



## **INTERNATIONAL LAW and NOMADIC PEOPLE**

By Marco Moretti

**Cette étude fort documentée de Marco Moretti sur le statut juridique des populations nomades rappelle pour l'histoire, la discrimination dont ces peuples font l'objet à travers le monde (Ndlr.)**

The international jurist usually pays little attention to nomadic societies. Yet, forty years ago, a French jurist, Rousseau, in his manual of International Law affirmed that «nomadism in itself, is utterly deprived of juridical relevance from the point of view of International Law. The pretended nomadic States are only itinerant communities with elastic frontiers»

This lack of consideration for nomadic peoples is due to the fact that nomadic societies lie at the opposite of the ideal pattern of organisation object of studies of the international jurist: the State. However, centralised and bureaucratic States of western-style are not necessarily better organised and efficient than the fluid system of organisation of nomadic societies.

The ethnologists have already demonstrated that the misjudgements and the prejudices concerning nomadic societies are without foundation. Their studies show that nomadic peoples have a strong feeling of belonging to their group which is combined with a developed notion of the possession and/or dominion over a territory. This notion is not surprising if one considers that the survival of these peoples depends on their capacity to have access to the large territories which they use for their traditional activities. Indeed, the territories occupied by nomadic communities are the object of different dispositions aimed at ensuring the subsistence of these groups and their participation in the use of lands and the other natural resources.

Moreover, nomadic peoples have proper institutions and laws that, though really different from each other are characterised by a common feature: the efficiency. In several cases, nomadic peoples were able to create very sophisticated institutions like those existing among the Vogouls, Samoyades, Tongouses and Yakoutes. In conclusion, nomadic societies deserve the same respect and consideration which is due to States.

The negative view of the international jurists with respect to nomadic societies started to change at the beginning of the 70s and a new approach was adopted in International Law which is more attentive to the interests and the rights of these populations. An example of this new approach results from the advisory opinion on the juridical status of the Western Sahara given by the International Court of Justice in 1975.

In this important judgement the Court declared that nomadic societies were juridical entities entitled to collective rights and added that the nomadic style of life, specific to these communities, did not preclude them from exercising the right of peoples to self determination.

In this case the Court adopted an «anthropologist approach» which had to be influenced by the new theories of juridical pluralism that were in the process of asserting themselves in the doctrine. According to those theories, any society develops its proper rules and institutions and constructs a juridical system.

## **Therefore, nomadic societies must be considered as juridical systems.**

In its judgement, the international Court of Justice drew attention to the fact that, during the 16th, the 17th and 18th centuries the international legal personality and the sovereignty of nomadic societies was recognised by International Law. At this time, International Law was in the process of becoming a coherent legal discipline: its principles were progressively specified and derived, as a last result, from naturalist's concepts.

According to those principles, any society endowed with a political organisation was considered to be subject to International Law. In that period, there were a number of politically organised entities like duchy, kingdoms, republics, cities, archbishops whose international legal personalities were recognised by the International Law. In this respect, nomadic tribes, provided that they formed politically organised societies (which means provided that they were permanently organised under the authority of a chief or an assembly and be ruled by common rules of conduct) constituted political entities whose juridical personality and sovereignty were recognised by International Law.

Around the middle of the 19th century, however, naturalist's concepts were abandoned and a new positive concept of international law asserted itself. This new concept was founded on western juridical concepts and assumed that International Law was the law exclusively applied among States in their mutual relationships; thus, the communities that were not yet constituted according to States' structure, like indigenous communities and nomadic societies, were no longer recognised as subjects of International Law.

Mostly, nomadic societies were considered to represent a primitive stage of the evolution of human political organisation. The territories occupied by these communities were considered as vacant lands or *terrae nullius* and the claims of the occupants to sovereignty and property were completely disregarded by International law.

For more than a century, International Law neglected the rights of nomadic societies; this tendency however is going to be reversed in the contemporary International Law. Indeed, modern International Law, though still focusing on the rights and prerogatives of sovereign States, is more and more concerned by the need of ensuring the protection of human rights: in this context, the rights of different groups, like for example the peoples struggling for self-determination, or more recently minorities and indigenous or tribal peoples are recognised and protected by International Law. Therefore, it is within the framework of the international system of protection of human rights that the question of the legal protection of nomadic societies is reconsidered and revised by the International Law.

This paper attempts to describe the evolution of International Law which is summarised below. The study is shared in three parts which corresponds to different approaches of International Law to the question of the treatment of nomadic societies : in the first period stretching from the 16th century to the middle of 19th century, the international legal personality of nomadic societies was affirmed by International Law ; the second period which terminates at the end of the Second World war corresponds on the contrary to the period of the denial of the rights and the international personality of these societies; the third period shows the recent trend of contemporary International Law which is characterised by a renewed interest for the rights of nomadic peoples.

### **The period of recognition from 16th century to the middle of the 19th century**

At the time, when the first adventurers started to colonise territories in America, the problem of the legal status of indigenous peoples living in the continent as well as the principles which had to be applied in the relationships with them began to be questioned by international jurists.

After the massacre by the Spaniards and the Portuguese of the civilised empire of the

Atzeques in Mexico and of the Incas in Peru, several authors started to react to the brutal treatment of these populations, claiming the respect of the sovereignty and independence of the indigenous peoples living on the continent.

Among those authors, Francisco de Vitoria, proclaimed in the 16th century that indigenous peoples possessed natural rights, including the right to have independent political institutions and to exercise exclusive rights of property and of sovereignty over their territories. In North America the European colonisers came in contact with several tribes with a nomadic style of life. The territories occupied by these tribes were neither clearly defined nor existed on the continent a form of individual property. On the contrary, those territories were used by different tribes in order to practice traditional activities, such as hunting, fishing or collecting.

The majority of authors affirmed that these territories cannot be considered as unoccupied or vacant lands; on the contrary, they were placed under the sovereignty of the indigenous tribes and belonged to them. At the beginning of 16th century, Hugo Grotius affirmed that once people have occupied a territory, they must first acquire exclusive rights of sovereignty and of property on it. Therefore, the erratic tribes which have occupied and used the territories of North America before the advent of the Europeans colonisers, possessed exclusive rights of property and sovereignty over them by virtue of the first occupancy. In the case of these tribes, the property of the territory was not individual but a collective one and belonged to the tribe.

