

## **DANCES WITH AFFIRMATIVE ACTION: ABORIGINAL CANADIANS AND AFFIRMATIVE ACTION**

Yussuf N. Kly  
School of Human Justice  
University of Regina  
Regina, Saskatchewan  
Canada, S4S 0A2

### **Abstract/Résumé**

The author reviews the theory of affirmative action programs in the United States and Canada. He pays some attention to a series of United Nations agreements, covenants and declarations, which lend legitimacy to such programs.

L'auteur réexamine la théorie des programmes de l'action affirmative aux Etats-Unis et au Canada. Il fait attention à une série d'accords, de conventions et de déclarations des Nations Unies qui rendent valable tels programmes.

## Introduction

The purpose of this article is to emphasize the human rights of Aboriginal Canadians and in so doing to suggest how and why the implementation of these rights enhances and informs Canadian democratic ideals and the potential for the successful resolution of government-Aboriginal conflict. This in turn should promote a conceptual framework which permits the equal-status integration of Aboriginal peoples into a multinational and multicultural Canada under conditions of mutual trust, acceptance and well-being.

It is beneficial first to acquaint the reader with some major assumptions (premises):

1. Canada is a multinational state founded on an historical interrelationship among Anglophone, Francophone and First Nations populations. These may, in their diversity, be acceptably referred to as founding nations. This fact explains why Canadians regard their country as a *multinational* state, as opposed to simply a *multicultural* one.
2. Past negotiations in relation to treaties and other agreements among these three groups have not led to a situation wherein Anglophones or Francophones have sincerely attempted to create an "equal-status within Canada" relationship with the First Nations. As witnessed by most scholars, the history of these relations did not create conditions conducive to mutual trust between the Aboriginal and Francophone/Anglophone peoples. It would not be inappropriate to suggest that, to a significant degree, it created a situation of mutual distrust.
3. Also axiomatic is the assumption that First Nations were not sufficiently historically engaged in the constitutional process as to see the evolution of this process as equivalent to the evolution of a social contract with Aboriginal Canadians, as did Francophones and Anglophones.

Given the above assumptions, and at the risk of oversimplification, for purposes of international human rights law, the following questions concerning Aboriginal Canadians can be succinctly posed:

- what are the present day human rights of Aboriginal Canadians, given that in the past they suffered from attempts at genocide, ethnocide, segregation and institutionalized racism; and

- what rights do Aboriginal Canadians enjoy given that their exclusion from full participation in the early Canadian constitutional processes has created a present day situation wherein, for all practical purposes, they find themselves grossly unequal and disadvantaged in most societal sectors?

It appears that, to a significant extent, the social contract that exists between Aboriginal and other Canadians may be impaired or uncertain.

The response of international human rights law to similar situations has been reparations, such as compensation, restitution and restoration, special rights, and special measures (popularly known as affirmative action). Initially, these remedies came into existence not because they were prescribed in international human rights law, but because in the search for solutions to similar ethnic conflicts, states have, over time, found that only such approaches are serviceable. This leads us to suggest that international law results from international customs, state practices and international consensus, not *vice versa*. Thus, before adducing the international legal basis for the Aboriginal Canadian human right to affirmative action (as it relates to special measures, rights or reparations), it is practicable to denote important reasons why, apart from these being rights in international law and serviceable for conflict resolution, Canada and Canadians would want to see such rights recognized for Aboriginal Canadians.

First, we note the limitations placed on the traditional conflict resolution method of "treaty interpretation negotiations." This constraint results from the "change of circumstances" (including demographic changes and power relations) between the time when most of the treaties were made and the present day. This fact alone places Aboriginal Canadians in the rather inflexible position of having to give top priority to maintaining the original agreements or risk victimization by "change of circumstances." Given the situation today (emphasis on the exclusive rule of domestic law) compared with that at the time of the treaties which had international legal personality, there can be little hope of replacing any abandonment of the original agreements with an equal and equally legally enforceable new treaty. While the earlier Aboriginal treaties were essentially international in scope, the government today shows partiality towards ignoring the international aspects of their legal personality. As a matter of fact, although the original Aboriginal/government treaties may still possess some degree of international personality, they have generally been interpreted by government according to exclusively domestic rules of law, with little if any significant consideration given to the Vienna Convention. There is nonetheless some evidence to suggest that some Aboriginal Canadians (witness statements by Ovide Mercredi) think in terms of both domestic and international legal criteria or some combination of the two. The Canadian government, like

the U.S. government, however, always favors the constitutional domestic route. This imperative of submitting the Aboriginal treaties to exclusively constitutional interpretation without appropriate international legal considerations, limits the usefulness of such treaties for dealing with many of the present day socio-economic and political difficulties arising from the government's past gross violations of Aboriginal human rights.

Second, and perhaps most important, is the sanctity of democracy and the democratic process in Canadian society. Canadian institutions, culture and governmental instruments view the democratic concept as the ideal framework for conflict resolution especially for maximizing individual freedom, economic developmental potential and fundamental equality. This means that above all, Canadians wish Canada to remain, for all practical purposes, a democratic state. Moreover, it is far from certain that, given its socio-political institutional history and its present political organization, Canada could, without democracy, create mechanisms for resolving conflicts to the degree necessary to remain one state or two associated states. Therefore, regardless of whether an uninformed backlash against human rights for Aboriginal Canadians may exist, it appears that the possibility of seriously damaging the democratic conflict resolution model because of the Aboriginal Canadian question is unlikely. The democratic model and Canadian national security interests are probably mutually interdependent.

