Hunting-Prohibition in the Hunters’ Autonomous Area: Legal Rights of Oroqen People and the Implementation of Regional National Autonomy Law*

Maria Lundberg
Associate Professor, Norwegian Centre for Human Rights, University of Oslo, Norway

Yong Zhou
Associate Professor, Institute of Ethnology and Anthropology, Chinese Academy of Social Sciences, China
Researcher and Programme Director, Norwegian Centre for Human Rights, Faculty of Law, University of Oslo, Norway

Abstract
The hunting-prohibition announced by the Oroqen autonomous government in the Oroqen hunters’ homeland, raise controversial issues of the actual function of regional national autonomy and the effectiveness of the implementation of law in relation to this autonomy arrangement in China. In this article, three key issues of this case are discussed in relation to the institutional design and practice of regional national autonomy: i.e., the exercise of Oroqen autonomy in the process of local forest exploitation; the representation of the Oroqen in the organs of self-government and the procedures of decision-making in the reform of the Oroqen’s traditional way of life. These issues are both independent and interrelated to the legal rights of the Oroqen people based on Chinese domestic law and international treaties. Through the description and analysis of the Oroqen case, this research presents the institutional obstacles for the Oroqen people to realise their rights and the failure of the regional national autonomy to fulfill its stated purpose.

Keywords
Oroqen; implementation of law; institutional design; autonomy; group rights; autonomous powers; autonomous organs; representation; participation; regional national autonomy; hunting-prohibition

*) In the summers of 2001 and 2006, the authors carried out field visits and interviews for this study. The first time in 2001 was just the moment when local authorities were about to celebrate the 50th anniversary of the establishment of the Oroqen Autonomous Banner. Our visit disagreed with the atmosphere there since we kept questioning the local officials on the course and causes of the hunting-prohibition, which they were accustomed to be praised for. The second time was in 2006 when the hunting-prohibition had lasted for ten years and the director of the Banner who mainly pushed to make this decision had left. This made our interviews easier to some degree. We were accompanied by Prof. Yisong in 2001 and Prof. Bailan in 2006 from the Inner Mongolian Academy of Social Sciences, Hohhot. Our study benefitted from their careful arrangements, and particularly from their rich knowledge of the social and cultural development of the Oroqens. Nevertheless, the viewpoints expressed in the paper are ours only and do not represent others’ opinions. In the process of writing this article we have benefited from the comments of our colleagues at the Norwegian Centre for Human Rights and at the Faculty of Law of the University of Oslo.
1. Introduction

Oroqen Autonomous Banner (OAB) in the Great Xing’an Mountains is the first and the only autonomous area established in the homeland of the Oroqen people, the ‘magic hunters in forest’. In 1996, the Oroqen Autonomous government adopted a decision to prohibit all hunting activities in the area, including that of Oroqen hunters. This hunting ban was described by the officially published local chronicles as ‘the third historical leap’ taken together with the other two in the ‘social progress’ of Oroqen during the past half-century. It was claimed as the prime symbol of the start of the Oroqens’ modern life.2

Although there were many positive proclamations from local autonomous authorities, some Oroqens regarded this as “betraying the Oroqen ethnicity”.3 Oroqen hunters were not only prohibited to hunt, but also ordered to hand in their hunting guns. “How can we be accounted for as the Oroqen if we cannot and do not know how to hunt?”, they asked rhetorically. This controversial event raised the questions of what is the actual function of the Chinese regional national autonomy, and what is the effectiveness of the implementation of law in relation to this autonomy arrangement.4

By tracing the background and reasons of this event, the situation of the Oroqens reveals some major tensions between the strategy for development and the implementation of regional national autonomy in relation to the rights of minorities or indigenous peoples in China. Our exploration starts by asking two questions: Did the Oroqens themselves choose to prohibit hunting with the purpose to enter the ‘civilised modern society’ in their own autonomous area? How did the regional national autonomy function in the decision-making process of prohibiting the hunting? These questions are raised from our main concern about the realisation of the stated purpose of regional national autonomy: Does the regional national autonomy respect group rights and facilitate that the Oroqens are the ‘masters in administering their internal affairs’?

Among those we wish to particularly thank are Prof. Kirsti Størm Bull, Prof. Emeritus Asbjørn Eide, Prof. Ole-Kristian Fauchald, Doctoral candidate Richard Hustad, Asst. Prof. Tore Lindholm, Dr. Gro Nystuen, Prof. Kjetil Tronvoll and Prof. Geir Ulfstein.


4) The Regional National Autonomy Law of the People’s Republic of China was enacted in 1984 and revised in 2001. Regional national autonomy has been part of the policy of the Communist Party of China (CPC) since the early days of the People’s Republic of China (China or PRC) and it was included in the first Constitution of 1954. For the development of regional national autonomy in policy and law, see Yong Zhou, ‘Legal Predicament of Combining Regional and National Autonomy: A Group Rights Perspective’, 16(3) International Journal of Minority and Group Rights (2009) 329–348, this issue.
In this article, the hunting-prohibition case is discussed in relation to the institutional design and practice of regional national autonomy in the following three aspects: (1) in the exercise of autonomy in the process of local forest exploitation; (2) in the representation of Oroqen in the organs of self-government; and (3) in the legitimate procedures for decision-making in the reform of the traditional way of life of an ethnic minority or indigenous people. These issues are both independent and interrelated to the legal rights of Oroqen people based on the Chinese domestic law and international conventions. Through the description and analysis of the Oroqen case, this research presents the institutional obstacles for Oroqen people to realise their rights within the social context of regional national autonomy.

2. Autonomy and Local Forest Exploitation

In the beginning of the 1950s, the Chinese government established the OAB in the area of the Great Xing’an Mountains where the Oroqens led a nomadic and hunting life. It was among the first autonomous areas for ethnic minorities in China. The Banner Chronicle summarised that the development of Oroqen society has experienced what is called “three historical leaps” in the past half-century: the first leap was taken in 1951 by the establishment of the Oroqen Banner. Oroqen hunters started the practice of regional national autonomy as master of themselves in the political affairs; the second leap was in 1958 with the transformation of their social life from nomadic hunters to a sedentary way of life; the third leap was in 1996 when hunting was totally prohibited. This last leap was claimed as the prime symbol of the start of the Oroqens’ modern life.

While the hunting ban remains controversial, the first leap was really exciting for those involved. At that time, the government integrated three administrative areas where the Oroqens were living, setting up the autonomous Banner for Oroqen hunters with a population of no more than 800 persons. The Banner covered an area of about 60,000 square kilometres, and is larger than Switzerland and approximately two times the size of Belgium. We can imagine the Oroqens’ joy at that time when they were told that they became the ‘masters of their lands’, lands encompassing such vast territory and rich in natural resources – the forest and animals – and making up their cultural basis.

Originally, the OAB was covered by forest, accounting for 97.2 per cent of the land. According to incomplete statistics, the local wild animals, not including

---

5) It was known as the Oroqen Banner when it was first set up in 1951, but in the next year, 31 May 1952, the name was changed to the ‘Oroqen Autonomous (zizhi) Banner’. An autonomous Banner is equivalent to an autonomous area at county level as indicated in Article 2 of the Regional National Autonomy Law (RNAL).

amphibian, reptile and aquatic animals, amounted to 150 different species, with some 40 kinds of beasts and some 100 kinds of birds.\footnote{Ibid., p. 72.} In the 1950s, an Oroqen folk song described their environment and hunting life like this:

\begin{quote}
In the high Xing’an Mountains, there are vast forests. / In the forests live the brave Oroqens. / Each has his hunting horse. / Each has his gun. / And there are countless roes all around the mountains.
\end{quote}

Oroqen sayings boast of the abundant game and rewarding hunting life: ‘that you could easily get roes just by a club and get fish by a gourd, and a pheasant could happen to fly into the cooking pot’.

The direct reason for the hunting-prohibition was the sharp decrease of wild animals in the area. The head of the government of the Banner emphasised that the decision was based on the government’s investigation which found that the Oroqen hunters could no longer live on hunting exclusively.\footnote{We got the information from our interview conducted in 2001. In 2006, we interviewed the People’s Congress of the Banner and were told that the Standing Committee of the Banner’s Congress also conducted their investigation and wrote a report, which provided the foundation for the decision for hunting-prohibition. However, we failed to get the report.} The poverty of the Oroqen hunters was not a sudden result of the hunting-prohibition but evolved since the 1950s when exploitation started in the Great Xing’an Mountains. According to the Banner Chronicle, the wild animals’ habitat was reduced and undermined over time. Meanwhile, a great amount of migrant lumberjacks and farmers caught and killed animals contrary to regulations in place and completely ignoring the hunting rules of the Oroqen hunters. As a result, the formerly countless wild animals finally became rare.\footnote{Confirmed by interviews in August 2001.}

The legal issues relating to the exercise of regional national autonomy with respect to the forest exploitation in OAB can be divided into two aspects which are fundamental to the understanding of regional national autonomy. One is that of autonomous powers, which relates to the division and exercise of state power between different levels of state organs. The other relates to the exercise of group and individual rights of the Oroqens. We will discuss the two aspects of the legal issues under the following three topics, that is: (a) the powers of decision-making in the forest exploitation; (b) the rights of the Oroqen hunters to the forests; and (c) the distribution of benefits and compensation systems in forest exploitation.

2.1. Powers of Decision-making in the Process of Forest Exploitation

Forest is the main natural resource in OAB, and its utilisation and exploitation has an important impact on the local social and economic development. But for
years, the Banner government exercising autonomy has had no power to decide whether, how and the quantity of forest resources that are exploited. The Forestry Bureau of the Banner cannot do anything but represent the local government to inspect and supervise the implementation of forestry logging quota given by the state organs at higher levels.\textsuperscript{10} The forest resource in the Banner is exploited mainly by the Great Xing’an Mountains Forestry Administration (now named the Inner Mongolia Forestry Industry Group) and its six affiliated forestry bureaus (now known as the forestry companies).

The applicable decision-making system which transcended the powers of the autonomous Banner was legitimatised by the state ownership of the forest resources. The Law of the People’s Republic of China on Land Reform in 1950 prescribed that all large forests, wastelands, barren mountains, salt marshes, and mines, as well as lakes, ponds, rivers and harbours, are owned by the state and administered by the government.\textsuperscript{11} Although the OAB government was also a state organ, it had no powers in the process of forest exploitation, which were controlled exclusively by the central government.\textsuperscript{12} In 1950, the State Council regulated via an instruction that the public-owned forests, including those owned by the state, should be managed and lumbered by the Forestry and Farming Ministry of the Central People’s Government or by the forestry organs at different levels entrusted by the central government to supply the timber for public or private use according to unified plans.\textsuperscript{13} As far as OAB is concerned, only 0.27 per cent of the forest area in the Banner, limited to an area around the Gaxian Cave, an important historical culture relic, is currently managed by the local autonomous government.\textsuperscript{14}

The exploitation of the forests within OAB was included under the national plan for exploitation of the Great Xing’an Mountains which came into effect in the beginning of the 1950s. In 1950, the Forestry and Farming Ministry of the Central Government held the First National Conference on Forestry Work and decided to exploit the forests in the Great Xing’an Mountains. In 1954, after aerial and sub-aerial surveys, the Forestry Ministry of the central government laid out the overall programme and concrete measures, and made a report to the Financial and Economic Committee of the State Council. In the same year, the State Council ratified the exploitation plan for the Great Xing’an Mountains in

\textsuperscript{10} Interviews with local government and forest authorities in August 2001 and 2006.
\textsuperscript{11} Article 18 of the Law of the People’s Republic of China on Land Reform, promulgated by the Central Government on 30 June 1950.
\textsuperscript{12} The Regional National Autonomy Law (1984/2001) provides that the organs of self-government shall define the ownership of and the right to use the forests within the areas. However, the implementation of Article 27 of RNAL is still a matter of controversy in Inner Mongolia Autonomous Region.
\textsuperscript{13} Instruction on Forestry Work of the Whole Country, issued by the State Council in 1950.
Inner Mongolia. The local government of OAB was not involved, consulted or heard during the entire decision-making process. Furthermore, even the local government’s management of the projects of forest exploitation, as prescribed by law, was very difficult to carry out. The reasons are as follows:

First, it is the state-owned Forestry Administration that carries out the forest exploitation in OAB. It is both an administrative unit and an enterprise, and much more powerful than the local autonomous government with regard to population and area. Each of its six companies covers an area from 360,000 to 1,170,000 hectares and has a population from 4000 to 13,000 persons. In contrast, as mentioned above, the forest resource under the management of the local government is limited around the Gaxian Cave, encompassing only 0.27 per cent of the forest area in the Banner. The remaining forest resources are under the control of the six companies.