According to these authors, the European nations which wanted to come and settle territories in North America were forced to respect the rights of its inhabitants and apply in respect to them the principles of the Law of Nations (International Law) that they used to apply with the others nations.

The rules of International Law during this period provided that when a State or a nation wanted to install itself in a territory already occupied by another politically organised nation, it has to employ two methods: either conquering the territory in question by force after a war; or obtaining it by an agreement of cession, negotiated with the nation or the people occupying it. In practice, both of these methods of acquisition of sovereignty implied recognition of the sovereignty of the original occupants.

As refers to conquest, one has to bear in mind that in this period, the recourse to force and to war as a method of solution of controversies among members of the international community was not forbidden by the International Law.

According to these authors, the territories occupied by nomadic peoples have to be acquired by European colonisers only by conquest or by agreements signed with the peoples concerned which in practice means that the sovereignty of these peoples was recognised. The agreements concluded with nomadic peoples were valuable agreements from the point of view of International Law; which means that the authors recognised the international personality and legal capability of those peoples.

At the beginning of the 18th century a jurist, Vattel, separated himself from the others, affirming that the territories inhabited by nomadic peoples could have been partially occupied by the European nations in order to be cultivated. It must to be noted that Vattel accepted such a limitation of the original sovereignty of nomadic peoples only in extraordinary circumstances and provided that there was not enough arable lands left for agricultural peoples; in any case, such an expropriation should have been confined to a part of the territories of the nomads, and setting aside enough of land for nomads to continue their traditional system of life.

In conclusion, most of the authors who wrote between the 16th and the middle of 19th century recognised the sovereignty and the territorial rights of nomadic peoples.

Even Vattel, which seemed favourable to partial restriction of these rights, proclaimed that the sovereignty of nomadic peoples has to be respected, suggesting that agreements have to be signed with them before proceeding to the occupation of their territories.

When one considers the practice in the relationship between States and nomadic peoples during the same period one thing results evident: in their expansion in the non European continents, the majority of States have considered nomadic peoples as disposing of a sufficient level of political organisation to justify the recognition of their rights from the point of view of International Law. This conclusion is suggested by the analysis of the gestures of appropriation which allowed the Western States to establish their sovereignty on the territories previously occupied by nomadic societies. Indeed, in order to occupy the territories in consideration, States used to negotiate agreements with the indigenous populations or, as an alternative, resorted to conquest.

The practice of negotiating treaties of cession with nomadic tribes before proceeding to the occupation of their territories was particularly frequent in North America; any of the European powers engaged in the colonisation of that continent \_ Great Britain, France, Sweden and the Netherlands \_ resorted to treaties in their relationship with Indian nations . The United States, after the war of the Independence continued the same practice at until the middle of the 19th century.

When one considers the characters of those treaties it seems evident that they were veritable international treaties negotiated on a nation to nation basis. That conclusion is supported by the analysis of the object, the form and the terms employed in the treaties in question. Concerning the object, those treaties were consensual agreements which intended to regulate questions whose object became under the field of International Law: peace, political and military alliances, protectorates, cession of territory. Very often it is forgotten that those treaties served the political interests of Indian nations at least as well as they served the interests of the colonising powers. For example, the military alliances established with France allowed the Algonquians, Hurons and Montagnais nations to get a temporary supremacy on their eternal rivals, the Iroquois.

As to what concerns the form of those treaties, several considerations are necessary. It is true that several of these agreements where verbal agreements; thus, there lacked written form, that normally is considered essential for the validity of an international agreement. However it would be wrong to conclude that they were not valuable. As a matter of fact, the form adopted to conclude these agreements was conform to the laws and traditions of the indigenous populations : therefore, those agreements were negotiated and adopted at solemn conferences, during which different political questions were dealt with ; moreover, they were negotiated and signed by the highest authorities on each side, and very often they were accompanied by the offer of gifts from the European side which for the Indians have a very symbolic significance, for they were accepted in compensation of the permission granted to the European nations to establish on their territories. According to the authors , any form which is recognised by the laws and the traditions of native society was effective to the validity of the agreement. Also, the terminology employed in those agreements which made reference to the sovereignty and the authority of Indians chiefs over their subjects, is a further element confirming their international character.

The agreement concluded with Indians nations constitutes the most evident proof of the recognition by the Western States of the international personality and sovereignty of Indian tribes of North America.

However, on this continent, the recognition of the sovereignty and the territorial rights of the Indians is also supported by a number of administrative acts made by the

colonising powers, notably by the French and Great Britain . As a result of these acts, these nations considered that hunting grounds of the Indians belonged to them as a collective property; thus no nation has the right to occupy these territories on the pretext that their borders were not defined.

In 1763, after the defeat of the French, an important text, the Royal Proclamation affirmed that the territories in possession of Indian Nations, at this date, within British colonies, belonged to them and constituted reserved territories. The settlement of private appropriation of such territories was forbidden. The Crown reserved to herself the right to acquire the territories concerned, at public assemblies and following the negotiation of agreements with indigenous populations. In practice the Royal Proclamation confirmed the rights of Indians over their territories and requested their consent before the occupation of their land.

In the United States, the question of the international personality and the rights of Indians over their territories was lengthily debated after the independence of the country. Particularly, that question was examined and dealt with by the High Court in a series of famous decisions rendered between 1820 and 1835. In those sentences the chief of the High Court, Judge Marshall affirmed that Indians nations were independent peoples, disposing of the international personality ; by their international legal capacity those tribes were able to enter into agreements with the United States :  
« The constitution by declaring treaties already made as well as those to be made to be the supreme law of the land, has adopted and sanctioned the previous treaties with Indian nations and consequently admits their rank among the powers capable of making treaties ».

Judge Marshall added that the Indian nations retain original natural rights as the undisputed possessors of the soil from the time immemorial; therefore, their rights must be extinguished only by conquest or by treaties negotiated with them. The doctrine of High Court largely influenced the policy of the country with respect to Indians Nations. Thus, until 1850 the United States continued to negotiate agreements with Indian nations when they wanted to obtain the cession of their territories.

