

# The Current State of International Law

S. James Anaya

**S. James Anaya** is James J. Lenoir Professor of Human Rights Law and Policy at the University of Arizona, James E. Rogers College of Law, where he teaches and writes in the fields of international human rights, indigenous peoples' rights, and constitutional law. As a Visiting Professor of Law at Harvard in 2002–3, he co-taught "Indigenous Peoples' Rights: United States, International and Comparative Law Perspectives". He has practiced law representing Native American peoples and organizations in matters before United States courts and international institutions. His writing includes *International Human Rights: Problems of Law, Policy, and Practice* (4th ed., 2006), co-authored with Richard B. Lillich, Hurst Hannum, & Dinah L. Shelton, and *Indigenous Peoples in International Law* (2nd ed., 2004), published by Oxford University Press, which treats "the dynamics of indigenous and ethnic identity" as well as "the historical, contemporary and emerging international law related to indigenous peoples"

"Anaya's distillation of the complex debate surrounding the content of the right to self-determination has a clarity that is often missing in discussions of the term.... Anaya's presentation of the history, continuing struggles, and achievements of the indigenous rights movement is exemplary scholarship."

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Largely as a result of their own advocacy at the international level, indigenous peoples are now distinct subjects of concern within the United Nations, the Organization of American States, and other international institutions. Through their efforts over the last three decades especially, indigenous peoples have been able to generate substantial international sympathy for their demands. These developments are shaping a growing body of international human rights law that is focused on indigenous peoples and that lends support to their demands, despite continuing resistance to the indigenous agenda at the international level.

The current trend toward recognizing indigenous rights in international agreements can be traced to the International Labor Organization's Convention 169 on Indigenous & Tribal Peoples. The convention is the latest in a long series of indigenous-rights treaties adopted by the ILO, which predates the United Nations and first addressed the issue in the 1920s. The basic theme of Convention 169 is indicated by its preamble, which recognizes "the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life, and economic development and to maintain and develop their identities, languages, and religions within the framework of the states in which they live." The convention includes provisions advancing cultural integrity, land and resource rights, and nondiscrimination in social welfare spheres; and it generally requires states to respect indigenous peoples' aspirations in all decisions affecting them.

Since the ILO adopted the convention in 1989, indigenous peoples' organizations, particularly those from Central and South America, increasingly have expressed support for its ratification. In certain countries that have ratified the convention — particularly Bolivia, Mexico, Colombia, Costa Rica, and Norway — indigenous groups already have invoked the convention in domestic and ILO proceedings with some success.

With the model provided by Convention 169, many other international bodies, most prominently the United Nations and Organization of American States, have begun establishing declarations and agreements on indigenous rights. A draft of a United Nations Declaration on the Rights of Indigenous Peoples was produced and adopted in 1993, and is now before the UN Commission on Human Rights. Over the past several years there have been numerous other international developments, including resolutions adopted at major UN conferences like the 1992 United Nations Conference on Environment and Development (the Rio Summit) and the second Conference on Human Settlement (Habitat II), that reflect responsiveness to indigenous peoples' demands and rights. In addition to the UN resolutions, the OAS Inter-American Commission on Human Rights has adopted a Proposed American Declaration on the Rights of Indigenous Peoples that is now being considered by a working group of the Committee on Juridical and Political Affairs of the OAS Permanent Council. Despite continuing contentiousness between indigenous peoples and states over the language of the declarations and certain of the more far-reaching provisions, comments by participating states demonstrate movement toward a consensus that even more closely accords with indigenous peoples' demands.

The rights of indigenous peoples also can be seen as part of more general international laws and treaties. Article 1 of the widely ratified International Covenant on Civil and Political Rights affirms that "All peoples have the right of self-determination." The UN Human Rights Committee, which is charged with monitoring compliance with the covenant, considers indigenous land and resource rights to be implicit in the right of self-determination, and has applied that standard in rejecting the United States' most recent report under the covenant, which would permit Congress to extinguish inherent aboriginal rights.

In pronouncing on the rights of indigenous peoples, The Human Rights Committee has most frequently relied on Article 27 of the covenant, which states, "In those states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." In its general comment on Article 27, the committee said that this provision covered all aspects of an indigenous group's survival as a distinct culture, including economic or political institutions, land-use patterns, and language and religious practices. They also said that states were obligated to establish affirmative programs to protect indigenous peoples' rights.

For example, in *Ominayak, Chief of the Lubicon Lake Band of Cree v. Canada*, the Human Rights Committee determined that Canada had violated Article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and timber development within the ancestral territory of the Lubicon Lake Band. The committee has also found that indigenous religious and cultural traditions are protected by articles 17 and 23 of the covenant, which affirm the rights to privacy and to the integrity of the family. In a case involving people indigenous to Tahiti, the committee determined that these articles had been violated by France when its territorial authority allowed the construction of a hotel complex on indigenous ancestral burial grounds.

