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**Criminology, Human Rights and Indigenous
Peoples**

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Abstract

Criminology, human rights and Indigenous peoples: how do we understand the connections between these three terms? For too long the voices arguing to connect criminology with human rights were isolated and marginalized. At best, the possible links were seen as peripheral to the main concerns of criminology. At worst, bringing a human rights understanding to definitions of crime and criminal justice was seen as undermining criminology's search for scientific status. And as for Indigenous people? They were seen as part of the "crime problem", a segment of the problem population whose criminality needed explanation. Human rights apparently had nothing to do with their offending behaviour.

However, over the last decade or so the intellectual terrain has shifted significantly. As a result of these developments we can see at least three strands to how we might bring criminology to a more intellectually robust understanding of Indigenous people and human rights. The first point is that Indigenous people have been victims of profound historical injustices and abuses of human rights which can be at least partially understood as state crime. The second point is that contemporary justice systems are often seen in the context of the abuse of Indigenous people's human rights. The third strand is an analysis of how claims to specific Indigenous rights impact on current criminal justice processes, and how those claims might broaden our understanding of reform and change.

CRIMINOLOGY, HUMAN RIGHTS AND INDIGENOUS PEOPLES

Chris Cunneen

1. INTRODUCTION

Criminology, human rights and Indigenous peoples: how do we understand the connections between these three terms? For too long the voices arguing to connect criminology with human rights were isolated and marginalized. At best, the possible links were seen as peripheral to the main concerns of criminology. At worst, bringing a human rights understanding to definitions of crime and criminal justice was seen as undermining criminology's search for scientific status. And as for Indigenous people? They were seen as part of the "crime problem", a segment of the problem population whose criminality needed explanation. Human rights apparently had nothing to do with their offending behaviour. The problem for criminology was why did so many Aboriginal people in places like Canada or Australia commit so much crime?

However, over the last decade or so the intellectual terrain has shifted significantly. Discourses on human rights have emerged in social science disciplines, and now clearly provide one frame for how we analyse and interpret the world. In addition the development of concepts like "state crime" (which until recently had been largely ignored in criminology) has breathed fresh life into understanding the relationship between the

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1 development of modern political states and the violent and at times
2 genocidal dispossession of Indigenous peoples. Perhaps more importantly
3 for Indigenous people, human rights have emerged as a fundamental and
4 global political discourse and have provided a platform for the articulation
5 of specific Indigenous demands. This articulation has been achieved largely
6 through supranational bodies like the United Nations, and now finds
7 expression through organs like the UN Permanent Forum on Indigenous
8 Issues.

9 As a result of these developments we can see at least three strands to how
10 we might bring criminology to a more intellectually robust understanding of
11 Indigenous people and human rights. The first point is that Indigenous
12 people have been victims of profound historical injustices and abuses of
13 human rights which can be at least partially understood as state crime. The
14 second point is that contemporary justice systems are often seen in the
15 context of the abuse of Indigenous people's human rights. The third strand
16 is an analysis of how claims to specific Indigenous rights impact on current
17 criminal justice processes, and how those claims might broaden our
18 understanding of reform and change.

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2. HISTORICAL INJUSTICES AND HUMAN RIGHTS ABUSES OF INDIGENOUS PEOPLES

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We know the widespread role of state institutions, often sanctioned by law, as the perpetrators of some of the greatest crimes against humanity. One estimate is that modern political states have been responsible for the murder of over 169 million people between 1900 and 1987, excluding deaths in wars, judicial executions and the killing of armed opponents and criminals (Green & Ward, 2004, p. 1). The modern political state has been integral to the commission of genocide and other human rights abuses. Genocide and modernity have gone hand in hand (Bauman, 1989), and the specific modernity of genocide is that the vastness and totality of "final solutions" could only be pursued by the modern state with access to resources, administrative capacities and law-making functions (Gellately & Kiernan, 2003, p. 4). This is at the heart of our contemporary understanding of state crime. That genocide, the "crime of all crimes", should have been absent from criminology for so long deserves full explanation in itself (Morrison, 2004). A part of the problem has been the positivist approaches in law and criminology that define "crime" as a breach of state criminal law, and count

1 crimes from the data driven by state agencies. Within such state-centric
discourses it is difficult to conceptualize the incidence and nature of state
3 crime (Morrison, 2005).

The colonial context adds a further dimension to how we understand the
5 connections between the development of the modern political state and
the globalized nature of gross violations of human rights. As Marx noted,
7 the dawn of capitalist production was made possible through the
exploitation of the peoples and resources in Africa, Asia and the Americas.
9 It was the “extirpation, enslavement and entombment in mines of the
aboriginal population [in the Americas], the beginning of the conquest and
11 looting of the East Indies, and the turning of Africa into a warren for the
hunting of black-skins” that laid the foundations for capitalist development
13 (Marx quoted in Morrison, 2005, pp. 300–301).

The modern political state is built on the human rights abuses of
15 colonized and enslaved peoples. Indeed racism, slavery and its consequent
effects in Africa and America could be the subject of much criminological
17 research. However, the focus of this chapter is on Indigenous people and it is
primarily to Australia, New Zealand and North America that the discussion
19 is drawn, although I will use the example of the Mayan people in Guatemala
as an example of contemporary state genocide against an Indigenous people.
21 The claims concerning historical injustices and human rights abuses against
Indigenous peoples are multilayered. At the highest level is the claim that
23 particular colonial practices against Indigenous people constituted genocide.
Below genocide are claims of mass murder, racism, ethnocide (or cultural
25 genocide), slavery, forced labour, forced removals and relocations, the
denial of property rights, and the denial of civil and political rights. The
27 claims of genocide against Indigenous people in the settler-colonies of North
America, New Zealand and Australia have been controversial (Van
29 Krieken, 2004). However there seems little doubt that genocide is the
appropriate description for specific colonial laws and practices at particular
31 times and places (Churchill, 1997; Moses, 2000). More broadly, the concept
of ethnocide or cultural genocide captures the aggressive attempt to
33 “civilize” Indigenous peoples through a range of state-endorsed laws,
policies and practices.