On the other continents the utilisation by the European States of agreements in the relationship with nomadic groups is too well documented.

In Africa, for example, different treaties concerning political and military questions were concluded by the colonising powers with several nomadic tribes such as the treaty signed by Great Britain with the chief of Zulus, Panda, in 1843 which put an end to the conflict between the two countries; or the treaty of alliance and protectorate signed with the kings of the Mashonas and Matabeles respectively in 1836 and in 1888. Also of particular interest was the treaty signed by Great Britain with the tribe Ashantis in 1818 which set up a juridical co-operation between the two countries and provided that Great Britain may exert its jurisdiction over Ashantis subjects migrating in the territory of the British colony of the Gold coast .

As what concerns Asia, the occupation by Russia of the northern and central regions of the continent inhabited by nomadic peoples was a typical example of conquest. Several diplomatic documents show that the Russian government regarded its expansion in those territories as a conquest, recognising by that way the former sovereignty and occupation of the former occupants.

In Australia, on the contrary, Great Britain considered that the aborigines occupying the territory did not dispose of a sufficient level of political organisation to justify the recognition of their sovereignty and their international personality. Therefore, the continent was considered an unoccupied continent and acquired by simple occupation. As a matter of fact, the theory of the unoccupied continent was founded on the observations of several members of the crew of Captain Cook who discovered the island. In practice, the indigenous tribes were not too savages and primitive in their political organisation as the British pretended. However, the theory of the inhabited continent was too convenient and was easily adopted by the colonising power. Little



later, however the British authorities become aware of the real character of the political organisation of the indigenous tribes when they started to colonise the interior of the country and began to be confronted to a strong opposition from those tribes.

Another example of colonisation of territories inhabited by nomadic tribes is represented, in Europe, by the occupation of the territories traditionally occupied by the Laps or Saamis situated at the northern extremity of the Scandinavian peninsula. That region was coveted by the neighbouring States; in 1751 Sweden and Norway signed an agreement which intended to define the frontier between the territories of the two States. The frontier-line passed through the region inhabited by the Laps, separating the territory in two sides: one side belonging to Norway, the other one belonging to Sweden. The frontier line was drawn without any agreement passed with the Saamis or any conquest of the territory was made by the two States. Apparently, it seems that two States considered the occupation of the territory by the Saamis as not influential from the point of view of the International Law. However that impression is contradicted if one considers that after the signature of the agreement, the Saamis continued to control the region and to use the territory and its resources as they did before. Thus the agreement of 1751 did not modify the situation of the authority on the region ; furthermore, the two states in their attitude as well as in their administrative acts seems to recognise that the region concerned continued to be legitimately possessed by the Saamis, until the definitive establishment of their sovereignty on that territory (which occurred later and makes necessary the recourse to forcefully overcome the resistance of the Saamis : therefore, the occupation of the territory may be regarded as a case of conquest).

Attached to the 1751 treaty there was a Codicil which allowed the Saamis to have access to the territories of both States in order to continue their traditional migrations looking for better terrain of grazing for their herds or for hunting and fishing. This disposition was founded on the idea that the Saamis' traditional use of the territory and of resources need to be protected and their system of life preserved: one may compare this disposition to the contemporary norms aimed at preserving the culture of minorities or of indigenous peoples.

In 1826, Russia and Sweden signed another agreement which intended to define the common frontiers between Finland and Sweden (Finland had become in 1809 a Great Duchy under the sovereignty of Russia.)

The agreement of 1826 recognised the right for the Saamis to continue to occupy the region situated along the frontier line and confirmed their right established by the 1751 agreement) to continue to cross the frontier of the two countries.

In conclusion, the analysis of the methods employed by the European States for to establishing their sovereignty over the territories occupied by nomadic tribes suggests that with few exceptions, the sovereignty and the international personality of nomadic peoples were respected, provided that those peoples formed politically organised societies. According to the principles of the International Law in force in that period, conquest and or treaties were the instruments used by the Western States in their relationships with nomadic peoples for proceeding to the acquisition of their territories.

The period of the denial of the international legal personality

Around the middle of the 19th century, naturalists' concepts on equality and natural rights of political organised societies, which had until then influenced International Law, were abandoned and a new positive and evolutionist concept asserted itself. This new concept was founded on the idea that States were the exclusive subjects of International Law and that the international community was formed only by States. Several reasons may explain this change in juridical concepts. First, on the European

continent, States had consolidated their structure and constituted a «concerto» of nations connected by a long intercourse of relationship. Also, those States maintained tight relations with the States of the American continent with whom there was a solidarity founded on the same juridical traditions of western derivation and a similarity of political institutions. To conclude that the community of States formed the International Community « tout court » and the right in force among States was the International Law is a step which was readily made by positivist jurists mostly on the assumption of the superiority of western civilisation.

As a consequence of the affirmation of this new concept, the communities which presented a political organisation different from that of States were not longer recognised as subject of International Law. Particularly, the international personality and rights of nomadic tribes were denied on the pretext that such societies lacked of an essential element to constitute a State: a fixed territory. According to positivist jurists, nomadic peoples were unable, because of the organisation of their societies, to exert the most of rights, (notably territorial rights) and to comply with the obligations which fit in the competence of States like the protection of foreign residents. The jurists, therefore, proclaimed that nomadic tribes have no rights of sovereignty over the lands they occupied; such territories have to be considered as vacant or unoccupied lands and they were open to the acquisition by States.

As what concerns the agreements concluded with nomadic peoples, the authors affirmed that such agreements have to be considered as private agreements, thus refusing to recognise the evidence of the international character of these treaties . This doctrinal change was accompanied by a change in the practice of relationship between States and nomadic peoples. In practice, positivist concepts authorised a new attitude of States in respect to the peoples not yet organised in stable and centralised societies and not disposing of a fixed territory: this attitude consisted in the refuse to recognise the international personality and sovereign rights of those communities.

The first country to show signals of a change in its policy with respect to nomadic tribes are the United States. As said before, in the United States, the legal international personality and the territorial rights of Indians were recognised and proclaimed by the law as well as by the tribunals. However, since 1830, the government started to use extraordinary powers in respect to Indian nations aiming to submit those nations to the law of the State. Thus, a series of measures were approved which resulted in a serious limitation of the independence and the rights of the Indians.