The OAS Inter-American Commission on Human Rights has similarly invoked provisions of the covenant in examining the human rights situations of indigenous groups. The commission's primary references are the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, which also lay out indigenous rights and state obligations toward them. For example, Article 4 of the American Convention broadly affirms the right to life, and the commission has interpreted this to include the natural environments of "indigenous peoples [that] maintain special ties with their traditional lands, and a close depen-

dence upon the natural resources provided therein." Indigenous peoples' rights to land and natural resources are even more directly supported in Article 21 of the convention and in Article 23 of the American Declaration. In 2001 the Inter-American Court of Human Rights, the OAS judicial body that has the power to issue legally binding decisions against states, ruled in the case of *Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua* that Nicaragua violated the right to property by not taking sufficient measures to guarantee the traditional land and resource tenure of the Mayagna indigenous community of Awas Tingni, and by granting a concession for logging on the community's traditional lands. Following that ruling, in its decisions in *Maya Communities (Belize)* and *Mary and Carrie Dann (United States)*, the Inter-American Commission on Human Rights affirmed that the American Declaration on the Rights and Duties of Man also protects indigenous peoples' property arising from their traditional land tenure systems. Furthermore, in the case of *Yakye Axa Indigenous Community v. Paraguay* the Inter-American Court affirmed that states are required to provide legal remedies that offer indigenous peoples "a real possibility of the return of lands" of which they have been historically dispossessed.

Another important international treaty is the International Convention on the Elimination of All Forms of Racial Discrimination. Like the two other human-rights treaties just mentioned, the Convention Against Discrimination nowhere specifically mentions indigenous groups or individuals. Yet it also has been held to have particular implications in favor of indigenous peoples. The Committee on the Elimination of Racial Discrimination (CERD), which promotes implementation of this treaty, has called upon state parties to take special measures to protect indigenous cultural patterns and traditional land tenure and has repeatedly called on states to provide legal recognition of indigenous land rights.

With respect to the United States' obligations under the convention, CERD has expressed specific concern about the Congress unilaterally abrogating treaties signed between the government and Indian

tribes. Also, the committee recommends that decisions regarding aboriginal land rights must include effective participation by indigenous communities and that if aboriginal land is taken, indigenous people should be fairly compensated. Finally, the committee said that the United States should repudiate its guardianship doctrine as being inconsistent with contemporary legal developments in indigenous peoples' rights and not in line with the United States support for "internal indigenous self-determination."

Recently, in response to a request by the Western Shoshone people, CERD called upon the United States to address its doctrine of extinguishing Indian property rights, the remedies available for Indians, the abrogation of Indian treaties, and the United States' compliance with the right of indigenous peoples to participate in state decisions affecting them, including those affecting their traditional lands.

All of the international developments and interpretations of international agreements described here prompt legal reforms, but they also are reinforced by these reforms, which lead to an increasingly well-defined and consistent pattern of legal practice that favors the survival of indigenous communities and cultures. These legal practices are by no means universal, and even where reforms have been enacted, there are serious issues regarding their adequate implementation, but as consensus develops on the content of indigenous peoples' rights, so too do expectations that the rights will be upheld.

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***Native peoples have an opportunity to provide leadership in breaking down the monopoly of the controlling nations and to push the United Nations towards truly becoming a forum for all peoples of the world, a forum with an identity transcending the boundaries set by lines drawn on maps.***

**- Ingrid Washinawatok  
El-Issa, O'Peqtaw-Metamoh Menominee  
Nation, *New York City Law Review*,  
Volume 3, Number One**

This factsheet (dated 22 December 2005) has been prepared for public use by **Eva Nudd**, Professional Volunteer Associate with **AMICC**, the American Non-Governmental Organizations Coalition for the International Criminal Court.

# Indigenous Peoples and the International Criminal Court

*Eva Nudd*

The International Criminal Court is the first permanent court meant to punish perpetrators of gross human rights and humanitarian law violations, including genocide, crimes against humanity and war crimes committed after July 2002. The crimes committed against indigenous peoples around the world can amount to crimes within the Court's jurisdiction if committed after that date. The establishment of the Court creates a forum for indigenous peoples to seek justice and is another step in helping to end the struggle for their rights.

## PROTECTION OF THE RIGHTS OF INDIGENOUS PEOPLES WITHIN THE FRAMEWORK OF INTERNATIONAL LAW

Indigenous peoples<sup>1</sup> worldwide have been engaged in the fight to recognize their rights since the early 1920s. In 1923, Haudenosaunee Chief Deskaheh, representing the Six Nations of Iroquois, went to Geneva to implore the League of Nations to recognize the rights of his people to live on their own land, establish their own laws and practice their own faith. He was not allowed to speak, but his actions were a catalyst in the fight for indigenous rights around the world.

...

Since the establishment of the UN, concrete actions have been taken to promote the rights of indigenous people around the world. The Universal Declaration of Human Rights of 1948 and the International Covenant on Economic, Social and Cultural Rights of 1966 provide protection for certain rights important to indigenous peoples, ... includ[ing] the right to life, liberty and security of person and the right to take part in cultural life.

The International Convention on the Elimination of All Forms of Racial Discrimination of 1966 mandates that each State Party engages in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions act in conformity with this obligation.

In 1982, the United Nations Economic and Social Council established a Working Group on Indigenous Peoples (WGIP) of the Sub-Commission on the Promotion and Protection of Human Rights. The mandate of the Working Group is to review developments pertaining to the promotion and protection of human rights and freedoms of indigenous peoples and give attention to the evolution of international standards concerning indigenous rights.<sup>2</sup>

In 1989, the International Labor Organization created the Indigenous and Tribal Peoples Convention. It recognized indigenous rights of ownership and possession of lands, which they traditionally occupy, the right not to be discriminated against when attempting to obtain employment, and the rights to have governments adopt measures appropriate to the traditions and cultures of the specific groups concerned.