Second, although situated within the administrative area of OAB, the six companies have their own systems of economic management and public services. Each of them has its own material supply, repair services, transportation, marketing, timber stores, processing, truck services, roads, railroads, commercial network, primary schools, middle schools, vocational schools, hospitals, zoo, botanical park, entertainment park, housing construction, TV and satellite stations, etc. The local government has no power to plan, control, influence or interfere in the companies’ exploitation plans and management of the forest, with the exceptions of forest protection work and fire prevention. Since 1984, the local government of OAB gained new powers to deal with cases of forest destruction and illegal logging.

Third, the limitations of the OAB government’s autonomous powers may also be due to a relatively underdeveloped administrative system. For example, the head of the government of the Banner has the same administrative rank as the leaders of the six companies. This means that the head of the government of OAB has neither the competence nor the powers to address conflicts of interests or disputes involving the companies. In contrast, the companies have their own channels and a considerable social capital and economic weight when communicating with the Inner Mongolia Autonomous Region or even the central government.

Finally, in terms of jurisdiction, the six companies have jurisdiction over an area as extensive as 92 per cent of the total area of the Banner. In addition, there are six farms under the Inner Mongolia Farming Administration, and they cover 5 per cent of the total area of the Banner. Thus, the land left under the OAB government’s management amounts to a little more than 2 per cent. Furthermore, the areas of the state-owned forestry companies and farms extend even beyond the local administrative divisions. For example, the Oukenhe Farm straddles across two administrative areas, OAB and the Daur Autonomous Banner. These

15) Cf. Article 28 RNAL.
16) Interviews August 2006.
state-own entities are enclaves within the regional autonomous areas controlled by others. It is very hard for the government of the local autonomous area to exercise any of its administrative powers in relation to their management, with the exception of some powers relating to taxation.\textsuperscript{17}

All these limitations severely restrict OAB’s competence to use the natural resources in its autonomous area. When the system of regional national autonomy was first established, China exercised a system of highly centralised planned economy in the framework of an omnipotent state. The Program for Implementing the Regional National Autonomy of the People’s Republic of China (1952) regulated that the organs of self-government of all the national autonomous areas shall freely develop the local economy “under the State’s unified economic system and the plan for economic development”.\textsuperscript{18} As a matter of fact, the autonomous power was subject to ‘state plans’. It is difficult to imagine the national autonomous areas having any space for free development according to local circumstances.

At the end of the 1970s, the system based on the omnipotent state began to change. The adoption of the 1984 Law on Regional National Autonomy (RNAL) embodied the idea of the rule of law in accordance with the principles in the Constitution that China practices governance according to law. Furthermore, the 2001 amendment of the law was aimed at eliminating the influence of the system of planned economy, providing that the organs of self-government of national autonomous areas “on the principle of not contravening the Constitution and the laws shall have the power to adopt special policies and flexible measures in the light of local conditions to speed up the economic and cultural development of these areas”\textsuperscript{19}, and that they may give priority to the rational exploitation and utilisation of the natural resources that the local authorities are entitled to develop in accordance with legal stipulations and unified state plans.\textsuperscript{20} The amended RNAL not only permits that the autonomous organs use their powers for the benefit of local interests, but it also prescribes that the State, at different levels, has the obligation to “make arrangements favorable to the economic development there and pay proper attention to the productive pursuits and the life of the minority nationalities there” while exploiting resources and undertaking construction in the national autonomous areas.\textsuperscript{21}

Meanwhile, the amended Forest Law added an article concerning the autonomous power, regulating that in terms of forestry production and construction in regional national autonomous areas, in line with the stipulations of the state in

\textsuperscript{17} Even in this area big problems exist. According to our interviews in 2006 large sums are owed to the Banner authorities.
\textsuperscript{18} Article 20 of the Program for Implementing the Regional National Autonomy of the People’s Republic of China.
\textsuperscript{19} Article 6(2) of the RNAL.
\textsuperscript{20} Article 28 of the RNAL.
\textsuperscript{21} Article 65(1) of the RNAL.
regard to the autonomous power of regional national autonomous areas, the state and the people’s government at the provincial or autonomous region level shall offer more autonomy and economic benefits than ordinary areas in connection with forestry development, timber distribution and forestry fund utilisation.22 According to our observations, however, these new stipulations of the law failed to have any essential influence on the authorities in their actual exercise of autonomous powers and on the management, protection and utilisation of the forest resource in OAB.

Even according to the RNAL, the powers of the organs of self-government in national autonomous areas are still subject to the limitations of legal stipulations and unified state plans. In the amendments of the 1979 Forest Law in 1984 and 1998, the power to examine and approve logging rests with the central government, taking into consideration new needs and principles for protecting the ecological environment, thus strengthening the central government’s control in the field of forest exploitation. We know that the national autonomous areas were granted autonomous powers under the RNAL to define ownership of and the right to use the pastures and forests within the areas,23 and to manage and protect the natural resources of the areas.24 But taking into account the new conditions of ecological preservation, to what extents do the legal stipulations of the RNAL and the Forest Law have any influence on the process of forest exploitation? Were these stipulations even considered when implementing the law? In OAB, the forest coverage has been sharply reduced on account of continuous over-logging and a disproportion between deforestation and reforestation. The local government wanted to reforest the wasteland and improve the environment, but could do little because most undermined forest areas were on the lands of the state-owned forestry companies.25 Moreover, the local government also planned to build irrigation systems, but the huge compensation that the planned project should pay to the companies controlling the forest areas went far beyond the financial ability of OAB.26

2.2. The Rights of the Oroqen Hunters to the Forests

When leaving their forests, the Oroqen hunters lost their rights to the forests. When giving up their guns, they abandoned hunting, their unique way of life and the corresponding knowledge and skills. Various plans have been suggested to alleviate the difficulties that the Oroqens encountered in their lives, but each of

23) Article 27 of the RNAL.
24) Article 28 of the RNAL.
25) Interviews in August 2006. The local Banner officials to some extent actually relied on the stipulations of the RNAL.
them meets obstacles relating to the rights to the forests. “With a single step beyond our village or town, we enter the land of forest owned by the others.” This is the description that the Oroqen hunters give about their squeezed space and access to the forest resources in their homeland. The Oroqen hunters, either as a group or as individuals, almost have no forests under their own control to access and use. In fact, there have been numerous and continuous disputes on forest resources between the Oroqen hunters and the state-owned companies. Using the excuse of reforesting formerly cultivated land, the state-owned companies even planted trees ‘at the doorway’ of the hunters. However, when some hunters wanted to plant black fungus, they had to give up due to the lack of indispensable basswood.27 Some had ideas to make their traditional handicrafts of birch bark and sell them to tourists, but the birch forests were within the area of the state-owned forestry companies and all access and use of them were denied to the Oroqen. Also, attempts to raise wild animals or herd reindeers were hindered by the forestry companies. On the other hand, the forestry companies distributed parts of forests to their own employees under a ‘contract of responsibility’ in order to solve their difficulties of livelihood. The justifications for this have been very hard for the Oroqens to understand and accept. They complained that they had lived in the mountain forests for generations and had protected the forests for several hundred years at least, while the workers had been here for no more than 50 years. Why, they asked, did they have to get permission for a piece of birch bark? And why could they not have a piece of the forest for their own use?28

The Oroqens felt an obvious social injustice, but the existing specific legislation was of very little assistance when it came to regulating these issues. Our legal analysis will start from the basic principles and the aim of the Constitution and the system of the regional national autonomy. The overarching legal framework, the system of regional national autonomy, aims to let the minority nationalities become ‘the masters’ in administering their internal affairs in areas where they live in concentrated communities. The Constitution, either that of 1954 or the present, prescribes that all nationalities have the freedom to preserve or reform their own folkways and customs.29 These basic rules deduce two kinds of obligations of the state. The first is the negative obligation of non-interference, that is, not to intervene in the ethnic folkways and customs. With regard to the Oroqens, whether to preserve or reform their way of nomadic hunting should be decided by themselves and not by the State or other entities. The other is the positive obligation to take measures, that is, to facilitate, promote and protect the choices and interests of the people. For the Oroqens, the forests and wild animals comprise the material foundation for their hunting way of life. In this case, the

27 Ibid., p. 368
28 Interviews in August 2006.
29 Article 3 of the 1954 Constitution or Article 4 of the 1982 Constitution.
prescription of the Constitution should logically include the protection of the material foundation and the environment on which the survival of the ethnic folkways and customs relies. All law and policy should be in line with the principles of the Constitution.\textsuperscript{30} The destructive exploitation of the forest and the environment on which the survival of Oroqens’ hunting life relies deprives Oroqen hunters of their means of subsistence and means to preserve their way of life. Oroqens should be entitled at least to access the forests and utilise the animal or botanic resources there in line with their customs and way of life. The existing situation constitutes a violation of the fundamental principles of the Constitution. The matter would have had to be considered in a quite different way if the Oroqen would have given their consent during the development process.\textsuperscript{31} However, the fact is that the exploitation of the forest resources of the Great Xing’an Mountains, the change of the Oroqens’ into a sedentary way of life and the hunting-prohibition were all decided, organised and promoted by the state.

The RNAL, which was enacted in line with the principles of the Constitution, contains an even clearer dimension of group rights, declaring that through regional national autonomy the state shall fully respect and guarantee the right of minority nationalities to administer their internal affairs.\textsuperscript{32} The Oroqens should decide by themselves whether to preserve or reform their hunting way of life. The people’s congress and government of OAB are obliged to guarantee the realisation of the right of the Oroqen.\textsuperscript{33} They should, in the light of their powers as organs of self-government, enact regulations or alter decisions, according to Article 19 and Article 20 of the RNAL, to implement the resolutions with certain amendments or cease implementing those which do not suit the local conditions or Oroqen cultural characteristics. In fact, the local government of OAB did put forward a proposition of this kind. In 1998, when consulted about the amendments of the Forest Law, the autonomous government proposed that a certain range of forests be distributed to four townships for Oroqen hunters’ control. The OAB government argued that the hunters are familiar with the local wildlife, and they could experiment with raising some wild animals for their subsistence. However, their proposal was not accepted in the end.\textsuperscript{34}

The constitutional and legal framework provides that ‘consideration’ (\textit{zhaogu}) should be given to the needs and interests of the Oroqen. The 1954 Constitution declared in its preface that the state shall give due consideration to the needs of various nationalities in economic and cultural constructions. The present RNAL requires that “while exploiting resources and undertaking construction in national

\textsuperscript{31} This point will be discussed in details in the analysis of next two problems.
\textsuperscript{32} Preface of the RNAL.
\textsuperscript{33} Article 10 of the RNAL.
\textsuperscript{34} Interviews in August 2006.
autonomous areas, the State shall give consideration to the interests of these areas, make arrangements favorable to the economic development there and pay proper attention to the productive pursuits and the life of the minority nationalities there”. According to these provisions, the state is obliged to give consideration to the interests of the local Oroqens, and the rights of the Oroqen hunters to appropriate use of the local forests should be confirmed in the process of exploitation of the forest resources. When the existing relationship relating to the rights to the forests severely obstructs the development and maintenance of the Oroqens’ way of life, timely adjustment of the relationship becomes a key point of the matter.

Finally, the recent amendments of the Constitution confirm that the state shall respect and protect human rights. The international conventions signed and ratified by China require a re-examination of present legislations on resource management. A legal confirmation of the Oroqens’ rights to the forests as their means of subsistence and cultural survival should be recognised. This point will be expanded upon in Section 5 in relation to international law.

