“Strengthening Partnership between States and indigenous peoples: treaties, agreements and other constructive arrangements”

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Treaty- Making in Latin America: Where to go from here

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The views expressed in this paper do not necessarily reflect those of the OHCHR.
The political and legal implications of the treaty-based nation-to-nation relationship between indigenous peoples and states have been well researched for North America. The same cannot be said for Latin America where debates over indigenous rights, whether scholarly or policy-oriented, tend to discount the relevance of treaty-making in defining such rights.

Similarly, treaty-making with indigenous peoples is above all attributed to British and French imperial policy, and indeed Spain’s colonial policy was not grounded in the principle of seeking indigenous consent to the acquisition of territory and jurisdiction. Nonetheless, the Spanish Crown was compelled to negotiate treaties with indigenous peoples when competing with other European powers (e.g. in the southeastern United States) or when seeking to gain a foothold in areas lying on the fringes of the pre-Columbian empires, as in the Southern Cone, the most prominent example coming to mind here being that of the Mapuche that I am going to dwell on for a few minutes, with a bit of history that I think one ought not to lose sight of when addressing indigenous rights, if only to remember the fundamental connection between treaty-making and peoples’ rights.

The Mapuche managed to preserve their sovereignty until the mid-nineteenth century, fending off successfully Spanish and Chilean (as well as Argentine) domination. In their long war of resistance, peace conferences, or parlamentos, played a crucial role. These parlamentos leading to oral or written agreements between the colonial authorities and the Mapuche consistently asserted the existence of an independent Mapuche territory south of the Bíobío river, and they did so for over two centuries. The most significant parlamento of the seventeenth century was the 1641 peace conference of Quilín which recognised Mapuche sovereignty in an area extending between the Bíobío and Toltén rivers. This agreement was reiterated throughout the colonial era, until the last parlamento of colonial times, convened at Negrete in 1803. It then took the Republic of Chile (founded in 1817) about seven decades to gain dominance over the Mapuche of southern Chile. In the process the Chilean government was compelled to seek agreements with them until the mid-nineteenth century.

By and large, across the Americas, domestication of relations with indigenous peoples generally came to a head only in the second half of the nineteenth century, mainly via the unilateral extension of state or federal legislative power over indigenous
peoples and communities. As a consequence, treaties with indigenous peoples started to be used as a convenient means to extinguish aboriginal title to vast tracts of land or to force relocation. Treaty-making thus underwent profound changes depending on the shifting fortunes of indigenous peoples in relation to the settler societies.

In a manner similar to the North American situation, parlamentos came to be used as tools of territorial dispossession. This happened gradually, starting with the 1793 parlamento of Las Canoas convened by the Governor of Chile with the Huilliche after these had risen unsuccessfully against the colony. By the terms of that agreement, the Huilliche were compelled to cede vast portions of their territory to the Spanish Crown.

In the mid-nineteenth century, the Chilean government started to promote European immigration to develop the country’s agriculture. The settler frontier rapidly crossed the Bíobío river, forcing large numbers of Mapuche families off their land. In 1852, the province of Arauco was created to serve as the Chilean outpost in the territory situated immediately south of the Bíobío. By the same token, the Chilean government assumed jurisdiction over the new province and purported to “protect” and “civilise” the Indians. Legislation enacted in 1866 provided for the incorporation of Mapuche lands into the public domain, while the Mapuche themselves were denied recognition of aboriginal title. To obtain legally recognised title, they had to apply for so-called títulos de merced, that is, deeds granted at the pleasure of the state – a rationale that has not changed much to date.

The land question has been the main bone of contention between the Chilean government and the Mapuche. Numerous laws and decrees have been passed which dealt with Mapuche land tenure and assimilation into mainstream society, including various policies of agrarian reform which the government used to promote assimilation on the basis of allotting individual plots. Gradually, Mapuche territories were fragmented and considerably reduced (some say by 95 per cent), while the territories of other indigenous groups to be found in Chile (e.g. Aymaras, Atacameños, Rapa Nui of Easter Island) were not protected at all.

