Criminology, Human Rights and Indigenous Peoples

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

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.

2. HISTORICAL INJUSTICES AND HUMAN RIGHTS ABUSES OF INDIGENOUS PEOPLES

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

The colonial context adds a further dimension to how we understand the connections between the development of the modern political state and the globalized nature of gross violations of human rights. As Marx noted, the dawn of capitalist production was made possible through the exploitation of the peoples and resources in Africa, Asia and the Americas. It was the “extermination, enslavement and entombment in mines of the aboriginal population [in the Americas], the beginning of the conquest and 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 (Marx quoted in Morrison, 2005, pp. 300–301).

The modern political state is built on the human rights abuses of colonized and enslaved peoples. Indeed racism, slavery and its consequent effects in Africa and America could be the subject of much criminological 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 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.

The claims concerning historical injustices and human rights abuses against Indigenous peoples are multilayered. At the highest level is the claim that particular colonial practices against Indigenous people constituted genocide. Below genocide are claims of mass murder, racism, ethnocide (or cultural genocide), slavery, forced labour, forced removals and relocations, the denial of property rights, and the denial of civil and political rights. The claims of genocide against Indigenous people in the settler-colonies of North America, New Zealand and Australia have been controversial (Van Krieken, 2004). However there seems little doubt that genocide is the appropriate description for specific colonial laws and practices at particular times and places (Churchill, 1997; Moses, 2000). More broadly, the concept of ethnocide or cultural genocide captures the aggressive attempt to “civilize” Indigenous peoples through a range of state-endorsed laws, policies and practices.

2.1. Genocide

The United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1948) defines genocide as any of the following acts
committed with the intention to destroy, in whole or in part, a national, ethnical, racial or religious group by:

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

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

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

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

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

There are well documented massacres of Aboriginal people in Australia in the nineteenth century. In Western Australia and Queensland authorities spoke of police “teaching the blacks a lesson” and “dealing out a fearful punishment” (Cunneen, 2001a, p. 50). It is clear that colonial processes meant that the rule of law as a constraint on arbitrary power and as a guarantee of equality before the law was suspended in relation to Aboriginal people. What ensued can only be described as mass murders.
There were relatively recent massacres in Australia in the early part of the twentieth century. The last recorded massacre occurred in 1928 in Coniston, Northern Territory when some 60 to 70 Walpiri people were killed over several weeks by a police party. Murray, the officer in charge openly admitted to a policy of shoot to kill. According to a missionary who spoke to survivors of the killings, “the natives tell me that they simply shot them down like dogs and that they got the little children and hit them on the back of the neck and killed them”. Murray admitted killing 31 people. Other estimates by missionaries put the figure at between 70 and 100 Aboriginal people killed. An inquiry, headed by a police inspector, was established into the killings. Aboriginal people were refused legal representation. The inquiry cleared those who were involved (Cunneen, 2001a, p. 55).

2.2. The Civilising Mission and the Forced Removal of Children

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

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

In Canada the residential school system stretched for more than a century from the 1870s to the 1980s. There was a nationwide network of schools operated by the Anglican, Catholic, Presbyterian and United Churches. Thousands of Indian, Inuit and Metis children were to pass through the
schools. The system was a church-state partnership with the Department of Indian Affairs providing the funding, setting the standards and exercising legal control over the children who were wards (Milloy, 1999).

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

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

Both the Canadian and the Australia authorities saw the removal process as part of a civilising mission and spiritual duty to uplift the “natives”. Yet in both countries, the system was never properly resourced or supervised, and shocking neglect and physical abuse were common. In Australia a federal inquiry in 1997 found that basic safeguards which protected non-Indigenous families were cast aside when it came to Indigenous children. The main components of the forced removal of Indigenous children which were unlawful were deprivation of liberty, deprivation of parental rights, abuses of power, and breach of guardianship duties. In relation to international human rights the main obligations imposed on Australia and breached by a policy of forced removals were the prohibitions on racial discrimination and genocide. The policy continued to be practiced after Australia had voluntarily subscribed to treaties outlawing both racial
discrimination and genocide (NISATSIC, 1997). In 1996 the Canadian Royal Commission on Aboriginal Peoples (RCAP, 1996) released its final report. As a result the Canadian Government has acknowledged past injustice and apologized to Indigenous peoples, particularly in relation to the effects of the residential school system.