2.3. The Distribution of Benefits and Compensation in the Course of Forest Exploitation

Taxation is the principal benefit that the local government of OAB receives from the forest exploitation by the state-owned companies, and the major part of its revenue for a number of years has come from forestry taxation. Problems or disputes relating to the taxation are therefore of principal concern to the OAB government. In a report to the People’s Congress of Inner Mongolia Autonomous Region, the OAB government mentioned disputes on the taxation in two places, Jiagedaqi and Songling.

Jiagedaqi and Songling are main forest areas within the administrative range of the Banner, accounting for approximately one-third of the Banner area. However, these areas are under the jurisdiction of the neighbouring Heilongjiang Province. This special status can be traced back to the period of Cultural Revolution when the central government, having the purpose to guard against the so-called separatism of the “Revolutionary Party of the Inner Mongolia”, put the peripheral areas of Inner Mongolia under the administration of five provinces, Heilongjiang, Jilin, Liaoning, Ningxia and Gansu. The OAB was thus incorporated into the province of Heilongjiang. Later on, in 1979, the Central Committee of the Communist Party of China (CPC) decided that OAB should return to the Inner Mongolia Autonomous Region, with the two places Jiagedaqi and Songling remaining in Heilongjiang, but that the OAB should receive the taxation from the two places.

35. Article 65 of the RNAL.
36. See Document No. (1969)36 of the Central Committee of the CPC.
37. See: Document No. (1979)42 of the Central Committee of the CPC.
In 1980, based on the taxation in Jiagedaqi and Songling, the Ministry of Finance decided that Heilongjiang Province should transfer an annual amount of seven million RMB to OAB during the next five years. The amount increased to ten million in 1988 and fifteen million in 2002. However, the Heilongjiang Provincial government only transferred a small part of the tax collected from the two places. According to the statistics of Inner Mongolia Autonomous Region, Heilongjiang Province owes the OAB on average taxes of more than 46 million RMB each year since 1988. OAB has not been able to have their claims satisfied, despite having a decision of the Central Committee of the CPC in hand.

Clearly, tensions also exist in the division of the taxation benefits between the OAB and the organs at higher levels. The Hulun Buir League in Inner Mongolia Autonomous Region, now the Hulun Buir Municipality, claimed 60 per cent of the tax benefits owed to the OAB. Such a claim can hardly be accepted by the authorities of OAB, particularly in view of their financial difficulties. OAB claims that, as a self-government authority, it has the power of autonomy in managing and using its revenue on its own by law. Besides, as trans-regional companies under the Great Xing’an Mountains Forestry Administration, they log in the territory of OAB, but pay taxes to other local authorities. Thus, there is a great loss of taxation benefits which the OAB should have received according to law.

The distribution of benefits is something more than relationships between governments of different places. In other words, Oroqen people should also have compensation for their losses from the forest exploitation. The RNAL articulated that the State shall, “[w]hile exploiting resources and undertaking construction in national autonomous areas, … pay proper attention to the productive pursuits and the life of the minority nationalities there ….” Reading this provision in light of the aim of the law, such ‘proper attention’ should include compensation to local minority nationalities for their direct or indirect loss due to forest exploitation, and effective remedies for the restrictions on and damages to their ways of life due to measures for natural or environmental conservation. Thus, compensation is owed not only to the autonomous authorities of that area but also to ‘the

---

41) In a letter of the government of Inner Mongolia Autonomous Region to the Ministry of Finance in 2005.
43) Article 32 RNAL provides, “[t]he finance of a national autonomous area constitutes a particular level of finance and is a component of State finance. The organs of self-government of national autonomous areas shall have the power of autonomy in administering the finances of their areas…”
44) Article 65(1) RNAL.
group’ in order to prevent their cultural and economic marginalisation in the economic development process.\textsuperscript{45}

In the OAB, the state-organised exploitation of natural resources has resulted in disastrous ecological deterioration. In the early 1950s and before the first forestry teams arrived, OAB lands were covered with virgin forests with the exception of a small area of farmland in the south. Up to the year of 1999, however, more than 90 million cubic meters of timber have been logged, while farmland had expanded from 103 hectares to 100,000 hectares, an approximate increase of 1000 times. The situation in the Banner had changed tremendously: the area of soil erosion amounted to 28 per cent of the total area of the Banner; frequent flooding occurred; environmental pollution was high; the ecosystem was imbalanced; and extreme poverty among the Oroqen was common.\textsuperscript{46}

It should be noted that the situation is by no means peculiar to the OAB. In fact, it is because of similar situations nationwide, the occurrence of the frequent aftermaths of the exploitation of natural resources in national autonomous areas, that the 2001 amendments to the RNAL added that “State organs at higher levels shall incorporate major construction projects designed to maintain ecological balance and protect the environment in an all-around way in national autonomous areas into the national economic and social development plan”;\textsuperscript{47} that “[w]hile exploiting resources in national autonomous areas, the organizations or individuals shall take effective measures to protect local environment”;\textsuperscript{48} and that “[e]nterprises and institutions in national autonomous areas shall respect the power of autonomy of local organs of self-government, observe the local regulations on exercise of autonomy … and subject themselves to supervision by such organs”.\textsuperscript{49}

The RNAL prescribes that when national autonomous areas contribute to the protection of the ecosystem and environment planned and carried out by the state, the state shall give them ‘due benefit compensation’ (\textit{liyi buchang}) or subsidies.\textsuperscript{50} In 2005 the State Council enacted the Provisions for Implementation of the Law of the People’s Republic of China on Regional National Autonomy, providing that the state shall accelerate their efforts to establish the mechanism of compensation for ecological and environmental damage. When making contributions to ecological and environmental conservation, e.g. protection of wild

\textsuperscript{45}Article 65(1) provides that the “[s]tate shall take measures to give due benefit compensation to the national autonomous areas from which the natural resources are transported out”. Cf. also Article 55(1), “State organs at higher levels shall give assistance and guidance to national autonomous areas …. and provide financial, monetary assistance … to help them to help accelerate the development of their economic … cultural … affairs.”


\textsuperscript{47}Article 66(1) of the RNAL.

\textsuperscript{48}Article 66(3) of the RNAL.

\textsuperscript{49}Article 67(2) of the RNAL.

\textsuperscript{50}Article 66(2) of the RNAL.
animal and the construction of nature preservation zones, the national autonomous areas shall be given proper compensation. The underlying principles read that “those who exploit natural resources shall pay accordingly, those who benefit from the exploitation shall provide subsidies, and those who destroy the environment shall give compensation for the destruction.”51 The compensation shall be paid from the appropriate levels of the state, regions and industry-fields by measures of financial transfer payment or project support. However, no ecological compensation mechanism has yet been established by the state. In rewarding or compensating regional national autonomy areas for their contributions to environmental and ecological protection, there should be a specific mechanism which includes a clear and foreseeable procedure and appropriate criteria for determining the adequate compensation.

3. Representation of the Oroqens in the Organs of Self-Government

Issues of whether the organs of self-government are the legitimate agencies for representing the people who is exercising autonomy can be viewed from many angles. The form of the organs in relation to the structure of political power and the social organisation of the minority nationality’s community is one of the aspects. The autonomous area of the Oroqens was entitled the ‘Autonomous Banner’ rather than the ‘Autonomous County’ when it was established, showing a formal respect for the traditional forms of social organisation of minority nationalities at the time of its establishment.52 The 1952 Program for Implementing the Regional National Autonomy regulated that the specific forms of the organs for self-government in autonomous areas shall depend on the will of the majority of the people and the leaders who have connection with the people.53 This wording opened the door for various forms of the organs of self-government at that time. In other words, it actually gives room for the establishment of different forms of organs of self-government suitable to the specific minority nationalities’ social organization and local circumstances. Viewing the Tibetan situation, for example, Tibetans could maintain their traditional model of governance based on the Seventeen Points Agreement during 1951 to 1959. However, this was not the case in Oroqen Banner, and the possibilities to organise the organs of self-government in various forms was eliminated following the adoption of the 1954 Constitution, and the RNAL did not reinstitute this possibility.

52) However, a “banner” refers actually to the forms of social organisation of the Mongolian people, and it is not an indigenous organizational form of the Oroqen people.
53) Article 14 of the 1952 Program for Implementing the Regional National Autonomy.
The striking fact observed in OAB is the dramatic change of the proportion of the Oroqen population: Oroqens as the dominant majority in their own autonomous area, consisting of 99.48 per cent of the local population in 1951, decreased to a marginal minority group of 0.7 per cent of the local population in 1999. From the authors’ points of view, this is the cause of the legitimacy ‘crisis’ of the representation of the OAB authorities at present. Even if the form of the organs of self-government did not have any relationship with traditional Oroqen social organisation at that time when OAB was founded, the Oroqen people were at this time at least the majority population and also in the organs of self-government, which were established based on regular elections in OAB. However, are there any effective special measures taken by the OAB authorities to guarantee the rights of Oroqen people to administrate their internal affairs and to be appropriately represented by reference to the substantial demographic change in the Oroqens’ autonomous area?

China’s system of regional national autonomy is a combination of both regional autonomy (ouyue zizhi) and national autonomy (minzu zizhi). The key point is how the two kinds of autonomy, territorial and non-territorial, can be combined for the whole system of regional national autonomy to attain its aim. This key point, however, has scarcely been the subject of serious discussion in terms of the underlying principles and techniques for the institutional design of the regional national autonomy. In China, territorially-based local or regional autonomy have been established for historical or other reasons, e.g. in the cases of Hong Kong or Macao Special Administrative Region. Regional national autonomy, however, is a particular institutional arrangement within certain defined areas and for the special purpose of the protection of the group rights of minority nationalities. Therefore, in order to make the organs of self-government embody the legitimate representation of the group interests of the ‘nationality exercising regional autonomy’, the following question must be discussed and answered: What organisational structure and procedure can guarantee that a legitimate formation of the ‘group will’ of the ‘nationality exercising regional autonomy’ can take place and that their right to administrate ‘their internal affairs of the group’ can be ensured? In the present institutional framework, two factors are essential for the regional national autonomy.

Zhou Enlai, Guanyu woguo minzu zhengce de jige wenti [Some Questions Concerning Nationalities Policy in Our Country — Speech at the Qingdao Nationalities’ Work Symposium of August 4, 1957], Hong qi, 1 January 1980, pp. 4–14. Due to historical or other reasons local autonomy or regional autonomy has been established in China for subjects other than the national minority, such as the Special Administrative Regions of Hong Kong and Macao.

to function in accordance with its aims: (1) the population, and (2) the organisation and procedure. First of all, the nationality’s population should make up the majority of the local inhabitants and constitute the majority in the local representative organ through appropriate forms of elections or other special measures. Secondly, there should be a consultation procedure, taking into consideration the views of representatives and organisations of ‘the nationality exercising regional autonomy’. Those agencies of group representation should have the possibility of effectively influencing the decision-making process when discussing and deciding on affairs concerning the interests of ‘the nationality exercising regional autonomy’. The effective influence on decision-making procedures could be realised via ‘veto-power’, which empowers the legitimate representative agency of ‘the nationality exercising regional autonomy’ to have the final say on those decisions concerning essential aspects of their identity and the sustainability of their culture.

Now, let us first examine the population factor. In the year 1951, when OAB was founded, its population was 778, of which 774 were Oroqens, making up 99.48 per cent of the population. But along with the forest exploitation, coal mining and wasteland reclamation, migrants swarmed in continuously, with peaks in 1958, 1966, 1979 and 1984. A great number of migrants came each year since the end of 1950s, mainly from northern, northeastern and eastern China. These migrants settled in newly-established villages in the Banner. Already in 1958, the Banner had a population of 49,131, an increase of more than 60 times the number in 1951 and 14 times that of 1957. Out of the 49,131 people, 45,302 migrated from other places outside into the OAB in the same year. By 1960, the migrants doubled the number due to coal mine exploitation and wasteland reclamation. In 1966, the population of the Banner increased to 123,922, and in the next decade there was an average increase of more than 10,000 each year, a total influx of 110,130 persons.

