental rights under the various constitutions include the right to life, the prohibition against cruel, inhuman or degrading treatment or punishment, equality or non-discrimination, the right to private and family life, and protection of the law. The constitutions also provide that a person who alleges that any of his or her fundamental rights contained in the constitution has been, is being, or likely to be infringed upon in relation to him or her, may apply to the High Court for a remedy. The High Court is therefore given

the power under the constitutions to grant remedies for enforcing or securing the enforcement of the provisions of the constitution of which the person concerned is entitled.

The international community typically accepts the notion that constitutional rights are applicable to non-nationals who are subject to the jurisdiction of the state, especially regarding immigration matters. In *Naidike et al v. Attorney General of Trinidad and Tobago*, a Nigerian citizen had been employed as a doctor in Trinidad under a work permit that was successively renewed. When another work permit renewal application was refused, he was arrested and detained, pending deportation. The detention was made without a prior ministerial declaration required under the Immigration Act, that he had ceased to be a permitted entrant. He brought constitutional proceedings claiming that the non-renewal of his work permit and his unlawful arrest and detention violated his fundamental human rights and freedoms contrary to the Constitution of Trinidad and Tobago. The Judicial Committee of the Privy Council (Privy Council), the final appellate court for Trinidad and Tobago held that he had a legitimate expectation that the minister would not refuse the renewal of his work permit without good reason after he had been given a proper opportunity to be heard. Since that was not done, the refusal was unconstitutional. In short, no person under the authority and control of a state, regardless of his or her immigrant status, is devoid of legal protection for his or her fundamental and non-derogable human rights.

The principle of *non-refoulement*, as articulated in Article 33 of the Refugee Convention, is broad in scope, offering expansive protection to refugees. The scope of the principle under relevant human rights law treaties is even broader than that contained in the Refugee Convention. In international human rights law, the principle applies to numerous instances including torture and other cruel, inhumane, or degrading treatment the rights to life and integrity as well as grave forms of sexual and gender-based violence.¹⁵ The prohibition of *non-refoulement* has also been interpreted to include instances regarding lack of medical treatment.¹⁶

The European context provides an important parallel legal situation as many of the Caribbean bills of rights are modelled after the European Convention of Human Rights. The European Convention on Human Rights (ECHR) does not contain any explicit reference to the right to asylum. However, the European Court on Human Rights (ECtHR) has provided protection to asylum seekers through interpretation of Article 3, the prohibition against cruel, inhuman, or degrading treatment or punishment of the Convention. This right has been interpreted by the Court as providing an effective means of protection against return to places where there is a risk that an individual would be subjected to torture or to inhuman or degrading treatment or punishment.¹⁷ While asylum cases were most frequently considered under Article 3 of the ECHR, *non-refoulement* has also been contemplated

for protection under other provisions within the ECHR, such as the right to life, prohibition of slavery, servitude and compulsory labour, right to liberty and security, right to a fair trial, right to respect for private and family life, right to freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, prohibition of discrimination in the enjoyment of ECHR rights.¹⁸

Analogously, the lack of incorporation of the agreement regulating asylum claims does not absolve a state from its constitutional responsibilities. Therefore, it is argued that the domestic courts can use international law to likewise interpret the constitutional rights under Caribbean constitutions to include the notion that non-citizens must not be returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses.

THE USE OF INTERNATIONAL LAW IN CONSTITUTIONAL INTERPRETATION

The use of international law in domestic courts has a long and storied history in Commonwealth Caribbean jurisprudence. It is well established in the Commonwealth Caribbean that international human rights norms and commitments play an important role in the interpretation of domestic constitutional provisions. As then President of the Caribbean Court of Justice (CCJ) de la Bastide and former Justice of the CCJ, now President of the CCJ, Justice Saunders explained in their joint judgment in *AG v. Joseph and Boyce*:

*There is a distinct, irreversible tendency towards confluence of domestic and international jurisprudence. At the domestic level, the jurisprudence of international bodies is fully considered and applied. In determining the content of a municipal right, domestic courts may consider the judgments of international bodies.*¹⁹

In the joint judgment the judges emphasized that international law was not mere window dressing and that the court would not treat internationally accepted standards in human rights as being capable of simply being ignored on the domestic plane.²⁰

In *Cal v. Attorney General of Belize*, a formative case on indigenous rights, former Chief Justice Conteh explained the value of the pronouncements of international human rights tribunals interpreting treaties within their remit, noting that while the pronouncements of an international tribunal like the Inter-American Commission on Human Rights do not bind the Court, where appropriate they can be persuasive.²¹ In *Reyes v. R*, the Privy Council endorsed the dicta of then Justice of Appeal of the Eastern Caribbean Supreme Court Saunders, to the effect that the countries of the Caribbean are not unique in that the Courts cannot consider

the standards adopted by humankind in other jurisdictions.²² The Courts see the constitutions as imposing an obligation upon the state to conform to certain “irreducible” standards that can be measured in degrees of universal approbation and ought to be considered.²³ Therefore, there is a strong interdependence between the domestic constitutional provisions and international human rights norms with the greater recognition of “universal standards of human rights, accepted at the domestic and international level.”²⁴

In *Minister of Home Affairs v. Fisher*, Lord Wilberforce of the Privy Council stated that the ECHR and other international human rights instruments were antecedents to the Caribbean Bills of Rights and so provided the framework for the drafting of Commonwealth Constitutions and as a result call for their generous interpretation.²⁵ The constitutions of the Caribbean are also considered to be living instruments that are always speaking and are subject to interpretation in order to accommodate changing social realities in light of evolving international human rights standards.²⁶ As a result, where the Constitution uses broad and general language in relation to fundamental rights, judges have a duty to give interpretations that prevail in the contemporary period.²⁷

Therefore, it is suggested that the provisions of the right to life, prohibition against cruel, inhumane, or degrading punishment or treatment among others under the Caribbean constitutions should be interpreted consistent with international law so as to provide protection to those seeking refugee protection. It is suggested that this approach will more fully reflect the generous approach called for in *Minister of Home Affairs v Fisher*, avoiding the oft-quoted “austerity of tabulated legalism.”²⁸

Ambiguity

Caribbean courts directly and indirectly bridge the gap between international law and domestic law by interpretive processes, thereby incorporating these otherwise unincorporated international treaties. In *Boyce v. R*,²⁹ the Privy Council elaborated on the principle sometimes called the rule of “*harmonious construction*”³⁰ that where the domestic law, including the Constitution, is ambiguous—in that it is capable of an interpretation that conforms and conflicts with the state’s international legal obligations under a human rights convention—the court should choose the meaning that accords with the obligations that the treaty imposes. More recently, in *Maurice Tomlinson v. The State of Belize & The State of Trinidad and Tobago*, the CCJ assessed the importance of international law in interpreting the domestic law of Belize and Trinidad and Tobago to be consistent with its international obligations.³¹ The CCJ stated that in common law jurisdictions, like the Caribbean, there is a sacrosanct rule that statutory provisions should if at all possible be interpreted as compliant with the State’s treaty obligation. This rule of construction applies to at all statutes, as a general canon of statutory interpretation. This principle of

statutory interpretation applies equally in the realm of constitutional interpretation. The constitutional provisions for the protection of fundamental rights are often drafted vaguely, with details left to interpretation by the courts. Such rights include due process of law and life and personal liberty, which are expressly enumerated in constitutions across the Caribbean. In the recent case of *Caleb Orozco v. the AG of Belize*,³² the Court extended the protections of the equality and other fundamental rights in the Belizean Constitution to gay men. The Court relied on the Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) to conclude that discrimination on the ground of sex under the Belizean Constitution includes discrimination on the ground of sexual orientation. Likewise, in relation to the constitutional right to life, courts may give effect to the state's international law obligation to act consistently with the objects and purpose of the Refugee Convention. States like Trinidad and Tobago and Jamaica have signed the convention but have not incorporated it into domestic legislation.

Legitimate Expectation

In an effort to minimize the pitfalls of dualism, another way in which Commonwealth Caribbean courts use unincorporated treaties was set out in the CCJ decision *AG v. Joseph and Boyce*.³³ The CCJ held that, in some circumstances, ratification of a treaty could give rise to the legitimate expectation that the treaty would partially apply in the domestic plane, even if legislation had not brought the treaty into force locally. The fact that Barbados had ratified the American Convention on Human Rights and had acted in a manner which was compliant with the Convention, created a legitimate expectation. The legitimate expectation that resulted was that a convicted man must be afforded a reasonable time for the filing and completion of their international petition proceedings. A failure to act in accordance with that legitimate expectation was a denial of their right to protection of the law. In *British Caribbean Bank v. AG*³⁴ the CCJ indicated that the belief that unincorporated treaties were incapable of conferring rights in domestic law is rejected. They held that at a minimum, these unincorporated treaties could yield legitimate expectations cognizable under domestic law. While there has been a withdrawal from the approach adopted in *Minister for Immigration and Ethnic Affairs v. Teoh*³⁵ in Australia with regards to legitimate expectation,³⁶ the Caribbean courts have continued to apply and develop this line of jurisprudence.

There is also some support for this position in the United Kingdom. In *Ahmed v. Secretary of State for the Home Department*³⁷ Lord Woolf and Lord Justice Hobhouse accepted that the act of entering into a treaty could give rise to a legitimate expectation on which the public could rely. They also held that it could amount to a representation that the Secretary of State would act in compliance with any obligations undertaken in the treaty. In *R v. Uxbridge Magistrates' Court ex p. Adimi*,³⁸ Simon Brown LJ approved the statements by Lord Woolf in *Ahmed* and

accepted the contention that the UK's ratification of a treaty could, in itself, create a legitimate expectation that its provisions would be followed.

Therefore, the acceptance of Trinidad and Tobago and Jamaica of the Refugee Convention and even more with the adoption of a policy by the two governments means that asylum seekers have a legitimate expectation that the state will protect them and as such is enforceable under the constitution.