In 1993, WGIP agreed on a final text for the Declaration of the Rights of Indigenous Peoples. The Declaration was submitted for consideration to the Commission of Human Rights, which in turn created a working group to elaborate upon and submit the declaration to the General Assembly.

1 Indigenous peoples are the descendants of those who inhabited a country or a geographical region at the time when people of different cultures and ethnic origins arrived; the new arrivals later became dominant through conquest, occupation, settlement or other means. United Nations Office of the High Commissioner for Human Rights, Fact Sheet No. 9 (Rev.1) The Rights of Indigenous People, G.A. Res. 50/157, December 21, 1995.

2 Working Group on Indigenous People, <http://www.unhchr.ch/indigenous/mandate.htm>.

In 1995, the United Nations General Assembly launched the International Decade of the World's Indigenous People (1995-2004) to increase its commitment to promoting and protecting indigenous rights.

In 1997, the Organization of American States produced a Draft Resolution on the American Declaration on the Rights of Indigenous Peoples, ...[including] the right to life, humane treatment, and freedom of thought and expression.

The UN Economic and Social Council in 2000 established the Permanent Forum on Indigenous Peoples to discuss the primary concerns of indigenous peoples and to present these concerns to groups and individuals outside the UN.

In 2004, the UN continued its commitment to the rights of indigenous peoples by adopting resolution 59/174, which proclaims a second International Decade of the World's Indigenous Peoples commencing on January 1, 2005.

## INDIGENOUS PEOPLES AND THE INTERNATIONAL CRIMINAL COURT

The Rome Statute of the International Criminal Court (ICC) provides the Court with jurisdiction to investigate and try individuals accused of committing genocide, crimes against humanity and war crimes. Atrocities committed against indigenous populations worldwide often amount to the crimes within the Court's jurisdiction.

The following section discusses the scope of the ICC Statute and its similarities to the rights accorded to indigenous people in the UN Draft Declaration on the Rights of Indigenous Peoples.

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### The ICC Statute

**The Preamble** declares that, "[a]ll people are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time."

**The Preamble** is "[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."

**The Preamble** states that the ICC is "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes." It is "[r]esolved to guarantee lasting respect for and the enforcement of international justice."

**Article 5** states "[C]rimes within the jurisdiction of the Court include Crime of genocide, Crimes Against Humanity, War crimes and Crime of aggression (yet to be defined)."

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### UN Draft Declaration

**The Preamble** affirms that "[I]ndigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and be respected as such."

**The Preamble** reaffirms that "[I]ndigenous peoples, in the exercise of their rights, should be free from discrimination of any kind."

**Article 1** states that "[I]ndigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the UN Charter, the Universal Declaration of Human Rights and international human rights law."

**The Preamble** emphasizes concern that "[I]ndigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, inter alia, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."

**The Preamble** emphasizes "[t]he need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world."

### **Article 6: Genocide**

“[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”

**Article 6** states the collective right of indigenous peoples to “[l]ive in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including removal of indigenous children from their families and communities under any pretext. In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.”

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### **Article 7: Crimes against humanity**

The Statute mentions specific crimes, which are of particular interest to indigenous peoples worldwide. These include “[d]eportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender grounds; the crime of apartheid; and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental and physical health.”

**Article 2** reaffirms that “[i]ndigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.”

**Article 3** establishes the right of self-determination for indigenous peoples: “[b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

**Article 4** elaborates the right of indigenous peoples “[t]o maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”

**Article 10** states that “[i]ndigenous peoples shall not be forcibly removed from their lands and territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”

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### **Article 8: War crimes**

Crimes identified as war crimes include “[g]rave breaches of the Geneva Conventions of August 12, 1949 and other serious violations of the law and customs in armed conflict, including intentionally launching an attack knowing that such attack will cause incidental loss of life or injury to civilians; intentionally directing attacks against the civilian population; conscripting or enlisting children under the age of fifteen years into the national armed forces; and ordering the displacement of the civilian population for reasons related to the conflict”; to name a few.

**Article 10** [as above]

**Article 11** specifies the right of indigenous peoples “[t]o special protection and security in periods of armed conflict” and asserts that “[s]tates shall observe international standards, in particular the Fourth Geneva Convention of 1949... and shall not... Recruit indigenous individuals against their will into the armed forces... Recruit indigenous children into the armed forces under any circumstances... Force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centers for military purposes.”

**Article 28** lays emphasis on the right of indigenous peoples “[t]o the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.”

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## CURRENT ICC INVESTIGATIONS

### Darfur, Sudan

The clash between the Government of Sudan and two Sudanese rebel groups, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), started in February 2003 after rebel forces attacked government positions in the Darfur region of Sudan. The government responded to the insurgency by arming Arab militias called the Janjaweed. The Fur, Masaleet and Zagawa ethnic groups have been the primary victims of the war and resulting humanitarian crisis. The conflict, labeled genocide by the Bush administration, has claimed at least 180,000 lives and more than two million people have been displaced.