Since the establishment of OAB, the population’s total growth rate was higher than its natural growth rate, with the overwhelming majority of the migrants belonging to the Han, the majority nationality in China. These migrants were mainly employed in the forestry companies founded in the 1950s. Subsequently, in the 1960s and the 1970s, six state-owned farms were founded nearby the rivers in OAB, each of the farms employing thousands of migrants. In 1999, the population of the whole Banner amounted to 316,969, of which the Oroqens, ‘the nationality exercising regional autonomy’ in the Banner, only numbered 2221, accounting for 0.7 per cent of the total population.

This fundamental change in ethnic composition of the local population has had direct influence on the composition and operation of the organs of self-government in OAB. The laws regulating the rights to participate in the

---

57) Ibid.
election of local Banner organs provide that everybody present on the territory of the Banner shall have the right to vote. The number of deputies to the people’s congress from ‘the nationality exercising regional autonomy’ in the area is decided by the standing committee of the provincial level people’s congress, in this case the People’s Congress of the Inner Mongolia Autonomous Region.\textsuperscript{58} Our statistics of the number of Oroqen deputies in the people’s congresses of OAB show that since the fourth people’s congress in 1960, they have never exceeded half, but have been approximately one-third of the deputies. In the latest congress, the proportion even dropped to one-fourth, the lowest point with the exception of the time of the Cultural Revolution (1966–1976). The Rules of Procedure for the People’s Congress at the Level of County or Banner of Inner Mongolia Autonomous Region stipulate that in voting for proposals the principle of simple majority is applied.\textsuperscript{59} In other words, even if the Oroqen deputies reach a consensus among themselves on preserving or reforming the Oroqen language, folkways and customs,\textsuperscript{60} there is no procedure established to guarantee the realisation of the their

<table>
<thead>
<tr>
<th>Year</th>
<th>Congress / Session</th>
<th>Total Deputies</th>
<th>Oroqen Deputies</th>
<th>Percentage of Oroqens</th>
</tr>
</thead>
<tbody>
<tr>
<td>1954</td>
<td>First/1</td>
<td>32</td>
<td>21</td>
<td>65.6%</td>
</tr>
<tr>
<td>1956</td>
<td>Second/1</td>
<td>59</td>
<td>37</td>
<td>62.7%</td>
</tr>
<tr>
<td>1958</td>
<td>Third/1</td>
<td>67</td>
<td>41</td>
<td>61.2%</td>
</tr>
<tr>
<td>1960</td>
<td>Fourth/1</td>
<td>165</td>
<td>44</td>
<td>26.7%</td>
</tr>
<tr>
<td>1963</td>
<td>Fifth/1</td>
<td>151</td>
<td>38</td>
<td>25.2%</td>
</tr>
<tr>
<td>1981</td>
<td>Sixth/1</td>
<td>198</td>
<td>63</td>
<td>31.8%</td>
</tr>
<tr>
<td>1984</td>
<td>Seventh/1</td>
<td>218</td>
<td>64</td>
<td>29.4%</td>
</tr>
<tr>
<td>1987</td>
<td>Eighth/1</td>
<td>187</td>
<td>56</td>
<td>29.9%</td>
</tr>
<tr>
<td>1991</td>
<td>Ninth/1</td>
<td>207</td>
<td>62</td>
<td>30.0%</td>
</tr>
<tr>
<td>1994</td>
<td>Tenth/1</td>
<td>207</td>
<td>64</td>
<td>30.9%</td>
</tr>
<tr>
<td>1999</td>
<td>Eleventh/1</td>
<td>192</td>
<td>58</td>
<td>30.2%</td>
</tr>
<tr>
<td>2004</td>
<td>Twelfth/1</td>
<td>191</td>
<td>50</td>
<td>26.2%</td>
</tr>
</tbody>
</table>


\textsuperscript{58} Article 16 of the RNAL.
\textsuperscript{59} Article 47 of the Rules of Procedure for the People’s Congress at the Level of County or Banner of the Inner Mongolia Autonomous Region, 1995.
\textsuperscript{60} Article 10 of the RNAL.
volition in the local organs of self-government through which the Oroqens practice regional national autonomy.

Let us turn to discuss the factor of organisation and procedure. In the present institutional framework, the extent to which the Oroqens participate in the management of public affairs and hold public offices in organs of government are taken as indicators of the Oroqens ‘becoming masters’ in their autonomous area. According to the RNAL, the head, or the director, of the government of the autonomous Banner shall be an Oroqen.\(^61\) The Regulation of the Oroqen Autonomous Banner on the Exercise of Autonomy also prescribes that Oroqens shall be among the chairman, vice-chairmen and members of the Standing Committee of the People’s Congress of OAB; that the cadres in the departments under the organs of self-government of OAB shall be chosen from among the Oroqens; and that members of the leadership and of the staff of the People’s Court and People’s Procuratorate of OAB shall include the Oroqens.\(^62\) In practice, however, during the 56 years from 1951, when the Banner was founded, until 2006, there were 12 years (from 1967 to 1978, mainly during the Cultural Revolution) in which the director of the OAB government was not an Oroqen. The head of the government of the Banner is a very important position, having significant influence on the exercise of autonomy since this office has the ‘overall responsibility’ for directing the work of the government at this level according to the RNAL.\(^63\) However, the most important political office with substantial decision-making power in the Banner is the Chinese Communist Party secretary. Oroqens have only held this leading position for 16 years.\(^64\) Despite that the preface of the RNAL states that “[r]egional national autonomy is the basic policy adopted by the Communist Party of China for the solution of the national question in China”, the relationship between the CPC organisation and the autonomous authorities is not articulated in the law. Furthermore, the fact that the preamble of the Constitution and speeches of leaders emphasise that the leadership of the party is an essential part of Chinese political life and most officials in important positions are CPC members makes the actual independence of the leader of the government to pursue matters which may be in contradiction with CPC policy, to say the least, doubtful.\(^65\)

In the OAB, there has been a lasting tension in the election, appointment and promotion of the Oroqen cadres at basic levels.\(^66\) Neither the RNAL nor the local autonomous regulation contains specific rules on the proportion of cadres or

\(^61\) Article 17 of the RNAL.
\(^62\) Articles 13 and 21 of Regulations of the Oroqen Autonomous Banner on the Exercise of Autonomy.
\(^63\) Article 17 of the RNAL.
\(^64\) That is, from 1954 to 1955, and from 1980 to 1995.
\(^65\) Potter, supra note 55, pp. 293–322.
\(^66\) Interviews in August 2006. These tensions are also referred to by Potter, ibid., pp. 293–322.
leading positions from the Oroqens in various governmental departments or different levels. The status of the Oroqens as zhuti minzu, the principal nationality, in the Banner has been challenged in relation to the cadres’ recruitment and promotion. As the Oroqens see it, since they are ‘the nationality exercising regional autonomy’, the head of the township government should be an Oroqen, and the Oroqens should be predominant in the composition of cadres, so as to embody their political status as ‘the masters’ of their area. In various townships of OAB, however, the Oroqens have already become the minority in population. For example, in the township of Gankui, the Oroqens only account for 2.6 per cent of the population. Although the cadres of Oroqen origin already made up 26.9 per cent of the number of the cadres in the whole township, they argued that the township head should be an Oroqen. The local Han inhabitants, who had migrated there in recent decades, tended to think that the Oroqens are of ‘lower capability’ and complained that the proportion of Oroqen cadres has been much higher in the composition of local officials than their proportion of the population. In the elections of the township’s eighth people’s congress, the proposal of the Oroqen to be the head of the township failed. These tensions in the townships in OAB are not unusual.

In China, the RNAL does not set out any minimum requirements as to the proportion of the population that ‘the nationality exercising regional autonomy’ should have in their concentrated communities. It does not regulate any institutional adjustments in the case of migration or other essential changes in population proportion, which makes the notion of “concentrated community” come into doubt. As a result, tensions occur and it is difficult, if not impossible, for both ‘the nationality exercising regional autonomy’ to have adequate influence and control over the management of their internal affairs in the organs of self-government, and for the newcomers of various nationalities to exercise their democratic rights. Chinese regional national autonomy include some rules, and there is some practice in how to promote the political participation of the minority nationalities, but it has failed to provide for the appropriate organisational structures and procedures by which they can manage and decide on their internal

---


68 Article 2 of the RNAL stipulates merely that the regional autonomy shall be practiced in areas where minority nationalities live in ‘concentrated communities’. However, we have gathered information during our field visits in different minority areas that in practice there seems to have been a requirement of 30 per cent as to the proportion of the minority nationalities’ population to establish an autonomous area.

69 Cf. Article 14 of the RNAL which provides that boundary changes, abolition, merger or alteration shall be done in accordance with legal procedures and in full consultation with the organs of self-government, upon the proposal of the state organs at the next higher level.
affairs. If ‘the nationality exercising regional autonomy’ no longer makes up the majority in population, the system should be adjusted accordingly so as to guarantee its effectiveness and fairness in representing the population as a whole including the minority nationalities.

4. Legitimate Procedures in Reforming Minority Nationalities’ Way of Life

Out of the Oroqens’ ‘three historical leaps’, both the realisation of a sedentary way of life and the hunting-prohibition have had a significant impact on the Oroqens’ traditional way of life.\footnote{The OAB government adopted the Announcement about a Ban on Hunting the Wildlife on 23 January 1996 and the Implementing Measures on 8 February 1996. The ban was implemented throughout the Banner and included the entire population without exceptions.} Actually, the essential distinguishing feature of their traditional way of life, hunting, has vanished. As we have seen, the Chinese RNAL claims that the principle of this system is that the state shall fully respect and guarantee the rights of minority nationalities to administrate their internal affairs,\footnote{Preface of the RNAL.} and that the autonomous organs shall guarantee the freedom of the nationalities to preserve or reform their own folkways and customs.\footnote{Article 10 of the RNAL.} The contradiction between the objectives of the law ‘on paper’ and the actual practice makes the issue of legitimate and adequate procedures for the decision-making of those ‘historical leaps’ become the focus of this study.

By referring to historical documents and interviews with local people and government officials, we observed ‘the visible hand’ of the state that pushed the Oroqen society to take those leaps. In fact, the establishment of OAB, realisations of a sedentary way of life and the hunting-prohibition were all outcomes of the state’s unilateral drive and plan for social change.

Both settlement and the hunting-prohibition were carried out by the state based on ideological, political and economic motivations. Initially it is necessary to review the course of the establishment of the Oroqens’ sedentary lifestyle as it was the essential step which led to the subsequent hunting-prohibition in the OAB.

The state initiated and carried out the establishment of a sedentary way of life among the Oroqens with the stated purpose to change their ‘backward’ way of life and their ‘primitive’ form of social organisation. To the advocates of the ‘civilised, progressive way of life’, the Oroqens’ traditional values and folkways, knowledge and skills were all insignificant. Through the spectacles of the unilinear evolutionary theory adhered to by the Chinese leadership, the Oroqens’ language, culture and their hunting skills were doomed and would be replaced by modern civilisation. Only by discarding their traditions as soon as possible could the Oroqens ascend to the rank of ‘advanced nationalities’.

---

\footnote{The OAB government adopted the Announcement about a Ban on Hunting the Wildlife on 23 January 1996 and the Implementing Measures on 8 February 1996. The ban was implemented throughout the Banner and included the entire population without exceptions.}

\footnote{Preface of the RNAL.}

\footnote{Article 10 of the RNAL.}
The state’s drive to change the Oroqens from hunters to a sedentary people started in 1954,\(^{73}\) and the whole process was completed in 1958 after having successively established six villages. The four-year process was by no means without problems for the authorities. It turned out that the resistance among the Oroqens was firm and it was not so easy to make the Oroqen hunters ‘change their ideas’ and accept the ‘modern’ transformation of their culture. The government carried out the policy of changing their lifestyle via the following steps/measures:

- broad promotion of the advantages of a sedentary way of life, by assuring the Oroqens that it represented the civilised, progressive way of life and that only the sedentary way of life could make them a ‘modern’ nationality;
- organised tours for the Oroqen so as to make them learn about the modern life and remove their misgivings about the sedentary way of life;
- establishment of state-funded settlements.\(^{74}\)

The efforts to ‘persuade’ the Oroqens were intensive. For example, the government-organised tours covered roughly 30 per cent of the adults in some places.\(^{75}\)

The initiative to establish a sedentary way of life among the Oroqens has historical antecedents, but these failed to achieve their aim. Similar to the ‘modernisation-transformation’ that the state carried out in the 1950s, the policy known as ‘giving up hunting and coming under farming’ was implemented in the Oroqen area between 1915 and 1939. Taking into consideration the existence of the large gap, economically and socially, between the farming and hunting ways of life, the government at that time adopted a policy of ‘combining hunting and farming’. Recognising the necessity of gradual transition from the hunting way of life, settlements were built near the mountains so that the Oroqens could be taught how to farm while still practicing hunting in the off season. The historical archives show that the government distributed land to the Oroqens and gave them financial and material support when settling down. In spite of all these efforts, the local Oroqens still preferred their own way of living. “As soon as they heard of the ideas of settlement and farming, they would shake their heads, screen their ears and run away, as if their life were in danger”.\(^{76}\) Those Oroqen that came from the mountains to live in the settlements could never be accustomed to farm life. “Some even destroyed their houses and went back to the mountains with the whole family.”\(^{77}\) The failure of this governmental effort at that time was seen by

---

\(^{73}\) It was in the same year that the Central Government approved the plan for Great Xing’an Mountains exploitation.