2.3. Racism

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

After the 1940s ideas about cultural assimilation came to the fore. However, the ultimate goal was still the same: the disappearance of Indigenous people as a distinct group of people. In Australia, cultural assimilation was seen as leading to a form of “equality” with European Australians. However, this equality was to be one defined on the assumption of the superiority of white Anglo-Australian cultural, economic and political institutions. It was to be the equality of “sameness”: where everyone could participate on a social terrain defined by the colonizer. The goal of equality still authorized racial discrimination. To reach the level of equality the colonial subject required tutelage. They had to be taught and trained to be equal. As a result, in the post 1945 period there was intensive supervision and surveillance through a range of state agencies including child welfare and criminal justice agencies.
There were a range of specific harms which occurred as a result of racial discrimination and the policies and practices of the “protection” and assimilation periods of the twentieth century. These include such matters as stolen wages, missing trust monies, and under-award payments for Indigenous workers. There were negligent and, at times corrupt and dishonest practices which lead to the withholding of moneys from Aboriginal wages that had been paid into savings accounts, and trust funds. In addition to these practices there were also under-award payments to Aboriginal workers. The denial of civil and political rights included numerous legislative controls and restrictions on movement, residence, 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).

2.4. Reparations

Many of the harms against Aboriginal peoples in Australia and North America relied on law for their legitimacy. Many were essentially aimed at destroying Indigenous cultures. They were cultural harms in the broadest sense: colonial laws, policies and practices which, at various times, sought to assimilate, “civilize”, and Christianize Aboriginal peoples through 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).

Many of the harms caused by colonial polices are the subject of litigation, 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
accountable for state crime? And what is the purpose of punishment or reparations in these cases? Is it retribution: to punish the evil actions of those who committed crimes against humanity? Is it consequentialist: to achieve specific and general deterrence so that these systematic human rights abuses do not re-occur? Is it expressive: to reaffirm our commitment to human rights as an international standard?

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

3. CONTEMPORARY RELATIONS BETWEEN INDIGENOUS PEOPLES AND STATE CRIMINAL JUSTICE SYSTEMS

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

3.1. Imprisonment

A starting point in understanding contact between Indigenous peoples and criminal justice systems is the massive over-representation of Indigenous people. Data shows that Māori are over-represented at every stage of the New Zealand criminal justice system. In 1998 they were 3.3 times more likely to be apprehended for a criminal offence than non-Māori. They were
more likely to be prosecuted, more likely to be convicted, and more likely to be sentenced to imprisonment. The result was that Māori made up 14 per cent of the general population and 51 per cent of the prison population. Evidence suggests the gaps are widening, not narrowing (Doone, 2000, p. 8). In Canada Aboriginal people comprise 3 per cent of the general population, but Aboriginal offenders make up 17 per cent of inmates in the federal penitentiary system. The situation is even worse in some provincial institutions, particularly in Manitoba, Saskatchewan and Alberta, where Aboriginal people make up more than 60 per cent of the inmate population in some penitentiaries. In Saskatchewan, for example, Aboriginal people are incarcerated at a rate 35 times higher than the mainstream population (Cunneen, 2001b, p. 108). In the United States, on any given day an estimated one in 25 American Indians 18 years old and older is under the jurisdiction of the nation’s criminal justice system. This is 2.4 times the rate for whites and 9.3 times the per capita rate for Asians but about half the rate for blacks. The number of American Indians per capita confined in state and federal prisons is about 38 per cent above the national average. The rate of confinement in local jails is estimated to be nearly four times the national average (Greenfeld & Smith, 1999). In Australia, in 2005, Indigenous imprisonment rates were 2,021.2 per 100,000 compared to 162.5 for non Indigenous people, and some 22 per cent of the total prisoner population were Indigenous people (ABS, 2005, p. 3).