The UN created an International Commission of Inquiry on Darfur in September 2004. The Commission completed its work and presented its finding to the Secretary-General in January 2005. The Commission concluded that the government of Sudan committed crimes against humanity and war crimes. The Commission recommended that the perpetrators be brought to justice through the International Criminal Court (ICC). The UN Security Council referred the situation in Darfur to the ICC on March 21, 2005. ICC Prosecutor Luis Moreno Ocampo initiated an investigation on June 6, 2005. During the first stage of the investigation, the OTP has made good progress in collecting evidence pertaining to the crimes in Darfur and groups and individuals responsible for them. In the second stage, the Prosecutor will select number of criminal incidents and those bearing the greatest responsibility for them. ...

### Uganda

Northern Uganda has been suffering from an ongoing civil war for the last 20 years. The Lord's Resistance Army (LRA), led by self-proclaimed prophet Joseph Kony, is fighting to oust President Yoweri Museveni and his army, the Ugandan People's Defense Forces (UPDF). The primary victims of this conflict are members of the Acholi tribe; two-thirds of the tribe's population was forced to flee their homes and many are still living in government-run camps. Children often are abducted, indoctrinated, and physically abused. Boys are forced to fight along with LRA forces while many girls become "wives" of the rebel forces. These crimes fall within the jurisdiction of the ICC. They include murder, rape and other sexual violence, kidnapping and forced recruitment of children.

President Museveni referred the situation to the ICC in December 2003. On July 29, 2004, the Prosecutor determined that there was a reasonable basis to initiate an investigation in Uganda. The Prosecutor opened a first field office in Kampala, and continues to collect evidence and testimonies from all sides. The Court issued its first arrest warrants on July 8, 2005, which remained sealed until October 13, 2005. The five senior leaders of the LRA will be charged with several counts of crimes against humanity and war crimes.

The Court recognizes that prosecution of the senior LRA leadership is not enough to establish peace in Uganda. Reconciliation must be achieved through integration of peace talks, the ICC and traditional justice. The Court understands the importance of other forms of justice and sees their presence as complementary to its work. The peace dialogue has not stopped after the issuance of arrest warrants. If a peaceful solution to the conflict is found, the Prosecutor under article 53 can stop prosecution if it would be in the interest of justice to do so.

The ICC can only initiate investigations if the country in question is unwilling or unable to prosecute. The Amnesty Act passed by the Ugandan parliament in 2000 provides blanket immunity for rebels who renounce the rebellion. The amnesty excludes the individuals indicted by the ICC and therefore does not question the issue of complementarity.

Traditional justice reflects similar concepts as outlined in the Rome Statute. Both systems seek to punish the perpetrators, using different forms of punishment, and believe that ending impunity will prevent recurrence of heinous crimes. Acholi traditional justice is based on forgiveness. The Acholi do not believe that perpetrators should be sentenced to death because they will not realize the effect of their crimes. Perpetrators live among the community, undergo cleansing rituals, receive mild punishment, and are made to feel the burden. Acholi justice represents a restorative approach and reflects people's desires to end war and establish peace. Forcing the perpetrators to live among the community and feel the blame is supposed to serve as deterrence for future crimes.

### Democratic Republic of Congo

The Democratic Republic of Congo (DRC) is emerging from one of the world's most brutal wars in modern history. The beginning of the conflict dates back to 1997, when Laurent-Désire Kabila deposed President Mobutu Sese Seko with the support of both Ugandan and Rwandan armed forces. After becoming president, Kabila received military assistance from Zimbabwe and Angola and fell out of favor with Rwanda, which wanted to depose him. In 1999, Ugandan forces took control over the northern part of DRC. The country at this point was divided into three territories and the war was raging on all fronts. The eastern part of Congo has suffered the most and continues to experience ongoing violence.

The Banyamulenge ethnic group, consisting primarily of Tutsis, has been the primary target of the violence. Following the genocide in Rwanda, members of the former Hutu regime, genocidaires and others responsible for genocide, fled into the DRC. They continued attacks on the Tutsi population in the eastern part of the DRC. Crimes committed during the conflict constitute serious violations, including rape, sexual violence, murder and torture, and fall within the jurisdiction of the ICC.

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In March 2004, DRC referred its situation to the ICC. After careful consideration, the Prosecutor announced on June 23, 2004 that he was opening an investigation there. A field office has been set up in Kinshasa and the OTP has conducted several investigative missions, particularly in the Ituri region in eastern DRC.

## **POTENTIAL INVESTIGATIONS OF CRIMES AGAINST INDIGENOUS WITHIN THE COURT'S JURISDICTION**

The following examples represent the kinds of cases that could come before the Court:

- The pygmies in the Great Lakes region of Africa have been forced off their land by logging interests and governments. They were victimized by cannibalism and raped by rebel groups. These atrocities could be prosecuted as crimes against humanity and war crimes.
- The Jumma of Bangladesh have been subjected to massacres by the Bangladeshi Government since the mid-1980s, brutal and humiliating rapes, displacement from their lands by settling Bengalis on their land, destruction of places of worship, and specific acts of torture. Thus, the Jumma have been victims of genocide, crimes against humanity and war crimes.
- The Ashaninkas of the rainforests in Peru have been driven off their lands by logging interests; forcibly conscripted by a rebel group, Sendero Luminoso; murdered, tortured, and subject to having their lands destroyed by coca farmers who often use the crop for cocaine production. The Ashaninkas have a strong case for the crime against humanity, the war crimes and the genocidal acts.