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37

2.1. Genocide

39 The United Nations Convention on the Prevention and Punishment of the
Crime of Genocide (1948) defines genocide as any of the following acts

1 committed with the intention to destroy, in whole or in part, a national,
 2 ethnical, racial or religious group by:

- 3 a) killing members of the group;
 4 b) causing serious bodily or mental harm to members of the group;
 5 c) deliberately inflicting on the group conditions of life calculated to bring
 6 about its physical destruction in whole or in part;
 7 d) imposing measures intended to prevent births within the group;
 8 e) forcibly transferring children of the group to another group.

9
 10 The crime of genocide has been levelled against colonial regimes in their
 11 treatment of Indigenous peoples in Australia and the Americas. In relation
 12 to genocide and Native Americans, Ward Churchill has noted the following:

13
 14 During the four centuries spanning the time between 1492 ... and 1892 when the U.S.
 15 Census Bureau concluded that there were fewer than a quarter million Indigenous people
 16 surviving within the country's claimed boundaries, a hemispheric population estimated
 17 to have been as great as 125 million was reduced by something over 90 percent. The
 18 people had died in their millions of being hacked apart with axes and swords, burned
 19 alive and trampled under horses ... intentionally starved and frozen to death during a
 20 multitude of forced marches and internments, and in an unknown number of instances,
 21 deliberately infected with epidemic diseases. (Churchill, 1997, p. 1)

22 Intention is a key element of genocide, and much of the recent analysis
 23 draws distinctions between the intentional killings of Indigenous people by
 24 colonial forces as distinct from the deaths of Indigenous peoples arising
 25 from introduced diseases (Stannard, 1993, p. xii). Massacres of Indigenous
 26 people by colonial state forces occurred across North America and
 27 Australia during the colonial period. On both continents, Indigenous men,
 28 women and children were murdered. As Stannard has noted in relation to
 29 the US,

30
 31 the European habit of indiscriminately killing women and children when engaged in
 32 hostilities with the natives of the Americas was more than an atrocity. It was flatly and
 33 intentionally genocidal. For no population can survive if its women and children are
 34 destroyed. (Stannard, 1993, pp. 118–119)

35 There are well documented massacres of Aboriginal people in Australia in
 36 the nineteenth century. In Western Australia and Queensland authorities
 37 spoke of police “teaching the blacks a lesson” and “dealing out a fearful
 38 punishment” (Cunneen, 2001a, p. 50). It is clear that colonial processes
 39 meant that the rule of law as a constraint on arbitrary power and as a
 40 guarantee of equality before the law was suspended in relation to Aboriginal
 41 people. What ensued can only be described as mass murders.

1 There were relatively recent massacres in Australia in the early part of the
2 twentieth century. The last recorded massacre occurred in 1928 in Coniston,
3 Northern Territory when some 60 to 70 Walpiri people were killed over
4 several weeks by a police party. Murray, the officer in charge openly
5 admitted to a policy of shoot to kill. According to a missionary who spoke
6 to survivors of the killings, “the natives tell me that they simply shot them
7 down like dogs and that they got the little children and hit them on the back
8 of the neck and killed them”. Murray admitted killing 31 people. Other
9 estimates by missionaries put the figure at between 70 and 100 Aboriginal
10 people killed. An inquiry, headed by a police inspector, was established into
11 the killings. Aboriginal people were refused legal representation. The
12 inquiry cleared those who were involved (Cunneen, 2001a, p. 55).

13

15 2.2. *The Civilising Mission and the Forced Removal of Children*

17 The civilising mission involved changing natives from savages to civilized
18 Christians. It was a task that occupied the European empires over several
19 centuries, and continued into the twentieth century in settler states like
20 Australia and North America. Yet the civilising process was also often
21 brutal. Native Americans were placed on church missions where the deaths
22 tolls were horrific. While many of these deaths were caused by European-
23 introduced diseases, the conditions on these missions also directly
24 contributed to the large number of deaths. Living spaces for captive Indians
25 “averaged about seven feet by two feet per person ... common rooms
26 contained a single open pit for a toilet” (Stannard, 1993, p. 138). Severe
27 malnutrition resulted from the inadequate diets and long hours of forced
28 labour. Grotesque forms of punishment were used against the rebellious.

29 One way of ensuring the civilising process was through the removal of
30 Indigenous children. The Canadian residential school policy was based on
31 assimilation – of changing Indigenous peoples from savage to civilized by
32 educating the young away from the influences of their parents and tribes. As
33 Milloy (1999, p. xv) has noted in the Canadian context, the process was
34 “violent in its intention to ‘kill the Indian’ in the child for the sake of
35 Christian civilization. In that way, the system was, even as a concept,
36 abusive”.

37 In Canada the residential school system stretched for more than a century
38 from the 1870s to the 1980s. There was a nationwide network of schools
39 operated by the Anglican, Catholic, Presbyterian and United Churches.
Thousands of Indian, Inuit and Metis children were to pass through the

1 schools. The system was a church-state partnership with the Department of
2 Indian Affairs providing the funding, setting the standards and exercising
3 legal control over the children who were wards (Milloy, 1999).