However, because Aboriginal Canadians are national minorities, nations/peoples within the state, the question of minority/Aboriginal rights emerges along with the question of individual rights; the question of the rights of peoples as well as that of individuals. Thus, to meet this challenge in multinational Canada, pluralistic (consociated) democracy must emerge along with majority democracy. Given the already significant backlash under the banner of majority democracy, it may be only through education and political mobilization for pluralistic democracy that the Canadian democratic ideal and confidence in these ideals will not fall victim to government/Aboriginal conflict resolution efforts.

### **The Empirical Basis of Minority Rights**

While, as we shall see, the legal basis for minority/Aboriginal rights has become well established in international law, it is important to remember that the content of minority rights was not created by international law, but by the customs and practices evolved to resolve and/or manage conflicts in multinational states. Thus they result from a long historical period of trial and error, and represent the summary and consensus of this long period in which states (essentially in western Europe) searched for the best methods to resolve minority conflict within the context of encouraging

maximum individual freedom, fundamental equality, economic development, and maintenance of democratic institutions and ideals. It is with this in mind that we have suggested that Canadian democratic ideals and institutions could be significantly damaged by the refusal or failure to provide for the human rights of Aboriginal Canadians; as before implied, the refusal to be informed from international human rights history, insofar as it is the international legal analysis of this history that has created the principle and content of the international legal human rights of Aboriginal Canadians, not the other way around.

Thus, for the well-being of the democratic ideal, the global history of minority conflict resolution, as summarized in international human rights law, tells us that both individual and minority/Aboriginal rights are not only legally called for but are also an essential requirement for the well-being of multinational states. We emphasize that international legal Aboriginal human rights are only the tip of the iceberg underpinned by philosophical, socio-political and economic knowledge and reasoning resulting from a long period of trial and error.

### **Achieving Pluralistic Democracy**

The recognition of both individual and minority/Aboriginal rights in multinational Canada implies the institution of some forms of both pluralistic (consociated) and majoritarian democracy. However, to do this requires the creation of both good will and an approach, that is, a negotiating framework. These are necessary to achieve a workable and satisfactory agreement and understanding between the parties concerned, in this case, the Canadian government and the First Nations. If good will and an approach (the negotiating framework) are the key elements for success, then the chief question is: how is good will encouraged, and what type of approach is required? This article suggests that there is an interdependent relation between achieving the good will required and the approach used. We suggest that the exclusively constitutional approach to interpreting Aboriginal rights and treaties, and developing a framework for equal status negotiations is inadequate and inappropriate, given the existence of international treaty and human rights law and its traditional concern with minority questions. As well, in using this approach exclusively, situations of unequal or insufficient bargaining power and of the domination of the bargaining process are created. These lead people to suspect the government of ill will. Such situations and circumstances lead to the enforcement of treaty and rights interpretations which are obviously not mutually or popularly acceptable. As implied earlier, the main reasons for this are the gross "changes in circumstances" that have subsequently occurred between the

First Nations and Canada since the time the treaties were made, and the governments' very understandable desires to view Aboriginal Canadian rights and treaties today as essentially domestic agreements between Aboriginal Canadians and governments, rather than as international treaties between sovereign nations or as inherent rights of equal-status peoples within the same state.

Given the historical, legal, social and political evolution of the situation of Aboriginal people within the state of Canada, there is strong international legal evidence and support for the essence of the Canadian government position, that of viewing Aboriginal Canadians as an integral part of the Canadian multinational state and under the laws and jurisdiction of the Canadian constitution. But this approach fails legally at the junctures where it would ignore the interrelation between Canadian constitutional law and international law, where it would attempt to render the interpretation of the inherent and internationally protected human rights and treaties of Aboriginal Canadians exclusively a question of constitutional interpretation, omitting appropriate input from the Vienna Convention and international human rights instruments. It fails socially, politically and economically for the same reason. This exclusively constitutional approach in essence ignores the dubious history of First Nations/government interrelations; therefore the government is seen as not entering the bargaining process with "clean hands" and thus cannot inspire the required confidence in government fair play or provide the conceptual framework appropriate for good will and good will negotiations. Under such circumstances, it is not inappropriate to believe that the government may be suspect (the judge of its own case), and unable to achieve the required mutual good will and positive understanding (social contract) with Aboriginal Canadians. In this article, we will recommend that international human rights law, which fully encompasses Canadian constitutional law, should serve as the required approach for achieving both the functional conceptual framework and the necessary good will.

### **Back To The Future**

The introduction of international human rights law as the criterion around which the human rights of Aboriginal Canadians are interpreted seems to offer the potential of signalling a new beginning: the willingness of the government to learn from the past and to establish the basis for equal-status negotiations. This may be true not only because human rights law calls for equal-status negotiations in relation to Aboriginal human rights, but most importantly because it can provide for neutral concepts, a neutral conceptual negotiating framework, and neutral third party binding or non-

binding arbitration and/or adjudication. In a sense, the use of the human rights criterion would mean “back to the future”: the re-internationalization of the Aboriginal Canadian question similar in legal principle to the way it was at the time the early treaties were made. This would eliminate the crippling results of unfair restraints placed on the ability of Aboriginal Canadians to negotiate on an equal-status basis with other Canadians a new Canadian social contract in which all founding nations share equal status. This could be the basis for true non-Eurocentric democracy in multinational Canada; it could stop the Canadian constitution from being used as a conveyor belt carrying unequal political, economic and social potential from one generation of Aboriginal Canadians to the next, while at the same time transferring unfair privileges and superior potential to non-Aboriginal founding nations.