PROTECTION OF THE LAW & DUE PROCESS

While the state is not obliged to incorporate treaties into national law, international law requires, particularly in respect to treaties designed to protect human rights, that the state's obligations are effectively implemented. Domestic courts can utilize the Refugee Convention as part of the constitutional right of the litigant to due process or protection of the law as it has been developed in the Commonwealth Caribbean. In *R (Isiko) v. Secretary of State for the Home Department*,³⁹ the court insisted that, where fundamental rights were involved, a decision-maker would be required to respect those rights. This argument is not without merit, since the CCJ has repeatedly emphasized that the right to the protection of the law is a broad and expansive right. In *AG v. Joseph and Boyce*, in the joint judgment of then President de la Bastide and former Justice Saunders the Court observed:

*... the right to the protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of the constitution all the ways in which it may be invoked or can be infringed... The protection which the right was afforded by the Barbados Constitution would be a very poor thing indeed if it were limited to cases in which there had been a contravention of the provisions of section 18.*⁴⁰

Justice Wit of the CCJ, in a separate judgment, considered that the right to protection of the law was far-reaching in its scope and that the multi-layered concept of the rule of law infuses the Constitution with other fundamental safeguards such as rationality, reasonableness, fundamental fairness and the duty to protect against abuse and arbitrary exercise of power. He noted that:

*...It is clear that this concept of the rule of law is closely linked to, and broadly embraces, concepts like the principles of natural justice, procedural and substantive "due process of law" and its corollary, the protection of the law. It is obvious that the law cannot rule if it cannot protect.*⁴¹

Similarly, through the use of international law and a more expansive interpretation of the protection of the law, the CCJ protected the rights of indigenous peoples in

Belize, where there was no domestic legislation, save for preambular references in the Constitution and non-incorporated international treaties. In *The Maya Leaders Alliance et al v. AG of Belize*,⁴² the CCJ directly related the evolving concept of protection of law with the responsibility of the state to comply with its international obligations. The CCJ has recognized that a subset of the rule of law, which is a part of the constitutional right to the protection of the law, is the obligation of the state to honor its international commitments.⁴³ The CCJ concluded that the right to the protection of the law was not only a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. But they held that it goes further to include adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power; and the availability of effective remedies.⁴⁴ As Justice Wit said it “*the law cannot rule if it cannot protect.*” Justice Wit adopted Lord Bingham’s opinion that:

*the existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.*⁴⁵

The CCJ found that the Government of Belize breached Maya community members’ rights to protection of the law by failing to ensure that the existing land law system recognized and protected Maya land rights as required under their international law obligations. The Court has not utilized this expansive framing since the Maya Leaders Alliance, though the opportunity has arguably existed.⁴⁶

The concept of the rule of law is closely linked to, and broadly embraces, concepts like the principles of natural justice, procedural and substantive due process of law, and its corollary, the protection of the law.⁴⁷ In the CCJ’s recent landmark decision in *Nervais v. R* and *Severin v. R*, the Court noted that protection of the law is one of the underlying core elements of the rule of law which, while not expressed, is inherent to the Constitution.⁴⁸ Therefore, the courts, in keeping with the rule of law, must engage in a more generous interpretation of the constitutional provisions and adapt its interpretation with contemporary understandings and realities.

Such decisions are perhaps most wide-ranging and may be the vehicle which transforms, or at least renders more porous, the distinction between monism and dualism. The *Maya Alliance* case signifies that not only must a person have a right, but that they must have mechanisms to enforce that right. Therefore, a failure to provide domestic procedures to give effect to the rights under the Refugee Convention, it is submitted, is itself a breach of the constitutional provision of protection of the law. This is arguably the result if a state fails to provide a remedy to those seeking protection in that state in compliance with that state’s international obligations.

COUNTRIES WHO HAVE NOT SIGNED OR RATIFIED THE REFUGEE CONVENTION.

For those jurisdictions that have not ratified the Refugee Convention, a constitutional claim may still be brought with respect to the removal of any asylum seeker by the government arguing that it violates the customary law principle of *non-refoulement*. If considered a principle of customary international law, it is argued that a refugee or person seeking asylum may approach the Court under the constitution to prevent deportation and to take steps for the recognition of their rights in the Caribbean.

Non-Refoulement as a Norm of Customary International Law

The first step in cases such as this, where a relevant rule of customary international law is being ascertained, is to establish the existence of the rule. It has been asserted that the principle of *non-refoulement* today is not only a fundamental principle of international law,⁴⁹ but also is considered a rule of customary international law.⁵⁰ Recent commentators go as far as to assert that the principle of *non-refoulement* has acquired the status of *jus cogens*.⁵¹ Furthermore, common law authorities seem to support this view. In the UK Supreme Court case *R (European Roma Rights Centre and others) v. Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)*⁵² Lord Bingham held that it was a generally accepted principle that a person seeking asylum in another state should not be rejected or returned without the appropriate investigation of the alleged persecution. Lord Bingham's acknowledgment of the principle as being of "general acceptance" further confirms the view that the concept of *non-refoulement* of refugees has developed into customary international law. This was applied in another common law country, Hong Kong, in *C and Others v. Director of Immigration and Another*,⁵³ which comprehensively recognized customary international law principle of *non-refoulement* of refugees.

Once a rule of customary international law is identified, the question arises as to how it is actually applied as part of constitutional law in the Commonwealth Caribbean. Beyond the use of international law as mentioned above as an interpretative tool for constitutional rights, a domestic tribunal can refer to and apply customary international law as long as statutory or judicial authority does not contradict it as customary international law forms part of the common law.⁵⁴ It is a recognized principle of constitutional interpretation that the principle of customary international law may be used to interpret domestic statutes, provided they are not in conflict with domestic laws. An interesting use of customary international law as an interpretative tool occurs when the international rule is used to restrict the scope, rather than to clarify the content, of the statutory provision. A more recent case in which customary international law was used to limit the scope of a domestic

statute is in *Maurice Tomlinson*. In its assessment of the domestic law of Trinidad and Tobago, the CCJ, albeit sitting in its international law capacity, used customary international law to help interpret and restrict the provisions of the Trinidad and Tobago immigration laws. The CCJ said:

[44] ... it is relevant to point out that there are human rights materials that could support the domestic court of Trinidad and Tobago in taking a more liberal approach to the interpretation of section 8(1)(e) than the one advanced by Tomlinson and conceded by the State. The Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man are among the important international instruments that recognize the human dignity of every person. Sexual orientation is protected from discrimination (Article 2) and protected by the guarantee of equality before the law (Article 26) in the International Covenant on Civil and Political Rights (1966): Toonen v. Australia. International human rights which have crystallized into customary international law form part of the common law of Trinidad and Tobago.⁵⁵

This conclusion was reached despite the fact that nowhere in the statute did such an interpretation occur. The Court, in considering the proper construction of the Immigration Act, appears to move away from the traditional two-step approach of finding an ambiguity and then drawing on international law to resolve it; rather, it seems to have approached the issue as though international law is one of the tools available to assist with the interpretative process. Given the clear words of the statute in that case, the decision does appear to indicate that the courts may be willing to adopt an expansive approach to using customary international law in interpreting statutes to provide for a more robust understanding of rights.

CONCLUSION

In this brief article, insight into the various ways in which international law can be used within the dualist tradition in the Caribbean has been provided, with a demonstration of the potential scope of justiciability of rights arising under the Refugee Convention. Incorporation via legislation undoubtedly provides the strongest bulwark. The courts in the Commonwealth Caribbean have a stronger capacity to harmoniously interpret domestic law and international law due to recent jurisprudential developments. In doing so, any petitioner who wishes to approach the Court under the Constitution to prevent their deportation of other refugees in the Caribbean can use these mechanisms. Furthermore, these mechanisms will take steps for the recognition of rights of petitioners in the Commonwealth Caribbean in keeping with the constitutional guarantees. How the Court will actually develop its jurisprudence is indeed a question in waiting. While the interpretive sketches above are hopeful and positive, it is important to note that Caribbean Courts have

been loath to interfere with Executive determinations of measures with significant cost implications, affording the state a significant margin of appreciation and deference. In the coming tide, it is hoped that Caribbean judiciaries continue the development of more meaningful engagements with international law.

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NOTES

1 “Venezuela Situation: Responding to the Needs of People Displaced from Venezuela,” UNCHR, last modified March 2018, <http://reporting.unhcr.org/sites/default/files/unhcr%20venezuela%20situation%202018%20supplementary%20appeal.pdf>.

2 “Guidance Note on the Outflow of Venezuelans,” UNCHR, last modified March 2018, <https://data2.unhcr.org/en/documents/download/63243>.

3 “Convention Relating to the Status of Refugees,” opened for signature July 28, 1951, *United Nations Treaty Series* 189 UNTS 137, Art. 1, para. A(2).

4 Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984.

5 Note on International Protection, Thirty-sixth Session of the Executive Committee of the High Commissioner’s Programme, para. 6, UN Doc. A/AC.96/660 (1985).

6 See, e.g., UNHCR, Executive Comm. Programme, *Non-Refoulement, Conclusion No. 6 (XXVIII)*, October 12, 1977, <https://www.unhcr.org/en-us/excom/exconc/3ae68c43ac/non-refoulement.html>.

7 “Convention Relating to the Status of Refugees,” Art. 33.

8 “Convention Relating to the Status of Refugees,” Arts 2-34; see also James Hathaway and Michelle Foster, *The Law on Refugee Status, 2nd Edition* (Cambridge: Cambridge University Press, 2014), 1.

9 Kate Jastram and Marilyn Achiron, *Refugee Protection: A Guide to International Refugee Law* (Geneva: Inter-Parliamentary Union, 2001), 46.

10 Office of the United Nations High Commissioner for Human Rights, *CERD General Recommendation 30, Discrimination Against Non-Citizens*, Sixty-Fourth Session, 2004, UN Doc. CERD/C/64/Misc.11/rev.3.

11 Melanie Teff, “Forced into Illegality: Venezuelan Refugees and Migrants in Trinidad and Tobago, Field Report,” last modified January 2019, <https://reliefweb.int/sites/reliefweb.int/files/resources/Trinidad%2Band%2BTobago%2BReport%2B-%2BJanuary%2B2019%2B-%2B2.0.pdf>.

12 *Chung Chi Cheung v. R*, (1939) AC 160; *J.H. Rayner (Mincing Lane) Ltd v. The Department of Trade and Industry*, [1990] 2 AC 418, 476.

13 *The Maya Leaders Alliance v. The Attorney General of Belize* [2015] CCJ 15.

14 E.g. Constitution of Trinidad and Tobago section 2: “This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency.” Jamaica does not have a supreme law clause but one has been implied from the provisions of the Constitution.

15 Prohibition of torture and other cruel, inhumane, or degrading treatment see: *Othman (Abu Qatada) v. UK*, (2012) 55 EHRR 1, 235, 258; the right to life see: UN Human Rights Committee, *General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant*, May 26 2004, 12, CCPR/C/21/Rev.1/Add.13; the right integrity see: “American Convention on Human Rights,”

ratified November 22, 1969, *Inter-American Commission on Human Rights*, art. 22(8); *Pacheco Tineo Family v. Bolivia*, (2013) IACtHR, 135; prohibition of sexual and gender-based violence see: *Njamba and Balikosa v. Sweden*, Communication No. 322/2007 CAT, para. 9.5 (2010); UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, November 5, 2014, para. 23, CEDAW/C/GC/32.

16 *C v. Australia*, No. 900/1999 HRC (1999); *Paposhvili v. Belgium*, ECHR 41738/10, IACtHR, Advisory Opinion OC-21/14, para 229 (2017).

17 *Soering v. UK*, (1989) 11 EHRR 439; *Cruz Varas and Others v. Sweden*, (1991) 14 EHRR 1 paras. 69–70; *Vilvarajah and Others v. UK*, (1991) 14 EHRR 248.

18 The applicant in *H.L.R. v. France* (1997) ECHR 24573/94 alleged that his right to life would be at risk if returned to Colombia, the matter was however examined under Article 3. The Commission declared *D. v. UK* (1997) 24 EHRR 423 admissible under the right to life but examined it under Article 3 as did the Commission in *Bader and Kanbor v. Sweden*, (2008) 46 EHRR 197, 42; *V.F. v. France*, No. 7196/10 (2011); *Othman v. UK*, (2012) 55 EHRR 1; right to respect for private and family life was considered alongside the right to life and Article 3; see: *D. v. UK* (1997) 24 EHRR 423; *Sufi and Elmi v. UK*, (2012) 54 EHRR 9, 199.