It seems unlikely that the Court will prosecute human rights violations committed against the Jumma of Bangladesh and the Ashaninkas of Peru. The Court can only prosecute violations that have occurred after the Rome Statute entered into force on July 1, 2002. The ICC does not have a universal jurisdiction. It can only exercise jurisdiction over crimes committed by nationals of a State party or in the territory of a State Party, through the UN Security Council referral or if a non-state party consents to the ICC jurisdiction over the situation in which the crimes occurred. The Court is a court of last resort and can only prosecute individuals if a state party is unwilling or unable to prosecute them.

The crimes in Peru have occurred before July 1, 2002 and since the end of atrocities, the Peruvian government established a Truth and Reconciliation Commission to investigate crimes, which destabilized Peru for a period of twenty years. Truth and reconciliation commissions and other forms of traditional justice (such as Gacaca trials in Rwanda) often complement the prosecution carried out by the ICC. The Court and the other mechanisms for justice all contribute to restoring peace, ending impunity and deterring heinous crimes.

Atrocities committed against the Jumma in Bangladesh have continued since 1980 but Bangladesh has not ratified the Rome Statute and the Security Council is unlikely to refer the situation to the ICC.

Victimization of the Pygmies has been carried out in the entire Great Lakes region. Two countries within the region, the Central African Republic (CAR) and Democratic Republic of Congo (DRC), referred their situation to the ICC. DRC referred the situation to the Prosecutor in March 2004 and he has already started investigation. CAR referred the situation to the ICC on January 7, 2005 but he has yet to start an investigation.

## Quandaries of Identity: Joan Cocks

In a review essay on Patchen Markell's *Bound by Recognition* (in *Polity*, Volume 38, Number 1, January 2006), Mount Holyoke College Professor Joan Cocks notes that Markell "challenges the politics of recognition, not for its cry for social justice, with which he is entirely sympathetic, but rather for its starting assumptions and internal logic, which together ensnare its protagonists in a set of self-undermining errors. First, the politics of recognition misrecognizes social injustice as, at root, an identity injustice that is set into motion by the refusal of some group to recognize some other group for what it feels it really is, with its most deforming effects reserved for the psyches of those at the receiving end of that refusal. Second, the politics of recognition mistakenly presumes that identity precedes and determines action, which leads it to think that since who one is is a function of what one is, all unpredictable and unpleasant encounters between the whos can be prevented if all the whats can be persuaded to recognize and respect one another equally. Third, in its attempt to control the outcome of human interaction by enforcing the reciprocal recognition of all identities, as if those identities were fixed in advance of that interaction, the politics of recognition unwittingly recapitulates the logic of the politics of sovereignty it initially arose to challenge, both in the theory of liberal individualism and in the practice of various overweening groups.

to fix and freeze both identity and identity interactions. This democratic project of sovereignty is doomed by the open-endedness of identity and the unpredictability of action to tyrannical excesses and so to self-defeating failure."

According to Cocks, Markell substitutes "what he calls a politics of acknowledgement, which hinges on a realization not about the other but about the self: that we are inescapably vulnerable to the surprising reactions of others to our actions and hence can never be the true masters of our fates. Nor should we try: a democratic politics of acknowledgement requires us to refuse to corral others into serving our dreams of sovereign mastery."

She questions whether this takes into sufficient account "the unconscious anxieties that propel the search for sovereignty and the subterranean pleasures gained from splitting agency and vulnerability between two different parties" and whether it qualifies as "something as grand as a politics" rather than "a condition of practical wisdom: a forswearing by the individual of imperial temptations and an embrace of risk and irresolution in human affairs". She outlines the unbalanced resolution-promoting agendas of the usual "isms", with, "inversely, the identity politics of gender, sexuality, ethnicity, and race" seen as "well intentioned in contesting such monopolies" but "misguided about the relationship between identity, sovereignty, and injustice".

Primarily, since "we are living in a moment when identity politics are not the only or even the most dramatic kind of politics", Cocks considers how Markell's analysis might be "tweaked to show how political modalities that engage in acts of recognition but not (at least not most centrally) struggles for recognition are also implicated in dangerous attempts to split off agency from vulnerability".

She focuses on two crisis-level examples. One is the Israeli/Palestinian conflict, "in which we do see collective identities pressing against those who refuse them recognition or accord them the wrong kind of recognition for the sovereign purposes Markell describes", in which a

*I had avoided the national question for most of my life, in part because other questions seemed more pressing to me and to my generation but also because of my almost instinctive antipathy toward nationalist sentiments. One deep source of that antipathy were the bits and pieces I had picked up as a child about the terrible effects European nationalism had on the Jewish diaspora and a growing anxiety, as I grew, that a Jewish state was fated to follow some variant of nationalism's logic of discrimination, persecution, and expulsion. Once I confronted the national question instead of evading it, the Jewish implications of that question surfaced like the return of the repressed.*

**Joan Cocks,**  
*Passion and Paradox: Intellectuals  
Confront the National Question*  
(Princeton University Press, 2002)

Joan Cocks, Professor of Politics and Critical Social Thought at Mount Holyoke College, also is author of *The Oppositional Imagination: Feminism, Critique, and Political Theory* (Routledge, 1989), as well as "Collectivities and Cruelty," *Political Theory* (June 2004), and other articles and review essays.