\(^{75}\) Ibid.

\(^{76}\) Archives of the Oroqens of Kumar Route, 1917.

\(^{77}\) Archives of the Oroqens of Kumar Route, 1918.
scholars as a contradiction between the farming and hunting ways of life and the inadequacy of this policy.  

The implementation of the ‘civilised’ sedentary way of life had considerable negative influences on the Oroqen people. In the beginning, the Oroqens could not accept or adapt to the new way of life. Some refused to live in the houses built of bricks and timbers. Instead, they would set up a xierezenzhu, their traditional shelter when hunting in the mountains, beside the house. It is said that they feared that the roof would collapse and that they did not know how to repair the house. The Oroqens were used to living in the mountains and after settling down their health was affected by contagious diseases that spread from other places, to the extent that some even lost their lives.

Economically the government tried to assure the Oroqens that they would benefit from the sedentary way of life since, according to the ‘policy of combination’, they could engage in both farming and hunting. In fact, however, the two were incompatible in terms of time. The busy season for farming happened to be the season to hunt the young deer and the antlers, whereas the harvest of crops was just in the golden season to hunt and get the pelt. Thus, it was impossible for the nomadic hunting way of life to be effectively combined with that of farming.

The government policy of ‘combining hunting and farming’ was actually only a transitional step for ‘giving up hunting and taking up farming’. In the process, the Oroqens’ skills and knowledge were discarded and marginalised, but the hunters could not adapt to the new way of life. Furthermore, their social organisation was seriously weakened in the adoption of a sedentary way of life. The Oroqens used to live and go hunting in the unit of wulilen, but the new sedentary way of life was based on the geographical village, breaking their traditional social organisation. Meanwhile, the Oroqens’ tradition of cooperation in the wulilen was conducive to the adaptation to the economic transformation of production. Collective cooperatives were founded, public ownership was introduced

---

79 Also known as cuoluozi in colloquialism, it is a cone-shaped shelter, erected with 30–40 birch or willow poles and roe skins (in winter) or birch bark, reeds and canvas (in summer).
81 Ibid.
82 Interviews in August 2001 and 2006 confirm that Oroqen still look upon farming as a difficult and non-appropriate way for the Oroqen to live.
83 The word *wulilen* comes from the Oroqen language, referring to offspring or clan. Consisting of a common ancestor and his three or four generations of offspring, a *wulilen* used to be the basic organisation for life, production and consumption. Generally, the Oroqens chose to camp in a place with a mountain in the back and a river in the front, and each *wulilen* would have several or a dozen xierezenzhu. They went hunting together and migrated as the season changed. Games was distributed equally with the *wulilen*. See *Oroqen Jianshi* [A Short History of the Oroqen] (Inner Mongolia People’s Publishing House, 1983) p. 39.
for means of production, and rewards were distributed according to one's work. In this way, ‘socialist transformation’ was completed in the ethnic frontier.  

These new forms of cooperative organisation changed the traditional Oroqen system for social authority and norms, which also had a significant impact on their traditional faith, shamanism. Furthermore, the state planned and organised large scale migration into the Oroqen area, letting the Han farmers become the neighbours of the Oroqens. It was said that the Han migration should, in some way, help the Oroqens to acquire farming skills and speed up their development, but instead it resulted in their marginalisation, including less and less use of the Oroqen language, a language which has became endangered through its diminished use.

In the course of the state’s unilateral modernisation drive, the Oroqens attempted to return to their forests time after time. During the Cultural Revolution, the state’s policy of yi liang wei gang (taking grain production as the guiding principle) penetrated the remote OAB. The Oroqens were required to hand in their guns, and hunting was suspended as a result. Taking various political risks, a group of Oroqens decided to give up farming and escape to the forest. Later on, when agricultural reforms began, the Oroqen hunters were allowed to lease the land distributed to them to cultivate, and then they went back to the forest. However, after a long period of forest exploitation, the Great Xing’an Mountains were no longer what they were several decades ago. The Oroqens found themselves having lost the material surroundings for hunting, and there was no longer the hunting group, the wulilen, for them to rely on.

The policy of establishing a sedentary way of life for the Oroqens may be attributed to, besides the ideological conception of ‘social progress’, the decision to exploit the forests in the Great Xing’an Mountains. Actually, the settlement policy was implemented the same year that the plan for exploiting local forests was ratified by the state. The removal of the forest Oroqens was a necessary step in the realisation of the state’s plans. The situation can be compared with present day removals and resettlements of populations for hydropower construction, which are based on the state’s need for energy resources in a time of quick economic development.

85) Ibid., pp. 302–305.
86) For the opinion that the Chinese policy was to change the demographic dominant position of the nationalities in autonomous areas, see C. Walker, The National Question in Marxist-Leninist Theory and Strategy (Princeton University Press, Princeton, NJ, 1984) pp. 327–329. The Oroqen determine efforts to strengthen it, such as creating a written language, and its use in school has been largely ineffective and their language is basically dead, interviews 2001 and 2006.
87) Chronicle of the Oroqen Autonomous Banner, supra note 84, p. 305.
During our field visits, we learned that the Oroqens were unaware of the details of the plans and of their consequences for them.88 However, in contrast to the failure of implementing the similar policy in the first half of the 20th century, the state policy of a sedentary way of life succeeded this time around. Because the Oroqens found themselves with no forest to return to and no game left for them to hunt, they had no alternative way of life to that promoted by the State. This situation, created by government policy, made the hunting-prohibition ‘conform to the reality’, providing the basis for the decision of the government.

In our interviews with Oroqens, we got two completely different opinions on the hunting-prohibition. Some regarded hunting as a backward way of life and ascribed the hunting-prohibition to social progress. They emphasised that the decision was made to solve the hunter’s actual difficulties to have an economically sustainable life. On the contrary, others regarded hunting as central to their ethnic identity as Oroqens and took the hunting-prohibition as a betrayal of their nationality. Even if hunting could not be the main source for livelihood anymore, they argued, it continues to be a right and a central aspect of their culture as well as a hobby of many of the Oroqens. It is difficult for us to make a strict classification of the two groups, but roughly the former opinion was held mainly by Oroqen cadres who were involved in making the decision, while the latter opinion was held primarily by Oroqen hunters but also by some cadres and intellectuals.

The decision on the hunting-prohibition is at the core of the cultural identity and the internal affairs of the Oroqens. The process of decision-making is a central point for our inquiry.89 We have posed three questions in our study:

• First, which organ made the decision and by which procedure?
• Second, how did the participation of the Oroqens in the decision-making take place?
• Third, how were the interests of the Oroqen hunters taken into consideration in the process of decision-making?

---

88 In our family interview conducted at the Tomin Township on 15 August 2006, we inquired a hunter in his 50s about the process of establishing the sedentary way of life. The hunter said: “The old head of the government of the Banner rode on the horse to visited people one family after another, persuading us to move. The aged people all cried. They did not want to leave. But we kids did not mind. Anyway, all of us thought it as the care for us from the organisations at higher levels. And since it was the decision of the organisations at higher levels, we must obey. The Banner invited some Daurs to help us build thatched, earthen huts. We also learned hut heating from them. After having settled down, we did not get much help from the government. And the traffic was inconvenient. Since we had no fields, we had to keep relying on hunting. But it became less convenient than before.”

We failed to get detailed and clear answers to these questions in our first investigation in 2001. The head of the OAB government pointed to his nose and told us that this was his decision. We were aware, too, that the hunting-prohibition was issued in the form of a government order, but we could not understand why such a significant decision was not presented to and discussed in the people’s congress of the Banner. This decision had generally been acclaimed as a ‘historical leap’ of the Oroqens, and it seems that government officials of the Banner felt provoked by our inquiries on the hunting-prohibition. During our fieldwork in 2006, we continued asking the same questions and finally got some more definite answers, although we were still refused access to relevant documents and meeting minutes to confirm our information. Here is what we were told:

First of all, the hunting-prohibition was first discussed in the Standing Committee of the CPC Committee of the OAB. The Standing Committee consists of 11 members, i.e. the Party Secretary, the Deputy Party Secretary, the Secretary of the Party Disciplinary Committee, the Director (the Head) of the OAB government, the Deputy Directors of the OAB government, the Chairperson of the OAB People’s Congress, Chairperson of the OAB Women’s Federation, etc. Five of the 11 members of the CPC Standing Committee were Oroqens. We were told that all of them agreed on the hunting-prohibition. Subsequently, the order putting into effect the hunting-prohibition was issued by the working meeting of the OAB Director of the government, comprised of six persons, including the Director and Deputy Directors of the Banner, and the Director of the General Office of the Banner government. Still, we got no definite explanation why the issue was not referred to the People’s Congress of the Banner. According to the present Chairperson of the People’s Congress of the Banner, such an important issue should have been discussed in the People’s Congress or its Standing Committee, but at that time the chairperson of the People’s Congress did not insist on it.90

Second, the decision of the Standing Committee of the CPC Committee seemed to be the crux of the hunting-prohibition. Allegedly, the government and the People’s Congress of the Banner conducted an investigation into the general conditions of the hunters’ life before the decision was made. The Deputy Director of the Banner government, who was responsible for the hunters’ affairs, regarded hunting as a backward way of life. He told us that he had organised discussions about the issue among the hunters a year before the hunting-prohibition. According to him, most people agreed with the idea because there was no game to hunt or capture, and only a few objected, claiming that it would halt their traditional way of life. Considering that grain was a good source of income at the time and that it was feasible that wasteland could be reclaimed, he talked it over with the Director of the Banner government, and they reached a consensus. Then

90 Interviews with the People’s Congress of the Banner on 15 August 2006.
the issue was referred to the Party Committee, which believed that this decision ‘conformed to the reality’. In this manner the decision was made.\textsuperscript{91}

On the other hand, in our interviews in a hunters’ village, we received a quite different description. A leading Oroqen hunter said as follows:

\begin{quote}
We were not consulted with before the hunting-prohibition of 1996. The order came suddenly, without any notice in advance. In addition to hunting-prohibition, we were required to hand in the guns. All of us were reluctant, but we had to conform to the decision. I myself am a Party member, so I was the first to hand in my gun. For this reason, I have been condemned by my fellow hunters for quite a few years.\textsuperscript{92}
\end{quote}

Third, the hunting-prohibition and the compulsory handing over of guns in 1996 were allegedly conducive to the administration of the Oroqens’ life. From 1997 to 1998, the state permitted some wasteland reclamation at the second stage of its plan for agricultural development, and the OAB authorities encouraged the hunters to apply for land reclamation for their subsistence. However, some were excluded in accordance with the state’s policy, for example those who remained single, while some who were allowed to reclaim lands failed to get loans from the bank for purchase. After 1998, land reclamation was no longer permitted, and at present some former hunters still have no land at all.

Shortly after the adoption of the hunting-prohibition, the Bureau of Forestry of the Banner distributed a monthly subsidy of RMB 70 to each hunting family as a form of welfare since they had no access to hunting.\textsuperscript{93} However, it was terminated some years later. Nowadays, the main income of some of the hunters is a monthly minimum subsistence allowance of RMB 120. In addition, there is a small amount of income from rental incomes from some collective-owned land in the seven hunting villages, which can be distributed among the villagers. Additional extra income from some irregular work depends on the individual capacity of the former hunters.