4 In Australia Aboriginal children had been forcibly removed from their
5 families by colonizers since the beginning of European occupation of
6 Australia. However by the late nineteenth and early twentieth centuries
7 there developed a systematic and state-sponsored policy of removal which
8 was far more extensive than any previous interventions (see NISATSIC,
9 1997, pp. 25–149). In many states of Australia, Aboriginal children were
10 placed in church-run institutions, while in some states like New South Wales
11 the institutions were operated by the state.

12 The Australian removal policies rested on specific assumptions about
13 race, “blood” and racial hygiene. Aboriginal people were divided according
14 to the amount of European “blood” they might possess. Law became
15 fundamental to the categorization and separation of individuals within
16 racialized boundaries. According to the social Darwinist ideas, so-called
17 “full blood” Aboriginal people were bound to die out because of their
18 inferiority. However, the concern for the state was the apparently rapidly
19 growing population of “mixed blood” children. It was these children that
20 became the target of intervention. By permanently removing them
21 from their families and communities it was believed that this group of
22 children would, over generations, eventually be biologically absorbed into
23 the non-Indigenous population. Their Aboriginality would be “bred” out.
24 Eugenicist arguments required a proactive state to manage, cleanse and
25 maintain the “white” population. Law provided the foundation through
26 which an administrative edifice would define Indigenous people as “full
27 blood”, “half caste”, “quarter caste” and so on.

28 Both the Canadian and the Australia authorities saw the removal process
29 as part of a civilising mission and spiritual duty to uplift the “natives”. Yet
30 in both countries, the system was never properly resourced or supervised,
31 and shocking neglect and physical abuse were common. In Australia a
32 federal inquiry in 1997 found that basic safeguards which protected non-
33 Indigenous families were cast aside when it came to Indigenous children.
34 The main components of the forced removal of Indigenous children which
35 were unlawful were deprivation of liberty, deprivation of parental rights,
36 abuses of power, and breach of guardianship duties. In relation to
37 international human rights the main obligations imposed on Australia and
38 breached by a policy of forced removals were the prohibitions on racial
39 discrimination and genocide. The policy continued to be practiced after
Australia had voluntarily subscribed to treaties outlawing both racial

1 discrimination and genocide (NISATSIC, 1997). In 1996 the Canadian
2 Royal Commission on Aboriginal Peoples (RCAP, 1996) released its final
3 report. As a result the Canadian Government has acknowledged past
4 injustice and apologized to Indigenous peoples, particularly in relation to
5 the effects of the residential school system.

7

2.3. *Racism*

9

11 Racism was a precondition for the colonial genocides and the systematic
12 abuse of human rights of Indigenous peoples in Australia and the Americas.
13 As Stannard (1993, p. 247) notes, Spanish and Anglo-Americans saw the
14 natives of the Americas as racially inferior beings. Racial discrimination
15 provided an overarching basis to governmental law and policy towards
16 Indigenous people throughout much of the eighteenth, nineteenth and
17 twentieth centuries. The suspension of the rule of law and the use of terror
18 and violence by colonial authorities against Indigenous people was also
19 contextualized and legitimated within racialized constructions of Indigenous
20 people as inferior, lesser human beings. There is no doubt that these
21 racialized constructions changed during the eighteenth, nineteenth and
22 twentieth centuries: in Australia this move was from notions of barbarism
23 to views about a race “doomed” to extinction. Indeed competing views
24 about race were often prevalent at the same time. However, what is
25 important is that racialized constructions of Indigenous people inevitably
26 facilitated discriminatory intervention. Institutionalized and legalized
27 discrimination reached a peak during the “protection” period of the
28 twentieth century.

29 After the 1940s ideas about cultural assimilation came to the fore.
30 However, the ultimate goal was still the same: the disappearance of
31 Indigenous people as a distinct group of people. In Australia, cultural
32 assimilation was seen as leading to a form of “equality” with European
33 Australians. However, this equality was to be one defined on the assumption
34 of the superiority of white Anglo-Australian cultural, economic and political
35 institutions. It was to be the equality of “sameness”: where everyone could
36 participate on a social terrain defined by the colonizer. The goal of equality
37 still authorized racial discrimination. To reach the level of equality the
38 colonial subject required tutelage. They had to be taught and trained to be
39 equal. As a result, in the post 1945 period there was intensive supervision
40 and surveillance through a range of state agencies including child welfare
41 and criminal justice agencies.

1 There were a range of specific harms which occurred as a result of racial
3 discrimination and the policies and practices of the “protection” and
5 assimilation periods of the twentieth century. These include such matters as
7 stolen wages, missing trust monies, and under-award payments for
9 Indigenous workers. There were negligent and, at times corrupt and
11 dishonest practices which lead to the withholding of moneys from
13 Aboriginal wages that had been paid into savings accounts, and trust
15 funds. In addition to these practices there were also under-award payments
17 to Aboriginal workers. The denial of civil and political rights included
19 numerous legislative controls and restrictions on movement, residence,
21 education, health care, employment, voting, worker’s compensation and
welfare/social security entitlements. In Australia the right to vote in either
state or federal elections varied between States. It was not until 1962 that
Commonwealth amendments to electoral laws removed any remaining
prohibitions on voting at the federal level. States began to dismantle their
discriminatory laws during the same period. Restrictions on Indigenous
voting rights in Queensland were not removed until 1965. Discriminatory
restrictions on eligibility for social security benefits for Aboriginal people
were not completely lifted until 1966. State legislation which restricted the
citizenship rights of Indigenous people living on reserves in Queensland
remained in place until the 1980s (Chesterman & Galligan, 1997).