19 *AG v. Joseph*, (2006) 69 WIR 104 at para [106]; The Caribbean Court of Justice is the final appellate Court for the Commonwealth Caribbean countries save for Barbados, Belize, Dominica and Guyana whose final appellate court is the Caribbean Court of Justice.

20 *AG v. Joseph*, (2006) 69 WIR 104 at para [107].

21 Supreme Court of Belize (Claims No. 171 and 172 of 2007) (18 Oct 2007); *AG v. Joseph*, (2006) 69 WIR 104 at para [21]–[22].

22 *AG v. Joseph*, (2006) 69 WIR 104 at para [33].

23 *Reyes v. R*, (2002) 2 LRC 531, 214.

24 *AG v. Joseph*, (2006) 69 WIR 104 at para [106].

25 *Minister of Home Affairs v. Fisher*, (1980) AC 319, 328.

26 *R v. Lewis*, [2007] CCJ 3 (AJ), para [74], Pollard J.

27 *Boyce v. R*, [2004] UKPC 32, para [24].

28 *Minister of Home Affairs v. Fisher*, (1980) AC 319, 328.

29 *Boyce v R*, [2004] UKPC 32.

30 *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, 485.

31 *Maurice Tomlinson v. The State of Belize & The State of Trinidad and Tobago*, (2016) CCJ 1 OJ.

32 *Caleb Orozco v. the AG of Belize*, (2016) 90 WIR 161.

33 *AG v. Joseph*, (2006) 69 WIR 104 at 106 .

34 *British Caribbean Bank v. AG*, [2013] CCJ 4 (AJ) at para [19].

35 *Minister for Immigration and Ethnic Affairs v. Teoh*, (1995) 183 CLR 273.

36 Greg Weeks, “What Can We Legitimately Expect from the State?” in *Legitimate Expectations in the Common Law World*, eds. Matthew Groves and Greg

Weeks (Oxford: Hart Publishing, 2016).

37 *Ahmed v. Secretary of State for the Home Department*, (1999) Imm AR 22 at 36-37, 40.

38 *R v. Uxbridge Magistrates' Court ex p. Adimi*, (2001) QB 667 at 686.

39 *R (Isiko) v. Secretary of State for the Home Department*, (2001) UKHRR 385, 31.

40 *AG v. Joseph*, (2006) 69 WIR 104 at 60.

41 *AG v. Joseph*, (2006) 69 WIR 104 at 20.

42 *The Maya Leaders Alliance et al v. AG of Belize*, [2015] CCJ 15.

43 *The Maya Leaders Alliance et al v. AG of Belize*, [2015] CCJ 15, 52.

44 *The Maya Leaders Alliance et al v. AG of Belize*, [2015] CCJ 15, 47.

45 Lord Bingham, 'The Rule of Law' (2006) 66(1) C.L.J 67, 81.

46 *Nervais v. R and Severin v. R*, [2018] CCJ 19 (AJ).

47 *Nervais v. R and Severin v. R*, [2018] CCJ 19 (AJ), 20.

48 *Nervais v. R and Severin v. R*, [2018] CCJ 19 (AJ), 45.

49 See Sir Elihu Lauterpacht QC and Daniel Bethlehem QC, "The Scope and Content of the Principle of *Non-Refoulement*" in *Refugee Protection in International Law*, eds. Feller, Türk and Nicholson (Cambridge: Cambridge University Press, 2003), 140-159; The International Law Association, meeting in New Delhi in April 2002, Resolution 6/2002: available at: <https://www.refworld.org/docid/4280b2404.html> [accessed 22 November 2019].

50 UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, January 16 2002, HCR/MMSP/2001/09; San Remo Declaration on the Principle of *Non-Refoulement*; UNHCR Global Consultations on International Protection, Cambridge Expert Roundtable, 'Summary Conclusions – Supervisory Responsibility', 9–10 July 2001 available at: <https://www.unhcr.org/protection/globalconsult/4a1ba1aa6/refugee-protection-international-law.html> [accessed 22nd November 2019].

51 Jean Allain, "The Jus Cogens Nature of *Non-Refoulement*" *International Journal of Refugee Law* 13, no. 4 (October 2001): 533; See also General Conclusion on International Protection General Conclusion on International Protection No. 25 (XXXIII) – 1982 Executive Committee 33rd session. Contained in United Nations General Assembly Document No. 12A (A/37/12/Add.1) Executive Committee, Conclusion No. 25 (XXXIII), 1982, para. b.

52 *R (European Roma Rights Centre and others) v. Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)*, [2005] 2 AC 1.

53 *C and Others v. Director of Immigration and Another*, Civil Appeals No. 132-137, (2008).

54 *R v. Keyn*, 2 Ex. D., 63 (1876); *Trendtex v. The Central Bank of Nigeria*, (1977) Q.B. 529; *Triquet v. Bath*, (1764) 3 Burr 1478; *Heathfield v. Chilton*, (1767) 4 Burr 2016.

55 *Maurice Tomlinson v. The State of Belize & The State of Trinidad and Tobago*, [2016] CCJ 1 (OJ).

INDIGENOUS PEOPLES IN BRAZIL AND THE RIGHT TO THEIR SUSTAINABILITY: A TERRITORY, AUTHORITY, AND RIGHTS APPROACH

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INTRODUCTION

In order to maintain their rights and sustainability, indigenous peoples in Brazil depend on the support of national and international actors. At the national level, the Brazilian state still plays a central role in the process of recognition of indigenous peoples' rights. In the international arena, indigenous peoples are gaining more visibility as important actors for the creation/elaboration of international legal instruments and the implementation of sustainable development projects. Still, their role in this process is not a decision-making one. In other words, even though indigenous peoples are becoming more and more active in the international and national sphere, they still have limited control over their affairs.

In this article, my main goal is to illustrate how indigenous peoples in Brazil play a pivotal role in guaranteeing the recognition of their rights and sustainability. Rather than being passive victims in this process, indigenous peoples' activism have been instrumental in mobilizing national and international governmental and non-governmental actors towards the defense of their interests.¹ However limited or incipient the control over their affairs, I posit that indigenous peoples in Brazil have been causing a reordering of certain organizational logics at the national and international level since the colonial period.

To analyze this process, I adopt Sassen's approach on territory, authority, and rights (TAR).² By dislodging these three foundational components from their "particular historically constructed encasements (in this case, the national and the global)," ³ it is possible to examine their constitution and institutional location in different historical formations. According to Sassen, TAR "are complex institutionalization arising from specific processes, struggles and competing interest."⁴ In medieval Europe, the movement towards creating national states have caused the assemblage of TAR. With globalization, the emergence of a new organizing logic that regards rights as more important than territorial authority have triggered a movement of disassemblage of what has been perceived as the national state domain.

I find Sassen's approach particularly suitable for my analysis for two reasons. One relates to the fact that indigenous peoples' struggle has been a complex and conflicting process that challenged the national and international binary throughout time. The second is concerned with the recognition of the critical role indigenous peoples have for the defense of international legal instruments and projects focused on sustainable development and the protection of the environment. By disaggregating the TAR components from their original encasements, I will identify specific movements that signal to the emergence of a new organizing logic triggered by indigenous peoples' activism in the defense of their rights and sustainability.

TERRITORY- ASSEMBLING OF THE NATIONAL

In this section, I will present a review on the participation of indigenous peoples in the establishment of the borders and territorial authority of the national state of Brazil. Pimenta's study about the role of the indigenous peoples for the consolidation of the Brazilian borders shows that they played an important part in the defense of the territory of the Amazon region.⁵ For instance, the Ashaninka people not only helped with the 'fair wars' against the 'savage' indigenous peoples, they also defended the borders of Acre, in the north part of Brazil, from outside invaders. Another study from Pimenta indicates that Mato Grosso, in the west-central part of Brazil, "was incorporated into the national territory thanks to the Portuguese alliances with the Kadiweu people" (my translation).⁶

It's true that the relation between indigenous peoples and the colonizers was filled with contradictions and disparity. On one side, the 'savage' indigenous peoples were seen as threats and were exterminated either by the 'fair wars' or forced into the territory to scape assimilation. On the other, the 'meek' were seen as allies in the hard task of defending the territory and establishing the borders.⁷ According to Almeida, the arrival of the Portuguese Royal Family in Brazil in 1808 did not change the assimilationist approach of the 16th and 17th centuries. In fact, "the Regent Prince would continue to practice the defense of the allied indigenous peoples while encouraging the fight against the savage ones" (my translation).⁸

Relevant to my argument is the key role indigenous peoples had in the establishment of the borders and territorial authority. The literature on the subject has stressed the active role indigenous peoples had in the process of conquest, delimitation and consolidation of the Brazilian borders.⁹ Be that as it may, the purpose of the colonial and imperial official policy was to extinguish indigenous peoples' territories, in an attempt to "create the nation in European molds, where there was no place for pluralities, ethnic and cultural backgrounds" (my translation).¹⁰ The 19th century legislation promoted the recognition of indigenous peoples' rights to their territory only until they reached the so-called "state of civilization."¹¹ In

addition, the 1850 Territory Law established that indigenous peoples had the right to territory; however, the ownership remained with the Imperial State.¹²

Despite the long efforts to create a homogenous national state, many indigenous peoples in Brazil refused assimilation. At the same time, they learned to value agreements and negotiations with authority and with the king himself. The petition of the indigenous people from the village of São Miguel do Uma (in Pernambuco, in the northeast part of Brazil) is illustrative in this regard. They appealed against their persecution based on 1698 Royal Charter that confirmed the donation of their territory as a “reward for participating alongside the imperial troops against Quilombo dos Palmares” (my translation).¹³

In sum, the relation between indigenous peoples and the colonial/imperial authority involved disputes and conflicting interests. On one side, indigenous peoples struggled for the rights to their territory and distinct status from other citizens. On the other, the Imperial State sought to guarantee its domination over the vast territory of Brazil in an attempt to create a homogenous national state. Notably, because securing the territory was as crucial for indigenous peoples as for the ruling authority, it is no surprise that 30% of the Brazilian border strip is occupied by Indigenous Territories, demarcated and recognized by the national state.¹⁴

Segments of the Brazilian society, mainly the military, consider the recognition of indigenous peoples’ territories a threat to the national state.¹⁵ Nonetheless, indigenous peoples’ activism in the defense of the borders of Brazil “proves that the presence of indigenous peoples in the border region, instead of supporting the internationalization of the Amazon, is, on the contrary, an essential element to ensure surveillance of this vast region” (my translation).¹⁶ All things considered, I maintain that indigenous peoples had a crucial role in the assembling of the national state of Brazil. The next section will discuss how the defense of indigenous peoples’ rights has triggered the emergence of a new organizing logic that views rights as more important than territorial authority. In other words, I will illustrate how indigenous peoples’ struggle for the recognition of their rights has created a denationalization movement, which pulls the authority out of the national state.

