

Copyright (c) 2004 University of Michigan Law School
Michigan Journal of International Law

Summer, 2004

25 Mich. J. Int'l L. 1293

LENGTH: 2453 words

DIVERSITY OR CACOPHONY?: NEW SOURCES OF NORMS IN INTERNATIONAL LAW
SYMPOSIUM: COMMENT: A COMMENTARY TO MONTSERRAT GUIBERNAU NATIONS WITHOUT STATES: POLITICAL COMMUNITIES IN THE GLOBAL AGE

NAME: Beatrice Tice, Adjunct Instructor, University of Michigan Law School, **Jason Nelson**, J.D. University of Michigan Law School

SUMMARY:

... In her notable paper, Montserrat Guibernau correctly states that the concept of what comprises a nation is highly complex and problematic, susceptible to "multifarious definitions" about which there is much disagreement among scholars and policy makers. ... Fourth, the definition requires that the people share "attachment to a particular territory." Again, this element assumes homogeneity, as well as cultural significance of the land in question. ... Guibernau discusses Scotland as an example of a nation without a State that has achieved some measure of both cultural recognition and political autonomy. However, according to at least four of the six dimensions of her definition, Scotland does not appear to qualify as a stateless nation. ... Thus, Scotland fails to satisfy the alienation, cultural homogeneity, historical homogeneity, and uniform desire for independence prongs of Guibernau's definition of a stateless nation. ... Second, one might concede that Native Americans share a common culture and history, at least if one takes a panoptic historical view (there is patently extensive cultural and historical heterogeneity among Tribes). ... Thus, Native Americans fail to satisfy the alienation, distinct national identity, attachment to a particular territory, and uniform desire for independence prongs of Guibernau's nation without a State definition. Moreover, it is questionable whether Indians meet the cultural and historical heterogeneity prongs; this determination requires further elucidation from Guibernau regarding her level of analysis. ... Guibernau makes a laudable attempt to define a nation without a State. ...

Introduction

In her notable paper, Montserrat Guibernau correctly states that the concept of what comprises a nation is highly complex and problematic, susceptible to "multifarious definitions" about which there is much disagreement among scholars and policy makers. ⁿ¹ Yet, in crafting her own definition of a nation without a State, Guibernau does little to clarify this murky state of affairs.

Guibernau's definition of a nation without a State consists of six typological elements. First, she states that the "the members of a nation lacking a State of their own regard the State containing them as alien." ⁿ² This element implies not only a foreign relationship between the communities, but also one of hostility and conflict. Next, the definition requires that the people of the stateless nation "share a sense of national identity generally based upon a common culture [and]

history." ⁿ³ These two factors assume that culture and history are shared homogeneously across the entire community. Fourth, the definition requires that the people share "attachment to a particular territory." ⁿ⁴ Again, this element assumes homogeneity, as well as cultural significance of the land in question. Finally, Guibernau proffers that the stateless community must have "the explicit wish to rule themselves," which she defines as independence involving sovereign powers of "foreign and economic policy, defense and constitutional matters." ⁿ⁵ Implicit in this element is, of course, the assumption that the people of the nation without a State uniformly desire to form a separate State, independent of their alien host.

We argue that Guibernau's definition is a static classification, based on overly broad assumptions, which fails to take into account the inherent evolving nature of a nation without a State. Not only is her definition imprecise, but when considered critically, it actually excludes at least [*1294] one of the examples she presents. In addition, her definition excludes a settled example of a nation without a State, which she fails to consider in her analysis.