23

24 *2.4. Reparations*

25

26 Many of the harms against Aboriginal peoples in Australia and North
27 America relied on law for their legitimacy. Many were essentially aimed at
29 destroying Indigenous cultures. They were cultural harms in the broadest
31 sense: colonial laws, policies and practices which, at various times, sought
33 to assimilate, “civilize”, and Christianize Aboriginal peoples through
35 the establishment of reservations, the denial of basic citizenship rights,
the forced removal of children and forced education in residential
schools, the banning of language, cultural and spiritual practices, and the
imposition of an alien criminal justice system (RCAP, 1996; NISATSIC,
1997; Tsosie, 2004).

37 Many of the harms caused by colonial polices are the subject of litigation,
39 including the removal of children, missing wages and stolen trust fund
money. How we address these historical injustices raises important
questions for criminology, in particular how do we understand the purpose
of prosecutions for crimes against humanity? Do we hold individuals

1 accountable for state crime? And what is the purpose of punishment or
2 reparations in these cases? Is it retribution: to punish the evil actions of
3 those who committed crimes against humanity? Is it consequentialist: to
4 achieve specific and general deterrence so that these systematic human rights
5 abuses do not re-occur? Is it expressive: to reaffirm our commitment to
6 human rights as an international standard?

7 The historical abuse of Indigenous people's human rights requires a
8 comprehensive response to the past. The survivors and descendants of the
9 victims have a case for reparations and compensation. Criminology as a
10 discipline can make an important contribution to understanding how and
11 why we might develop a more systematic approach to reparations for
12 historical injustices through its interests in punishment.

15 **3. CONTEMPORARY RELATIONS BETWEEN** 16 **INDIGENOUS PEOPLES AND STATE CRIMINAL** 17 **JUSTICE SYSTEMS**

19 Indigenous people today total some are 370 million people across 70
20 nations. As distinct peoples they have retained social, cultural, economic
21 and political characteristics which distinguish them from the dominant
22 societies in which they live. Indigenous peoples are also among the most
23 disadvantaged and vulnerable groups of people in the world (Permanent
24 Forum on Indigenous Issues, 2006). It is inaccurate to generalize about the
25 specific nature of Indigenous cultures given their variety. Also the
26 experiences of colonization varied depending on when it occurred, where
27 and by whom. The discussion in this chapter focuses on Indigenous peoples
28 experiences in the settler colonies of Canada, the USA, New Zealand and
29 Australia, and some of the commonalities found in Indigenous peoples'
30 relations with dominant criminal justice systems in those countries.

33 *3.1. Imprisonment*

35 A starting point in understanding contact between Indigenous peoples and
36 criminal justice systems is the massive over-representation of Indigenous
37 people. Data shows that Māori are over-represented at every stage of the
38 New Zealand criminal justice system. In 1998 they were 3.3 times more
39 likely to be apprehended for a criminal offence than non-Māori. They were

1 more likely to be prosecuted, more likely to be convicted, and more likely to
2 be sentenced to imprisonment. The result was that Māori made up 14 per
3 cent of the general population and 51 per cent of the prison population.
4 Evidence suggests the gaps are widening, not narrowing (Doone, 2000, p. 8).
5 In Canada Aboriginal people comprise 3 per cent of the general population,
6 but Aboriginal offenders make up 17 per cent of inmates in the federal
7 penitentiary system. The situation is even worse in some provincial
8 institutions, particularly in Manitoba, Saskatchewan and Alberta, where
9 Aboriginal people make up more than 60 per cent of the inmate population
10 in some penitentiaries. In Saskatchewan, for example, Aboriginal people are
11 incarcerated at a rate 35 times higher than the mainstream population
12 (Cunneen, 2001b, p. 108). In the United States, on any given day an
13 estimated one in 25 American Indians 18 years old and older is under the
14 jurisdiction of the nation's criminal justice system. This is 2.4 times the rate
15 for whites and 9.3 times the per capita rate for Asians but about half the rate
16 for blacks. The number of American Indians per capita confined in state and
17 federal prisons is about 38 per cent above the national average. The rate of
18 confinement in local jails is estimated to be nearly four times the national
19 average (Greenfeld & Smith, 1999). In Australia, in 2005, Indigenous
20 imprisonment rates were 2,021.2 per 100,000 compared to 162.5 for non
21 Indigenous people, and some 22 per cent of the total prisoner population
22 were Indigenous people (ABS, 2005, p. 3).

23 There have been major inquiries into the relationship of Indigenous
24 people with the criminal justice system, particularly in Australia (the Royal
25 Commission into Aboriginal Deaths in Custody) and Canada (the
26 Manitoba Aboriginal Justice Inquiry, and the Royal Commission into
27 Aboriginal Peoples). There is a wealth of information which these inquiries
28 and subsequent research has provided on the problematic processes of
29 criminalization and Indigenous people. For the purposes of the current
30 discussion I have concentrated on the human rights issues which have arisen
31 in the context of Indigenous peoples in Australia.

33

34 *3.2. Freedom from Torture and Cruel, Inhuman and Degrading Treatment*

35

36 Freedom from torture and cruel, inhuman and degrading treatment is a
37 fundamental human right and protection from state abuse. There have been
38 long-running concerns over police violence against Indigenous people in
39 Australia. Amnesty International has accused Australia of a "wavering
40 commitment to human rights" and noted that:

1 Aboriginal Australians have been ill-treated and abused by state officials, and suffer
systemic discrimination. Incidents of ill-treatment by police have gone unpunished. The
3 government has also taken decisions that appear to undermine its stated commitment to
human rights. (Amnesty International, 1997, p. 3)

5 Problems associated with police violence against Indigenous people were a
key part of the National Inquiry into Racist Violence undertaken by the
7 Australian Human Rights and Equal Opportunity Commission (HREOC)
in 1991. The Inquiry found that racist violence is an endemic problem for
9 Aboriginal and Torres Strait Islander people in Australia and that
11 “Aboriginal – police relations have reached a critical point due to the
widespread involvement of police in acts of racist violence, intimidation and
harassment” (HREOC, 1991, p. 387).