It has been questioned whether the extraordinary powers used by the government to reduce the rights of the Indians were originally contemplated in the Constitution. This text affirmed at its 3rd article that « the Congress has the responsibility for making treaties and of conducting commercial relationship with States, foreign nations and Indian tribes ». Thus, the Constitution in principle placed Indian nations on the same level as States and foreign nations. However both the organs of the U.S. administration affirmed that the United States have the responsibility to exert « implied powers » in respect to Indian nations in order to improve their level of life and as the last resort, to civilise them. In practice, the role of « guardian » or of « tutor » which the United States affirmed to exert in respect to the Indian nations provided a comfortable justification for the adoption of arbitrary measures of limitation of the rights of those peoples.

As a matter of fact, until 1871, the United States continued to negotiate treaties with Indian nations, which means that they recognised their international personality. However, one must note the change in the character of these agreements in respect to the previous treaties. Indeed, the treaties signed after 1850 lose progressively the

character of agreements between equals and resemble more to unilateral acts by which the Indian tribes were forced to renounce to their rights over their traditional territories and were confined in the territories left at their disposition in the reserves. In 1871, however, by an act attached to the Indian Appropriation Act, the United States put an end to the practice of negotiating agreements with the Indian nations. This act was adopted after a remarkable debate at the Congress, during which many senators proclaimed themselves in favour of the continuation of the practice agreements in the relationship with Indian peoples, recognising the legal personality of these nations.

The 1871 Act in practice means that the United States no longer recognised the international legal personality of the Indians. After this act, the process of subjugation of Indian nations accelerated. In 1887, the General Allotment Act or Dawes Severalty Act provided for the cartelization of the territories of several Indians nations and their attribution to private individuals. Indians had rights of pre-emption over such territories. The purpose of that measure was evident; the government wanted to encourage the Indians to abandon their tribes and their nomadic system of life and to become sedentary agriculturists.

In Canada, the relationships between the government and the nomadic tribes occupying the territory had an evolution similar to that of the United States. In that country, the Indian territories were protected by the Royal Proclamation of 1763, providing that the Crown reserves to herself the right to acquire such territories after the negotiation of agreements with Indian nations. Since 1850, however, a new regime was applied to the territories belonging to nomadic peoples. In Low Canada, an act of 1850 created the post of superintendent responsible for the territories of the Indians. In practice this new change deprived the Indians of the powers to dispose freely of their lands; Indian lands were taken in charge by the administration and managed on their behalf.

During the same period several territories were acquired by British authorities in the north west of Canada forming the new colony of British Columbia. The new territories were placed under the sovereignty of the British Crown, in spite of the fact that they were occupied by several nomadic tribes. In this case neither an agreement was signed with the nomadic tribes nor was a conquest of the territory made. In the neighbouring island of Vancouver, later annexed to British Columbia, on the contrary, the British representative, governor Douglas negotiated 14 agreements with the indigenous tribes before occupying the territory; according to the instructions he had received, governor Douglas negotiated only with those tribes whose system of use and occupation of land conformed to British Law: in practice only with sedentary tribes. It seems, therefore that the British government had revised its previous policy and it did not intend to recognize, any longer, the rights and sovereignty of nomadic tribes.

As well as in the United States, Canada's administration tried to solve the problems of erratic tribes living within its territory, by confining them to reserved territories. However, this attempt was destined for failure: the reserved lands were situated in rough territories and they did not dispose of sufficient resources to allow the Indians to continue their traditional system of life. Another measure experienced with the Indians was their settling or the attempt to transform them in lands proprietors; this measure, too, was destined to fail as the Indians were roughly accustomed to sedentary customs of life and sooner or later they resumed their former nomadic habitudes.

After the creation of the Confederation in 1867, the process of assimilation of Indian tribes accelerated. The act of 1867 attributed to the government the responsibility for the administration of Indians and their territories. The Indian Law of 1868 contained a series of rules which intended to regulate several aspects of the political organisation of Indian tribes: thus, the law determined the criteria of belonging to a tribe, the eligibility and the powers of the chiefs and the duration of their powers etc. This



interference in the Indians system of political organisation was justified on the pretended trusteeship of the Canadian government respect to Indian nations. The Indian law was adopted without taking in consideration the traditional customs and traditions of Indians societies. The Indian territories, too, were the objects of different dispositions aimed at reducing the powers of the Indians to dispose of them.

In conclusion before the end of the century the Indians living in North America have been assimilated to the right of the States in which they lived and have loosen their international personality and most of their traditional lands.

On the other continents the process of limitation of Indians rights followed a similar development. In Africa and in Asia, the colonising States continued to use treaties in their relations with nomadic peoples until the end of the century. However, about the character of those agreements one may repeat the same remarks made on the subject of the U.S.' treaties after 1850.

The treaties signed at this period by indigenous peoples, under the threat of the use of force by the Europeans, were all but treaties between equal partners. From the point of view of the colonising powers, those treaties seemed to satisfy the need of keeping the illusion that the occupation of the indigenous territories depended on their consent more then to correspond to a real juridical obligation.

The treaties of protectorate are a clear mirror of this situation. When a colonising power decided to place a country under its authority, leaving its occupation to a second time, it signed a treaty of protectorate with the local chief. During the classic period of the Law of Nations, (until 1850), the treaties of protectorate had never intended to annihilate the internal sovereignty of the protected country ; thus the protecting State assumed by treaty, the responsibility for the representation of the foreign sovereign of the indigenous country, without interfering in its internal sovereignty. On the contrary, the treaties concluded in the second half of the 19th century deviated from this traditional objective and were used by the European powers as instruments for establishing their control on the indigenous country and for taking over the internal sovereignty.

This pattern of colonisation was used by Great Britain in Somalia: after the signature of a treaty of protectorate with several chiefs on the Somali Coast between 1884 and 1886, Great Britain took over the administration of justice and by a unilateral act proclaimed that the territory was under its sovereignty. In Namibia, after the signature of several treaties of protectorate with the tribes Hereros and Nanas, Germany took over the control of the country; the territories of those tribes were expropriated in the whole and the lands were attributed to German companies. The same sort had the protectorate established by Great Britain in Kenya; after the signature of the treaty in 1903, the British started to chase the Masais off their traditional rich high lands and to confine them in the reserved territories situated on the north and on the south of the country. Not satisfied with that result, the British authorities, several years later started to encroach on the territories reserved to the Macias: thus, before 1910, the most of the land had been expropriated and the Macias confined in very dry territories, insufficient for assuring the continuation of their system of life.