To sum up, the hunting-prohibition, as part of the local government’s administrative behaviour, was proposed and carried out by some of the leading Oroqen cadres such as the Director of the OAB government, who, as an Oroqen individual, should have represented the interests of the Oroqen. It should be noted that these leading cadres who were involved in the decision are also part of the decision-making bodies of the CPC. The procedure that was used circumvented the autonomous organs and cannot be said to represent an adequate mechanism for decision-making of ‘the nationality exercising regional autonomy’ for administering their internal affairs. In the existing framework of institutional arrangements, there is not yet a representative organ of the group through which the Oroqens

\textsuperscript{91} Interviews with the People’s Congress of the Banner August 2006.
\textsuperscript{92} Interviews in Tomin Township August 2006.
\textsuperscript{93} Interviews August 2001.
can express their opinions as a group, as a minority nationality. Such an institution and appropriate procedures to form the group will of the Oroqens are lacking under the existing legal framework. This makes it possible, and perhaps even probable, that the decisions of OAB ‘autonomous’ government may fail to guarantee the rights of minority nationalities to maintain and develop their culture, language and traditions, which is required both by the Constitution and by the RNAL.

In addition, the decision of the hunting-prohibition in OAB did not pass through a procedure that employed formal consultation with other organisations such as the Society of Hunters and the Assembly of Villagers, which possibly could have provided more representative views of the Oroqen than the cadres closely linked to the CPC organisation. This is a fundamental feature that is lacking, as we see it in this case, and that it is not foreseen in the system of regional national autonomy makes regional national autonomy fail to meet the goals it is expected and declared to meet.

According to the state’s ideology, hunting is conceived of as the most primitive and backward way of subsistence in the evolution of human society. The Oroqens’ transformation to a sedentary way of life and farming was regarded as a historical leap of Oroqen social evolution. The policies and decisions were made under the strong influence of this uni-linear evolution ideology. They lack basic respect for the Oroqen hunters’ particular way of life. The state tended to educate and persuade the so-called ‘backward nationalities’ rather than try to understand and accommodate their interests linked to culture and consult them about how they perceive their development.

Furthermore, the state’s standpoint on land and forests conflicted with the Oroqens’ established way of life. To the Oroqens, hunting served as their way of life for several centuries, while to the State it was backward and it damaged the ecology and hindered the economic exploitation of forest resources. However, a way of life is something more than a way of subsistence for a group. It is closely related to the social organisation, religious faith and language of the ethnic group. We learned from our fieldwork that the Oroqens were extremely concerned and anxious of the outcome of excessive deforestation and the excessive and illegal hunting and catching of wild animals by the migrants. The OAB authorities expected that strict measures, such as the total ban on hunting, would check and stop the illegal actions. However, for the migrants in the OAB, the decision only cut off one single source of ‘illegal’ income, while for the Oroqens it meant that their hunting culture would only be preserved in a museum for future generations.94 A decade of hunting-prohibition has made it impossible for the new generation of Oroqens to inherit hunting knowledge and skills. Because of this,

94 In August 2001 we visited the newly renovated museum in Alihe where the Oroqen hunting culture was exhibited.
the end of the hunting culture as well as the disappearance of the Oroqens’ cultural identity is only a matter of time.

5. The Oroqen Case in the Perspective of International Law

Our study of the historical leaps in the development of the Oroqen society during a period of about 50 years discusses the relevant legal framework, the actual impact of regional national autonomy and the participation of the Oroqen people in decision-making processes in the exploration of the forest and in the prohibition of hunting in the OAB. In this part the discussion will focus on China’s obligations and the rights of the Oroqen people according to international human rights law.

5.1. State Obligations and International Legal Sources

The present institutional design and practice of regional national autonomy in the case of the Oroqen hunters’ society may also be subject to discussion and challenge from the viewpoint of international human rights law. For more than two decades China has become party to a number of international human rights treaties and participated in the adoption of relevant standard-setting in the United Nations (UN). Some of these human rights are directly relevant to the analysis of the structure and implementation of regional national autonomy. We will discuss issues raised in this article on the basis of the practice and interpretation of international human rights by international organs. We assume that human rights not only should but that they may also inform and inspire domestic institutional and legal reforms relating to the issues raised in this article with respect to domestic law and policy. There are signs that China is moving towards a society based on ideas of the rule of law. The Chinese Constitution of 1982 is amended and encompasses now references to the protection of human rights and a vague notion of rule of law in relation to the governance of China. Specifically, the Constitution

95 China has ratified a number of important human rights treaties and is therefore formally bound to implement these treaties in their jurisdiction, such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) on 29 December 1981; the Convention on the Rights of the Child (CRC) on 2 March 1992; the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 27 March 2001.
97 Article 5 of the 1982 Constitution (amendment 1999) states: “The People’s Republic of China practices ruling the country in accordance with the law and building a socialist country of law.”
includes in Article 4 that all minorities have the freedom to use and develop their own language, culture and traditions, and the RNAL expresses in the preface the principle of the state’s respect of the minorities’ right to administer their own affairs.

According to the Chinese legal and political system, China is a unitary but multi-ethnic state, and regional national autonomy is the principal means of the CPC to solve the national question. Formally, the aim of the regional national autonomy is to guarantee “the rights of minority nationalities to administer their internal affairs”, and their rights to enjoy their own culture and use their own language should be realised through regional national autonomy.\(^98\)

In the perspective of international law ‘autonomy’ has not acquired a precise meaning neither in doctrine nor in relation to universal or regional human rights despite that ‘autonomy’ is discussed in relation to minority issues concerning the management of public affairs standards.\(^99\) Nevertheless, ‘autonomy’ has been mentioned in relation to the right to effective participation in documents of the Organization for Security and Cooperation in Europe (OSCE), and ‘a right to autonomy’ in matters relating to the internal and local affairs of indigenous peoples was included in the 2007 UN Declaration on the Rights of Indigenous Peoples (UN Indigenous Declaration) linking to the right to self-determination of indigenous peoples.\(^100\)

We will in this part focus our comments on international human rights of the Oroqen people, as a group and as individuals. At the heart of the analysis lie the rights of the Oroqens to enjoy their own culture, their rights to participation in decision-making, their rights to non-discrimination and the right to self-determination which are all part of the rights which the Chinese authorities has undertaken to implement in China. The discussion will include human rights treaties which are, or may be expected to become, binding upon China, but also certain other relevant standards which could inform possible institutional and legal changes in this field.\(^101\)

---


\(^{100}\) See para. 35 of the Document of the Copenhagen Meeting of the Second Conference on the Human Dimension of the CSCE (CSCE, 1990) linking the right of national minorities to effective participation in public affairs. Article 4 of the Declaration on the Rights of Indigenous Peoples (UN, 2007).

\(^{101}\) Cf. Article 38(1) of the Statute of the International Court of Justice.
Article 27 of the International Covenant on Civil and Political Rights (ICCPR) is central to the understanding of the international legal rules relating to minority rights protection and a focal point for our discussion. It reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language.

The Chinese government signed the ICCPR on the 5 October 1998. Although the ICCPR has not been ratified yet, the state has the obligation not to act against the purpose of the Covenant according to international law as expressed in Article 18 of the Vienna Convention on the Law of Treaties (VCLT). It may also be expected that states should take measures between signature and ratification for realising the purpose of the ICCPR in accordance with the principle of good faith.\(^{102}\) Much of the discussion will be based on the interpretation of the rights enshrined in the ICCPR developed through the practice of the Human Rights Committee (HRC) since this provides relevant clarifications of the legal issues in relation to the analysis we have presented in the Oroqen case.

Furthermore, Article 30 of the Convention on the Rights of the Child (CRC) has to a large extent an identical wording as Article 27 of the ICCPR, that minority and indigenous children shall not be denied their rights to enjoy, use or practice their own culture, religion and language. Since this convention has been ratified by China,\(^{103}\) China has the obligation to respect and ensure these rights in accordance with the convention.\(^{104}\) It seems hard to imagine that the rights under Article 30 of the CRC can be realised without compliance with Article 27 of the ICCPR which has a more general scope of application. The obligations under the two conventions would be overlapping to a large extent; actually, it is difficult to see that a state could refrain from complying with Article 27 of the ICCPR without at the same time violating Article 30 of the CRC. Thus, the interpretation of Article 27 of the ICCPR would be of direct relevance to the content of China’s obligations under Article 30 of the CRC.

Among other human rights instruments that are of particular relevance to the issues raised in our discussion of the Oroqen case are the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which China has ratified and thus has the obligation to implement.\(^{105}\) Furthermore, the international standards on the rights of minorities and indigenous peoples included in

---

\(^{102}\) Article 26 of the Vienna Convention on the Law of Treaties (VCLT).

\(^{103}\) On 2 March 1992.

\(^{104}\) Articles 2, 4 and 30 of the CRC.

the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (UN, 1992), the Declaration on the Rights of Indigenous Peoples (UN, 2007) and the earlier Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (International Labour Organization (ILO), 1989) provide important guidance for the discussion despite the fact that these instruments are not binding upon China. Nevertheless, the conclusions drawn in this article will to a large extent be based on applicable treaty law, while guidance as to the content of the relevant standards will be sought from other sources.

5.2. Oroqen as a ‘Minority’ and an ‘Indigenous People’

The international standards for the protection of the rights of minorities and indigenous peoples have developed despite the fact that no agreement has been reached on a general definition of a minority or an indigenous people for the applicability of international human rights. However, certain features of a definition can be found in different documents, and it is our assumption that the rights of the Oroqen people could be analysed and subsumed under minority rights, indigenous peoples’ rights and as a part of a people’s right to self-determination. These sets of rights are all of importance to a discussion of the issues raised considering the law and practice of regional national autonomy in the case of the Oroqen people.

While Article 27 of the ICCPR does not explicitly mention indigenous peoples, the HRC has applied the provision in a number of cases to members of indigenous people, and in its general comment on Article 27 it affirms the application of Article 27 to members of indigenous peoples also constituting minorities. Furthermore, the HRC has also concluded that indigenous peoples may also enjoy, at least in part, the right to self-determination in Article 1 of the ICCPR. In its concluding observations on Canada, the HRC states:

China has not ratified ILO Convention 169 and does not recognise that indigenous peoples exist in mainland China. The political standpoint in relation to the fact that indigenous people are recognised in Taiwan is not clear. The legal value of UN General Assembly declarations depends on several elements. For a brief overview of the the legal value of the resolutions of the General Assembly, see R. Higgins, *Problems and Process. International Law and How We Use It* (Oxford University Press, Oxford, 1994) pp. 22–28.

Cf. Article 38(1) of the Statute of the International Court of Justice; Article 31 of the VCLT.

World Conference on Human Rights: Vienna Declaration and Programme of Action (Vienna, 1993), para. 5, declares: “All human rights are universal, indivisible and interdependent and interrelated.”

See CCPR General Comment 23, The rights of minorities (Article 27), UN Doc. CCPR/C/21/Rev.1/Add.5, paras. 3.2 and 7. Article 30 of the CRC also lists children of indigenous origin as beneficiaries of the rights. For a discussion on the definition of indigenous peoples, see M. Scheinin, ‘What are Indigenous Peoples?’, in N. Ghanea and A. Xanthaki (eds.), *Minorities, Peoples and*
…With reference to the conclusion by RCAP [the Royal Commission on Aboriginal Peoples] that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.\textsuperscript{110}

Since Article 1 of the ICCPR and the ICESCR have the same wording it could be argued by analogy that this will also be the case in relation to the ICESCR. However, the interpretation of the law in the field of self-determination is far from clear not the least as far as the subject is concerned. The impact of the adoption of the UN Indigenous Declaration in 2007, including two articles explicitly affirming the right of self-determination of indigenous peoples, remains to be seen. But, taking the prohibition of discrimination in relation to internal aspects of the right to self-determination, indigenous peoples as an ethnic or racial group should have rights to enjoy a non-discriminatory right of self-determination as part of the people.\textsuperscript{111}

Article 1 of the ILO Convention 169 concerning Indigenous and Tribal Peoples includes criteria for defining indigenous people for the applicability of the convention. However, the UN Indigenous Declaration adopted in 2007 does not include a definition of indigenous peoples, giving it a potential for a broader application. Taking the definition included in Article 1 of the ILO Indigenous and Tribal Peoples Convention as a starting point for a discussion on whether the Oroqen people may be considered as indigenous peoples we can find at least four criteria:

1. A historical presence in the country they live.
2. A distinctive social, cultural, economic and political organisation.
3. A link between their culture and to the land they traditionally occupy or use.
4. A subjective sense of being different as an indigenous people.