13

15 *3.3. Special Considerations for Children and Young People*

17 There are special human rights obligations which are applicable to children
and young people. These include:

- 19 • detention as a last resort, the utilization of alternatives to detention and
the availability of a variety of sentencing dispositions;
21 • treatment with humanity and respect, treatment suitable for age, and
treatment to promote a child’s sense of dignity; and
23 • the promotion of the child’s reintegration into society.

25 The evidence shows clearly that Indigenous young people are less likely to
receive diversionary options like youth conferencing compared to non-
27 Indigenous youth, are more likely to be proceeded against by way of arrest,
are more likely to be refused bail and remanded in custody, and are more
29 likely to be sentenced to a period of detention (Cunneen & White, 2007,
pp. 141–170). In other words, the specific human rights protections which
31 have been developed for children and young people are less likely to be
applied when the young person is Indigenous.

33

35 *3.4. Freedom from Racial Discrimination*

37 A major area of concern with the operation of criminal justice systems has
been the impact of policing and the use of public order or “street” offences
39 legislation against Indigenous people. The argument has been that the high
levels of discretion available to police in utilising this type of legislation,

1 allows for racially discriminatory decisions to be made. As a result,
2 Indigenous people are much more likely to be criminalized for minor
3 offences, and required to “move-on” in public places. For example, it has
4 been found that in New South Wales’ townships with large Aboriginal
5 populations, police used their move-one powers at a rate 30 times higher
6 than across the State generally (Chan & Cunneen, 2000).

7

9

3.5. The Use of Arrest as a Last Resort

11 A critical issue examined by the Royal Commission into Aboriginal Deaths
12 in Custody was the high level of criminalization of Indigenous people.
13 Research has continually called into question the issue of over-policing in
14 Indigenous communities, particularly in relation to public order offences.
15 The evidence also shows that police are more likely to use arrest when
16 dealing with Indigenous people rather than alternative processes. In several
17 jurisdictions detentions for public drunkenness are a major reason for
18 contact with the police.

19

21

3.6. The Right to a Fair Trial

23 A fair trial demands that the accused understands the charges and can
24 answer the case against them. Many Indigenous people in remote
25 communities do not speak English and there is a lack of interpreters. Legal
26 representation for Indigenous accused in remote communities may also be
27 limited. The right to a fair trial is a requirement of the International
28 Covenant on Civil and Political Rights. However, the problem of
29 interpreters and legal representation has been identified for decades as
30 significantly reducing the ability of Indigenous people to utilize the courts in
31 a fair and equitable manner.

33

35

3.7. The Use of Detention and Imprisonment as a Sanction of Last Resort

37 As indicated above, Indigenous people are significantly over-represented in
38 prison. The evidence shows that Indigenous people are more likely to receive
39 a sentence of imprisonment than non-Indigenous people. There are a
40 number of reasons for this. It is more likely that Indigenous people have
41 prior criminal records and this affects sentencing decisions. It is also less

1 likely that Indigenous people sentenced in rural and remote areas will have
2 access to a full range of non-custodial sentencing options.

3 3.8. *Deaths in Custody: The Failure to Exercise Appropriate Duty of Care*

7 Indigenous deaths in custody continue to occur in controversial circum-
8 stances. Investigations of those deaths show that negligence and lack of care
9 are still endemic despite the accepted legal view that authorities have a duty
10 of care for those in their custody. However, basic failings mean that deaths
11 occur in preventable circumstances:

- 13 • hanging points remain common place in custodial environments;
- 14 • medical assessments and other vital information are not communicated or
15 do not impact on decision-making;
- 16 • there is a lack of training in how to respond to vulnerable persons such as
17 the mentally ill; and
- 18 • there is a failure of custodial authorities to follow instructions or
19 procedure (Cunneen, 2006).

20 The challenge for a human rights perspective in criminology is to
21 understand how contemporary criminal justice systems work in a way that
22 criminalizes Indigenous peoples and entrenches them within that system. At
23 a deeper level this requires an understanding of how specific human rights
24 which in theory guide the operation of criminal justice systems, appear to be
25 disregarded or suspended when it comes to Indigenous people. At least part
26 of this understanding will involve an analysis of institutional racism in the
27 justice system.

29 **4. A CONTEMPORARY INDIGENOUS GENOCIDE**

31 Lest we think that the genocide of Indigenous people is a matter of historical
32 interest only, it is worth considering the more recent events in Guatemala – a
33 relatively small Central American country of 12 million people, of whom
34 about 40 per cent are Indigenous. From the 1960s through to a peace
35 accord in 1996, the country suffered what has been recognized as one of
36 the worst internal armed conflicts in the region. The Guatemalan
37 Commission for Historical Clarification was formed after the peace
38 accord and reported in 1999. It found that massacres occurred in some
39 626 villages, while 200,000 people were documented to have been killed

1 or disappeared during the period of conflict. Some 83 per cent of those killed
 3 were Indigenous Mayans. State forces, in particular the Guatemalan army,
 5 police and paramilitary groups, were responsible for 93 per cent of the
 7 human rights violations. The Commission also noted the role of the US
 9 Central Intelligence Agency in the events which had occurred in Guatemala
 11 (Sanford, 2003, p. 14), for which President Clinton was later to express **AU:1**
 13 regret, saying the US involvement and support of the military-sponsored
 15 human rights abuses was wrong.