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

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

Freedom from torture and cruel, inhuman and degrading treatment is a fundamental human right and protection from state abuse. There have been long-running concerns over police violence against Indigenous people in Australia. Amnesty International has accused Australia of a “wavering commitment to human rights” and noted that:
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 government has also taken decisions that appear to undermine its stated commitment to human rights. (Amnesty International, 1997, p. 3)

Problems associated with police violence against Indigenous people were a key part of the National Inquiry into Racist Violence undertaken by the Australian Human Rights and Equal Opportunity Commission (HREOC) in 1991. The Inquiry found that racist violence is an endemic problem for Aboriginal and Torres Strait Islander people in Australia and that “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).

3.3. Special Considerations for Children and Young People

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

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

The evidence shows clearly that Indigenous young people are less likely to receive diversionary options like youth conferencing compared to non-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 likely to be sentenced to a period of detention (Cunneen & White, 2007, pp. 141–170). In other words, the specific human rights protections which have been developed for children and young people are less likely to be applied when the young person is Indigenous.

3.4. Freedom from Racial Discrimination

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 legislation against Indigenous people. The argument has been that the high levels of discretion available to police in utilising this type of legislation,
allows for racially discriminatory decisions to be made. As a result, Indigenous people are much more likely to be criminalized for minor offences, and required to “move-on” in public places. For example, it has been found that in New South Wales’ townships with large Aboriginal populations, police used their move-one powers at a rate 30 times higher than across the State generally (Chan & Cunneen, 2000).

3.5. The Use of Arrest as a Last Resort

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

3.6. The Right to a Fair Trial

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

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

As indicated above, Indigenous people are significantly over-represented in prison. The evidence shows that Indigenous people are more likely to receive a sentence of imprisonment than non-Indigenous people. There are a number for reasons for this. It is more likely that Indigenous people have prior criminal records and this affects sentencing decisions. It is also less
likely that Indigenous people sentenced in rural and remote areas will have access to a full range of non-custodial sentencing options.

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

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

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

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

4. A CONTEMPORARY INDIGENOUS GENOCIDE

Lest we think that the genocide of Indigenous people is a matter of historical interest only, it is worth considering the more recent events in Guatemala – a relatively small Central American country of 12 million people, of whom about 40 per cent are Indigenous. From the 1960s through to a peace accord in 1996, the country suffered what has been recognized as one of the worst internal armed conflicts in the region. The Guatemalan Commission for Historical Clarification was formed after the peace accord and reported in 1999. It found that massacres occurred in some 626 villages, while 200,000 people were documented to have been killed
or disappeared during the period of conflict. Some 83 per cent of those killed were Indigenous Mayans. State forces, in particular the Guatemalan army, police and paramilitary groups, were responsible for 93 per cent of the human rights violations. The Commission also noted the role of the US Central Intelligence Agency in the events which had occurred in Guatemala (Sanford, 2003, p. 14), for which President Clinton was later to express regret, saying the US involvement and support of the military-sponsored human rights abuses was wrong.

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

The Army’s perception of Mayan communities as natural allies of the guerrillas contributed to increasing and aggravating the human rights violations perpetrated against them, demonstrating an aggressive racist component of extreme cruelty that led 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)

The number of deaths in Guatemala exceeded the deaths tolls of conflicts in El Salvador, Nicaragua, Argentina and Chile combined. In addition there were forced displacements of up to one and a half million Indigenous people during the 1980s. The Commission found that Mayans suffered arbitrary execution, forced disappearance, and the torture and rape of men, women and children, “the effect of which was to terrorize the population and destroy the foundations of social cohesion, particularly when people were 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).

The Commission, whose report was titled “Guatemala: Memory of Silence”, also found racism to be an “underlying cause” of the armed 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,
that in the four regions most affected by the violence, the Guatemalan state through its agents had committed acts of genocide against groups of Mayan people (1999, para 122).