RIGHTS – DISASSEMBLING OF THE NATIONAL

In Brazil, anthropologists have analyzed how indigenous peoples have resisted domination, assimilation, cooptation from the larger society throughout time.¹⁷ In doing so, these peoples have created a multiplicity of assemblages aiming at taking control over their own affairs. The ‘Alliance of the Peoples of the Forest’, which assembles more than five hundred indigenous chiefs, is one illustrative development of this movement.¹⁸ At the international level, indigenous peoples’ global activism began before globalization. For instance, the first official document recognizing

indigenous peoples' rights to their territory dates back to 1680.¹⁹ However, as stated before, the colonial and imperial official policy promoted an assimilationist approach that intended to incorporate indigenous peoples as citizens. In this context, indigenous peoples continued to be perceived as defenders of the borders; notwithstanding their legal status as distinct from other 'civilized' peoples was not a concern of the Brazilian State.

According to Lima, the creation of the Indigenous Peoples Protection Service (SPI - Serviço de Proteção Indígena, in Portuguese) was a response of the Brazilian State to the international denunciation of enslavement of indigenous people in Putumayo in 1912.²⁰ Its creation aimed at showing the world that Brazil was a civilized national state. This event demonstrates the influence indigenous peoples had in the assembling of TAR in Brazil since a very early state. Relevant to my argument is how this denunciation triggered a movement, which pulled the authority of the national state over rights even when it installed itself inside the state apparatus. Moreover, it is important to note how this process involved conflicting interests, given that the Brazilian State's recognition of indigenous peoples' rights aimed at guaranteeing its authority over the territory. For instance, in 1928, Law no. 5,484 "assigned the SPI the task of executing state tutelage over the generic indigenous peoples' legal status [...] it combined a project of management of population segments defined as having a civil participation necessarily mediated by the national state" (my translation).²¹

After World War I, the Western liberal democratic ideal of European nationalists formed an important part of the international political discourse about the term 'self-determination.'²² During this period, the assemblage of the national was based on the premise of a modern state which "gains exclusive authority over a given territory and at the same time this territory is constructed as conterminous with that authority."²³ In this context, the assemblage of TAR strengthened even further the notion of the national state as the sole grantor of rights within a given territory. This explains the crucial role the national state of Brazil had for the recognition of indigenous peoples' rights. It also explains why the Brazilian state created new forms of exercising control over indigenous peoples, thus, guaranteeing its sovereignty. An example of this movement is the establishment of the National Council for the Protection of the Indians (CNPI - Conselho Nacional de Proteção Indígena, in Portuguese) whose aim was to act "as a consultant and formulating body of the Brazilian indigenous policy" (my translation).²⁴

Following the end of World War II, the emergence of international legal instruments, as the Universal Declaration of Human Rights – approved by the United Nations General Assembly in 1948, triggered an opposing movement that began to pull the authority of the national states over rights.²⁵ Albeit the national state continued to play a crucial role, it was no longer the sole grantor of rights. The emergence of

global actors, such as the Sub-Commission on the Prevention of Discrimination and Protection of Minorities – created by the Human Rights Commission of United Nations in 1947 – signals to this denationalization movement.²⁶

In the 1960s and 1970s, the awareness of “the international human rights agenda began to systematically include issues concerning the recognition of the cultural rights of ethnic minorities, indigenous peoples” (my translation).²⁷ The creation of the International Work Group for Indigenous Affairs (IWGIA) in 1968 is a milestone of this movement, since it became a locus for the discussion of issues relating to the defense of indigenous peoples’ rights and sustainability.²⁸ Despite this global trend, the national state of Brazil continued to adopt an assimilationist approach. The substitution of the SPI by the National Indian Foundation (FUNAI -Fundação Nacional do Índio, in Portuguese) in 1967 represented the attempts of the Brazilian State to “assimilate the remaining indigenous peoples’ societies into the dominant national society.”²⁹

A curious characteristic of the international agenda instruments and other mechanisms is the fact that they don't need to be internalized in the national apparatus to change social perception at all levels. Specifically regarding indigenous peoples, Convention no. 169 of the International Labor Organization (ILO), held in Geneva in 1966, established guidelines concerning respect, culture, customs, tribal organization, and indigenous territories.³⁰ The First Declaration of Barbados, in 1971, “constituted a strategic starting point for the transactional articulation of indigenous and non-indigenous actors in favor of indigenous peoples’ rights” (my translation).³¹ Also in 1971, “the Subcommittee on Prevention and Discrimination and Protection of Minorities appointed a special rapporteur to conduct a comprehensive “Study on the problem of discrimination against indigenous peoples” (my translation).³²

Crucial to my argument is the critical role indigenous peoples had in mobilizing national and international governmental and non-governmental actors towards the defense of their interests. Little points out that indigenous peoples played an important role in the constructing of an endogenous notion of ‘ethnodevelopment.’³³ According to the authors, this notion of development stemmed from the participation of indigenous peoples “in a host of continent-wide meetings with anthropologists and progressive sectors of the Catholic and Protestant churches” (my translation).³⁴ Another illustrative example of indigenous peoples’ activism is the creation of the Coordination of Indigenous Organizations of the Amazonian Basin (COICA – Coordinación de las Organizaciones Indígenas de la Cuenca Amazónica in Spanish), in 1984. Since it “led to the consolidation of the alliance between environmentalists and indigenous organizations located in the Amazon rainforest aiming at defending indigenous peoples’ rights and sustainability from major development projects implemented with resources from the World Bank” (my translation).³⁵

According to Almeida, indigenous peoples “slowly moved from the invisibility built in the 19th century to the protagonist conquered and restored in the 20th and 21st centuries by political and intellectual movements in which they have had intense participation” (my translation).³⁶ The 1988 Federal Constitution is a landmark of indigenous peoples’ activism in Brazil. For the first time ever, the national state “recognized the social organization, customs, languages, beliefs and traditions of indigenous peoples and guaranteed their original rights to the territory they traditionally occupy” (my translation).³⁷ According to Davis, advances achieved with the advent of the Federal Constitution of 1988 resulted from the intense participation of indigenous peoples’ organizations in the formulation process of this legal document.³⁸

From an international perspective, Silva stresses the important part the worldwide trend of recognition and protection of the rights of ethnic minorities played as well.³⁹ Hoffmann points out that the emergence of indigenous peoples’ organizations in the 1980s can be attributed to the growing number of international instruments elaborated on the subject of minority groups, including indigenous peoples; also, to the insurgence of sustainable development projects supported by financial agencies.⁴⁰ In Brazil, the dynamic process of creation and registration of indigenous peoples’ organizations can be ascribed to the fact that indigenous peoples began to organize themselves around a common identity and political agenda to negotiate with non-indigenous actors, mainly the national state and international financial organizations.⁴¹ For instance, the Alliance of the Peoples of the Forest while “advocating for specific actions (demarcation of indigenous territories, creation of extractive reserves, etc.), also reshaped and guided the Brazilian government’s Amazon policy with the new ideology of sustainable development” (my translation).⁴²

As stated before, indigenous peoples’ struggle for their rights has changed over time. Where the national state once dominated, and indigenous peoples were allies defending the nascent national state’s territorial authority; now, is populated with a multiplicity of new organizations with whom indigenous peoples can interact for the defense of their rights and sustainability. The following section will discuss in more detail how the role of the Brazilian State as the sole grantor of indigenous peoples’ rights is being challenged by the activism of new assemblages of TAR. Furthermore, it will discuss how indigenous peoples’ activism can de-border the national authority, producing an unsettling movement towards the denationalization of certain bits and pieces of the national state of Brazil, even when it installs itself inside the national apparatus.

AUTHORITY – ASSEMBLING OF THE GLOBAL

The interaction between indigenous peoples and national and international actors is not new. However, the changes it has been through are worthy of attention.

Indigenous peoples' local, national and international activism has changed their interaction methods as well as their perception of the larger society. Studies have argued "that many indigenous peoples who are immersed in westernization do not reject it outright – in spite of its hegemonic, bureaucratic, and modernizing traits – but rather they place it within the context of their own agency that provides for their differentiated incorporation of development."⁴³ Evidence of this process is the conceptualization of 'ethnodevelopment'.

In the case of Brazil, the recognition of indigenous peoples' rights to their territory has been enforced by the implementation of financial projects supported by international actors. Little points out that the Pilot Program for the Protection of Brazilian Tropical Forests of the Group of Seven Industrialized Countries (PPG7) "grew out of national and international concern over the accelerated destruction of the world's tropical rain forests."⁴⁴ Throughout the 1990s, many international development agencies showed greater concern in recognizing policies and programs focused on the rights of indigenous peoples and ethnic minorities.⁴⁵ A report of the United Nations Development Program (UNDP) notes that a growing number of international legal instruments have been recognizing "indigenous peoples as a particularly important group for achieving sustainable development."⁴⁶ The ILO Convention 169 on Indigenous and Tribe People in Independent Countries is a cornerstone of this movement.

At the national level, the insurgence of the sustainable development movement had two important outcomes. One relates to the recognition of indigenous peoples' rights to territory. For instance, the mobilization of the Kayapó Peoples in Brazil against the construction of the Cararaô dam in 1989, which would flood part of the land they inhabited, had major repercussions in the international media. Sting's European tour with Chief Kayapó Raoni led to the creation of the Rainforest Foundation Norway, which aimed at demarcating the Kayapó territory in Brazil.⁴⁷ The other outcome relates to the emergence of various indigenous peoples' organizations. According to Ricardo, from the 1980s through the 2000s, there was an explosion of new indigenous peoples' organizations. To get an idea of the scale of the phenomenon, there were ten organizations before 1988 of the more than 180 computed at the end of 2000.⁴⁸ Today, there are more than a thousand indigenous peoples' organizations listed at the Socio-Environmental Institute (ISA - Instituto Socioambiental, in Portuguese) website.⁴⁹

Regarding indigenous peoples' control over their own affairs, I divide the literature into two approaches. The optimistic one views local and national indigenous peoples' organizations as critical players for the implementation and monitoring of sustainable development projects. This approach is mainly supported by governmental and non-governmental organizations, such as: the UNDP⁵⁰, the United Nations Educational, Scientific and Cultural Organization

(Unesco),⁵¹ the World Bank⁵² the Inter-American Development Bank.⁵³ Little's study on the PPG7 has demonstrated that indigenous peoples were not involved in the designing and implementation of the sustainable development projects in the beginning; however, as the projects were executed the importance of indigenous peoples' role became more obvious.⁵⁴ Consequently, they became more and more involved in the implementation of sustainable development projects. According to Chav et al, the Amazonian Working Group (Grupo de Trabalho Amazônico, in Portuguese), "a network of organizations covering 513 organizations, including indigenous peoples, rubber tappers, chestnut collectors, etc" (my translation),⁵⁵ was created to monitor the initiatives of the PPG- 7. Oliveira Filho's article about indigenous peoples and the World Bank demonstrates how indigenous peoples became increasingly involved in the implementation and monitoring of the bank's projects.⁵⁶ Another study about indigenous peoples and sustainable development in Amazonas shows that indigenous peoples in the region have been acting as inspectors of the implementation of projects preventing the degradation of the environment.⁵⁷

