

AN EXISTING GUARANTEE OF LAND RIGHTS:

doCip
ARCHIVES

A memorandum prepared by the International Commission of Jurists for the UN Working Group on Indigenous Populations, August 1984

The International Commission of Jurists welcomes the programme of the Working Group for elaborating standards for the land rights, and other rights, of indigenous peoples. It hopes these may later be included in a formal Declaration of the General Assembly.

Inevitably, this will take time. As a first step, the Working Group might, in its Report to the Sub-Commission, draw attention to the extent to which Article 17 of the Universal Declaration of Human Rights requires States to respect land rights.

Article 17 provides that "Everyone has the right to own property alone as well as in association with others" and that "no-one shall be arbitrarily deprived of his property".

The ICJ believes that this is a far wider guarantee of land rights than is commonly recognised.

In the first place, it recognises common as well as individual rights of property, and calls for both to be respected.

It is commonplace that fundamental guarantees such as this do not depend upon the idiosyncracies of municipal law. It would be quite inappropriate therefore if Article 17 were so interpreted that a State could escape its obligations simply because under the law of that State, its indigenous inhabitants had never had property in their land.

WGIP 84/UN/7

Article 17 imposes a universal standard. If an indigenous person or group ever enjoyed property rights in land, and ^{was} ~~were~~ arbitrarily deprived of them, their rights have been infringed. They will have had property in their land if, before the State to which they are now subject imposed its laws, certain conditions were met.

If a previous State recognised their property in land, they cannot be arbitrarily deprived of it. If there was no such central authority to determine the validity of their claims, it does not follow that they did not have rights of property. In such societies groups often reached mutually accepted views as to hunting or cultivation rights, and other matters of concern with respect to land. Provided the result was to exclude others from these rights, they constituted a form of property. The Universal Declaration of Human Rights was not meant to enshrine narrow values, fixed in a particular culture. It is not necessary to point to title deeds, if there were rights over land recognised and enforced by the communities which inhabited those lands.

Even so, it may be that those indigenous people who never faced competition for their land will find it difficult to qualify for protection under Article 17, for they would never have found it necessary to develop any concept of property in land. This is a gap in protection which the ICJ believes the Working Group should attempt to fill, for surely the right of such people to retain for their own use some part at least of the lands they occupied before new settlers arrived should be recognised.

The scope of Article 17 is also qualified in that it protects only against arbitrary deprivation of property. It is not a guarantee against taxation, or nationalization, or the seizure of land. Nevertheless, it requires more than that the seizure of an indigenous people's land was lawful, according to the municipal law.

The Concise Oxford Dictionary defines 'arbitrary' as capricious, unrestrained, despotic'. Arbitrary deprivation of property implies that the deprivation is without reasonable cause or justification and that it is imposed by the mere exercise of power without giving those affected the right to be heard and to have their interests considered. In a word, it is deprivation which, in its motivation and its manner, is unjust.

It is unnecessary at this point to elaborate these standards. Suffice it to say, if a State made a treaty with an indigenous group, then unilaterally revoked the treaty, there would be a strong case for saying that this was arbitrary, and a breach of Article 17. Similarly, if a State imposed a law which deemed a territory to be "waste" or unsettled, regardless of the fact that there were indigenous inhabitants, and for this "reason" claimed that traditional forms of property in land should not be enforced, it would seem to have behaved arbitrarily.

It must be acknowledged that the abuses of Article 17 which indigenous peoples have suffered will, in many cases, have happened long ago. If the damage is irreparable, then, at the very least, the peoples concerned have a moral claim to compensation. And where indigenous people have been arbitrarily deprived of land, and it is now vested in the State, the State in many cases should recognise the right of that people to its return. It should be noted that in many legal systems, lapse of time does not ^{af} affect the claims of the rightful owner of property. This is so irrespective of the innocence of a person who has purchased it in good faith. If such an approach is implied by Article 17, there are many indigenous peoples who could benefit.

In summary, many of the seizures of land from indigenous peoples have been in breach of the principle in Article 17 of the Universal Declaration of Human Rights. It follows that, even if a State has not acceded to the ILO Conventions guaranteeing land rights, it may be in breach of its international obligations if it does not return land which was arbitrarily seized.