The Treaty-Making Capacity of Indigenous Peoples

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1. Introduction

The question of which entities have the capacity to conclude treaties is a sensitive one as treaties are one of the sources of international law. Therefore, recognizing the capacity of entities other than States to conclude treaties has a profound impact on our conception of international law. This article explores the possibilities of indigenous peoples to participate in multilateral treaties. The available solutions might differ depending if one examines the question from a traditional international law point of view or if one takes into consideration the effect human rights law might have on the treaty-making capacity of indigenous peoples. It is recognized that peoples living on territories with a colonial past or occupied by foreign forces possess a certain degree of treaty-making capacity. Under contemporary international law this connects them to the right of self-determination. Considering the special relation of indigenous people to their lands, territories and natural resources in combination with the internationally recognized right of all peoples to self-determination, it is justified to ask whether indigenous peoples can be considered to possess treaty-making capacity under international law. The question whether indigenous peoples in the past, before the formation of the States in which they now live, possessed treaty-making capacity is a disputed issue.

2. The Capacity to Conclude Treaties

The capacity to conclude treaties is partly connected to the question whether a certain entity constitutes a ‘subject of international law’.² In a nutshell one could say that all entities having treaty-making capacity necessarily are subjects of international law but it does not follow that all subjects of international law have treaty-making capacity. While States are the predominant actors in international law and referred

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² Reference is also made to States as the ‘full’ subjects of international law, while other entities’ status as subjects of international law is considered to be derivative. For an overview of the concept ‘subjects of international law, see e.g., H. Mosler, ‘Subjects of International Law’ in R. Bernardt (ed.), 4 Encyclopedia of Public International Law (2000) pp. 710–727.
to as ‘original’ subjects of international law, there is no rule in international law that would exclude other entities from gaining such a status.\(^2\) The criteria traditionally associated with statehood, i.e. population, territory and effective government can be indicative concerning an entity’s treaty-making capacity. The right to self-determination has proved to be able to compensate for some of the shortcomings concerning the fulfilment of the criteria set for statehood or the recognition of an entity as a sovereign State.\(^3\) Some indication of an entity’s treaty-making capacity can also be drawn on the basis of what kind of capacities may reasonably be seen as necessary in view of the purposes and functions of a certain entity, to enable it to fulfil its tasks. The precise extent of the status, which different entities have acquired, remains controversial,\(^4\) but evidently other entities than States are considered to have acquired the status as ‘subjects of international law’, some of which also possess treaty-making capacity.\(^5\) The Vienna Convention on the Law of Treaties,\(^6\) which regulates treaty-making by States, does not exclude the capacity of other subjects of international law to conclude international agreements.\(^7\) It is set forth in Article 3 that:

“The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:
(a) the legal force of such agreements;
(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
(c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.”\(^8\)

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\(^3\) According to information from the Treaty Section at the UN Secretariat received on 9 December 2003, the Secretary-General has in certain circumstances recognized non-State entities as having treaty-making capacity with regard to certain treaties only, e.g., Namibia (by GA resolution in the case of Namibia prior to statehood) and Palestine (as authorized by treaty concluded under the auspices of ESCWA to which Palestine is a member).


\(^5\) The International Court of Justice (ICJ) noted in the Reparations for Injuries Suffered in the Service of the United Nations case, Advisory Opinion of 11 April 1949, ICJ Reports 1949, p. 178, that “[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community.”

\(^6\) Vienna Convention on the Law of Treaties, 1155 UNTS 331.

\(^7\) Concerning the use of ‘treaty’ and ‘international agreement’ one can notice that the 1969 Vienna Convention, \textit{ibid.}, employs the term ‘international agreement’ in its broadest sense. On the one hand, it defines treaties as ‘international agreements’ with certain characteristics. On the other hand, it employs the term ‘international agreements’ for instruments, which do not meet its definition of ‘treaty’. For more detailed definitions of the two terms, see e.g., \textit{Treaty Reference Guide}, <http://untreaty.un.org/English/guide.asp>, visited on 18 April 2005.

\(^8\) Article 3, \textit{supra} note 6, emphasis added.