On indifferent continents, the occupation of the territories of nomadic and indigenous peoples and their domination was justified under the pretext that it must serve to aid those non-civilised peoples to improve their condition of life and to attain a level of civilisation similar to that of the European nations. The «sacred duty « to help the less advanced nations to come out of barbarianism was a principle informing international relationship in this period : that principle was proclaimed at different international Conferences, notably the conference of Berlin in 1885 and the Bruxelles' Conference on Africa held between 1889 and 1990. Also that principle was at the roots of the system of trusteeship set up by the Covenant.

In practice, this principle concealed the same racist philosophy that was at the origin

of positivist doctrine, above all, the idea of supremacy of western civilisation and the opinion that indigenous peoples must be forced to change their habitudes and to imitate the western system of life; in this respect, nomadic peoples have to abandon their system of life and were to be settled, eventually by force. As a matter of fact, the principle of the trusteeship of non civilised peoples was a comfortable pretext which allowed the European colonisers to occupy the country of indigenous people, to destroy their institutions, and to expropriate their lands. It's interesting to observe that this principle had a universal application: thus, in Latin America, Brazil and Venezuela resorted to that principle to justify the adoption of a series of measures which intended to civilise the indigenous peoples living in the country and to persuade them to abandon their nomadic style of life.

To sum up, before the end of the century, most nomadic tribes, in the different continents came under the domination of western colonisers and were expropriated of most of their land.

At the beginning of the 20th century, the question of the juridical status of indigenous peoples was analysed by three international tribunals in different cases. In the first case known under the name of Cayuga Indians case, the Anglo-American tribunal for arbitration proclaimed in 1928 that: « A tribe is not a legal unit of International Law. The American Indians have never been so regarded. From the time of the discovery of America, the Indian tribes have been treated under the exclusive protection of the power which by discovery or conquest or cession held the land which they occupied ; so far as an Indians tribes exists as a legal unit , it is by virtue of the domestic law of the sovereign within whose territory the tribe occupies the land, and so far as the law recognised it ». Thus the international tribunal denied a posteriori the international legal personality of indigenous tribes which for at least three centuries have been affirmed and recognised by International Law.

Several years later, another judgement, rendered this time by the international arbiter Max Huber in the case of the island of Palmas affirmed that treaties signed with indigenous peoples were not valuable treaties on the point of view of International Law.

In the third case, the juridical status of the Eastern Greenland was examined by the Permanent Court of International Justice. In the 15th century that island fell under the control of several groups of Inuits that continued to occupy the island until the conquest of Denmark in the 16th century. The Permanent Court find it useful to remind that term conquest was unfit when applied to the occupation of territory by some nomadic groups. Indeed, this term might be used properly when relationship between sovereign states is in question: in practice according to the International Tribunal, the occupation of a territory by a nomadic group is irrelevant from the point of view of the sovereignty.

In conclusion by those three sentences, the juridical opinion confirmed the principle asserted by positivist doctrine according to which indigenous peoples and particularly nomadic tribes have no juridical status in International Law. Positivist doctrines in practice were at the service of political interests justifying the domination of western-style States in the other continents.

## The resurgence on the international scene

For half a century, International Law has completely forgotten the question of the legal protection of nomadic peoples and was exclusively concerned with the prerogatives and rights of sovereign States.

At the end of the Second World War, a new system of International Law was elaborated that though it continues to be «State-centred» is more and more concerned by the need to ensure the universal protection of human rights of the individuals as well as of the groups and associations to which the individuals participate.

As a matter of fact, a new consciousness is developing among the members of the International Community about the fact that several human associations like the peoples struggling for self-determination, or indigenous and tribal peoples and minorities deserve a special recognition and protection by the International Law. In this respect, by the proclamation of the right of peoples to self-determination at the end of the Second World War, the International Law moved the first step towards the recognition of the international personality and the rights of non-States entities. The peoples entitled to self-determination, indeed, made their appearance on the international scene as actors of International Law alongside the traditional actors represented by States.

In the practice of the United Nations and in the legal theory, the right to self-determination was recognised only to the aggregated populations of territories which suffered with some form of colonial or foreign domination.

This interpretation excluded from the exercise of the right to self-determination many tribal and indigenous populations that constituted minority groups within those populations and which differentiated themselves because of their specific features and their system of life. Those groups continued to suffer a form of discrimination of colonial style in the State in which they lived. And they risked either the assimilation or the extinction.

Recently, however, the exigency to protect the groups with a distinctive culture qualified, respectively, as «indigenous peoples» and «tribal peoples» and «minorities» asserted itself in International Law and new systems of protection have been elaborated .

It is under the rubric of the legal protection offered to those categories that the International Law recognise and protect the rights of nomadic populations. Indeed, all of the nomadic peoples fit into one of those categories, although they constitute distinct groups due to their mobile style of life.

In International Law, indigenous and tribal peoples are identified by several subjective and objective characters:

a) Cultural distinctiveness: indigenous and tribal peoples usually possess their own language, religion, economic and social institutions. They have a communal form of political organization and they have a traditional system of life. They can be nomadic or semi-nomadic people, such as itinerant agriculturists hunters and gatherers or they practice intensive agriculture with high level of labour generating a surplus and demanding a minimum of energy resources. Moreover, indigenous and tribal populations usually have a global vision of the world consisting in a non materialistic attitude in respect to the land.

b) Self identification: indigenous and tribal peoples have a strong identity as a group and they are determined to preserve the particular characters of their culture.

c) They usually constitute minority groups in their country of citizenship and they are marginalized in respect to the rest of the population because of their cultural a communal differences and their particular system of life.

According to several texts, indigenous peoples should be distinguished from tribal peoples in reason of a characteristic which is specific to them that is their priority on the occupation of the land in which they live. To be clear, indigenous Peoples are the descendants of the ancient peoples which originally occupied a territory and were able to maintain an historical relationship with it. The application of the term «indigenous peoples» creates some difficulties as far as nomadic populations are concerned.