## **Summary of Reasoning Supporting International-Legal Obligations**

Many international legal scholars have called attention to the complex problematic of national minorities in multi-national states wishing to achieve recognition as equal partners in the multi-national state and some degree of autonomy inside of the state with which they are identified. National minorities are minorities such as French Canadians, Métis, the First Nations of Canada. Minority rights in human rights law are concerned primarily with national minorities. Immigrants and other types of minorities' rights are protected by the same instruments that protect individual rights. These include special conventions, such as the Convention on the Rights of Women; The Refugee Convention; The Convention on the Elimination of All Forms of Discrimination; the International Covenant on Civil and Political Rights; The Rules Governing the Rights of Immigrants and Aliens, etc.

Kumar Rupesinghe (1988) has referred to the multi-national state phenomenon in the context of the need for consociated democracy. For him, this is a system wherein all national minorities in a state are guaranteed a reasonable degree of influence in the political system to ensure the fairest possible distribution of resources. Pluralistic democracy represents an alternative or addition to what is called a majority democracy wherein the individual citizen is always, in all legal domains, the most important political unit, and political legitimacy in all domains is won from the support of the majority of individual citizens. A pluralistic or consociated democratic system means that political decisions receive an appropriate input through collaboration among representatives of different national minorities as well as the votes of the majority of individuals in the state. It requires that political

leaders of the majority and minorities collaborate and recognize the right of each minority to work for its own interests as well as those of the state and society as a whole (Enloe, 1977; Butenschen, n.d.).

The need for pluralistic democracy, according to Rupesinghe, results from the fact that in majority democracy, the governments of multi-national states often evolve in such a manner as to represent the will and interest of the majority ethny or nation, thus leading to the domination, and often the exploitation, of the national minorities. This is particularly true when the culture and politico-economic institutions evolved from and thus act to preserve an historical relationship wherein racial domination of the minority was legally, socially, economically and culturally in widespread practice.

The socio-historical causes of developmental crisis typically lie in the historical domination of a national minority for the purpose of exploitation (including the expropriation of land in the case of the Canadian Aboriginal minority), and the resulting inability or unwillingness to institutionally recognize its developmental needs, thus effectively denying it its rights to restitution or compensation for past governmental wrongs.

Today such minorities often find themselves deeply involved in an identity and developmental crisis wherein their (unempowered) leadership, whether selected through promotion by the majority ethny or government (tokenism) or selected by the minority itself, is unable to function as representatives of the people they are said to represent. Rather they are so positioned as to represent only majority policy and interest, and to represent minority interest only insofar as it can be made to coincide with majority interest. Thus, neither Aboriginal Canadian leadership nor the federal government are able to provide the programs required to meet Aboriginal needs and interests.

### **The Human Rights Law**

The effect of human rights law, when dealing with these types of minority problems, is to create instrumentality and institutions that can lead to a functional distinction between the interests of minorities and the majority, so that both sets of needs can be appropriately addressed and so that both minority and majority socio-political and economic equal status development can occur. This lessens the prospects for unmanageable conflict and increases the chances for multi-national politico-economic equal opportunity development within the structure of a single state. Here international human rights law, by promoting institutions that preclude minorities' exploitation and domination, also encourages the operation of natural law towards multi-cultural unity, peace and equality. It is intended that through the implementation of human rights, natural law is given free



rein to create conditions of real and natural forms of consociated socio-political and economic unity within multi-national states. The historical record of customary practices and consensus from which human rights emerges suggests that unity by domination or forced assimilation usually leads to (unmanageable) ethnic conflict, developmental retardation, and functional disunity, where in the guise of national solidarity and security, there exists monopoly of power by the dominant ethny and often abuse of that power. The majority ethny often uses the multi-national state apparatus to secure its exclusive interests and to hide or deny the identity and ignore the rights of the national minorities.

If majority democracy under conditions of systematic discrimination means that a minority with very distinct needs and rights operates within the context of majority rule (which denies the instrumentality or institutions required to functionally distinguish or attend to its unique needs), then we should suspect that majority democracy in multi-national states may stifle the socio-political and economic development of national minorities. Indeed, the unequal development of Aboriginal Canadians in most areas *vis-à-vis* the majority (including French Canadians whose minority rights were always recognized to a significant degree) evidences this probability.

However, human rights law can only provide a feasible framework for minority problem solving; the framework alone does not solve these problems. The bottom line is good will, mutual acceptance of differences, equal status of ethnies, and willingness to share resources. The absence of any of these attributes can only mean continued oppression and retaliation, unmanageable conflict, or independence (the eventual break-up of the multi-national states). Despite the lessons of history, majority ethnies often hope for voluntary acceptance by the national minority of its domination, with the good will delusion that such willing acceptance will lead to the solution of all minority problems by the minority becoming culturally the same as—but economically and politically inferior to—the majority. However, history provides us with quite a different probability; many examples of such delusions have led instead to our most bitter, intransigent and violent conflicts: the Irish and English, the Muslims in India, the Croats and Serbs, the Greeks and Turks, and so forth.