This being said, in Chile, a general discussion of the actual legal and political implications of parlamentos has yet to occur, beyond the simple recognition of the existence of such instruments (as by the state-instituted Comisión de la Verdad y Reconciliación). This is the reason why I chose to recall the specific example of the
It is also worth remembering that the Special Rapporteur on indigenous treaties did not have the possibility to review in detail the considerable amount of documentation that he had been given during a visit with the Mapuche in the province of Cautín, in February 1998. So I am taking this opportunity to honour Miguel Alfonso Martinez's memory, and for the purpose of this session, his interest in the history of treaty-making in the Southern Cone (documented both in his Third Progress Report and in his Final Report). I would also like to take this opportunity to encourage people to pursue his endeavour.

Existing scholarship on treaty-making with indigenous peoples both in Chile and Argentina tends to view parlamentos and similar legal instruments as being primarily of historical interest, or even as relics of the past, having no bearing on the current rights situation of the Mapuche and other indigenous peoples in the region. It is my contention, however, that these instruments must be featured into ongoing discussions, if only to create a proper basis for negotiations where these occur or where they involve what has been termed "other constructive arrangements". Failing the acknowledgement of the historical role of indigenous peoples and the nation-to-nation relationship, there can be nothing much constructive about these arrangements. This then requires untangling the current legal and political meaning of treaties involving indigenous peoples in the countries of the Southern Cone with regard to human rights, collective (that is, minority) rights and, above all, group rights (especially the right of self-determination) - all three categories of rights being contained in the UN Declaration and (ideally) meant to complement each other.

Nonetheless, in current debates, indigenous rights tend to be cast mainly as human rights, sometimes with a focus on cultural (minority) rights. I would like to encourage a different approach grounded in a non-Eurocentric view of the history of international relations. In this view, peoples nowadays qualified as "indigenous" are first and foremost part of the large number of overseas peoples with whom European powers entertained diplomatic, commercial and political relations in the course of their expansion abroad. As documentary evidence of such relations, treaties contradict the widespread doctrinal assumption that these peoples could not lay claim to sovereignty. When viewed in this context, indigenous rights reach well beyond the domain of human and cultural rights: they bring to the fore contested sovereignties that underscore the founding dilemma of many a state in which indigenous peoples now live.
Such a project does not revolve primarily around treaty provisions or their role as a source of municipal law. For this would mean setting aside treaty-making as a mode of regulating relations between peoples by virtue of which, for instance, the unilateral granting of land deeds by the Chilean state may be questioned. Beyond the often raised issue of conflicting views about the substance of the agreement reached or contradictory accounts of treaty negotiations, one crucial problem lies in the failure of indigenous parties to gain recognition for their own treaty discourse, on an equal footing with that of state parties. This points to the persistent colonial nature of relationships between indigenous peoples and states, going hand in hand with pretensions to cultural hegemony by which the authority to provide an interpretive framework to resolve treaty disputes is being confined to the dominant (legal) culture and institutions.

At present, indigenous peoples cannot assert their rights in any other manner but as individuals or as persons belonging to minorities, both nationally as citizens, and at the international level via existing human rights mechanisms. This situation is reflected in the ongoing mainstreaming of indigenous concerns within the United Nations system, as well as nationally, for instance under the terms of the Chilean Ley Indígena of 1993, enacted in the pluriculturalist spirit that now prevails in many Latin American countries with regard to so-called ethnic minorities. The Act recognises in Article 1 the “ethnic and cultural diversity” of the Chilean nation and identifies Chile’s indigenous peoples. Under the Act, indigenous rights are defined individually, however, based on a contingent rights approach, and often reduced to issues of cultural difference. As far as Chile is concerned, making a case for parlamentos and the treaty relationship thus represents a necessary enrichment of the debates over indigenous rights and recalls the fundamental peoples’ rights component of treaty-making.

Bibliographic references provided on demand:

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