The Case of Scotland

Guibernau discusses Scotland as an example of a nation without a State that has achieved some measure of both cultural recognition and political autonomy. ⁿ⁶ However, according to at least four of the six dimensions of her definition, Scotland does not appear to qualify as a stateless nation. Scots do not consider themselves alienated from the rest of the United Kingdom; it has been said that "being Scottish and being British is the norm in Scotland." ⁿ⁷ Indeed, the union of Scotland and England in the early eighteenth century - and the concurrent loss of Scotland's independent statehood - was made possible in part because of the lack of strong cultural distinctions between the English and the lowland Scots. ⁿ⁸ On the other hand, Scotland itself is, and always has been, extremely diverse. The traditional clear-cut division of the country into Highlands and Lowlands is based on key differences among Scots in matters of ancestry, tradition, language, religion, and social and political structure. For example, Highlanders of the mountainous regions of northern Scotland, descended from the indigenous Picts, traditionally speak Gaelic, follow the Catholic religion, and adhered to a clan system of self-rule. ⁿ⁹ The Lowlanders of southern Scotland and the border regions, descended from mixed Anglo-Saxon and Teutonic heritage, traditionally speak English, follow the Presbyterian religion, and adhered to a feudal system of governance. ⁿ¹⁰ Although such differences are historical in origin and have blurred over time, Scotland remains very diverse in its attitudes and beliefs. Such differences have tended to dilute the notion of a common Scottish national identity and have served as a rallying cry for the significant number of Scots who oppose Scottish self-governance. ⁿ¹¹ Thus, Scotland fails to satisfy the alienation, cultural homogeneity, historical homogeneity, and uniform desire for independence prongs of Guibernau's definition of a stateless nation. Yet there can be little doubt of the ideological existence of Scotland as a nation, with or without a State.

[*1295]

The Case of U.S. Native Americans

Guibernau's definition not only excludes Scotland as a nation without a State, but she ignores what is arguably the seminal case in the West - Native Americans. Though she does mention the plight of indigenous peoples when discussing Quebec, she chooses not to analyze the issue. ⁿ¹² Perhaps this avoidance was strategic, as Indians do not fit neatly within her definition of a nation without a State. In fact, Indians fail to fully satisfy at least four of her six definitional elements.

First, it would be hard to argue that Native Americans regard the United States as an alien host State. The very term "Native American" symbolizes the dual nature of Native people, including their distinct multidimensional national identities. Indians participate in all facets of U.S. society, even choosing to enlist and fight in the country's armed forces. For instance, a Native American Lori Piestewa was the first female soldier killed in the Iraq War. ⁿ¹³ And during World War II, the legendary Native "Code Talkers" invented a decisive military code that the Japanese never broke. ⁿ¹⁴ Hence, there is scant evidence to support the notion that Indians consider the United States as alien.

Second, one might concede that Native Americans share a common culture and history, at least if one takes a panoptic historical view (there is patently extensive cultural and historical heterogeneity among Tribes). Even so, there is little evidence to show that Indians remain attached to particular territories. Guibernau's underlying intent in naming this element seems grounded in Radin's personhood theory of property, which is the notion that the significance of property is a function of its position in a social context.ⁿ¹⁵ For Native Americans, such an attachment to land likely existed during the pre-colonization period, but following the period of Indian removal (1814-1858),ⁿ¹⁶ this attachment ceased to exist. Yet it seems dubious to assert that Tribes' failure to maintain attachment to a particular territory lessens their status as a nation without a State.

Finally, Guibernau argues that members of a nation without a State have a desire for self-rule. This factor is partially descriptive of Native [*1296] Americans, whose Tribes often claim sovereign status.ⁿ¹⁷ How far their sovereign power extends is a question beyond the scope of this analysis, but it is reasonable to allege that not all Native communities promulgate identical claims regarding the extent of their sovereignty. The key point is that to fit within the confines of Guibernau's definition, "tribal governments must be able and willing to accept the responsibility of governing."ⁿ¹⁸ In short, there are in excess of 500 federally-recognized U.S. Indian Tribes,ⁿ¹⁹ and they are neither all willing to assume an equivalent amount of governing responsibility, nor are they all capable of the same level of governmental functioning. Still, this intra-tribal self-determinative heterogeneity does not imply that some Tribes are more deserving of the status of a nation without a State. The Universal Declaration of Human Rights correctly holds that self-determination depends on the will of the people,ⁿ²⁰ and in the case of Indians, there can be a variety of factors that lead Tribes to pursue different sovereignty goals.

Thus, Native Americans fail to satisfy the alienation, distinct national identity, attachment to a particular territory, and uniform desire for independence prongs of Guibernau's nation without a State definition. Moreover, it is questionable whether Indians meet the cultural and historical heterogeneity prongs; this determination requires further elucidation from Guibernau regarding her level of analysis. Nonetheless, one can hardly doubt that domestic Tribes like the Cherokee, Seminole, Choctaws, Creeks, and Chickasaws qualify as nations without a State.