\textsuperscript{110} UN Doc. CCPR/C/79/Add.105 (1999), para. 8.

In the Chinese context, the Oroqen is part of the 55 *shaoshu minzu*, recognised as such by the state.\textsuperscript{112} This term *shaoshu minzu*, translated as ‘minority nationalities’ or ‘ethnic minorities’ in official documents, comprise a great variety of groups in very different situations, having ethnicity or culture, religion, and/or language as their common denominator. The Chinese authorities do not recognise indigenous peoples in China;\textsuperscript{113} but the notion of minorities which have existed for generations and generations, *shijue minzu*, is used in official documents describing differences between ethnic groups in certain areas, which in practice seems to amount to a recognition of similar distinctions as between minorities and indigenous peoples.\textsuperscript{114}

A decision by the state to recognise a group as indigenous or as a minority is not a criterion which determines whether international human rights apply. It would in essence be in contradiction to the basic precept of international human rights protection that all persons are “born free and equal in dignity and rights”.\textsuperscript{115} Starting from this precept, the subjective idea of persons feeling that they belong to a minority or an indigenous people as being distinct from other parts of society and having a common sense of solidarity toward preserving their own identity is fundamental to the applicability of these rules.\textsuperscript{116}

Under Article 27 of the ICCPR the existence of a minority as a distinct cultural, linguistic or religious group is considered an objective fact and is not dependent on the recognition by the state.\textsuperscript{117} The HRC has taken a broad approach to the

\textsuperscript{112} In the latest population census in 2000 there were about 730,000 persons accounted for as belonging to non-recognised groups.

\textsuperscript{113} See the latest official statement on this issue of the Chinese government, <www.china-embassy.ch/eng/ztnr/rqwt/t138829.htm>.

\textsuperscript{114} Article 1 of Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO, 1989) makes a distinction between indigenous and tribal peoples on the basis that the indigenous were in the territory at conquest or at establishment of the present states.

\textsuperscript{115} Article 1 of the Universal Declaration of Human Rights (UN, 1948).

\textsuperscript{116} Article 1(2) of ILO Convention 169: “Self-identification as indigenous or tribal shall be regarded as the fundamental criterion for determining the groups to which the provisions of this Convention apply”; CERD General Recommendation 8, Identification with a particular racial or ethnic group (Art. 1, par. 1 and 4), UN Doc. A/45/18: “Such identification shall, if no justification exists to the contrary, be based upon self-identification of the individual concerned.” Most definitions include both ‘objective’ and ‘subjective’ criteria, see e.g. Special Rapporteur F. Caportorti’s proposed definition of minority for Article 27 of the ICCPR in his *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev.1 (1979): “A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language” (emphasis added).

\textsuperscript{117} The HRC states in CCPR General Comment 23, The rights of minorities (Article 27), UN Doc. CCPR/C/21/Add.5, para. 5.2: “The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon the decision by that State party but requires to be established by objective criteria”. In UN instruments on minorities the term ‘minority’ is qualified by ethnic or national, religious and linguistic, see Article 27 of the ICCPR, Article 30 of


119) However, we are aware that the official designation of ‘minority nationality status’ entails many principal and legal technical problems both at the individual level and at the group level, but this discussion is outside the scope of the discussion in this article.

120) It is a central element in the definition of indigenous peoples, communities and nations proposed by Special Rapporteur, José Martínez Cobo, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, para. 379; see Scheinin, *supra* note 111, pp. 3–13. The urgent need to respect and promote the rights of indigenous peoples to their lands, territories and resources is recognised in the UN Declaration on the Rights of Indigenous Peoples, para. 7 of the Preamble of the UN Declaration on the Rights of Indigenous Peoples and Articles 25–30 of the UN Declaration on the Rights of Indigenous Peoples; Articles 13 and 1.1(b) the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, and Articles 14–15 of the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries; CERD General Recommendation 23, Indigenous Peoples, UN Doc. A/52/18, Annex 5, para. 5.
However, what is more important in international law is that the subjective determination of being or belonging to an indigenous people is considered as a ‘fundamental criterion’ for the applicability of the rights of indigenous peoples according to Article 1(2) of the ILO Indigenous and Tribal Peoples Convention. The importance of this criterion was reemphasised in the second paragraph of the preamble of the UN Indigenous Declaration:

Affirming that indigenous peoples are equal to all other peoples, while recognizing the rights of peoples to be different, to consider themselves different, and respected as such,

China supported the adoption of the UN Declaration, but has not ratified the ILO Convention. Nevertheless, there is an open question on what would be the legal and political consequences if minority groups, like the Oroqen, already recognised as *shaoshu minzu* would claim that they should be recognised as indigenous peoples. It seems unlikely in view of the political stance of China on indigenous peoples that the ILO Indigenous and Tribal Peoples Convention would become binding in the near future. At present, for the application of the ICERD, which China has ratified, the emphasis is laid on the self-identification of the individual concerned as belonging to a particular racial or ethnic group.  

In view of the situation of the Oroqens and that it seems to in most respects comply with the criteria of Article 1 of the ILO Indigenous and Tribal Peoples Convention, there would not be any obvious reasons not to apply the specific interpretation of the ICERD to the Oroqens as indigenous peoples for the discussion in this article.

5.3. The Rights of the Oroqens to Enjoy Their Own Culture

Article 27 of the ICCPR protects the rights of members of minorities to enjoy their own culture together with other members of their group. The fundamental importance that states take measures to protect the existence and identity of minority groups for the enjoyment of minority rights was noted by the international community in Article 1 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN Minority Declaration).  

---

121) CERD General Recommendation 8, Identification with a particular racial or ethnic group (Art.1, par. 1 and 4), UN Doc. A/45/18. The wording in General Recommendation 8 “if no justification exists to the contrary” could avert obvious abuse of the protection under ICERD including an obligation to take special measures, see Article 2(2) of ICERD.

122) This declaration is formally not binding upon states. Nevertheless, the declaration was adopted without a vote and its influence as ‘subsequent practice’ (Article 31(3)(b) VCLT) may be seen in CCPR General Comment 23, The rights of minorities (Article 27), UN Doc. CCPR/C/21/Rev.1/Add.5. For a brief overview of the the legal value of the resolutions of the General Assembly, see
HRC has clarified that positive measures of protection against acts of the state party or other persons are required to protect the rights of the members of minorities, and stated in General Comment 23 that “[a]lthough the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members…” (emphasis added).\(^\text{123}\)

In its views under the Optional Protocol, the HRC has developed criteria for whether a violation of Article 27 has taken place in cases on economic development in minority areas. It has brought up an obligation to provide for the participation and the consultation of the group, prior to and during the decision-making, on the one hand, and the sustainability of the culture of the group, on the other.\(^\text{124}\)

States are under an obligation of a certain conduct, consulting and involving the group in decision-making, but also a certain result, that the culture can be sustained under the circumstances. Issues relating to the process of consultation and their right to participate in decision-making will be further discussed in the next section on the right to participation.

The ‘culture’ of the group has been interpreted to also include economic or other activities associated with a particular way of life of the group. In the case of Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada, the HRC recognised that “the rights protected by Article 27, include the rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.”\(^\text{125}\) The HRC has followed and developed this line of interpretation in a number of cases during the years. The bottom-line according to the wording of Article 27 lies in whether the impediments to the economic or other activities, which are essential elements in the culture of the group,\(^\text{126}\) amount to ‘a denial’ of the rights of the members of the minority to enjoy their own culture, while “a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial” (emphasis added).\(^\text{127}\) The HRC accepts that there are legitimate economic

---

\(^{123}\) Higgins, supra note 106, pp. 22–28. For a commentary on the UN Minority Declaration bringing out the importance of the link to territory and livelihood for the protection of minorities, see Commentary, A. Eide, Chairperson, UN Doc. E/CN.4/Sub.2/AC.5/2001/2, para. 24.

\(^{124}\) CCPR General Comment 23 on the rights of minorities (Article 27), UN Doc. CCPR/C/21/Rev.1/Add.5, paras. 6.1 and 6.2.


\(^{127}\) Ilmari Länsman et al. v. Finland, Comm. 511/92, UN Doc. CCPR/C/52/D/511/1992, para. 9.4.
interests of the state, and a balance needs to be found. In the Jouni Länsman case the HRC put forward that the Finnish authorities went “through a process of weighing the author’s interests and the general economic interests in the area when deciding on the most appropriate measures of forest management”.128

The limits to such balancing between the interests of the state and the minority are clearly expressed in a case which concerned economic activities (mining) in a Sami reindeer herding area. In Ilmari Länsman et al. v. Finland, the HRC expressed that “the Committee notes that economic activities must, in order to comply with Article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry” (emphasis added).129 Thus, the maintenance of the cultural life through sustainable economic activities of the community is fundamental to the enjoyment of the minority rights of the members of the group.130 Therefore, the state is under the obligation to protect such activities from interference, but also to take measures to create conditions that enable the group to continue to benefit from such activities.

The economic activities protected as part of the culture of a group do not need to be carried out in an original or traditional manner, but the modern ways of carrying out their livelihood will also be included. The HRC stated in relation to commercial fishing activities that “article 27 does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology”.131 It is also important not to see interference as an isolated occurrence, but to make an overall assessment of the situation for compliance with Article 27 taking into account that it is an on-going violation. In Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada, the HRC concluded that the ‘cumulative effects’ of different measures for natural resource development amounted to a violation of Article 27, in the following way: “Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of Article 27 so long as they continue.”132

130) The wording of Article 27 points to a collective dimension of these rights; they are enjoyed “in community with other members of their group”. The HRC asserts that measures should be taken to protect the identity of the minority group, see CCPR General Comment 23, The rights of minorities (Article 27), UN Doc. CCPR/C/21/Rev.1/Add.5, para. 6.2.
The plight of indigenous peoples, losing land and natural resources to companies or state-owned enterprises, in economic development has been addressed as an issue which falls within the scope of discrimination prohibited under ICERD. According to the Committee on the Elimination of Racial Discrimination (CERD), in order to ensure that there is no racial discrimination of such peoples, states shall “provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics.” 133

The crucial question for the Oroqen people during the process of development in the OAB has been their access to the forest to continue their traditional ways of life. The recognition of rights to usage and ownership or possession to land which indigenous peoples traditionally occupy has been a controversial issue for the international community. Nevertheless, the ILO Indigenous and Tribal and Peoples Convention addresses this issue, 134 and the more recently adopted UN Indigenous Declaration brings such rules to a universal level. China is not legally bound to implement these instruments, but in view of the Oroqens’ situation they include a normative framework that may inspire China to find ways to address issues which are crucial to the Oroqens’ continued survival as a cultural group.

The traditional usage by indigenous peoples for their subsistence and traditional activities of such lands which they traditionally occupy shall be safeguarded, and rights to ownership and possession shall be recognised according to the ILO 169 Convention. 135 In relation to natural resources on their lands, indigenous peoples shall have the rights to participate in the use, management and conservation of these, according to the ILO Convention, while Article 26(2) of the Indigenous Declaration recognises that

[i]ndigenous peoples have the right to own, use, develop and control the land, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

In order to solve controversial claims for land or resources and determine which lands that indigenous peoples traditionally occupy, governments shall, according
to these instruments, establish domestic procedures in which indigenous peoples can participate.\textsuperscript{136}

Thus, these instruments set out standards which clearly give indigenous the rights to use their traditionally occupied lands and control and benefit from resources linked to these lands.\textsuperscript{137} Indigenous peoples should receive just and fair compensation for incurred damages from resource exploitation and for exceptional dispossession of lands that they traditionally occupy.\textsuperscript{138} If these instruments were applied in the Chinese context, in which all lands and resources are either state or collectively owned and rights of usage are given to others, it would have a far-reaching impact on the situation of the Oroqen people.