### **Majority Democracy and Arrested Development**

It is suggested that majority democracy in multi-national states is ineffective in providing the institutions required by national minorities to meet their special collective needs. Indeed, majority democracy is actually a cause of the disproportionate involvement of members of national minorities with criminal justice systems, social and welfare systems, and health

and family welfare services. The supposition is simply that the operation and premises of majority democracy do not permit national minorities to develop institutions unique to their special needs, circumstances, mentality, lifestyles, morality, values, etc. Instead, such systems institutionalize a rejection and devaluation of the unique values, morality, circumstances, history, etc. of the minorities. This systemic discrimination attempts to oblige them to adopt the same values, mores, lifestyles, morality, etc. of the majority. This devalues and disempowers not only the individual members of the minority themselves *vis-à-vis* the general society (Havemann, 1988), but also the culture of the minority to its members, thus acting to disempower unique Indigenous social controls and developmental incentives (Harding, MacDonald and Kly, 1992). The condition *vis-à-vis* the majority population of the Chicano in the United States, or of the Métis and First Nations in Saskatchewan and Manitoba, testifies to the vicious cycle of criminality, single parent families, poverty, welfare dependency, drug consumption, and poor health conditions imposed on national minorities by the exercise of majority democracy and its logical companion: forced assimilation (Kly, 1985).

In the case of the Dalit (Untouchable) minority in India, prolonged and unmitigated exposure to the operation of majority democracy and systemic discrimination—the caste system—has produced a problematic of negative collective identification, not only blocking this minority from effectively creating institutions to meet its unique collective needs, but also encouraging a negative collective self-identification (Kly, 1990). Until recently, even the most militant of Dalit movements or organizations did not identify with a struggle for Dalit equal-status or self-determination.

Consequently, such groups often find themselves straddled with an even more ominous frustration and overt racism. Just as majorities (not understanding the contradictions and limitations of majority democracy) justify their domination of minorities on the basis of majority supremacy for both moral and political reasons, so too some minority groups attempt to explain their dominated situation by reference to a moral or cultural inferiority of the majority. The lack of a dialogue, or the realization of the need for a dialogue on the basic premises of majority democracy, re-enforces concepts that support such racist or fascist explanations. This encourages continuous conflict and the effective isolation or withdrawal from exposure to, and the use of, those international human rights informational or educational resources which are so badly required.

The modern majority's ability to capture, exploit or dominate a minority historically results from provisionally superior material circumstances. Socio-psychological propaganda about the inferiority of the defeated or captured nation and institutionalization of a corresponding belief-system about

that minority necessarily follows the *fait accompli* and is in fact a requirement for maintaining the *status quo*, keeping the victory in place, and transmitting the fruits of victory to future generations. Unfortunately, this also assures that the fruits of defeat, enslavement or capture will be transmitted to future generations of the minority. The minority nation remembers its humiliation and awaits its day in court: an obvious example would be the recent Los Angeles riots. The mindless, cruel and deadly march continues, unproclaimed, unspoken, uncontained, with the international institutionalization of human rights as the sign post where the grisly parade should end.

### **The Right To Be Different and the Right To Development**

This paper suggests that the right of national or Aboriginal minorities to be different and equal, and to have sufficient self-determination for the purpose of development, may require significant socio-political and economic restructuring in Canada. This would permit minorities to become sufficiently developed to vie in fair competition with the majority ethny for control over those state resources necessary for their material, intellectual and spiritual development. The Aboriginal right to equal development suggests that the right to be different should be proclaimed in a positive manner, rather than in a paternalist-dependency relationship; at present the difference between Aboriginal Canadians and other Canadians is recognized in that special government policies are created in relation to them alone. Are these policies sponsored by them, however; do they reflect Aboriginal notions as to what might successfully respond to Aboriginal needs?

Due to the domination of government and state institutions by the majority, and the contradictions that exist between historically evolved situations of systemic discrimination on the one hand and Aboriginal human rights on the other, Aboriginal peoples entrapped in multi-national states seem to have little choice but to simultaneously address their appeal for recognition not only to their governments, but also to the international community (the United Nations). The simple act of a minority, subjected to tactics of forced assimilation, petitioning for justice to the international community, represents its first cognitive and political conceptualization of itself as a people with the right to be different and equal, the right to equal development in relation to all other nations or peoples, and the right to determine that development. It is a declaration of collective rights, of not being a class, caste or sub-section of the majority ethny. It is a first declaration to the world, to the minority members themselves and to the government that they have come to fully recognize their own collective, with

inherent human rights, and are no longer politically, socially or economically a dependency of the majority ethny, that they now seek equal status, a new social contract (Kly, 1989). Apparently the leaders of the Aboriginal minorities in Canada have reached this stage. The response of the government is seen in Meech Lake, in the 1991 Aboriginal Justice Inquiry in Manitoba, in the various Inuit agreements, the Lubicon negotiations, the Charlottetown agreement, and so forth.

In the distant past, there are numerous records of appeals by minority nationalities to natural and divine law used with relative success. However, these appeals usually served as a means of soliciting group unity and inter-group commitment in an international system not dominated by the secularist and materialist nation-state and international law structures. Today, international politico-legal appeals seem necessary even if the United Nations or other international organization is only to act as an honest broker, providing neutral conflict resolution concepts, a frame of reference, or good offices, to the disputants.<sup>1</sup>

In most cases, going to the United Nations becomes a more effective way of reaching the decision makers—the government—of the state in which the minority lives, of giving a political voice to different social forces, of mobilizing minority, majority and other socio-political forces for change, for such mobilization responds to the need of securing political will and resources. This calls minority attention to its present undemocratic, unempowered or imposed tokenist leadership which must answer only to the institutions and government of the majority ethny, and not to the people whom they are presumed to represent; of providing the minority and the majority with an international—broader and more suitable—framework for decision-making by exposing the society to cross-cultural and international concepts for multi-national or multicultural conflict resolution.