As a matter of fact how would it be possible to speak of historical links to a particular territory and rights to lands for mobile populations? This definition acquire a meaning only if we consider as the «territory» not only the land in which they live but also «the total environment of the areas which the peoples concerned occupy or otherwise use

for their economic activities» , for example herding or hunting or gathering.

Even if we accept such an interpretation of the term «territory», still remain some problems. It is true, that some nomadic populations continue to occupy the lands where traditionally lived their ascendants and were able to maintain an historical relationship with those territories: in this respect, the Saamis living in the Scandinavian peninsula or the Inuits that inhabit the northern territories of Canada or the Pygmies living in the rainforest of the Central Africa can surely be qualified as indigenous peoples because they were the original occupants of those territories.

But for many other nomadic groups it is difficult to state with certitude that they are indigenous in the sense that they occupied the land before the arrival of other groups. For example, in Africa and in Asia different tribal groups, nomadic and settler are living alongside within the same territory since immemorial times and nobody can affirm that the nomads are more entitled to the qualification of «indigenous peoples» than the other tribal groups. Also, it is necessary to remember that many nomadic populations have been expropriated of the territories they occupied originally in consequence of the colonisation. Should those populations no longer be considered as indigenous?

The above considerations suggest that in applying the term «indigenous peoples» to nomadic populations, one has rather to take in consideration the aspect of the marginalization and discrimination those peoples have been victims in the past and continue to be today.

Throughout centuries, nomadic populations have been put under pressure by settled populations and they have been marginalized because their culture and system of life were different from that of modern industrial societies; nowadays, those peoples have a subordinate status within those societies and their very physical and cultural existence is threatened to such an extent that they need to be protected. Therefore, whenever it is demonstrated that a nomadic group feels it is being discriminated because of its system of life, the group in question needs to be protected and deserves the qualification of «indigenous people».

The question of the qualification of nomadic groups is less disputed when it comes to the category of « minorities »: indeed, practically all of the nomadic groups constitute ethnic minorities. As for the Gypsies, they fit only in this category, for they cannot be qualified as indigenous or tribal peoples.

Minorities share many of the attributes defining «indigenous» and «tribal peoples»: cultural distinctiveness, sense of identification, minority number. However, it is important to remember that in International Law minorities are not, in a legal sense, indigenous peoples, but are a distinct category, enjoying a separate status.

The protection of these three categories in International Law is founded on a series of texts of different source.

As far as indigenous and tribal peoples are concerned, the texts of reference are : the Convention n.169 «concerning indigenous and other tribal and semi-tribal populations in independent countries» approved by the International Labour Organization in 1989 (entered into force on September 1994) ; the Draft United Nations Declaration on the Rights of Indigenous Peoples whose final text adopted in 1994 is presently under the examination of Commission of Human Rights for definitive approval ; the World Bank Operational Directive 4.20 adopted in 1991 ; the Rio Declaration on Environment and Development and the Agenda 21 (notably Chapter 26) adopted the issue of the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992. Concerning minorities, the texts of reference are the United Nations Declaration on the Rights of Ethnic, Linguistic and Religious Minorities approved in 1992 and, at European level, the European Framework Convention on the Protection of Minorities approved by the Council of Europe in 1995.

Those texts attribute to the concerned groups a number of collective rights that are essential to their subsistence: the right to non discrimination, cultural rights or the right to a separate identity, the rights on the lands and the right to political autonomy.

The protection of the identity and cultural rights represents for nomadic populations the first element of their legal protection.

The principle concerning the respect of the cultural identity of indigenous populations, tribal populations and minorities is nowadays a consolidated principle of International Law. It is important to understand that this principle intends to cover the whole of the aspects of the cultural life of the concerned group, including the economic activities and for extension, the traditional system of life. In this respect, the United Nations Human Rights Committee declared that «culture manifests itself in different forms, included a particular system of life associated with the utilisation of resources in a territory particularly when indigenous peoples are concerned. This right might include the practice of traditional activities such as fishing or hunting or the right to live in reserved territories ». Also, there is a consolidated jurisprudence of the Commission of Human Rights confirming this interpretation.

The protection of the culture of a minority or of an indigenous group must be accompanied by the adoption by States of specific measures of protection in favour of the group concerned: a simple attitude of indifference or passiveness by the State may be insufficient to ensure an effective protection to the culture of these groups . As far as nomadic populations are concerned, special measures should be enacted in order to allow those populations to continue their migrations throughout the territories of different States. Also, special measures should be adopted to enforce the political as well as the economic and social institutions of those populations. A special mention deserve, in this respect, the measures supporting education: «education for indigenous and nomadic peoples should be linguistically and culturally appropriate to their needs and should facilitate access for further education and training ». Thus, education should be made accessible to nomads: in this purpose, it can be envisaged the use of mobile schools.

Lands rights are unquestionable at the linchpin of legal protection of nomadic groups. As a matter of fact, the subsistence of those groups depends on the possibility to have access and to use the natural resources of the territory in which they migrate. That linkage with the territory is not only material but also spiritual one, as the land is considered the mother of all things and a part of their identity. Deprived of its territory, the nomadic group is condemned to cultural extinction.

The international texts of protection of indigenous peoples, particularly the I.L.O. Convention n. 169 and the Draft United Nations Declaration on the Rights of Indigenous Peoples recognize and protects the systems of common ownership of lands which are typical of indigenous peoples as well as the traditional right to use specific to nomadic groups. In this respect, the article 14 of the I.L.O. Convention n. 169 affirms that: «The right to ownership and possession of the territories that indigenous peoples traditionally occupy must be recognised. In addition, measures should be adopted in appropriate cases to safeguard the right for the peoples concerned to use the land not exclusively occupied by them but to which they have traditional access for their subsistence and their economic activities.

The situation of nomadic groups and itinerant agriculturists deserves particular attention.

The second paragraph of article 14 imposes to States to adopt measures aiming to enforce the right for indigenous peoples to go on using their lands. Among those



measures, the following seems of particular importance as far as nomadic groups are concerned : the geographic delimitation of the territories occupied or otherwise used by those groups and the definition of the different types of use authorised : ( ex right of hunting, fishing, collecting, water drawing, etc.).