In contrast, the pessimistic approach states that indigenous peoples still have limited control over their affairs at all levels. In the international and national sphere, the recognition of indigenous peoples' rights still relies on the interest of the Brazilian State. Moreover, the framework, within which deforestation is governed globally, is "negotiated in a forum that does not give agency to actors other than national governments."⁵⁸ According to Hoffmann, the sustainable development 'project market' have created new ways of tutelage of indigenous peoples by international cooperation agencies.⁵⁹ Locally, sustainable development projects have been instrumental for the recognition of indigenous territories and rights; however, these developments don't have the scale to compensate for the unfavorable and unbalanced power relation.⁶⁰ Last but not least, Baines argues that the growing involvement of indigenous peoples and environmentalist non-governmental organizations with the implementation of sustainable development projects has deepened the power imbalance between benefactor and beneficiary countries.⁶¹

I maintain that the Brazilian national state is no longer the sole grantor of rights as a unitary assemblage of TAR, considering that indigenous peoples have been creating new assemblages that views rights as more important than territorial authority. One illustrative example of this movement was the 'Ashaninka Week', event held in Brasilia (capital of Brazil), in 2004, when indigenous peoples' representatives presented their pioneering initiatives for the preservation and sustainable use of natural resources.⁶² Furthermore, they disclosed the difficulties experienced by them with the constant invasion of illegal loggers in their territory. As a result, in this same year, the Federal Justice of Acre (Justiça Federal do Acre, in Portuguese) ordered the national state to restore the borders between Brazil and Peru, in Alto Juruá (in the north part of Brazil), and to establish checkpoints for the Federal Police, the Brazilian Institute

of Environment and Renewable Natural Resources (Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis, in Portuguese), FUNAI and the Army Force in the region.⁶³ It is important to note that the Ashaninka of the Ammonia River were the first to report to the Brazilian authorities the invasions of Peruvian logging in their territory, i.e., the national territory. Their mobilization against logging and in defense of sustainable development led to the creation of the Serra do Divisor and Alto Juruá Cross-Border Protection Working Group—Brazil and Peru.⁶⁴

In sum, the growing involvement of indigenous peoples in the implementation of sustainable development projects and the insurgence of indigenous peoples' organizations signals to the creation of new assemblages of TAR that challenges the national authority over rights. Although these assemblages are still incipient and to a large extent informal, I concur with Sassen's argument that views this movement as "a process that lifts a variety of segments (involving dimensions of TAR) out of their national state normative framing, thereby reshuffling their constitutional alignments."⁶⁵

At the international level, indigenous peoples have been recognized as critical actors in the designing and implementation of legal instruments and sustainable development projects; however, their role is still not a decision-making one. At the national level, indigenous peoples' activism is instrumental for the recognition of their rights and sustainability. Moreover, they are important partners not only for the defense of the border strips of Brazil, but also for implementation of governmental programs in the field of health, education, environment, etc.⁶⁶ Nonetheless, the Brazilian State still plays a crucial role in recognizing indigenous peoples' rights, establishing and implementing policies, and managing projects funded by international agencies. In this context, if the national state changes policy, indigenous peoples can only oppose and try to mobilize national and international actors towards the defense of their rights and sustainability.

One recent event involving indigenous peoples in Brazil relates to changes made by the national state regarding the environmental agenda.⁶⁷ Mainly Norway and Germany expressed concerns about Brazil's policy changes.⁶⁸ Later, this international discomfort was augmented by satellite images of the Amazonian forest on fire.⁶⁹ As a result, the aforementioned countries voiced their withdrawal of financial aid to the Amazonian Fund (Fundo Amazônia, in Portuguese).⁷⁰ This episode reveals how indigenous peoples still depend on the international and national support to guarantee their sustainability. Moreover, it shows how international and national legal instruments depend on the agency of indigenous peoples to be effective. It is true that indigenous peoples' global and local activism have created a transnational movement that enforces the implementation of their rights and sustainability. Nevertheless, the national state still has a central role in this process and recent events have demonstrated the fragility of indigenous peoples' agency.

FINAL CONSIDERATIONS

In this article, I illustrate that even when indigenous peoples' rights tests the authority of the state, it creates new forms of exercising control over them. My conclusion is marked by the understanding that these new assemblages of TAR indigenous peoples have created, however incipient and informal they may be, are provoking an unsettling movement towards the denationalization of certain bits and pieces of the national state of Brazil, even when it installs itself inside the national apparatus. It is true that indigenous peoples continue to depend on national and international support in order to maintain their sustainability. Regardless, I posit that the growing involvement of indigenous peoples in the defense of their own affairs has triggered the emergence of a new organizing logic, which considers rights as more important than territorial authority. Although the control over their own affairs is still limited, indigenous peoples' activism in Brazil have been causing a reordering of certain organizational logics at the national and international level.

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NOTES

- 1 Andéa Zhouiri and Klemens Laschefschi. "Conflitos Ambientais," *Universidade Federal de Minas Gerais*, (2010): 1-13. <https://bit.ly/3bAREsC>.
- 2 Saskia Sassen. "Neither Global nor National: Novel Assemblages of Territory, Authority and Rights," *Ethics & Global Politics* 1, no. 1-2 (2008): 61-79. <https://doi.org/10.3402/egp.v1i1.1814>.
- 3 Sassen, "Neither," 68.
- 4 Ibid.
- 5 José Pimenta. "Desenvolvimento Sustentável e Povos Indígenas: os Paradoxos de um Exemplo Amazônico," in *Tempo Brasileiro*, (2004), 115-150.
- 6 José Pimenta. "Povos Indígenas, Fronteiras Amazônicas e Soberania Nacional. Algumas Reflexões a Partir dos Ashaninka do Acre," in *Comunicação Apresentada na Mesa Redonda: GRUPOS INDÍGENAS NA AMAZÔNIA SBPC*, (Manaus, 2009), 3.
- 7 Pimenta, "Desenvolvimento," 115-150.
- 8 Maria Regina Celestino de Almeida. "Os Índios na História do Brasil no Século XIX: da Invisibilidade ao Protagonismo," *Revista História Hoje* 1, no. 2, (2012), 25. <https://doi.org/10.20949/rhhj.v1i2.39>.
- 9 Pimenta, "Povos," 1-15; Antônio Carlos de S. Lima. "Diversidade Cultural e Política Indigenista no Brasil," *Tellus* 2, (Outubro 2002): 11-31, <http://dx.doi.org/10.20435/tellus.v0i3.21>; Paul E. Little. "Indigenous Peoples and Sustainable Development Subprojects in Brazilian Amazonia: The Challenges of Interculturality," *Law & Policy* 27, No. 3 (July 2005): 450-471. <https://doi.org/10.1111/j.1467-9930.2005.00207.x>.
- 10 Almeida, "Os Índios," 31.
- 11 Ibid.
- 12 Ibid., 22-39.
- 13 Ibid., 35.
- 14 Pimenta, "Povos," 1-15.
- 15 Ibid.
- 16 Ibid., 3.
- 17 Little, "Indigenous," 450-471; Lima, "Diversidade," 11-31; Pimenta, "Povos," 1-15; José Licínio Backes, "Brazilian Indigenous People's Struggle for an Intercultural, Specific, Differentiated School," *Creative Education* 7, (2016): 13-19. <http://dx.doi.org/10.4236/ce.2016.71002>.
- 18 Pimenta, "Desenvolvimento," 115-150.
- 19 Lásaro Moreira da Silva. "O Reconhecimento dos Direitos Originários dos Índios Sobre Suas Terras Tradicionais na Constituição Federal de 1988 e a Extensão do Conceito de Terras Indígenas Tradicionalmente Ocupadas," *Revista Jurídica* 11, Vol. 6, (janeiro-julho 2004): 139-152.
- 20 Lima, "Diversidade," 11-31.
- 21 Ibid., 18-9.

- 22 Val Napoleon. "Aboriginal Self Determination: Individual Self and Collective Selves," *Atlantis*, Volume 29, No. 2 (Spring/Summer 2005): 31-46.
- 23 Sassen, "Neither," 69.
- 24 Lima, "Diversidade," 19.
- 25 Sassen, "Neither," 61-79.
- 26 Napoleon, "Aboriginal," 31-46.
- 27 Shelton H. Davis. "Diversidade Cultura e Diretos dos Povos Indígenas," *Mana* 14, no.2 (2008): 573. <http://dx.doi.org/10.1590/S0104-93132008000200014>.
- 28 Maria Barroso Hoffmann. "A Produção Social do Desenvolvimento e os Povos Indígenas: Observações a Partir do Caso Norueguês," *Mana* 17, no.3 (2011): 519-547. <http://dx.doi.org/10.1590/S0104-93132011000300002>.
- 29 Little, "Indigenous," 452.
- 30 International Labour Organization, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, Convention 169, (Geneva: ILO, 1969).
- 31 Hoffmann, "A Produção," 529.
- 32 Davis, "Diversidade," 574.
- 33 Little, "Indigenous," 450-471.
- 34 Ibid., 464.
- 35 Hoffmann, "A Produção," 534.
- 36 Almeida, "Os Índios," 22.
- 37 Brasil, Presidência da República. 1988. "*Constituição da República Federativa do Brasil*." Diário Oficial da União de 5 de outubro de 1988, Artigo 231.
- 38 Davis, "Diversidade," 571-585.
- 39 Silva, "O Reconhecimento," 139-152.
- 40 Hoffmann, "A produção," 519-547.
- 41 Vincenzo Lauriola. "Ecologia Global contra Diversidade Cultural? Conservação da Natureza e Povos Indígenas no Brasil. O Monte Roraima entre Parque Nacional e Terra Indígena Raposa-Serra do Sol," *Ambiente e Sociedade* 1, (Janeiro-Julho 2003): 172. <http://dx.doi.org/10.1590/S1414-753X2003000200010>.
- 42 Pimenta, "Desenvolvimento," 134.
- 43 Little, "Indigenous," 464; Hoffmann, "A Produção," 529; Davis, "Diversidade," 574; Backes, "Brazilian," 13-19; João Pacheco de Oliveira Filho. "Cidadania e Globalização: Povos Indígenas e Agências Multilaterais," *Horizontes Antropológicos* 6, no. 14, (Novembro 2000): 125-141. <http://dx.doi.org/10.1590/S0104-71832000001400006>.
- 44 Little, "Indigenous," 450.
- 45 Davis, "Diversidade," 571-585.
- 46 United Nations Development Program, *UNDP and Indigenous Peoples: A practice note on engagement* (2000): 3.
- 47 Hoffmann, "A Produção," 519-547.
- 48 Beto Ricardo. "Notas sobre economia indígena e mercado no Brasil," in *Povos Indígenas no Brasil*, ed. Beto Ricardo, (São Paulo: Instituto Socioambiental, 1996), 1-29.