It is not without reason that Indigenous Canadians, who have recently been promised Canadian constitutional recognition of their right to self-government, or Nelson Mandela, or the Europeans of Zimbabwe, etc. found and find it desirable, if not necessary, to call upon the United Nations (and/or its human rights instruments) for equal-status and minority protection. Indeed, the world system and its international human rights instruments, perfect or imperfect, effective or not so effective, is just that: the only non-domestically controlled system and law of our planet. Aboriginal Canadians and Americans are often spoken of in United Nations circles as being among the few minorities in recent times to launch a persistent effort and to commit the resources necessary to lobby at the United Nations for their Aboriginal minority rights.<sup>2</sup> It is likely that this effort will continue for Aboriginal Canadians, as the Charlottetown constitutional agreement was found inadequate by many Aboriginal Canadians as well as by the Cana-

dian people as a whole.

## A New Beginning

These are some of the political and socio-economic reasons why Canadians may find the international human rights law criteria appropriate for dealing with the Aboriginal question within the context of Canadians' democratic ideals. It is now possible to describe these Aboriginal human rights as they relate to the important present question of the rights to special measures/special rights, and reparations (compensation, restoration or restitution), *all popularly seen as affirmative action*, for gross violations of human rights in the past.

Affirmative action is the most well-known human right politico-legal instrument historically used by states to remedy situations wherein national minorities suffered from past gross human rights violations. It is an internationally recognized legal remedy for damages resulting from violation (through omission or commission) of state responsibility.<sup>3</sup> The concept of affirmative action (a phrase originally popularized by United States policy makers to meet international as well as domestic requirements for special measures to achieve minority equality) has been troubled by misunderstanding, due to its method of introduction and implementation in Canada from the United States. It has too often been projected as a form of preferential treatment (i.e., reverse discrimination) based on race, solely because the race or group receiving preference is behind, less educated, less able, less employable, etc. The very choice of a non-traditional term instead of traditional minority rights terminology (special rights or special measures), suggests the possibility of a desire on the part of U.S. policy makers to take a non-traditional or special route for dealing with its minority problems. This was perhaps a route supporting the concept of a particular remedy from policies of non-discrimination or equality before the law and from the historical policies of voluntary and forced assimilation. (The policies were voluntary in relation to most European immigrants, but forced to the extent that they existed for Indigenous people.) Not enough emphasis was placed on affirmative action as a means of providing a remedy for damage done to its national minorities by gross human rights violations in the past. There was little recognition of any significant state responsibility for these damages. In fact, there was no formal admission by the United States that its past treatment of Indigenous peoples or enslaved Africans was wrong. Traditionally, efforts by states to compensate for gross violations in the past resulted in what was termed special rights and measures, the present international human rights concepts for encouraging remedies

to minority struggles for equal status with the majority. When such conflict resulted from past gross violations of human rights, states acquired not only a moral responsibility, but also a legal obligation to provide a remedy for harm done.

From a political philosophical perspective, affirmative action is also a way of instituting concepts of consociated democracy *vis-à-vis* a specific minority, such as the Aboriginal minority in Canada. Affirmative action consists of the recognition of special rights and/or the provision of special measures such as the right to self-government, land rights, monetary compensation, job quotas, control over community social, legal or educational services, etc., and should be viewed as an element of state responsibility to compensate or provide restitution for the gross violation of human rights that precipitated arrested socio-economic development. By taking this approach to affirmative action, we not only provide it with the broadest possible framework for majority-minority conflict resolution, but we also encourage an interpretation which conforms to traditional and time-tested legally recommended devices for minority-majority conflict resolution.

The concept of non-discrimination has traditionally been understood within the context of the right of individuals not to be discriminated against before the law, or with regard to education or employment opportunity, etc. because of their race, religion, color or sex. However, the right to non-discrimination in the human rights context includes the dimension of individual and collective affirmative action (Schacter, 1982:190). As a matter of fact, affirmative action derives from the effort to avoid discrimination, in cases where to treat all the same would put some at a disadvantage (or discriminate against some) due to natural, institutional or historical circumstances.<sup>4</sup> If a multi-national state is practicing forced assimilation and/or does not provide for special rights or special measures where required for equal status or to compensate for gross human rights violations,<sup>5</sup> the state in which that minority lives can be said to have neglected its obligation to protect the minority's human rights or to provide a remedy. The failure to provide for special rights or measures where required for equal status usually encourages victimization of the national minority through systemic discrimination, which also violates the minority's right to non-discrimination. Insofar as systemic discrimination represents an act of discrimination against Aboriginal Canadians as well as a failure to protect their human rights, it places the offending state in a position of having violated fundamental principles of state responsibility.<sup>6</sup> To the extent that the disproportionate nature of Aboriginal socio-economic problems in Canada may be convincingly attributable to systemic discrimination (Harding, MacDonald and Kly, 1992), the Canadian government bears responsibility to continue its policies of affirmative action, including compensation, where

restitution or restoration is not feasible.