Another important aspect relating to the protection of territorial rights of nomadic populations concerns the prohibition to remove those groups from their traditional territories. During the colonialism era, the removal of nomadic groups from the territories they occupied traditionally and their segregation in the reserves was quite normal. Actually, such arbitrary practice is forbidden by the international texts: for example the Convention 169, affirms that the removal of indigenous peoples from their lands must occur with their consent. On the same line, the Draft United Nations Declaration on the Rights of Indigenous Peoples declares « that indigenous peoples shall not be forcibly removed from their land or 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 the option of return ».

Moreover, considering the interest that nomadic peoples have in the conservation of natural resources and of the environment in which they live, those populations should have the opportunity to participate in the decisions concerning their exploitation. Normally the property on mineral and other subsoil resources is vested on States. The experience shows that very often, (and particularly in the developing countries) licences for the exploitation of such resources are attributed by States, with disastrous impacts on the region inhabited by nomadic populations.

To avoid this situation, both the I.L.O. Convention n. 169 and the Draft United Nations Declaration on the Rights of Indigenous Peoples put on States the obligation before authorising such programs of exploitation, to consult the indigenous peoples present in the territory to determine whether and to what extent those decisions might affect the right of those groups to go on using their land. In addition to it, indigenous peoples should have the right to participate in the profits derived from the economic activities undertaken by States in their territories.

Furthermore, several texts go further and explicitly recognise that indigenous peoples and among them nomadic groups because of their system of life and traditional practices can play a significant role in the preservation of biodiversity and in the preservation of a sustainable development. In recent years, as a consequence of the steady degradation and desiccation of lands in many parts of the world, the International Community started to consider nomadic pastoralism as a viable solution in order to ensure resources' conservation and sustainable development in dry regions.

Therefore, in 2002, the UNDP launched a three-year programme involving a world-wide partnership among civil society, national governments and international agencies to promote and to sustain the development of pastoralism in dry regions.

The third element of the legal protection of nomadic groups in contemporary International Law consists in the protection of the right to dispose of a form of political autonomy and of an autonomous power of decision in the question concerning the traditional aspects of their life.

This right represents in the context of indigenous peoples a way for exerting their right to self-determination, which in principle should appertain to all the peoples.

The right to political autonomy is provided by the Draft United Nations Declaration on the Rights of Indigenous Peoples that specifies that self-determination in the case of indigenous peoples has to be intended only in an internal sense : « indigenous peoples as a specific forms of exercising their right to self determination have the right to autonomy and self-government in matter relating to their local affairs including culture, religion, education, information, health, housing, employment, social

activities, land management, environment as well as the ways and means for financing these autonomous functions ».

According to the text, indigenous peoples should have the possibility to maintain and develop their political institutions \_ condition necessary to exert an autonomous power of decision in the question related to their local interests and affairs.

Moreover those groups should have the right to participate, at any level, through their representatives, in the decisions which concern the most relevant aspects of their life.

This right of political participation is very important for it allows knowing the view of indigenous peoples before adopting any decision susceptible of affecting their life .

Up to now, it is impossible to draw out a general conclusion on the implementation of those international norms by States. In respect to this question, States policies are very different.

Several countries, particularly the northern countries of Europe and Canada are at the forefront of what concerns the protection and the respect of the rights of nomadic peoples present in their territory.

In the Scandinavian peninsula, the Lapps or Saamis are recognised by the law as ethnic minorities and indigenous peoples. Since the '80, the government in those countries enacted a number of initiatives aimed at protecting the cultural rights, including the system of life of these peoples. It must be remembered that in Norway and Sweden, the Lapps Codicil is still in force. This text along the years has been frequently modified but in the substance, the right of the Lapps to continue their traditional migrations through the territories of the two countries is still recognised.

Finland and Norway have recently negotiated an agreement which allows the migration of reindeer herders through the territories of the two States. Moreover, in Norway and Finland the Lapps have proper representative institutions that are to be consulted and must participate in the adoption of decisions concerning the matters specifically relating to the life of the Lapps.

In Canada, the right of indigenous peoples on their lands has been recognised by section 35 of the Constitution Act of 1982. Since 1992 the government decided to grant a large political autonomy to the Inuits, a semi-nomadic population, inhabiting the north western territory of Nunavut. This territory which for extension constitutes the third largest administrative unit of the State enjoys a large political autonomy.

The Inuits, have the right of ownership on a territory which extends on 350 000 square Km within the territory of administrative unit, whose 32000 square Km include the right to exploit the resources of the soil. Therefore, the Canadian government recognised at the same time the territorial rights and the political autonomy of the Inuits.

After the Nunavut agreement the Canadian government is in the process of negotiating agreements with other indigenous peoples aimed at recognizing their rights on their traditional land. A 1996 report of the Canadian Commission on Indigenous Peoples envisaged concluding by 15 years treaties with any of the indigenous peoples present in the territory, in order to recognize their territorial rights and to grant political autonomy to those populations.

In Greenland, the Inuits enjoy a large political autonomy granted by the Danish government in 1979; actually a Commission is in the process of revising, extending the conditions of this autonomy.

In Australia the rights of the aborigines has been recognized after a real revolution in the legislation which followed a memorable decision of the Australian Supreme Court .

In that decision, the High Court proclaimed that, when the British arrived on the island, the aborigines inhabiting the continent were unquestionably the suzerains in the territory. The Supreme Court thus rejected the theory of the terra nullius and the pretension of the British authorities that territory was inhabited by tribes that did not constitute political societies. The conclusion of the High Court determined a change in the legislation and actually a special tribunal has been set up which must examine the claiming of the aborigines on their traditional land.

Several countries in Latin America are following the same path : for example, the

articles 69 and 329 of the Colombia' Constitution explicitly recognise the right for nomadic populations to use the territories that they do not occupy exclusively but to which they have access in order to practice their traditional economic activities. Moreover, Perou and Bolivia have recently recognised the territorial rights of nomadic groups and have created reserved territories destined to their exclusive utilisation that are qualified as «inalienable, indivisible, imprescriptible and unseizable». The article 27 of the Bolivian Environmental Act of 1992, recognise the right for indigenous populations to participate in the use, management and conservation of natural resources in the concerned territories.