"Following both Hegel and Arendt, Markell condemns the politics of sovereignty as the pursuit of self-determination, an unrealizable goal that can only be sought via the tyrannical attempt to determine everything outside the self. Dominant groups enjoy the semblance of mastery and independence by forcing others to bear an excess burden of the vulnerability and dependence that is part of the human condition. The various identity strategies of dominant groups serve this core project of social exploitation. Besides mistaking such strategies for the core project, the politics of recognition embarks on its own quest for sovereignty when, to ensure social justice, it attempts

“semblance of sovereign mastery” for one group is achieved precariously by “foisting an excess burden of vulnerability” on another, whose counterdemands for “the same putative good” guarantee that it too “will become trapped by the epistemological errors of the politics of recognition (among those errors, the belief that who one is, is a function of what one is) and the moral pitfalls of the politics of sovereignty (among those pitfalls, the temptation to draw a fixed and hostile line between the whats)”. In the other — the “tight restriction of independent agency in the world for the sake of achieving American super-sovereignty” over it — the “struggle for identity recognition” is scarcely (if at all) at issue, according to Cocks, with each side more intent on forcing the other to recognize *that* it is rather than *what* it is.

She considers as well the domestic example of the radical Christian right, which “also seems not to be engaged in a struggle to win recognition from the larger society of *what* it is, although it does intend, much like radical Islam, to force liberal secularists to realize *that* it is. Instead, it is engaged in a politics of truth about the world, with its goal the imposition of its version of the truth on all those with whom it shares the world: a symptom of not an identity politics that aims to enlarge the panoply of respected identities, but of what liberals like to call an ideological politics that aims to obliterate perspectives at odds with its perspective. This is a distinctive instance of a doubly delusional politics of sovereign mastery: self-deluded in thinking that sovereign mastery is possible through an elimination of all repudiated aspects of society and the self, deluding others by covering its will to power with the drapery of the divine (the same drapery in which radical Islam is dressed when it faces its own domestic societies).”

In neither the domestic nor the foreign policy version “is the paramount political goal the kind of adjustments in conception and respect that multiculturalists seek. This is not to say that the desire for recognition is not at work in generating popular support” in both struggles, however.

Cocks speculates that much popular support for the so-called moral agenda of radical right-wing politics is less a religious resentment of secularists — allegedly “having practiced merely a more flaccid and devious brand of the politics of sovereign power by claiming to be uniquely hospitable to pluralism and heterogeneity while striving to ban from public view all identities and ideologies at odds with its vision of human beings as rational calculators or critical reasoners” — than alienation of several insular “parochial” constituencies from “peripatetic” populations of “cosmopolitan types who are psychologically at ease in the larger world of heterogeneous peoples, races, and cultures; who have the cultural capital it takes to move smoothly across national boundaries; who enjoy the perquisites of sought-after skills, money, mobility, power, and status in the global economy; and who therefore are well cushioned, or at least better cushioned, against the shock waves of global capitalism.” If the perceived attitude of the latter group toward the former (not that either is homogeneous) “can be seen as a kind of refusal of recognition, what is refused recognition is not an identity that can be accommodated or, in Markell’s view, reified, in the pluralist patchwork quilt of different racial, sexual, and ethnic groups. For what is unrecognized is a situation and a plight that all people share, but to unequal degrees: the predicament of being stranded in the swirl of a great historical transformation, of enjoying a familiar way of life, scheme of values, and material foothold increasingly out of synch with the expanding horizons of a volatile new world that presses in hard on the old. To the consequent diminishing sense of agency over their own fates felt by many people in America today, many different political responses are theoretically possible. The one most loudly touted, however, is support for the politics of sovereign mastery pursued by the Bush administration at home and abroad...”

In sum, says Cocks, “identity politics is most problematically alive and well in the form of ethnonational politics. But identity politics in general has come to share the world’s stage with imperial and ideological politics, as well as the politics of

tectonic upheaval in which all identities are exposed, assaulted, and recomposed.

“In such a context, Markell’s analysis can and should be stretched to cover not only misrecognitions involved in struggles for recognition on the part of marginalized races, genders, sexualities, and ethnicities, but also dreams of agency without vulnerability infusing struggles for power, truth, and security on the part of governments, politicized religions, and threatened majorities both outside and inside the United States.”

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In *Passion and Paradox: Intellectuals Confront the National Question* (Princeton University Press, 2002), Professor Cocks asks “that enduring question in the modern age of how a first state is able to whip up popular feeling against a second, often for its intrusions in a more distant third. Why do the citizens of any one state see themselves as violated by violations of the sovereignty and borders of another state they may know or care little about? How is the identification of a people not only with its own state but also with the entire state system accomplished, and to what ends?” For her, the Gulf War raised even “knottier questions about the meaning of ethnic identity and the relation of ethnicity to nationalism and the nation-state”. Her research generated more “paradoxes and conundrums” than she had anticipated. “Every theoretical explanation of nationalism ultimately gave way to its own negation. Every assessment of the value of nationalist movements was inadequate in the absence of some other assessment with which it was mutually exclusive. Every practical response to nationalism in politics promised as many disturbing as reassuring results. ... [A]ll paths of thought obscured equally telling contrary thoughts; all paths of action were strewn with causes for regret and remorse. Moreover, these conundrums were intrinsic to nationalism and so were inescapable elements of all epochs in which nationalism plays a central part” — including our own.