### State Responsibility to Remedy Past Violations

The right to a remedy for victims of breaches of international obligation is well established. Concerning this fundamental international legal principle, the Permanent Court of International Justice ruled in the Chorzow Factory (Indemnity) Case:

It is a principle of international law, and even a general conception of law, that any breach of an engagement invokes an obligation to make reparation {...} reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.<sup>7</sup>

A number of both universal and regional human rights instruments contain express provisions relating to the right of every individual to an “effective remedy” by competent national tribunals for acts violating human rights (see article 8 of the Universal Declaration of Human Rights). The notion of an “effective remedy” is also included in article 2(3)(a) of the International Covenant of Civil and Political Rights and in article 6 of the Declaration on the Elimination of All Forms of Racial Discrimination. Some human rights instruments refer to a more particular “right to be compensated in accordance with the law”<sup>8</sup> or the “right to an adequate compensation.”<sup>9</sup> Even more specific are the provisions of article 9(5) of the International Covenant on Civil and Political Rights and article 5(5) of the European Convention for the Protection of Human Rights and Fundamental Freedoms which refer to the “enforceable right to compensation.” Similarly, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains a provision providing for the torture victim a redress and “an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”<sup>10</sup>

In some instruments, a specific provision is contained indicating that compensation is due *in accordance with law* or with *national law*.<sup>11</sup> Equally, provisions relating to “reparation” or “satisfaction” of damages are contained in the International Convention on the Elimination of All Forms of Racial Discrimination, article 6, which provides for the right to seek “just and adequate reparation or satisfaction for any damage suffered.” The ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries also refers to “fair compensation for damages,”<sup>12</sup> to “compensation in money”<sup>13</sup> and “under appropriate guarantees,” and to full compensation “for any loss or injury.”<sup>14</sup>

The American Convention on Human Rights, to which both Canada and the United States are parties, speaks of “compensatory damages”

(article 68) and provides that the consequences of the measure or situation that constituted the breach of the right or freedom “be remedied” and that “fair compensation be paid to the injured party.”<sup>15</sup>

The Convention on the Rights of the Child contains a provision to the effect that Parties shall take all appropriate measures to promote “physical and psychological recovery and social reintegration of a child victim...”<sup>16</sup>

In short, numerous human rights instruments provide strong evidence that the right to remedy is an established obligation where the actions or failures to act of states result in damages. Concerning the issue as to whether the internationally accepted obligation to remedy is applicable to damages suffered by minorities, Sub-Commission resolution 1989/14 provides some useful guidance as to victims' rights to restitution and compensation. The resolution mentions in its first preambular paragraph “individuals, groups and communities.” This supports the assumption that the right to remedy concerns minorities as well as individuals. That minorities are included is also confirmed in Sub-Commission resolution 1988/11 of 1 September 1988 which, in its first operative paragraph, refers to “victims, either individually or collectively.” Another indication regarding the categories of victims is the repeated reference in Sub-Commission resolution 1989/14 to “gross violations of human rights and fundamental freedoms.” Under most international legal instruments dealing with individual rights, the violation of any one provision may entail a right to an appropriate remedy, while instruments concerned with the rights of minorities to compensation focus on gross violations of human rights and fundamental freedoms. For example, a state violates international law if, as a matter of State policy, it practices, encourages or condones:

- (a) genocide (collective rights)
- (b) slavery or slave trade (collective or individual)
- (c) the murder or causing the disappearance of individuals (individual or collective)
- (d) torture or other cruel, inhuman or degrading treatment or punishment (individual or collective)
- (e) prolonged arbitrary detention (individual or collective)
- (f) systematic racial discrimination (collective or individual); or
- (g) a consistent pattern of gross violations of internationally recognized human rights (collective).<sup>17</sup>

It is generally recognized that victims who are entitled to compensation—and this may also include their descendants or survivors—have suffered substantial damages and harm. This interpretation is reflected in the first preambular paragraph of Sub-Commission resolution 1989/14



which refers to “substantial damages and acute sufferings.” In this regard the notion of victims, as spelled out in paragraph 18 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power should be taken into account. The paragraph reads in part:

Victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that {...} constitute violations {...} of internationally recognized norms relating to human rights.

### **The Meaning of Remedy**

Having pointed out how international law may be interpreted to call for the right to remedy for minorities suffering from systemic discrimination, we shall now turn to the question of what is meant by remedy. The Permanent Court of International Justice establishes the basic principles governing remedy for breaches of international obligation:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.<sup>18</sup>

Remedy for breach of international obligation may consist of restitution (restoration), compensation and/or satisfaction. The Canadian government, in its effort to resolve government/Aboriginal conflicts, employs a variety of these concepts, for example, providing a cash settlement and establishing a new self-governing territory for the Inuit,<sup>19</sup> which amounts to compensation, and to some extent, restitution.

#### **A. Restitution**

Restitution in kind is designed to re-establish the situation which would have existed if the wrongful act or omission had not taken place, by performance of the obligation which the State failed to discharge: revocation of the unlawful act, return of property wrongfully removed, or abstention

from further wrongful conduct. The essential requirement is to restore the situation to what it would be if the wrongful act had not occurred, or to compensate for loss or damages. The Permanent Court of International Justice implied in the *Chorzow Factory (Indemnity) Case* decision, that restitution is the normal kind of reparation and indemnity (compensation) should take place only if restitution in kind is not possible.