- 49 “Lista de organizações indígenas,” Instituto Socioambiental, accessed February 21, 2020, https://pib.socioambiental.org/pt/Organiza%C3%A7%C3%B5es_ind%C3%ADgenas.
- 50 United Nations Development Program. “UNDP,” 1-12.
- 51 United Nations Educational, Scientific and Cultural Organization, *UNESCO and indigenous peoples: partnership to promote cultural diversity*, (2006): 116.
- 52 Tom Griffiths. “Indigenous Peoples and the World Bank: experiences with participation,” *Forest Peoples Programme* (July 2005): 1-25.
- 53 Inter-American Development Bank, *Strategy for Indigenous Development*, (22 February 2006): 1-28.
- 54 Little, “Indigenous,” 450-469.
- 55 Chav, Maria do Perpetuo Socorro et al. “Conflitos Socioambientais e Identidades Políticas na Amazônia,” 49. http://www.achegas.net/numero/37/maria_37.pdf.
- 56 Oliveira Filho, “Cidadania,” 125-141.
- 57 Carlos E. C. Freitas et al. “Indigenous People and Sustainable Development in Amazonas,” *International Journal of Sustainable Development & World Ecology*, Vol. 11, Issue 3 (2004): 312-325. <https://doi.org/10.1080/13504500409469834>.
- 58 Heike Schroeder. “Agency in International Climate Negotiations: the Case of Indigenous Peoples and Avoided Deforestation,” *International Environmental Agreements: Politics, Law and Economics* 4, vol. 10 (2010): 322.
- 59 Hoffmann, “A produção,” 519-547.
- 60 Ricardo, “Notas,” 1-29.
- 61 Stephen G. Baines. “O Desafio do Desenvolvimento Social dos Povos Indígenas,” *Cadernos de Estudos Indígenas*, Ministério do Desenvolvimento Social e Combate à Fome, (November 2008): 9-16.
- 62 Pimenta, “Povos,” 1-15.
- 63 Ibid.
- 64 Ibid.
- 65 Sassen, “Neither,” 62.
- 66 Backes, “Brazilian,” 13-19; Fábio Pedro S. de F. Bandeira et al., “Avaliação da Carteira Indígena,” *Cadernos de Estudos Indígenas*, Ministério do Desenvolvimento Social e Combate à Fome, (November 2008): 23-41; Marco Aurélio Loureiro and Ricardo Neves R. Pereira, “Carteira Indígena: um Processo em Construção,” *Cadernos de Estudos Indígenas*, Ministério do Desenvolvimento Social e Combate à Fome, (November 2008): 17-22.
- 67 “What changes (or is left) for indigenous peoples with president Bolsonaro’s reforms in Brazil?” *Instituto SocioAmbiental*, February 7, 2019, <https://bit.ly/2qGBECO>.
- 68 André Trigueiro. “Noruega e Alemanha se Posicionam contra a Proposta de Mudança do Governo para o Fundo Amazônia,” *G1*, June 11, 2019, <https://glo.bo/2YNE3sd>.
- 69 “Bolsonaro doesn’t need NGOs to burn Brazil’s image around the world,”

Instituto SocioAmbiental, August 22, 2019, <https://bit.ly/2PdQ8DQ>.

70 “Noruega bloqueia repasse de R\$ 132,6 milhões ao Fundo Amazônia,” *G1*, August 08, 2019, <https://glo.bo/34ehHkq>; “Ministério alemão vai suspender financiamento de projetos na Amazônia, diz jornal,” *DW*, October 08, 2019, <https://bit.ly/2PGyCqS>.

INDIGENOUS LANDS AND TERRITORIES: SELF-DETERMINATION, ACTIVISM AND CANADA'S WHITE PAPER

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Abstract: *Indigenous peoples in Canada, regardless of their nation, have long asserted their place on their ancestral territories now known as Canada. Indigenous peoples thrived on their ancestral territories during the pre-contact period. However, with the arrival of outsiders from Europe, Indigenous peoples experienced major shifts and overwhelmingly detrimental changes to their distinct ways of life, social structures, economies, governance systems and everyday processes. This article provides an overview of both the historicity and contemporary understanding of Canada's imposition of policies and laws on Indigenous peoples, often by violent means. These actions derived as part of the continuum of building and expanding of the Canadian settler nation-state. Both past and current policies have worked to undermine Indigenous self-determination and governance. These policies were paradoxically codified using terms such as inclusionary, equality and dignity. This article specifically examines the federal government's 1969 Statement of the Government on Indian Policy (the 'White Paper, which proposed eliminating any recognition of the rights of Indigenous people in Canada'), and it references the more recent Indigenous Rights Framework which the federal government introduced in 2018. It argues that both of these documents were designed to suppress, erase and assimilate Indigenous peoples. This article also provides an overview of the ways in which Indigenous peoples have mobilized in response to these attacks on their right to self-determination and their historical treaty rights with Canada.*

INTRODUCTION

In 1991, the Canadian government commissioned a comprehensive inquiry into the relationship between Indigenous peoples and the Canadian government and Canadian society as a whole. Named the Royal Commission on Aboriginal Peoples (RCAP), the final report was submitted in 1996.¹ It remains a significant document for its discussion of the history of Indigenous peoples in Canada and its many recommendations. The final report of the RCAP asserted that Indigenous cultures in Canada are framed by the everyday environment in which Indigenous peoples² live and the development of technology over time. The RCAP emphasized the fact that, whether they are on the east coast or in the Canadian North, Indigenous peoples' knowledge systems and original ways of being made it possible for them to continue to live in challenging environments. Furthermore, the RCAP added that in places such as in Central and South America, which are

entirely Indigenous territories, Indigenous peoples had developed their architecture, housing and technology prior to the arrival of Europeans. The same was the case for the Indigenous peoples of the Caribbean. They lived on, and learned from, the land long before the arrival of Europeans to their ancestral places, and this is still a common experience for Indigenous peoples in the Caribbean. So, for Indigenous peoples across the *Americas*, the relevance and relatedness of life and the land is a common and relatable theme.

In their crucial work with Indigenous Elders from Saskatchewan, Canada, Harold Cardinal and Walter Hildebrandt noted that the Elders shared with them how knowledge had been transmitted through the ages. First Nations' histories started with creation, and First Nations peoples built their "political, social, educational, economic and spiritual structures and institutions"³ long before the arrival of Europeans to North America. According to Rachel Yacaa?at George, generations of Indigenous peoples in Canada had their identities aggressively taken from them and new identities forcefully imposed on them. As the author explains, there continues to be "a denial, disregard and continual subjugation of Indigenous peoples" living in Canada.⁴ This is a common theme in the literature on relations between Indigenous nations and the Europeans who spread their dominance worldwide.⁵

James Anaya points out that, in the "scramble for Africa" in the 1800s, European imperialists set the framework for the ways in which the Europeans were to divide and exploit not only the African continent, but also the 'New World.'⁶ This 'scramble' continues today throughout many parts of the world and, importantly in the Canadian context, in the longing for Indigenous resources and lands. This includes the building of oil pipelines through Indigenous territories. Such resource-extraction policies and activities by governments, and opposition to them by many Indigenous peoples, are interwoven with, and connected to, the history of continuing settler colonialism and the ways in which these systems are operationalized. Anaya explains that the government of Brazil established legislation to relegate Indigenous peoples as wards of the state; and then developed additional programs to control the Indigenous peoples and further the assimilation project.⁷ Accordingly, Indigenous peoples in Brazil are viewed through a paternalistic lens. That is, Brazil has become a settler state, and the Indigenous peoples are seen as wards of the state. The assimilation project in Canada is quite similar. Attitudes toward Indigenous peoples over time have not changed much and colonial institutions and systemic discrimination remain salient. This can be seen in documents such as the Truth and Reconciliation Commission report (2015) which included the stories of the survivors of Canada's forced residential schools, and the final report of the national inquiry into the missing and murdered Indigenous women and girls (2019).

Historically, Canada has always been, and continues to be shaped by Euro-colonial forms and expressions of violence against Indigenous peoples.⁸ This article provides

a short overview of the 1969 White Paper⁹ (which is more formally referred to as the Statement of the Government on Indian Policy), reviews the Canadian government's policies and their impact on Indigenous peoples, and discusses the ways in which Indigenous peoples have actively challenged those policies. The article demonstrates the courage of Indigenous peoples in the face of the colonial government's conflicting language of equality and its policy of erasure.

WHITE PAPER POLICY AND DENIAL

The Canadian government released its White Paper on Indigenous affairs in 1969, but there was a long history of government assimilation policies and laws that led up to the development and release of the White Paper. According to the RCAP, Indigenous peoples are “political and cultural groups with values and lifeways distinct from those of other Canadians. They lived as nations – highly centralized, loosely federated, or small and clan-based – for thousands of years before the arrival of Europeans.”¹⁰ Venne explains that Indigenous peoples signed treaties with other Indigenous nations before European arrival, such as the peace treaty made between the Cree and Dene nations.¹¹ Venne points out that this treaty, which is alive today, was made to differentiate between their territories. This is just one example of Indigenous peoples enacting and living their governance systems in their everyday lives. Leanne Simpson describes another example about the Nishnaabeg nation's relationship to the Rotinohsheshá:ka and the responsibility that they have to nurture that relationship.¹² Simpson tells of the four Wampum Belts, or treaties, that are reminders to these nations of their responsibility to each other. These examples demonstrate a recognized history of treaty making before any outsiders came to these lands.¹³

According to the RCAP, once Europeans started arriving, treaty-making was extended to include them, and many of these treaties covered issues of governance, lands, resources and the economic relationship between various Indigenous nations and Europeans.¹⁴ According to the Truth and Reconciliation Commission, “Canada asserted control over Aboriginal land. In some locations, Canada negotiated treaties with First Nations; in others, the land was simply occupied or seized. The negotiation of treaties, while seemingly honourable and legal, was often marked by fraud and coercion, and Canada was, and remains, slow to implement their provisions and intent.”¹⁵

Based on his research with Saskatchewan Elders, Cardinal shed light on Cree understanding and worldviews of treaty making.¹⁶ He told of the Cree Doctrine of law which governs relationships called Wa-koo-towin. It governs conduct and behaviour within families, outside their communities. Cardinal made it clear that “Wa-koo-towin provides the framework from which the treaty relationships with Europeans were to function.”¹⁷ The Canadian government historically and

currently has dishonoured these treaties as they relate to Indigenous peoples, yet non-Indigenous peoples continue to benefit from these treaties incalculably. As Manuel (2017) noted, the Canadian state claims the privilege of exercising 100 per cent control over Aboriginal and treaty land and Indigenous peoples.¹⁸

In 1969, then-Prime Minister Pierre Trudeau said of treaties, “We will recognize forms of contract which have been made with the Indian people by the Crown and we will try to bring justice in that area and this will mean that perhaps the treaties shouldn’t go on forever. It is inconceivable I think, that in a given society one section of the society have a treaty with the other section of the society. We must all be equal under the laws and we must not sign treaties amongst ourselves.”¹⁹

This is unimaginable, for Indigenous peoples, treaties are living documents, and they are to be nurtured and well cared for. In fact, the RCAP emphasized the fact that treaties are “sacred and enduring.”²⁰ This is an undeniable belief among many Indigenous peoples and nations. Trudeau’s notion that treaties “shouldn’t go on forever” rests on the premise that treaties must be terminated. It provides some insight into the differences in worldviews through which treaties are viewed by some people, one in which power dynamics are ingrained and the paternalistic, settler colonial domineering attitude of the state in relation to Indigenous peoples and nations continue.