She reflects that, “[i]n the pauses between violent contests among states such as the Gulf War, dilemmas of national belong-

ing, assertion, and exclusion might have sunk back to the level of the merely theoretical. Instead, our age has witnessed an escalation of tensions articulated in ethnic terms, a migration of peoples sometimes as cause and sometimes as consequence of state-orchestrated ethnic persecution, and a surge of separatist nationalist politics worldwide.” And she reminds her readers that at the end of the Cold War, many people of varying political leanings thought that “ethno-national movements in the disintegrating Soviet Empire” portended “the triumph of democracy and freedom”.

Her book, written during a period of communal strife and ethnic upheavals around the world, is an “attempt to understand the disparate tendencies of thought that inform a sympathy for ethno-nationalism, a sympathy for heterogeneous political community, and sometimes a contradictory sympathy for both. A second thread is the attempt to dive for pearls among the wreckage of old universalist ideas in order to help crystallize a new way of linking an appreciation of cultural particularity and variety to a feeling of solidarity across ‘difference’ lines. A third thread is an attempt to consider how nonparticipants might judge and act in response to ventures in ethnic cleansing.”

The third theme has been the most “chastening” for Cocks. “The participation of all states in domestic cruelties of various kinds, the self-interest of states in upholding the inviolability of borders, and the gross inequality of power internationally mean that most states will have neither the will nor the capacity to orchestrate interventions against atrocities elsewhere, while the few that are strong enough in capacity always will be susceptible to the charge of hypocrisy and Machiavellianism, whether they have the will to intervene or not. But it is the effectiveness of intervention, the ability of even the most knowledgeable and well-intentioned international organizations to secure a better rather than worse fate for targets of ethnic violence, that now appears catastrophically unclear.”

In this context, she again cites Hannah Arendt, for “the compelling argument

that not self-determination but creativity, not the absolute control of action but the unpredictability of action and its consequences, is the true condition of human freedom. Still, such unpredictability can bring to life as much tragedy as adventure. It also guarantees that we never can know after the fact if some other action would have led to as great a tragedy as an action that was actually taken”, as in the aftermath debates about intervention in Kosovo and failure to intervene in Rwanda.

The focus of *Passion and Paradox* is on “nationalism in politics, especially the drive for political unity by any group that asserts itself as ethnically distinct and self-identical, but also on claims to national distinctiveness and self-identity by established states. The felt grounds for such assertions may be racial, religious, linguistic, historico-political, civilizational, or what Michael Ignatieff describes as minor differences among similar peoples narcissistically reconceived as major differences [*The Warrior’s Honor; Blood and Belonging*].”

Its purpose is “to probe, in the context of nationalism in politics, how one might think, feel, and judge in order to act well” — foremost among “the oldest political philosophical question[s]”, which, under the “relativizing and democratizing tendencies” of modernity, have become even more perplexing than ever “because they are intrinsically open-ended: they are real questions rather than staged or artificial steps to an answer that is fixed in advance. This change in the logic of questioning from the classical period to our own implies that different political perspectives may point the way to different judgments and decisions that are equally compelling within their distinctive worldviews. In turn, the semi-decline of the idea of a philosophically cultivated political elite means that the question of how to think in order to act should be treated as a question not just for any political perspective but for any person with any stake in the world. That is, it should be posed as a question not for the privileged and powerful few but, hypothetically at least, for everyone”, recognizing that everyone — perhaps especially professional intel-

lectuals, she acknowledges — is “susceptible to self-deception” and that there is a risk of political paralysis resulting from detachment or too much detail or “seeing so much from so many angles that every conceivable course of action seems hopelessly coarse and one-sided”.

Cocks discusses subcategories of nationalism, especially the two most prominent: ethno-nationalism and nationalism “based on common citizenship, subjection to the same laws, and habitation in a unified geographical territory. Then again, these two kinds of nationalism with such different starting points — ethnic and civic — seem to reach the same practical conclusion when they are successful. In the first case, the experience of a common ethnic identity leads to a national movement to create a political state; in the second case, the development of a political state leads to the solidification of a national culture and the consolidation of a new people. If ethno- and civic nationalism do inevitably converge, one must wonder if there ever can be a people that does not ultimately imagine itself in ethnic terms or a state that does not legitimate its power by recourse to such imaginings.”

She also traces the interwoven complexities of “ethnicities, nationalities, peoples, and nation-states” in life, history, and political thought, observing that “[a]ttitudes toward the relative coherence of national identity versus its propensity for internal contradiction and fracture do not divide as neatly along essentialist and constructionist lines. Those who are adamant about the modernity of nationhood are capable of seeing national identity as internally stable and unitary, while those who tie modern nationness to older ethnic identifications can be more aware of national identity’s transmigrations and fractures precisely because they take the historical long view. Over three thousand instead of three hundred years, any identity is bound to vary, splinter, and mutate.”