On the contrary, the States of the African and Asian continent are not making headway in respect to the question of the legal protection of nomadic groups : unfortunately, one might say, a great number of nomadic tribes are living in those continents. As a matter of fact, it is only recently that the States in these continents acquired the independence which partially explains the fact that their governments are concerned to maintain the national unity among the different ethnic groups composing the population of the State. In this context the claming of nomadic groups to a separate regime of protection for their rights and eventually to the recognition of some form of political autonomy are regarded with suspicion by the government.

In Africa the question of the right to self-determination by the people of Western Sahara continue to be unsolved. This territory is a former colonial territory and therefore its population according to International Law is entitled to the right of peoples to self - determination. This right has been confirmed by the advisory opinion given by the International Court of Justice in 1975. Since then; however, the process of organisation of the referendum for self-determination encountered a number of obstacles, particularly the opposition of Morocco which intends to annex the territory, at least partially.

Despite of the pressure of the International Community, during these years, Morocco occupied a part of the region and increased the economic and political dependency of the territory to its kingdom. The occupation of Morocco is fought against by the P.O.L.I.S.A.R.I.O., the National Front of Liberation of the Sahara population which claims the right of Sahara people to exert self-determination. In 1992, the Secretary General of the United Nations mandated a U.N. Mission with the charge of organising the referendum. It was only recently, in 2001, that the M.I.N.U.R.S.O. comes at the end of this principle task which consists in the determination of the list of voters.

The next step should be the material organisation of the referendum but in the meanwhile, a different plan to solve the situation has been proposed by the foreign secretary of the United States, James Baker. This new plan, more favourable to Morocco, provided for the annexation of the territory to Morocco and the organisation by 5 years of a referendum that would decide about concession of some form of political autonomy to the region. Without completely abandoning the idea of the referendum, the plan in practice deprived it of its significance, for it is clear now that a referendum of political autonomy organised within Morocco's jurisdiction would be a different thing than the right to exert freely self-determination which was originally recognised by the population of Western Sahara.

Unquestionably, the evolution of International Law of the last fifty years and the emphasis put on the question of the protection of human rights of the individuals as well as of the groups, to which the individuals participate, provide a great opportunity for improving the legal status and the condition of life of nomadic populations. As a matter of fact the International Law cannot any longer neglect those populations, once that it is generally recognised that the final purpose of this law is that of serving men more then abstract political entities.

Therefore, the attitude of contempt and the propositions of assimilation that prevailed

in International Law in respect to nomadic societies yet fifty years ago have been replaced by a new attitude, founded on the recognition of the dignity and value of the culture of those groups and on the acknowledgement of the exigency of protecting their system of life.

Moreover, there is an increasing awareness of the important contribution that nomadic population can give to the conservation of environmental balance and the construction of a sustainable development.

In contemporary International Law, nomadic populations fit generally into the legal categories of «indigenous peoples» and «tribal peoples» and «minorities» and are concerned by the international texts of protection of those categories that are going to be set in place.

Those texts set up a minimal of human rights standards that should be recognised to nomadic populations and that are essential to ensure their subsistence: the right to maintain and develop their culture, including their system of life; the right of continuing to use the territories to which they have traditionally access and of disposing of natural resources in conformity to their system of life (including their right to participate to the all the decisions concerning the management of natural resources and the protection environment of their territory) ; whenever is possible, their right of disposing of an autonomous powers of decision in the question concerning the different aspect of their life.

Certainly, those systems of protection might be improved; from this point of view, a rapid evolution of the international norms is going on. To sum up, it is possible to affirm that the legal protection of nomadic groups in International Law is in fiery, in course of elaboration.

Because of this renewed interest for the rights of nomadic populations and respect for their system of life, the contemporary system of International Law renews in some way with the ancient Law of Nations that was in force between the 16th and the half of the 19h centuries that recognised the natural rights and the international legal personality of any politically organised society, without consideration for the its type of organisation, system of life and level of development.

Up to now, it seems too early to evaluate the effect that the International norms of protection of nomadic peoples will exert on the policies of national States. It is important to remind that the international texts provide a minimal standard of legal protection, which does not exclude the adoption of more advanced measures of protection by national States.

As a matter of fact, during the last years the legal protection of nomadic groups has greatly improved in the countries of northern Europe and in Canada. A reason for explaining this result has to be found in the existence in those countries of a long tradition of democratic and liberal institutions which facilitated the dialogue between the State and indigenous populations.

Moreover, the example of Sweden and Norway suggests that, in several conditions, nomads might be allowed to continue their traditional migrations through the borders of different national States, without threatening their national sovereignty and unity. Thus, one can imagine a scenario for the future in which other nomadic populations will be allowed to cross the borders of their State of nationality and to migrate into the territory of the neighbouring States.

In many developing countries, particularly in Asia and Africa, democratic institutions are not yet enough developed, which explains why the political and legal status of the nomads living in those countries continue to be subordinated, and they continue to be victims of discrimination and of marginalization.

Also, the obstacles that continue to encounter the organisation of the referendum for the self-determination of the Touareg of Western Sahara \_ in spite of the universal recognition of their right by the International Law and the pressure of International

Community \_ show that often the principles of realpolitik and the interests of States prevail on the application of the international norms.

In spite of this negative example, the improvement of the treatment and of the legal status of nomadic populations in some countries allows to conclude our analysis with a moderate optimism.

The ongoing evolution of the international Law try to remedy to the experience of discrimination and expropriation of their lands whose the nomadic populations have been victims until a recent past.

Throughout the course of the History, nomadic populations played a considerable role in the evolution of human and arts and in the exploitation of territories and natural resources. It is necessary to preserve from the extinction that system of life that is a part of the common cultural heritage of humankind. Moreover, nomadic populations, for their knowledge and traditional practices, may play an important role in respect to the question of constructing a sustainable development. Thus, in some respects nomadic societies have still something to teach to the settled. Above all, in the actual changing world, in which the mobility of peoples of different culture and the withdrawal of boundaries between different States, brings our life system together with theirs.

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