The White Paper repeatedly emphasized the notion of equality, stating: “This Government believes in equality. It believes that all men and women have equal rights. It is determined that all shall be treated fairly and that no one shall be shut out of Canadian life, and especially that no one shall be shut out because of his race.”²¹ In essence, the government proposed doing away with treaties and repealing the Indian Act. With that, any legal recognition of Indigenous people who were registered under the Indian Act would also have been repealed. The ultimate goal was to “assimilate Indigenous people into the existing body politic.”²² This goal of assimilation was disguised in the name of ending discrimination. Additionally, various governments remained consistent in developing laws and policies geared toward assimilation. For those who have a critical understanding of the history of Canada and its ongoing relationship with Indigenous peoples, the contradictions are revealing. The White Paper also stated that Indigenous people do not have full control of their land. This statement indicated failure by the government to take into consideration the fact that they – government officials – are implicated in the forced removal and displacement that Indigenous people in Canada experience. The effect of the White Paper policy, if implemented, would have been to eliminate the legal status of “Indian” with its proposed goal of equality.²³

The White Paper was full of paradoxical statements, but it was clear that the intent was to justify gaining more access and control of Indigenous resources

and wealth, which includes control of Indigenous lands. While some Indigenous peoples/nations have signed treaties with settlers, including numbered treaties that detail education, health, and peace and friendship treaties, for Indigenous peoples the treaties did not mean the surrendering of their lands.²⁴ As Rachel Yacaaʔat George (2017) puts it, even if the Canadian government's approach has changed with the White Paper's call for equality, "the state remains intent on our destruction and suppression as it strives to create its own legitimacy."²⁵ Njoki Wane often speaks about how colonial policies can be packaged differently, but ultimately, the content of the package remains the same.²⁶

The question is: how can the Canadian government fail to acknowledge Indigenous people's sovereign rights, their treaty rights, the nation-to-nation understanding and relationships that govern treaty making with Europeans? The assimilation plan remains active.

Many examples of policies, laws and legislation which were introduced to further promote the government's goals come to mind. For example, Canada's forced Indian Act contains complex and layered measures of assimilation; Manuel (2017) depicts the ways in which the Act made possible further colonial dominance and control over the lives of Indigenous peoples.²⁷ Another policy was the establishment of the imposed residential school system, which was designed by the Canadian government in partnership with churches, including the Catholic, United and Anglican churches. Both governments and churches supported, aided, fostered and complemented each other to fully maximize and implement assimilationist policies which were entrenched in settler colonial dominance and thoughts. Through this system, Indigenous children were forcibly removed from their homes and sent to residential schools (or boarding schools in the United States) which were located far from their families and communities. According to Barker, Indigenous people experienced mental and emotional colonization in residential schools.²⁸ The effects of those schools were catastrophic and persist today. The false images of Indigenous peoples that are depicted by the educational systems and mass media are embedded in racist attitudes of the dominant society. According to the Truth and Reconciliation Commission report,

The Canadian government pursued this policy of cultural genocide because it wished to divest itself of its legal and financial obligations to Aboriginal people and gain control over their land and resources. If every Aboriginal person had been "absorbed into the body politic," there would be no reserves, no Treaties, and no Aboriginal rights.²⁹

Indigenous languages came under persistent aggression and violation in these schools. Lyons speaks to the significance of Indigenous languages and he explains

that “language is the storehouse of Indigenous knowledge.”³⁰ Venne reminds us that the colonizers proposed many policies to convince Indigenous peoples that they no longer needed their lands and should assimilate.³¹ Cardinal notes that the use of terms such as ‘equality’ to argue for the recognition and realization of fundamental human rights for Indigenous peoples was “turned on its head.”³² In its quest to reflect “a new and different notion of equality,” the government essentially argued that if everyone is to be recognized as equal, then there should be no special status and no recognition of First Nations or Indigenous rights in Canada.³³ This understanding of equality fails to address the systemic injustices which Indigenous people faced. The colonial government sought to address systemic inequality by introducing additional forms of inequality and inequity through its White Paper.

INDIGENOUS RESPONSE AND ACTIVISM: THERE IS NO EMPTY LAND

When looking at the White Paper, it is important to examine Indigenous people’s understanding of their relationship with their lands. Venne rightfully states that Indigenous territories were not the “land of no one because Indigenous peoples already live on their lands.”³⁴ As Venne puts it, “we have our own governments, our own laws, our own political and legal systems operating in our territories. These were already there at the time of contact with the colonizers Our creation stories tell us that there was no terra nullius.”³⁵ Within Indigenous culture, creation stories express and speak of Indigenous peoples’ relationships with their ancestral lands, which they have lived on for centuries and millennia. Couthard writes: “I started thinking about colonialism as a structure of dispossession that is fundamentally grounded in the theft of land and the usurpation of indigenous peoples’ political authority in relationship to that land and their communities.”³⁶

Venne argues that when Indigenous people talk about land and treaty, “we are talking about our life and the life of the future generations. Land is central to the process.”³⁷ This reflects Indigenous worldviews of the ethical care, principle and consideration provided to the generations ahead and their ontological connection with their ancestral territories and lands.

Cardinal posits that regardless of who is in power in the Canadian government, Canadian leaders only vaguely commit to Indigenous rights. In 1999, he stated that no government has “yet committed itself to the simple honesty of fulfilling its obligations to our people as outlined in the treaties.”³⁸ The statement remains accurate even decades later. Palmater reinforces this point by noting that subsequent governments have never stopped trying to fulfill the objective of assimilation of Indigenous peoples.³⁹

Cardinal and Hildebrandt, in their study of Elders in Saskatchewan, noted the emphasis which Elders placed on the treaty-making process. The Elders told them

the goal was to have the new people arriving in their territories recognize and affirm Indigenous continuing rights to maintain their lands, which were given to them by the Creator.⁴⁰ Indigenous peoples did not give up their rights to anyone and surely not to the Canadian state. They did not give up their lands. Furthermore, there is no evidence to show that Indigenous peoples in Canada have ever surrendered their lands, and they did not choose to send their children to Canada's abusive residential schools. Venne asked the very important question, who would give away so much?⁴¹

Indigenous peoples, whether in Canada or across the globe, have always been active participants in their ways of governing. In Canada, they opposed the White Paper in various ways, which resulted in it being withdrawn. As noted by the Truth and Reconciliation Commission, the White Paper did not denote a new policy, rather it was simply the acceleration of existing policy, and its withdrawal was an important victory for Indigenous people.⁴²

In one such act of activism and resistance to the White Paper, Alberta chiefs released a counter statement titled Citizen Plus, which was more popularly known as the Red Paper.⁴³ Harold Cardinal, the then-president of the Indian Association of Alberta⁴⁴ and the National Indian Brotherhood (known today as the Assembly of First Nations), presented the Red Paper to the Canadian government. For Cardinal, the White Paper was a "thinly disguised programme of extermination through assimilation."⁴⁵ The Red Paper countered Canada's policy of extermination of Indigenous ways. As Crane Bear puts it, the Red Paper refused any and all attempts by the government in its goal to assimilate Indigenous peoples.⁴⁶ He notes how the Red Paper argued that treaties were written on a nation-to-nation basis. In other words, they were written by equal partners, and by sovereign nations. As a result, these agreements provided Indigenous peoples with rights, and the government would need to honor these agreements made with Indigenous nations.⁴⁷

Hayden King wrote that the Red Paper was a constructive alternative to Canada's vision of Indigenous peoples.⁴⁸ Crane Bear reminds us that historical treaties are important to First Nations people, as discussed in the content of the Red Paper.⁴⁹ In their critique of the White Paper, the authors of the Red Paper wrote the following: "We say that these are nice sounding words, which are intended to mislead everybody To preserve our culture, it is necessary to preserve our status, rights and traditions. Our treaties are the bases of our rights."⁵⁰

According to Nickel, "the settler framework of what constitutes notions of justice and equality have ignored the detrimental impacts of centuries of colonialism and racism and they failed to follow through with consulting with Indigenous peoples about changes to the very policies that impact their everyday lives, thereby reinforcing, rather than getting rid of, their already well established paternalistic practices."⁵¹ Rachel Yacaa'at George argued that the framing of the White Paper

policies was misleading because “hidden under the guise of benefiting Indigenous communities through economic prosperity, this framing privileges the destruction of the land for capitalistic gain.”⁵²

The White Paper and other similar policies are rooted in British imperial strategies.⁵³ Meanwhile, Couthard explains that the settler colonial relationship with Indigenous peoples is characterized by forms of domination, be they economic, gendered or racial.⁵⁴ The goal of imposing such hierarchical social relations has always been to dispossess Indigenous peoples of their lands and, as Couthard puts it, their “self-determining authority.”⁵⁵

According to Simpson, the Canadian state, through its practices, consultations, negotiations, high-level meetings, inquiries, royal commissions and the like, have tried to control points of interaction with Indigenous peoples when reviewing colonialist policies and laws.⁵⁶ Yet Indigenous peoples have refused to be controlled or pushed aside. Indigenous activism has led to some profound changes in the international legal environment regarding Indigenous rights.⁵⁷ As Youngblood Henderson explains, the United Nations has made powerful observations about Indigenous peoples. For example, the UN recognizes that the key feature of Indigenous peoples is their having a significant historical attachment to their territory; it explicitly recognizes the cultural distinctiveness of Indigenous peoples; and it has resolved to preserve both the territory and culture of Indigenous peoples as a means of achieving community.⁵⁸

There are countless ways in which Canada as a settler state continues with its systemic violent assimilation policies today. Cardinal writes about the need to deconstruct racist colonial paradigms that are carefully constructed through the Canadian state.⁵⁹ Remarkably, in February of 2018, the federal government introduced the Recognition and Implementation of Indigenous Rights Framework.⁶⁰ Many Indigenous scholars and community members see this as the White Paper 2.0, with more of the same policies repeated with the intention to continue to infringe on Indigenous rights.⁶¹ In a recent examination of the framework, Hayden King and Shiri Pasternak of the Yellowhead Institute write the following:

*We find the foundational Principles respecting the Government of Canada’s relationship with Indigenous peoples emphasize the supremacy of the Canadian constitutional framework and significantly constrain the possibilities for self-determination to move beyond the current circumstances. An analysis of the “Ten Principles” reveals that we can expect very little structural change in the existing relationship. If they form the basis for future negotiations, the Principles are a potential threat to Indigenous rights and title.*⁶²

Similarly, Joyce Green and Gina Starblanket assert that Indigenous lands are “the very foundation of the colonial impulse and the source of wealth of Project Canada.”⁶³ For Indigenous peoples, they point out that land is “key to our pasts and our futures. And land is precisely what government want, but never want to talk about.”⁶⁴ Palmater cautions that Canada “must do away with its policy of assimilation of Indigenous peoples.”⁶⁵ In the era of reconciliation, what does it take to have this shift?

The RCAP shares how Indigenous peoples were made by the “Creator in a different mould, one beyond the experience and comprehension of the settlers. They had a different view of the world and their place in it and a different set of norms and values to live by.”⁶⁶ Such worldviews have shaped Indigenous activism and rebuild their own systems of governance, in spite of the colonial surveillance and gaze.⁶⁷

CONCLUSION

Rachel Yacaa?at George has argued that with “colonial authority as the fundamental assumption, the above structuring of reconciliation allows for the denial of inherent Indigenous self-determination when in conflict with colonial desires.”⁶⁸ These colonial desires for Indigenous lands have never left. Both the Canadian government’s White Paper of 1969 and the more recent *Recognition and Implementation of Indigenous Rights Framework* are problematic and paternalistic in nature and continue to foster similar old colonial policies that have been forced on Indigenous people for hundreds of years.⁶⁹

The colonial settler state’s sense of entitlement to Indigenous lands is deeply fixed. Their policies, both past and present, show just how far settler governments will go in their claims to Indigenous lands and resources.⁷⁰ Yet, one most significant point to keep in mind is that colonial governments have no legitimate authority over Indigenous peoples who have always been self-determining. What’s more, time and time again, Canada’s desire to assimilate Indigenous peoples has been disrupted and subverted⁷¹ and therefore remains only a possibility in the imagination of the colonial settler state.