Conclusion

Guibernau makes a laudable attempt to define a nation without a State. In fact, her paper culminates with an analysis of the major dilemmas facing the nation without a State: addressing internal diversity; avoiding violence as a means of creating change; and controlling the drive to create expensive bureaucracy. Nonetheless, these recommendations fail to aid the majority of communities that one would consider to be stateless nations because these communities do not fall within the [*1297] narrow confines of her definition. For instance, it is unclear whether Scotland or Native America would consider these dilemmas as major issues; it seems unlikely.

In fact, the static definition of a nation without a State is the primary failure in Guibernau's account. We posit that it is not feasible to define the nation without a State - which is a fluid, evolving, and amorphous ideological concept - by employing strict typological elements. In the case of Scotland and Native America, one can readily discern the changes that have occurred in these communities throughout history; even if there was a point in time where both examples fit within Guibernau's definitional parameters, the defined construct's validity was short-lived. Employing exacting criteria within a definitional construct is best reserved for substantive jurisprudence, such as the Montevideo Convention's requirements for statehood under international law: a permanent population; a defined territory; a government; and capacity to enter into relations with other States.ⁿ²¹

In the final analysis, what defines a nation, Stateless or otherwise? Surely it must be left to the people who comprise the community in question to determine the answer. If the people belonging to a community understand and believe it to be a nation, and act within it as a fitting social and cultural structure for their lives, then these individuals obviously deem that sufficient homogeneity and shared identity exists, in whatever form or proportion, to satisfy their consciousness of unity and kinship. Such an idea of community assuredly qualifies as a nation. And if that nation is not constitutionally autonomous, but is situated within the territory and/or autonomy of an existing State, then undoubtedly

it continues to qualify as a nation without a State.

Legal Topics:

For related research and practice materials, see the following legal topics:
Governments Native Americans Property Rights

FOOTNOTES:

n1. Monserrat Guibernau, Nations Without States: Political Communities in the Global Age, 25 Mich. J. Int'l L. 1251 (2004).

n2. Id. at 1254.

n3. Id.

n4. Id.

n5. Id. at 1254-55.

n6. Id. at 1259.

n7. David McCrone, *Understanding Scotland* 192 (2d ed. 2001).

n8. See Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (rev. ed. 1996).

n9. See Thomas Martin Devine, *The Scottish Nation, 1700-2000* (1999).

n10. See *id.*

n11. See McCrone, *supra* note 7, at 192-93, 149-174.

n12. Guibernau, *supra* note 1, at 1265.

n13. First American Female and Native Soldier Killed in Iraq War is Remembered, *Indian Country Today*, Apr. 11, 2003, available at <http://www.indiancountry.com/content.cfm?id=10500725108&CFID=2463188&CFTOKEN=93733443> (last visited Nov. 7, 2004).

n14. Margaret T. Bixler, *Winds of Freedom: The Story of the Navajo Code Talkers of World War II* (1992).

n15. Richard T. Ford, Book Review, 48 *Stan L. Rev.* 217, 223 (1995) (reviewing Margaret Jane Radin, *Facts and Values in Pragmatism and Personhood* (1993)).

n16. See Robert V. Remini, *Andrew Jackson and His Indian Wars* (2002).

n17. Robert A. Fairbanks, Native American Sovereignty and Treaty Rights: Are they Historical Illusions?, 20 *Am. Indian L. Rev.* 141 (1995-1996); see also David E. Wilkins, Indigenous Nations as Reserved Sovereigns, *Indian Country Today*, June 13, 2003, at Perspectives, available at <http://www.indiancountry.com/content.cfm?id=1055516194> (last visited Nov. 7, 2004).

n18. Fairbanks, *supra* note 17, at 144.

n19. Bureau of Indian Affairs Home Page, U.S. Department of the Interior, at <http://www.doi.gov/bureau-indian-affairs.html> (last visited Oct. 26, 2004).

n20. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, art. 21(3), at 71, U.N. Doc. A/810 (1948), available at <http://www.un.org/Overview/rights.html>.

n21. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 165 L.N.T.S. 19.