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

The prosecutors and investigators who handle these cases receive grossly inadequate training and resources. The courts routinely fail to resolve judicial appeals and motions 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)

Political violence and the victimization of Indigenous people continue to be a significant problem. According to Human Rights Watch, there is a widespread consensus that those responsible for the violence and intimidation are affiliated with private, secretive, and illegally armed networks who “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).

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 kind against Indigenous people. Secondly a critical criminology built on a human rights perspective, has specific analytical tools for understanding how that crime developed and was operationalized in state law and policy, and in practice with allegiances between military, police and paramilitary groups. Thirdly, a critical criminology can contribute to our understanding of the processes of redress and remedy. How and why do we punish those responsible for crime? And what can we put in place to alleviate the harm caused to victims?

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

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

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

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

It is not possible in the context of this chapter to deal with all the human rights issues covered in the Declaration. However, a number of the rights outlined in the Declaration have specific relevance to criminology. The Declaration states that Indigenous peoples have the right to self-determination and the right to keep their distinct characteristics. It is these 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
right of Indigenous peoples to choose their political status and to make decisions about their own development. Article 4 of the Declaration notes that in exercising self Determination, Indigenous peoples “have the right to autonomy or self-government in matters relating to their internal and local affairs”, and in Article 5 that Indigenous peoples have “the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions”. Article 34 asserts that:

Indigenous peoples have the right to promote, develop and maintain their institutional 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.

It is not surprising that Indigenous peoples might wish to re-assert their claims to develop Indigenous law and processes for dealing with dispute resolution. The criminal justice systems of colonial states developed as state activities fundamentally captured within the wider historical trends of colonization and nation building—and nation-building occurred at the expense of dispossessed and excluded peoples, including Indigenous peoples. 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.

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

(E)very issue concerning the historical and present status, entitlements, treatment and 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)

Henriksen (1998, p. 32) has discussed four existing ways of arranging Indigenous autonomy and self-government. These are not meant to be 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:

- Indigenous autonomy through contemporary Indigenous political institutions (for example, Saami Parliaments in the Nordic countries);
Indigenous autonomy based on the concept of an Indigenous territorial base (for example, the Comarca arrangement in Panama, the Torres Strait Regional Authority in Australia, or Indian jurisdictions in the United States);

Regional autonomy within the state (for example, the Nunavut territory in Canada or Indigenous autonomous regions in the Philippines);

Indigenous overseas autonomy (for example, Greenland Home Rule).

The right of self-determination is also often linked to Indigenous claims of sovereignty. Sovereignty can have multiple meanings in the context of Indigenous political claims. It can refer to the historical claim that Indigenous people have never relinquished sovereignty – particularly 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 and unextinguished rights to self-government and autonomy which were recognized to varying degrees through treaties in New Zealand and North 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 if within the boundaries of existing nation states.

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 confines of the overarching authority and jurisdiction of the federal government. Federal Indian law is founded on the doctrine of inherent sovereignty. “The essential claim of tribal Indians that distinguishes them from other groups is their claim of sovereignty – the inherent right to promulgate and be governed by their own laws” (Scott Gould, 1996, p. 815).

Sovereignty in international law is usually seen as inextricably tied to territory:

Sovereignty demands a territory over which the governmental authority of the sovereign extends. Control over territory is the most essential element of sovereignty. (...) 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)

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 which privileges a particular political relationship and concept of power, sovereignty is in a state of flux. From an Indigenous perspective, it can be conceptualized in terms of jurisdictional multiplicity and divisibility rather than monopoly and unity.
While sovereign power remains central to the nation state, trends towards globalization have also seen the state deal with competing modes of governance. Although “the liberal-democratic nation-state retains a central role in redistributing elements of sovereign power and national jurisdiction” (Stenson, 1999, p. 67), there has also been a “redistribution” of sovereign 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-determination 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?

6. CONCLUSION

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

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

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

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

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