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NOTES

1 Library and Archives Canada, Notes on *Report of the Royal Commission on Aboriginal Peoples* (1996), last modified May 6, 2019, accessed February 14, 2020, <https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/introduction.aspx>.

2 The term “peoples” is used to indicate the diversity of groups, customs, practises and languages within Indigenous peoples in Canada.

3 Harold Cardinal and Walter Hildebrand. *Treaty Elders of Saskatchewan: Our Dream is that Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000), 3.

4 Rachel Yacaa?at George, “Inclusion is just the Canadian Word for Assimilation.” In *Surviving Canada: Indigenous Peoples Celebrate 150 Years of Betrayal*, ed. Kiera L. Ladner and Myra J. Tait (Winnipeg: Arbeiter Ring Publishing, 2017), 49.

5 See generally James Anaya, *Indigenous Peoples in International Law* (London: Oxford University Press, 2000); and Keith Smith, “In a State of Tutelage,” in *The Indian Act of 1876*, ed. Keith D. Smith (Toronto: University of Toronto Press, 2014).

6 Anaya, *Indigenous Peoples*, 25.

7 Ibid.

8 Jobb Arnold, “Three Sovereignties and the Hope of Indigenous -Led Populism,” in *Surviving Canada: Indigenous Peoples Celebrate 150 Years of Betrayal*, ed. Kiera L. Ladner and Myra J. Tait (Winnipeg: Arbeiter Ring Publishing, 2017), 308.

9 The term “White Paper” is commonly used in business and government to refer to a report that provides background information on a topic or to serve as a basis of discussion before formal action is taken.

10 *Looking Forward Looking Back, Report of the Royal Commission on Aboriginal Peoples, Volume 1*, (Online). Ottawa: Canada Communication Group, 1996: 11. <http://data2.archives.ca/e/e448/e011188230-01.pdf>.

11 Sharon Venne, “Treaties Made in Good Faith,” *Canadian Review of Comparative Literature* 34, no. 1 (2007): 2, https://www.sfu.ca/~palys/Venne-Treaties_Made_in_Good_Faith.pdf.

12 Leanne Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (Minneapolis: University of Minneapolis Press, 2017), 2.

13 *Looking Forward Looking Back*, 11.

14 Ibid.

15 *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, 2015, 1, accessed February 14, 2020, http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf.

16 Harold Cardinal, “Nation Building as a Process: Reflections of a Nihiyow [Cree],” *The Canadian Review of Comparative Literature* 34, no. 1 (2007): 74, <https://setonhalljournalofdiplomacyandinternationalrelations.org/>

journals.library.ualberta.ca/crcl/index.php/crcl/issue/view/687.

17 Ibid.

18 Arthur Manuel, "In Canada, white supremacy is the law of the land," *Now*, October 26, 2017, accessed January 14, 2019, <https://nowtoronto.com/news/white-supremacy-is-the-law-of-the-land/?fbclid=IwAR38SwYKeN62o6v1J42B33p32plfCLdtU3Yc4wdaHJHwGhIPn9EHrjGT7-w>.

19 *Restructuring the Relationship: Report of the Royal Commission on Aboriginal Peoples, Volume 2*, (Online). Ottawa: Canada Communication Group, 1996: 12. <http://caid.ca/RRCAP2.2.pdf>.

20 Ibid, 17.

21 See generally Canada, *Statement of the Government of Canada on Indian Policy* (Online), Presented by Jean Chrétien, Minister of Indian Affairs and Northern Development to the First Session of the Twenty-Eighth Parliament, Ottawa: Canada, June 1969. <https://www.aadnc-aandc.gc.ca/eng/1100100010189/1100100010191>.

22 See Leon Crane Bear, "The Contemporary Relevance of Historical Treaties to Treaty Indian Peoples," *Active History Matters* (blog), accessed October 20, 2019, <http://activehistory.ca/papers/the-contemporary-relevance-of-the-historical-treaties-to-treaty-indian-peoples/>.

23 Elisabetta Kerr, "Pierre Trudeau's White Paper and the Struggle for Aboriginal Rights in Canada: An Analysis of the Extent to which the White Paper was a Turning Point in the Struggle for Aboriginal Rights and Land Claims in Canada," *The Great Lakes Journal of Undergraduate History* 5, no.1 (2017): 56, <https://scholar.uwindsor.ca/gljuh/vol5/iss1/4>.

24 See generally *Looking Forward Looking Back*; Venne, "Treaties;" and Crane Bear, "Contemporary Relevance."

25 Yacaa?at George, "Inclusion," 50.

26 On the topic, see generally Njoki Nathani Wane, "Is Decolonization Possible?" in *Anti-colonialism and Education: The Politics of Resistance*, ed. George Sefa Dei and Arlo Kempf (Rotterdam, Netherlands: Sense Publishers, 2006).

27 Manuel, "In Canada, white supremacy is the law of the land."

28 Adam Barker, "The Contemporary Reality of Canadian Imperialism: Settler Colonialism and the Hybrid Colonial State," *American Indian Quarterly* 33, no. 3 (2009): 327, www.jstor.org/stable/40388468.

29 *Honouring the Truth, Reconciling for the Future*, 3.

30 Oren Lyons, "Perspectives (Foreword)," in *Sovereign Bones: New Native American Writing*, ed Eric Gansworth (New York: Nation Books, 2007), xv.

31 Venne, "Treaties," 8.

32 Cardinal, "Nation Building," 71.

33 Ibid.

34 Venne, "Treaties," 3.

35 Ibid, 3.

36 Andrew Bard Epstein, "The Colonialism of the Present: An Interview with

Glen Couthard,” Jacobin, accessed November 15, 2019, <https://www.jacobinmag.com/2015/01/indigenous-left-glen-couthard-interview/>

37 Venne, “Treaties,” 2.

38 Harold Cardinal, *The Unjust Society* (Vancouver: Douglas & McIntyre, 1999), 14.

39 Pamela Palmater, “Trudeau’s dance of deception on Indigenous rights,” *The Lawyer’s Daily*, accessed November 20, 2019, <https://www.thelawyersdaily.ca/articles/5976/trudeau-s-dance-of-deception-on-indigenous-rights-pamela-palmater>.

40 Cardinal and Hildebrand, *Treaty Elders*, 6-7.

41 Venne, “Treaties,” 7.

42 Canada’s Residential Schools, The History, Part 2, 1939 to 2000, The Final Report of the Truth and Reconciliation Commission of Canada, Volume 1, 22, accessed February 11, 2020, http://www.trc.ca/assets/pdf/Volume_1_History_Part_2_English_Web.pdf.

43 Indian Chiefs of Alberta, “Foundational Document: Citizens Plus,” *Aboriginal Policy Studies* 1, no. 2 (2011), <http://ejournals.library.ualberta.ca/index.php/aps/article/view/11690>.

44 Department of Indian Affairs and Northern Development, “Alberta Indians Present ‘Citizens Plus,’” *The Indian News* 13, no. 3 (June 1970): 1, <https://archivesrevolutionnaires.files.wordpress.com/2018/10/the-indian-news-june-1970.pdf>.

45 Harold Cardinal, *The Unjust Society: The Tragedy of Canada’s Indians* (Edmonton: M.G. Hurtig, 1969), 40.

46 Crane Bear, “Contemporary Relevance.”

47 Ibid.

48 Hayden King, *Land Back: A Yellowhead Institute Red Paper* (Online), [Toronto]: Yellowhead Institute, 2019, 6. <https://redpaper.yellowheadinstitute.org/wp-content/uploads/2019/10/red-paper-report-final.pdf>.

49 Crane Bear, “Contemporary Relevance.”

50 Indian Chiefs of Alberta, “Citizens Plus,” 194.

51 Sarah Nickel, “Reconsidering 1969: The *White Paper* and the Making of the Modern Indigenous Rights Movement,” *The Canadian Historical Review* 100, no. 2 (2019): 224, <https://www.muse.jhu.edu/article/726518>.

52 Yacaa?at George, “Inclusion,” 57.

53 Smith, “In a State of Tutelage,” 1.

54 Glen Couthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 7.

55 Ibid.

56 Simpson, *As We Have Always Done*, 45.

57 Rachel Sieder, “Introduction,” in *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy*, ed. Rachel Sieder (London: Palgrave, 2002), 3.

58 James (Sa’ke’i) Youngblood Henderson, *Indigenous Diplomacy and the*

Rights of Peoples: Achieving UN Recognition (Saskatoon: Purich Publishing Ltd., 2008), 11.

59 Cardinal, "Nation Building," 68.

60 See generally Hayden King and Shiri Pasternak, *Canada's Emerging Indigenous Rights Framework: A Critical Analysis* (Online), [Toronto]: Yellowhead Institute, 2018. <https://yellowheadinstitute.org/wp-content/uploads/2018/06/yi-rights-report-june-2018-final-5.4.pdf>.

61 See Russell Diabo, "The Indian Act – The Foundation of Colonialism in Canada," in *Whose Land is it Anyway? A Manual for Decolonization*, ed. Peter McFarlane and Nicole Schabus (Vancouver: Federation of Post-Secondary Educators, BC, 2018); and Palmater, "Trudeau's Dance."

62 King and Pasternak, *Canada's Emerging Indigenous Rights Framework*, 4.

63 Joyce Green and Gina Starblanket, "Recognition of Rights Framework Risks Terminating Rights for Indigenous People," *Regina Leader-Post*, August 7, 2018, <https://leaderpost.com/opinion/columnists/recognition-of-rights-framework-risks-terminating-rights-for-indigenous-people?fbclid=IwAR0aP-rJOgKmeEQ6iw rITKTYKRQ5mRcli6N3qEmLJnEmplsCKGbDTrG13wYc>.

64 Ibid.

65 Pamela Palmater, "Genocide, Indian Policy and the Legislated Elimination of Indians in Canada," *Aboriginal Policy Studies Journal* 3, no. 3 (2014): 46, https://journals.library.ualberta.ca/aps/index.php/aps/article/view/22225/pdf_22.

66 See generally *Restructuring the Relationship*.

67 See generally Simpson, *As We Have Always Done*.

68 Yacaa?at George, "Inclusion," 57.

69 Add see shiri and king re 2018 framework? (see Palmater 2018; Anaya, *Indigenous Peoples; Looking Forward Looking Back*).

70 See Julie Evans, Patricia Grimshaw, David Philips and Shurlee Swain, *Equal Subjects, Unequal Rights: Indigenous Peoples in British Settler Colonies, 1830-1910* (Manchester: Manchester University Press, 2003).

71 Bell hooks, *Black Looks: Race and Representation* (Boston: South End Press, 1992), 370.