9 According to the Commission for Historical Clarification (1999), the
 11 army was responsible for genocide against the Maya, particularly in the
 13 years between 1981 and 1983 when more than half the massacres occurred.
 15 The National Security Doctrine was based on identifying and targeting
 17 Mayans and all political opposition for elimination. The Commission
 19 noted that

15 The Army's perception of Mayan communities as natural allies of the guerrillas
 17 contributed to increasing and aggravating the human rights violations perpetrated
 19 against them, demonstrating an aggressive racist component of extreme cruelty that led
 21 to the extermination en masse, of defenceless Mayan communities purportedly linked to
 the guerrillas – including children, women and the elderly – through methods whose
 cruelty has outraged the moral conscience of the civilised world. (Commission for
 Historical Clarification, 1999, para 85)

23 The number of deaths in Guatemala exceeded the deaths tolls of conflicts in
 25 El Salvador, Nicaragua, Argentina and Chile combined. In addition there
 27 were forced displacements of up to one and a half million Indigenous people
 29 during the 1980s. The Commission found that Mayans suffered arbitrary
 31 execution, forced disappearance, and the torture and rape of men, women
 33 and children, “the effect of which was to terrorize the population and
 35 destroy the foundations of social cohesion, particularly when people were
 37 forced to witness or execute these acts themselves” (Commission for
 Historical Clarification, 1999, para 114). The “scorched earth” operations
 involved burning entire villages and collectively worked fields and harvests
 to the ground. In the Ixil region the Commission found that “between 70%
 and 90% of villages were razed” (Commission for Historical Clarification,
 1999, para 116).

35 The Commission, whose report was titled “Guatemala: Memory of
 37 Silence”, also found racism to be an “underlying cause” of the armed
 39 conflict (1999, para 12). Indeed, Seils (2002) argues that one of the reasons
 the Guatemalan conflict received so little attention internationally was that
 at least from the 1980s it was essentially a war of racial persecution against
 Mayan peoples. In one of its strongest conclusions the Commission found,

1 that in the four regions most affected by the violence, the Guatemalan state
3 through its agents had committed acts of genocide against groups of Mayan
people (1999, para 122).

5 Of the 626 massacres documented by the Commission for Historical
Clarification, only two cases relating to mass killings during the conflict
7 have been successfully prosecuted in the Guatemalan courts. As Human
Rights Watch has noted, Guatemalans seeking accountability for these
abuses face considerable obstacles.

9
11 The prosecutors and investigators who handle these cases receive grossly inadequate
training and resources. The courts routinely fail to resolve judicial appeals and motions
13 in an expeditious manner. The army and other state institutions fail to cooperate fully
with investigations into abuses committed by current or former members. The police do
not provide adequate protection to judges, prosecutors, and witnesses involved in
politically sensitive cases. (Human Rights Watch, 2006)

15
17 Political violence and the victimization of Indigenous people continue to be
a significant problem. According to Human Rights Watch, there is a
19 widespread consensus that those responsible for the violence and intimidation
are affiliated with private, secretive, and illegally armed networks who
21 “appear to have links to both state agents and organized crime-which give
them access to considerable political and economic resources” (Human
Rights Watch, 2006).

23 What do we make of the genocide in Guatemala in terms of criminology?
In the first instance it is a contemporary example of state crime of the worst
25 kind against Indigenous people. Secondly a critical criminology built on a
human rights perspective, has specific analytical tools for understanding
27 how that crime developed and was operationalized in state law and policy,
and in practice with allegiances between military, police and paramilitary
29 groups. Thirdly, a critical criminology can contribute to our understanding
of the processes of redress and remedy. How and why do we punish those
31 responsible for crime? And what can we put in place to alleviate the harm
caused to victims?

35
37 **5. INDIGENOUS RIGHTS IN A GLOBAL CONTEXT:
THE IMPLICATIONS FOR CRIMINOLOGY**

39 Indigenous aspirations for human rights occur on a global stage. Over the
last decades the struggle for Indigenous rights has become a matter of global

1 politics in which nation states can no longer claim Indigenous rights are
2 merely issues of domestic policy. The importance which Indigenous peoples
3 have placed on the development of international human rights standards is
4 not surprising when it is understood that modern states have been at the
5 forefront of denying basic rights to Indigenous peoples.

6 The growth of Indigenous peoples' claims at the international level
7 is reflected in the Declaration on the Rights of Indigenous Peoples,
8 adopted by the General Assembly of the United Nations in March 2007
9 (United Nations, General Assembly, 2007). The Declaration was developed
10 by the United Nations Working Group on Indigenous Populations
11 (WGIP) during the 1980s and 1990s and brought a new level of
12 internationalism to the question of Indigenous rights. The WGIP was a
13 body that was representative of Indigenous peoples from around the
14 world, and the draft declaration it developed is widely seen as a
15 document reflecting the aspirations of Indigenous peoples, rather than the
16 interests of states. Indigenous people also now have a permanent presence at
17 the United Nations. The Permanent Forum on Indigenous Issues was
18 established as an advisory body to the Economic and Social Council in
19 July 2000, with a mandate to discuss Indigenous issues related to economic
20 and social development, culture, the environment, education, health and
21 human rights.