As suggested before, limiting the definition of affirmative action to assimilation or to preferential treatment in hiring and education may not restore or compensate, and thus may not meet the requirements for restitution. Moreover, such attempts in relation to Aboriginal Canadians (when forced assimilation was the clear government policy) seem to be premised on the false institutionalized belief that whether victims of systemic discrimination or not, Aboriginals, due to natural inferiority, would today be nothing more than a primitive or lower class (or caste) segment of the majority ethny, and that assimilating most of the minority population into this position would be mutually satisfactory and acceptable. Such attempts disregard the inherent right of minorities to the preservation and protection of their collective identity, even though it may recognize their (individual) right to non-discrimination (equal treatment before the law).

Of course, this approach to integrating the major components of a multinational state usually fails; it is difficult, to say the least, for a minority to participate in the process of natural integration when public and institutional policies keep it preoccupied with defending the value and existence of its identity. Likewise, it is equally difficult for the majority ethny to accept the members of minority groups whose values, lifestyles, physiques, etc. they have been persuaded by their institutions and by government policy to devalue and dislike.

## B. Compensation

Because restitution is so often impossible or impractical, compensation is in practice the most usual form of reparation. The indemnity should compensate for all damage which results from the unlawful act, including benefits which would have been possible in the ordinary course of events, but not gains which are highly problematical, too remote or speculative. The basic test is the certainty of the damage. The land claims settlements of Aboriginal Canadians are particularly amenable to the basic test, and thus serve as model compensation cases.

## C. Satisfaction

The international law of State responsibility, we have said, envisages reparation for the wrongful act, which usually takes the form of restitution and/or compensation. There are also other means of granting satisfaction

to the victims, as before mentioned: mutually acceptable agreements, special rights or special measures, etc. But it should not be overlooked that the disclosure of the truth after an official and thorough investigation of the facts and circumstances in connection with gross violations of human rights and fundamental freedoms may constitute still another important means of providing satisfaction to the victims. Here we may note the reluctant institutional admission that it was wrong to teach that Columbus “discovered” America.

The fact of granting just satisfaction to victims individually and collectively (particularly by an international tribunal) may have broad implications pertaining to provoking changes in economic, political, social and criminal justice policies. Thus the 1991 findings of the Aboriginal Justice Inquiry in Manitoba led to the recommendation of policy changes suggesting the need for greater decentralization of the political, social and criminal justice system so as to permit Aboriginal Canadians an appropriate degree of self-government in these areas.<sup>20</sup> However, after such investigation and finding, it is appropriate for the courts to initiate an injunctive relief with a view to precluding continuation of the human rights violation.

The question of statutory limitations necessarily arises in the question of remedy for past gross human rights violations suffered by Aboriginal Canadians as a result of land appropriation and systemic discrimination, insofar as it is a natural tendency for contemporary governments to absolve themselves of responsibility for actions taken by preceding governments, and to argue non-responsibility due to the passage of time, the decease of the parties concerned, etc. Statutory limitations usually apply in the area of criminal justice. The applicability of statutory limitations is generally based on the assumption that the passage of time has the effect of gradually erasing the infraction of the legal order and that it may diminish the reliability of evidence. However, important sectors of legal opinion oppose the application of a period of limitation with regard to the most serious crimes. This principle is reflected in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Our legal research suggests that a similar attitude exists in relation to a period of limitation applying to the exercise of the right to restitution, compensation and/or satisfaction by or on behalf of victims of gross violations of human rights and fundamental freedoms. According to the special report of the Sub-Commission,<sup>21</sup> “weighty arguments can be adduced against a short, finite statutory period for the filing of claims.” The Special Rapporteur of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities himself favored an open-ended or a very long period. First of all, the Report suggests past gross violations of human rights and fundamental freedoms, such as enslavement, land appropriation,

systemic discrimination, ethnocide or genocide, would often concern the effects of acts against the rights of national minorities, which have much in common with the most serious crimes of the nature of crimes against humanity, e.g., the Jewish minority in Germany. A second no less important consideration is that for many Aboriginal minorities whose ancestors were victims of gross violations, the passage of time has often no attenuating effect, but on the contrary can increase post-traumatic stress, deteriorated social, material, etc. conditions, requiring all necessary special rights as well as compensation and rehabilitation measures. We may conclude that as long as the effects of past gross violations and resulting damage can be demonstrated as the cause of present developmental problems, it would be difficult to produce an acceptable argument for statutory limitations as it would amount to the denial of the fundamental human right to a remedy for past injustices.

## Conclusion

This article has first highlighted the political, social and legal reasons why affirmative action is needed in relation to minority-majority ethnic conflicts. I have attempted to suggest that when affirmative action is viewed within the framework of international human rights law, it amounts simply to an action to achieve an “effective remedy” and can be associated with any of the international legal obligations of states to respect, protect and promote the human rights of its citizens, as well as the obligations of states to compensate or provide restitution in the case of damages or harm caused by past gross violations of human rights.

In the case of Aboriginal nations suffering because of past gross violations of human rights, affirmative action may necessitate the implementation of special rights or measures (including compensation, restitution and/or satisfaction). Affirmative action in international human rights should not be viewed as reverse discrimination, that is taking jobs or university education from Tom to give to Harry. Rather, when correctly interpreted, it can be seen to be an obligatory fundamental principle of international law, one which attempts to assure equal status relations between the Aboriginal minority and the majority. It also encourages the provision of adequate economic, political and social environments, including the socio-political institutions necessary to permit Aboriginal Canadians to experience equal-status socio-economic development within the context of state economic and political unity, and peace.