The evaluative view of this is even more ambiguous than the conceptualization of it, Cocks remarks. “Strong communal feeling, a sense of cultural distinctiveness, the love of a particular landscape, pride in shared historical accomplishments, a

collective political agency — seen from another angle, these virtues become the vices of a suspicion of critics inside the community, a contempt for foreigners outside, a drive to dispossess aliens and conquer new territory, a self-mystified relation to the past, a collective political bellicosity. The negative features of nationalism are so weirdly the same features as the positive that anyone who reflects on the national question must have a high tolerance for contradiction and double-sidedness.”

And these “evaluative ambiguities forecast the moral-political quandaries that confront every age in which politics have taken a nationalist turn. What constitutes a people, historically, geographically, and, to use an old-fashioned but fitting term, spiritually? Does national identity merit territorial autonomy? Is national self-determination a condition of political freedom? Of human freedom? Whose will makes up the national will? Does national identity require national homogeneity, and if so, what is the fate in a national community of ethnic and racial minorities, diaspora populations, immigrants, and ‘guestworkers’?” The pursuit of answers to these questions, inevitably involving “the partialities and prejudices of nationalism”, too often veers into violence. “If nationalist violence drives such quandaries into the minds of participants and onlookers alike, it quickly drives them out again, as the brute material realities of warfare, mass rape, coerced refugee marches, and genocidal killings obliterate all speculative thought about collective identity.”

For intellectuals, this is complicated by “the tension between the intellectual’s mental constitution as a critical thinker and social constitution as a member of a group whose status and power has come to depend on its control over the language, literature, and public life of a national society”, comments Cocks, noting that they may be as susceptible as anyone to the myth-making urge along with the professional impulse to puncture myths. They also must cope with “tension between criticism and democracy”, alienating them from popular causes, espoused or not.

The intellectuals Professor Cocks has chosen to study (Karl Marx, Rosa Luxemburg, Hannah Arendt, Frantz Fanon, Isaiah Berlin, Tom Nairn, V. S. Naipaul, and Edward Said) exhibit, “in different ways, the strain between critical reflexes and popular politics”, but also “are deft at handling the conceptual antinomies that crowd this field” in addition to the basic “antinomy of particularism and universalism”: “civil society and political society; class division and national unity; ethno- and civic nationalism; separation and assimilation; liberal individualism and national-cultural pluralism; the country and the city; tradition and modernity; and nationalism and cosmopolitanism. A few antinomies take the form of ideal types: the pariah and the parvenu; the native and the exile.” Others are methodological.

Her thinkers “display a wide variety of temperaments: some earnest, others ironic; some optimistic, others despairing; some kindhearted, others caustic. Their politics stretch from the left to the right and their habits of thought from the systematic to the picaresque ... and they bear the markings of different cultures and regions. At the same time, they are tied together by similar preoccupations and the fact that almost all of them are exiles of some sort.” She examines “modernist and postmodernist tendencies of thought, liberal pluralist positions, and anti- and post-colonial perspectives that issue from (to use terms that may sound outmoded) revolutionary, conservative, and radical camps. But it is the singular Hannah Arendt, a partisan of no camp at all, who haunts this volume more than anyone else. This is partly because the interwar period Arendt studied — with its collapsing multinational empires, its aggressive majority peoples, its persecuted minorities and stateless refugees — so eerily resembles our own. It is also because Arendt understood the essential lineaments of her own time in her own time, without being trapped inside the myopic limits of her time. This is why she can speak with what seems like exquisite timelessness to us.”

The book concludes with “two necessary conditions of political community today that are unfulfilled and unfulfillable by the nation-state form”.

“The first, ‘nationalist’ condition is an effective, material respect for the human attachment to place that the British conservative Michael Oakeshott calls ‘the love of the familiar’. This condition requires that political communities provide and safeguard, from both the political pressures of ethnic homogenization and the economic pressures of the infinite accumulation of wealth, a home in the world for all human beings.”

“The second, ‘cosmopolitan’ condition is a popular, visceral delight in human variety inside political unity, which is not at all the same thing as an intellectual affirmation of variety between one political society and another. This condition requires an amelioration of group resentments and humiliations that drive collective searches for recognition and movements for national self-determination. It requires the extension to all those who live within the borders of a state, for the time they live there, whatever political rights and obligations the citizens of that state enjoy. Most elusive of all, it requires a release of the springs that snap open hearts and minds to the reciprocal engagement with strangers that Said rightly praises as ‘true worldliness’.”

Obviously, many of the quandaries about collective identity and sovereign self-determination considered in *Passion and Paradox* have repercussions for consideration of world citizenship and multiple levels of government. Since such large perplexities are the book’s “real subject of inquiry”, Joan Cocks says in its introduction, “its destination is not a resolution of ... any ... specific nationalist conflict. Neither is its destination a single formula for the ideal political community, which would only be a new assault on the variety of cultures that, against all odds, still manage to cling to the world.”

*Minerva* would welcome comments on that proposition, with or without reference to any of the other perspectives on culture, civilization, and cosmopolitan outlook offered elsewhere in this issue.