22 The Declaration on the Rights of Indigenous Peoples contains a preamble
23 and 46 articles covering matters of self-determination, nationality, security,
24 culture, religion, language, education, media, employment, land and
25 resources. The preamble rejects racism and affirms that Indigenous
26 people should be free from discrimination. It recognizes that Indigenous
27 peoples have been deprived of their human rights through colonization
28 and the taking of their land. It recognizes the urgent need to respect
29 the rights of Indigenous peoples, particularly their rights to self-determination,
30 and to their land and resources. It recognizes that respect for
31 Indigenous knowledge, cultures and traditional practices contributes to
32 sustainable and equitable development and proper management of the
33 environment.

34 It is not possible in the context of this chapter to deal with all the human
35 rights issues covered in the Declaration. However, a number of the rights
36 outlined in the Declaration have specific relevance to criminology. The
37 Declaration states that Indigenous peoples have the right to self-
38 determination and the right to keep their distinct characteristics. It is these
39 two rights which I explore further below: the right to self-determination and
the right to freedom from genocide and ethnocide.

5.1. Freedom from Genocide and Ethnocide

Given the history of the attempted destruction of Indigenous peoples, and the historically entrenched discrimination and dispossession, it is not surprising that a fundamental right claimed by Indigenous peoples is the right to exist as distinct “peoples” with their own language, culture and institutions.

Several articles of the Declaration are concerned with the rights to life and existence. Indigenous peoples are to be free from genocide and their children must not be removed from their communities. They have the right to their culture and identity. They have the right to stay on their land and must be specially protected in time of war. Of particular relevance is the right to existence as a collective right of Indigenous peoples to maintain and develop their distinct identities and characteristics. It has been recognized that a major theme of the Declaration is the “protection of the unique character and attributes of Indigenous peoples, including culture, religion and social institutions” (Coulter, 1995, p. 127). Articles 7 and 8 of the draft Declaration deal with genocide, forced assimilation and destruction of culture (ethnocide).

Prohibitions against genocide fit firmly within a criminological frame – genocide is the crime of violence *par excellence*, so it is not difficult to see the relevance to criminology. However, ethnocide and cultural assimilation are also relevant rights for proper criminological understandings. Article 8 (d) of the Declaration prohibits “any form of forced assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures”. The provisions which prohibit forced assimilation and integration have implications for how we think about the development of institutions which may seek either directly or indirectly to impose the standards and cultural and social mores of the dominant group on Indigenous communities. We might think about this in relation to the criminal justice system at a number of levels: does the criminalization of certain activities discriminate against Indigenous people? Do legal processes recognize cultural differences, for example by providing for a role for Indigenous Elders in sentencing? Do legal processes recognize language differences, for example by providing interpreters? Do penal regimes adequately cater for cultural differences of Indigenous people?

5.2. Self-Determination

Indigenous peoples base their claims to self-determination on the fact that they were the first peoples in their territories. Self-determination means the

1 right of Indigenous peoples to choose their political status and to make
 3 decisions about their own development. Article 4 of the Declaration notes
 5 that in exercising self determination, Indigenous peoples “have the right to
 7 autonomy or self-government in matters relating to their internal and local
 9 affairs”, and in Article 5 that Indigenous peoples have “the right to
 11 maintain and strengthen their distinct political, legal, economic, social and
 13 cultural institutions”. Article 34 asserts that:

9 Indigenous peoples have the right to promote, develop and maintain their institutional
 11 structures and their distinctive customs, spirituality, traditions, procedures, practices
 and, in cases where they exist, juridical systems or customs, in accordance with
 international human rights standards.

13 It is not surprising that Indigenous peoples might wish to re-assert their
 15 claims to develop Indigenous law and processes for dealing with dispute
 17 resolution. The criminal justice systems of colonial states developed as state
 19 activities fundamentally captured within the wider historical trends of
 21 colonization and nation building-and nation-building occurred at the
 23 expense of dispossessed and excluded peoples, including Indigenous peoples.
 25 While western liberal democratic states may see their criminal justice
 systems as essentially neutral, fair and universal in their application, it is
 clear that for many Indigenous peoples state criminal justice systems are
 seen as oppressive. The process of re-asserting Indigenous rights may
 require significant institutional change on the part of state criminal justice
 agencies, especially when a central component of the Indigenous critique of
 policing and the criminal justice system has been that Indigenous rights have
 been ignored, in particular the right to self-determination.

27 Self-determination can take a variety of forms. As the Australian
 Indigenous leader Michael Dodson has noted,

29 [E]very issue concerning the historical and present status, entitlements, treatment and
 31 aspirations of Aboriginal and Torres Strait Islander peoples is implicated in the concept
 of self-determination. The reason for this is that self-determination is a process. The
 right to self-determination is the right to make decisions. (Dodson, 1993, p. 41)

33 Henriksen (1998, p. 32) has discussed four existing ways of arranging
 35 Indigenous autonomy and self-government. These are not meant to be
 37 exhaustive of all possibilities nor are they meant to suggest that the existing
 solutions are necessarily adequate, but rather they provide an illustrative
 way of thinking about the issue. The four arrangements include:

- 39 • Indigenous autonomy through contemporary Indigenous political institu-
 tions (for example, Saami Parliaments in the Nordic countries);

- 1 • Indigenous autonomy based on the concept of an Indigenous territorial
3 base (for example, the Comarca arrangement in Panama, the Torres
Strait Regional Authority in Australia, or Indian jurisdictions in the
United States);
- 5 • Regional autonomy within the state (for example, the Nunavut territory
in Canada or Indigenous autonomous regions in the Philippines);
- 7 • Indigenous overseas autonomy (for example, Greenland Home Rule).

