

## Some Thoughts on ‘Communities’, ‘Groups’ and ‘Individuals’ in International Law

Janet Blake<sup>1</sup>

As an international lawyer, I will look at the way and contexts in which these terms have been used in international (mainly human rights) law and certain theoretical issues that this has thrown up. This should present some broad lines of thinking about how we can use these terms. We should remember that there is a difference between the ‘meaning’ of a term such as community (one which an anthropologist is much better placed than I am to supply) and the legal implication of the chosen definition and use given to it.

The *Glossary* for ICH defines “community” as:

“People who share a self-ascribed sense of connectedness. This may be manifested, for example, in a feeling of identity or common behaviour, as well as in activities and territory. Individuals can belong to more than one community.”

Further definitions are also given for “cultural community” and “local community”.

An interesting point to come out of my brief survey of the use of ‘people’, ‘group’, ‘minority’ and ‘community’ in international human rights law (to some degree interchangeable from the legal viewpoint) is that there is no absolute and agreed meaning for any of them. Even ‘people’ with its legal baggage of the right to self-determination has no clearly agreed meaning and is not defined in any treaty. Hence, the way in which we understand and use these terms is to a large degree context-dependent. What is important, then, is to determine the parameters in which we are working in order to understand their meaning for the purposes of the 2003 Intangible Cultural Heritage Convention ICHC.

### **A brief survey of where reference is found to these (or related) terms provides useful background to our search for meanings.**

In providing its early legal definition of “community”, the PCIJ<sup>2</sup> noted that “[t]he existence of communities is a question of fact; it is not a question of law.” This suggests that, up to a point, we should follow ‘ordinary meaning’ when considering such terms, always remaining aware of the wider legal context and the potential pitfalls of ascribing rights not recognised in international law. The accepted definition of “minorities” (in relation to Article 27 of the ICCPR<sup>3</sup>) relies on both objective criteria (such as ethnicity, language etc.) and the subjective one of self-identification or ‘solidarity’. This raises an interesting question – can a group that has no consciousness of itself as a ‘group’ or ‘community’ be said to ‘exist’ legally, despite the existence of objective criteria that sets it apart from other elements in a State’s population? In other words, is it the sense of

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<sup>1</sup> Assistant Professor, Faculty of Law, University of Shahid Beheshti, Tehran.

<sup>2</sup> Precursor to the International Court of Justice.

<sup>3</sup> International Covenant on Civil and Political Rights (1966).

distinct cultural identity and their desire to preserve it that gives minorities this cultural right? The 1989 ILO Convention also gives a high importance to “self-identification” as a criterion for determining the groups to which the Convention applies.<sup>4</sup> Article 27 is also noteworthy in not referring directly to ‘minorities’ as right holders but to members of minorities who exercise the rights “in community with” other members. Hence, the right attaches to individuals but can only be exercised within the community context.

The 1966 UNESCO Declaration on Cultural Co-operation refers to the right of “every people” develop its culture, the African Charter (1981) talks of the right of “all peoples” to their economic, social and cultural development and the UNESCO Declaration on Racial Prejudice (1978) uses the interesting formulation “all peoples and all human groups” (Preamble) and refers to the “right of all groups to their own cultural identity.” This latter represents the highest development of a statement of ‘group rights’ in any international instrument thus far. The African Charter on Human and Peoples’ Rights (1981) contains a very interesting provision in Article 29 that adds anew dimension to the relationship between the individual and the community by placing the duty on the individual “to preserve and strengthen positive African cultural values in his relations with other members of the society ... and, in general, to contribute to the promotion of the moral well-being of society.”

More recently, given sensitivities over its association with self-determination, ‘communities’ or ‘groups’ have been used instead of ‘peoples’. However, with the exception of provisions that deal specifically with self-determination, these terms are generally used interchangeably, although we might identify some different nuances in meaning between ‘communities’, ‘groups’ and ‘minorities.’ Much, however, is down to the context of the instrument in which they are used. The 1992 CBD, for example, talks in Article 8(j) of preserving and maintaining the “knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles” and the 2001 FAO treaty<sup>5</sup> refers to the contribution of “indigenous and local communities and farmers” to conserving PGRs. Neither treaty defines who these ‘communities’ are and we are left to interpret this in terms of the particular instrument and the wider context of international law.

**These terms and the related rights, however, create theoretical dilemmas for human right law that I wish to look at briefly here.**

1. The classic question – can collective rights exist? A classic position is that some ‘individual’ rights (such as the enjoyment of culture) presuppose the existence of a community of individuals and the underlying assumption here is that the rights of groups are taken care of automatically by protecting individuals’ rights. However, individuals do not exist *in abstracto* but, in reality, are defined by their membership of certain (cultural, ethnic, linguistic etc.) groups. Indigenous people and the AU,<sup>6</sup> for example, seek to

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<sup>4</sup> Art.1(2) refers to “Self-identification as indigenous or tribal” as a “fundamental criterion” for this.

<sup>5</sup> The UN Convention on Biological Diversity (1992) and the International Treaty on Plant Genetic Resources for Food and Agriculture (FAO, 2001), respectively.

<sup>6</sup> OAU Model Legislation on Community Rights and Access to Genetic Resources.

challenge the 'Western' system of individual rights with a notion of 'community' or 'peoples' rights held directly by the collectivity.

2. The tension between individual and collective rights. Assuming some rights of groups do exist, there is always the potential for conflict between the needs of the group and those of individuals within it. For example, an individual's right to choose not to be part of a certain cultural identity against the right of that group to exist. The lesson from this is that we must always bear in mind the primacy of individual over collective rights in such conflicts when defining the 'community' or 'group' i.e. **a community should be defined in terms of the individual members that make it up.**

3. The "clash of norms" in relation to a community's right to a cultural identity. Some elements deeply embedded in most cultures clash directly with widely recognised human rights norms. This sets up a clash between those norms and the right to cultural identity. We should also remember that an individual can claim multiple identities – the choice is the individual's not the community's.

4. Can we define "cultural identity" and "community" independently of each other? The former requires reference to some group or community to which it attaches and the latter cannot easily be defined without reference to cultural criteria. Thus, there is some circularity to be addressed here in identifying a 'cultural community'.

5. How can we decide when a 'culture' is sufficiently distinct and important to give it special legal protections – is this something that can be decided objectively, or is it purely a subjective choice of the community involved?

6. Once we have identified a 'community' who, in practice, can exercise the rights ascribed to it or represent it in other ways? Many cultural communities are heterogeneous in character and it is difficult to find a 'representative' who speaks for the group (and all individuals within it). Here, principles of democratic participation must come into play.

**To finish, can we distinguish these apparently interchangeable terms used in international law texts?**

"Communities" and "peoples" can be regarded as totally interchangeable (when not referring to a people's right of self-determination).

"Groups" alone may also stand for the above terms but, when expressed as "communities and groups", there is the sense that communities are somehow 'more' than groups, with a greater sense of self-identification.

"Minorities" are clearly understood in relation to Article 27 and customary international law and we should not attempt to address this question here, except in so far as there is a clear overlap with both "peoples" and "communities".