Not being a party to any of the major human rights treaties (except the Genocide Convention and more recently the International Covenant on

Civil and Political Rights), the United States thus far has not seen fit to give a fuller and more serious content to its affirmative action efforts. As a matter of fact, it appears that the notion of affirmative action as introduced into the heavily social Darwinist-oriented American society (as a form of reverse job and education discrimination) was predictably rejected. On the other hand, in relation to its negotiations with both French and Aboriginal Canadians for self-determination, land rights and compensation for land appropriated, as well as for special economic, political, educational, social welfare and judicial rights and arrangements,<sup>22</sup> Canada seems willing to benefit from the use of traditional human rights concepts and devices for conflict resolution, and appears ready to apply the full range of human rights concepts and devices to its Aboriginal population in general, as evidenced by the constitutional amendments proposed in the Charlottetown Accord. These included various forms of special rights and measures, as well as compensation and restitution. The Accord represented a hopeful start. However, despite Canadian employment of the terminology of self-government in the proposed constitutional agreement, and its provision for Inuit self-government and distinct society status for Quebec, the Canadian failure to view self-government within the larger framework of the right to self-determination and international law is no doubt partly responsible for its lukewarm reception by Aboriginal Canadians, and perhaps for its rejection by French Canadians. The Canadian interpretation of affirmative action remains confused, probably overly influenced by the American use of the term, and thus subject to popular rejection. Tendencies remain on the part of opponents of Aboriginal self-determination and affirmative action to refer to American-based arguments concerning reverse discrimination, which seems to be an invalid critique of reparations, special measures and special rights.<sup>23</sup>

Promoting affirmative action as a tool for minority-majority conflict resolution while ignoring its relation to conflict resolution devices experienced in international law (and indeed, in the case of the United States, not admitting past wrongs, and using affirmative action as a means of enforcing cultural assimilation rather than as a means of achieving recognition of the unique cultural heritage of its national minorities) is perhaps to hold the right string but the wrong yo-yo, thus promoting unnecessary confusion and popular misunderstanding. Indeed, we may discover new and better methods for dealing with minority problems other than those evolved over the past 500 years into international human rights law. However, these are likely to be better ways of recognizing minority rights, not new techniques for ignoring these rights. There is no doubt that affirmative action should be interpreted so as to reflect the obligation by states to provide some form of special rights, measures, restitution or compensation as a means to

repair a situation of past gross human rights violations and suffering maintained through systemic discrimination. The right to remedy is a well-established principle in international law.

In conclusion, one can note that the overall purpose of providing for Aboriginal rights in international law is to provide for remedy and alternatives to unmanageable conflict, ethno-nationalism and the demand for political independence or inappropriate struggles for national liberation. Let us not forget or misread the failure of Meech Lake; for whatever reason it failed to recreate or create a new social contract based on equal status between founding nations (good or bad). What followed has not strengthened national unity or led to improvements in the economic well being of Canadians, but instead to the smashing electoral victory of the Bloc Quebecois and the Reform Party in the Canadian parliament; economic retrenchment (cuts in social spending); and the expectation of a Parti Quebecois victory in the next Quebec election. Of course, this does not mean that the latter events were caused by the former, but let us not underestimate the relationship among Aboriginal/minority rights, national unity, peace and economic well-being.

### Notes

1. See, for example, the Muslim flight to Ethiopia, and the present efforts of the world's Indigenous peoples in the United Nations.
2. See the Special Report, Asbjorn Eide, U.N. Doc. E/CN.4/Sub.2/ 1991/ 43.
3. See particularly articles 6 and 13 in the draft Declaration on the Rights and Duties of States.
4. See U.N. Doc. E/CN.4/Sub.2/384/Addenda, by special rapporteur Francesco Capotorti, among others.
5. See Special Report, Asbjorn Eide, U.N. Doc. E/CN.4/Sub.2/1991/43.
6. See the Declaration on the Rights and Duties of States.
7. P.C.I.J. Collection of Judgements, Series A, No. 17, p. 29.
8. Article 10 of the American Convention on Human Rights.
9. Article 21 (2) of the African Charter on Human and Peoples' Rights.
10. Article 14 (1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
11. Article 14 (6) of the International Covenant on Civil and Political Rights, and Article 11 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
12. Article 15 (2) of the ILO Convention.

13. Article 16 (4) of the ILO Convention.
14. Article 16 (5) of the ILO Convention.
15. Article 63 (1) of the American Convention on Human Rights.
16. Article 39 of the Convention on the Rights of the Child.
17. Section 702 of the Third Restatement of the Foreign Relations Law of the United States (1987).
18. P.C.I.J., *op. cit.*, 47.
19. Associate Chief Justice A.C. Hamilton and Associate Chief Judge C.K. Sinclair: *Report of the Aboriginal Justice Inquiry of Manitoba*. 2 Volumes. Winnipeg: Queen's Printer.
20. Report of the Aboriginal Justice Inquiry of Manitoba, *op. cit.*
21. E/CN.4/Sub.2/1990/10.
22. See the proposed constitutional amendments of the Charlottetown Accord.
23. International Convention on the Elimination of All Forms of Racial Discrimination, Article 1, paragraph 4, reads:
 

“Special measures taken for the sole purpose of securing adequate advancement or certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination...”

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