9 The right of self-determination is also often linked to Indigenous claims of
sovereignty. Sovereignty can have multiple meanings in the context of
11 Indigenous political claims. It can refer to the historical claim that
Indigenous people have never relinquished sovereignty – particularly
13 pertinent in Australia where there were no written treaties recognized by
the Crown. Or it can be used to refer by Indigenous people to the residual
15 and unextinguished rights to self-government and autonomy which were
recognized to varying degrees through treaties in New Zealand and North
17 America. More generally, the political claim of a right to self-determination
implies the right and ability to exercise some level of sovereign power – even
19 if within the boundaries of existing nation states.

21 In practice Indigenous peoples' experience of sovereignty under colonial
regimes varies widely depending on the particular historical circumstances.
In the USA, Indigenous peoples have had sovereignty recognized within the
23 confines of the overarching authority and jurisdiction of the federal
government. Federal Indian law is founded on the doctrine of inherent
25 sovereignty. "The essential claim of tribal Indians that distinguishes them
from other groups is their claim of sovereignty – the inherent right to
27 promulgate and be governed by their own laws"(Scott Gould, 1996, p. 815).
Sovereignty in international law is usually seen as inextricably tied to
29 territory:

31 Sovereignty demands a territory over which the governmental authority of the sovereign
extends. Control over territory is the most essential element of sovereignty. (...)
33 Territory thus represents both the encompassing limits of a state's jurisdiction over its
resident population and the barriers to outside jurisdiction. (Royster, 1995, pp. 1–2)

35 However, sovereignty is also a dynamic concept with transformed meanings
in different political and historical contexts. It is neither static nor absolute.
Despite the apparent claims of the nation state to a concept of sovereignty
37 which privileges a particular political relationship and concept of power,
sovereignty is in a state of flux. From an Indigenous perspective, it can be
39 conceptualized in terms of jurisdictional multiplicity and divisibility rather
than monopoly and unity.

1 While sovereign power remains central to the nation state, trends towards
3 globalization have also seen the state deal with competing modes of
5 governance. Although “the liberal-democratic nation-state retains a central
7 role in redistributing elements of sovereign power and national jurisdiction”
9 (Stenson, 1999, p. 67), there has also been a “redistribution” of sovereign
11 powers. In the criminal justice area, we can see sovereign power moving out
of the state to international bodies for courts and policing (United Nations
and regional-based courts, regulatory bodies, investigatory bodies and so
forth). Sovereign power can also be seen as moving downwards to more
regional and local spheres of government and governance such as multi-
agency crime control partnerships (Stenson, 1999, p. 68).

The challenge that Indigenous claims to sovereignty and self-determina-
tion pose for criminology are both theoretical and practical. The theoretical
challenge is to understand that basic categories and definitions of crime are
fundamentally circumscribed by historical and political contexts. The very
legitimacy of the institutions used to control crime is not universally
accepted. The praxis issue this raises is how do we develop legal institutions
which are capable of dealing with multiple jurisdictions and differential
citizenship claims (Cunneen, 2005). In other words, how do criminal justice
system institutions develop in a manner that can deal fairly with competing
citizenship demands and maintain legitimacy for different social groups?

23

6. CONCLUSION

25

The intersection between human rights, criminology and Indigenous peoples
opens up new and important terrain for understanding how criminal justice
systems operate and their impact on specific groups. As I have identified in
this chapter a human rights perspective on Indigenous issues and
criminology falls broadly across three areas: the historical relationship
between Indigenous people and colonial states, the contemporary operation
of criminal justice systems in nations with significant Indigenous minorities,
and the contemporary human rights claims of Indigenous peoples in the
international arena and the effect this is likely to have on domestic systems
of justice.

A criminology informed by human rights can bring new scholarship to the
historical relationship between Indigenous people and colonial states. Part
of this will necessarily involve a re-interpretation of the historical
development of criminal justice systems in the context of the colonial
imperative of controlling Indigenous people. However the task is not only

1 one of “history”. A key contemporary demand by Indigenous peoples is the
2 claim for reparations for past human rights abuses. Criminology can also
3 offer insights and analysis into how processes for reparations might develop
4 – particular given criminology’s traditional interests in punishment and
5 victims, and its developing interests in restorative justice.

6 As indicated in this chapter, Indigenous people are significantly over-
7 represented in the criminal justice systems of former colonial states. A
8 criminology informed by human rights can offer a significant analysis of the
9 nature and impact of that over-representation. It can also offer guidance as
10 to how criminal justice systems might develop in a way that is respectful of
11 key internationally accepted human rights standards (like the Convention
12 on the Rights of the Child, and the Covenant on Civil and Political Rights).

13 Finally, Indigenous people are increasingly using international human
14 rights mechanisms to develop their own specific claims. In particular, the
15 Declaration on the Rights of Indigenous Peoples represents a key document
16 in understanding the current political aspirations of Indigenous people. The
17 aspirations of Indigenous people in regard to law and justice open up some
18 exciting and challenging possibilities for criminologists. Those aspirations
19 require us to re-think how criminal justice institutions operate, and how
20 they might be developed in a way that allows for cultural multiplicity.

21 The bulk of criminological research in relation to Indigenous people has
22 been narrowly confined to “Indigenous crime” and traditionally sees state
23 criminal justice responses as the more or less technical application of laws,
24 policies and procedures to control crime. Most government-employed
25 “administrative” criminologists steer as far away as possible from the issue
26 of human rights. Bringing a human rights perspective to criminology and
27 Indigenous people is an important task. It opens up a new level of research,
28 analysis and theory building, and can directly contribute to identifying and
29 remedying human rights abuses.

31

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