The Oroqen people should have their right to usage of state-owned forests for their economic and cultural subsistence and for enjoying and maintaining their own customs and traditions recognised and identified in national procedures. Such procedures should take due account of indigenous people’s laws and traditions when determining such rights.\textsuperscript{139} Furthermore, they should participate in and benefit from natural resource exploitation and receive compensation for any damages which they have sustained.\textsuperscript{140} The latter rules would have made it necessary for the central government to oversee that the neighbouring provinces satisfy the autonomous organs’ claims for tax revenues, and it would have to compensate the Oroqens as a group for the damages they have sustained.

Returning to Article 27 of the ICCPR, the cases of the HRC concern economic or other activities, or decisions on future activities, for the exploitation of natural resources such as oil, gas, stone, timber or fish in areas traditionally used by minority groups that encroach upon the ways of life or culture of the groups. These situations remind us of the situation of the Oroqen people in the OAB. In practice, the enjoyment of the cultural rights of the Oroqen people depends on them accessing a certain area, the forest in the Great Xing’an Mountains, and using its resources.

\textsuperscript{136} See Article 14 of the ILO Convention 169 and Article 27 of the Indigenous Declaration.

\textsuperscript{137} According to Article 15(2) of the ILO Indigenous and Tribal Convention indigenous peoples shall ‘whenever possible’ participate in the benefits when ‘the State retains’ the ownership of resources pertaining to the traditionally occupied lands of indigenous peoples.

\textsuperscript{138} Articles 15–16 of ILO Convention 169, and Article 28 of the Indigenous Declaration goes further and stipulates that monetary compensation or equivalent lands should be the rule whenever lands or resources “have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent” \textit{Cf., also Ángela Poma Poma v. Peru}, Comm. 1457/2006, UN Doc. CCPR/C/95/D/1457/2006.

\textsuperscript{139} Generally these procedures should be fair, independent, impartial and open, \textit{see Article 27 of the Indigenous Declaration}.

\textsuperscript{140} Article 29 of the Indigenous Declaration specifically addresses the protection of the environment. It provides: “Indigenous peoples shall have the right to the conservation and protection of the environment and productive capacity of their lands or territories and resources.” Article 15(2) of the ILO Convention 169 provides for fair compensation in the case of damages related to natural resource exploitation.
The HRC emphasises that minorities or indigenous peoples have the right to protection of their traditional activities associated with the lands, such as hunting, fishing and reindeer husbandry, and the state has the obligation to take measures, legal or other, to protect such ‘cultural’ activities according to the ICCPR.\textsuperscript{141} However, the HRC has acknowledged that tension between the state’s legitimate economic interests and rights of minorities to enjoy their culture may exist.\textsuperscript{142} But any balancing of these interests may never result in the ‘denial’ of the rights of the minority to enjoy their own culture.\textsuperscript{143} In the \textit{Jouni Länsman} case,\textsuperscript{144} the HRC made the conclusion that “the future logging activities … does not appear to threaten the survival of reindeer husbandry”. Furthermore, obligations to adopt special measures to create conditions for a culturally acceptable social and economic development for indigenous peoples can be derived from the ICERD on the basis of the prohibition of racial discrimination.\textsuperscript{145}

Applied to the Oroqen case, it means that the autonomous authorities of the OAB have not adopted the necessary measures to protect the Oroqens’ culture by preventing that the state’s development actions are not substantially detrimental to the hunting way of life of the Oroqen people and to the continuous benefits from hunting activities of these persons. In our opinion, considering the scale and results of forestry and agricultural exploitation organised by the state in the OAB, the continued effects of the economic exploitation constitute a permanent and substantial detriment to the enjoyment of cultural rights by persons belonging to the Oroqen, including maintaining their way of life, using their

\textsuperscript{141} \textit{Jouni E. Länsman et al. v. Finland}, Comm. 671/1995, UN Doc. CCPR/C/58/D/671/1995, para. 10.4, referring to CCPR General Comment 23, The rights of minorities (Article 27), UN Doc. CCPR/C/21/Rev.1/Add.5, paras. 6 and 7. In this later case the HRC confirmed that in order to comply with Article 27 the state must take measures.

\textsuperscript{142} “The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under Article 27…”, \textit{Kitok v. Sweden}, Comm. 197/1985, UN Doc. CCPR/C/33/D/197/1985 (1988), para. 9.2. In \textit{Ilmari Länsman et al. v. Finland}, Comm. 511/92, UN Doc. CCPR/C/52/D/511/1992, para. 9.4, the HRC states: “A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in Article 27.”

\textsuperscript{143} \textit{Ilmari Länsman et al. v. Finland}, Comm. 511/92, UN Doc. CCPR/C/52/D/511/1992, para. 9.8. However, “measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27”, para. 9.4: ‘Historical inequities’ were taken into account in addition to new activities for resource exploration in order to amount to a ‘denial’ in the sense of Article 27, \textit{Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada}, para. 33.


\textsuperscript{145} ICERD General Recommendation 23, Indigenous Peoples, UN Doc. A/52/18, Annex 5, para. 4(c).
own language and practicing their own religion. Thus, in the OAB, it must be concluded that the regional national autonomy has failed its purpose to make the Oroqen ‘the masters’ of their internal affairs in their own area.

According to our interviews, the Oroqen could at present not even access the forest under the control of the forest companies in order to collect materials for the making of small traditional household items.

The final ban on all hunting activities in the OAB seems an extraordinary measure in view of the fact that the Oroqen’s hunting was already limited. The practice of the HRC clearly shows that a reconciliation of the different activities of the state and the minority should be sought to secure that the minority can continue to benefit from their traditional activities. From the information collected during our field visits in the OAB, it seems that the process of the prohibition of the hunting did not really take into account that hunting was the essential element of the Oroqen culture. The interests of the state to preserve wild life seem to have been an overriding concern. Thus, viewing the situation of the Oroqen at present, the Oroqen’s culture is on the brink of extinction due to the cumulative and on-going effects of the state’s development strategies during the past 50 years and the more recent decision in relation to hunting activities. This is a situation which in our assessment is in violation of Article 27 and the object and purpose of the ICCPR as long as it continues.

5.4. The Rights of the Oroqens to Participation in Decision-making

In the practice of the HRC, the interpretation of Article 27 confirms that the rights of persons belonging to minorities should include measures to guarantee that consultations and effective participation take place in decision-making relating to the culture of the minority. General Comment 23 states that minorities and indigenous peoples not only have a right to protection of traditional activities but also that this right includes measures for the effective participation in decision-making which affect them. This content of minority rights was developed in

---

146) That traditional economic activities may have both cultural and religious significance for the group was addressed by the HRC in Apirana Mahuika et al. v. New Zealand, Comm. 547/1993, UN Doc. CCPR/C/70/D/547/1993 (2001), para. 9.9.

147) According to our interviews, the Oroqen could at present not even access the forest under the control of the forest companies in order to collect materials for the making of small traditional household items.

148) The autonomous authorities shall guarantee the freedom to use and enjoy their own language, culture and religion, see Articles 10 and 11 of the RNAL.

149) Interviews in August 2006.


151) This content of minority rights was developed in General Comment 23 on the rights of minorities (Article 27), UN Doc. CCPR/C/21/Rev.1/Add.5, para. 7.
the two Länsman cases against Finland, confirmed by the Apirana Mahuika case against New Zealand and the recent Poma case against Peru (2009).

The right to effective participation and the participation in economic development are explicitly included in the UN Minority Declaration, which was adopted in 1992, more than 25 years after the adoption of the 1966 covenants. It includes in Article 2(2) that persons belonging to minorities have the right to effective participation in public life but also more specifically in decisions, at both national and regional levels, which concern ‘their group’ or ‘the area’ in which they live according to Article 2(3). Furthermore, in relation to economic development, Article 4(5) provides that states should consider appropriate measures in order for minority persons to ‘participate fully’ in economic progress and development in their country. Moreover, the Minority Declaration states, in Article 5(1) that “[n]ational policies and programmes shall be planned with due regard for the legitimate interests of persons belonging to minorities”. The UN Minority Declaration is not a legally binding document, but it was adopted by the General Assembly of the UN by consensus, and it may be seen as one expression by the international community of the state of acceptance of the content of minority protection.

The interpretation of political rights under Article 25 of the ICCPR is of interest in this discussion on the rights of effective participation. Article 25(a) and 25(c) include a right to public participation without any discrimination and on general terms of equality. Thus, persons belonging to minorities or indigenous peoples should have this right to participate on an individual basis. The HRC has stated that Article 25(a) “cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs”. However, today, 20 years after this case was decided, the interpretation of Article 25 must be seen in the context of Articles 1 and 27 of the ICCPR, and it seems likely that such a right of an indigenous people to participate may be under development.

From the practice of the HRC we learn that in order for the participation to be ‘effective’ there are requirements for the procedures as well as the result. First, the consultation and participation of the minority in the decision-making process needs to be carried out in a manner which in the actual situation makes it possible for the minority to influence the relevant decision-making. The minority shall be involved early in and during the process of decision-making. In the Ilmary Länsman case the HRC notes that “the interests of the Moutkatunturi Heardmens’

---

353 R. Hanski and M. Scheinin, Leading Cases of the Human Rights Committee (Institute for Human Rights, Åbo Akademi University, Åbo/Turku, 2003) p. 402. See also the interpretation of the internal aspect of the right to self-determination by CERD, General Recommendation 21, Right to self-determination, UN Doc. A/51/18, paras. 3 and 4. See also the UN Indigenous Declaration, Articles 3, 4, 18 and 19.
Committee and of the authors were considered during the proceedings leading to the delivery of the quarrying permit, that the authors were consulted during the proceedings...” (emphasis added). Second, there should be some kind of ‘effect’ of that involvement. The HRC has noted “that the authors, and other key stakeholder groups, were consulted in the evolution of the logging plans..., and that the plans were partially altered in response to criticism from those quarters”. In the Poma case the HRC established that mere consultations of the group concerned was not enough, but the “free, prior and informed consent of the members of the community” was required for the participation in the decision-making to be effective.

These processes should involve interested parties, stakeholders as well as individuals and organisations representing interests of the group. In the Apirana Mahuika case not all Maori agreed, but the HRC stated that, “[f]or many Maori, the Act was an acceptable settlement of their claims”. As to the effectiveness of the process of consultations, there is a qualitative requirement on the process, whether attention is paid to issues of the cultural or religious significance of the economic activity of the minority or indigenous people. Despite the significance of the commercial fishing activities to many or most of the Maoris, in the Apirana Mahuika case the HRC took into account the fisheries’ sacred nature to the Maoris and the importance to secure that also individuals and communities of ‘future generations’ could enjoy and practice non-commercial fishing activities.

In this case broad consultations were conducted before the legislation was passed on the regulation of fishing activities. The New Zealand authorities carried out a complicated process of consultation in order to secure broad Maori support to a nationwide settlement and regulation of fishing activities. The settlement, which was the basis for the legislation, required that those negotiating on behalf of the Maoris actually had the mandate to do so and that the subsequent enactment of the settlement was only made “following the Maori representatives’ report that Maori support for the Settlement existed”.

The development of the interpretation of Article 27 in the practice of the HRC shows that the rights for a part of the group or certain individuals within the
group may be limited if it is in the interest of the community as a whole and if there are objective and reasonable justifications to do so. In the Mahuika case, the HRC states that the Maoris did not only gain a greater part of the commercial fishing through the settlement, but they also gained better and effective control over the activities. In the words of the HRC, “[i]n regard to commercial fisheries, the effect of the Settlement was that Maori authority and traditional methods of control as recognized in the Treaty were replaced by a new control structure, in an entity in which Maori share was not only the role of safeguarding their interests in fisheries but also the effective control” (emphasis added). In addition, according to the settlement the State recognised and provided for customary food gathering of the Maori.

The participation of the Oroqens in the decision-making process is a crucial measure to guarantee the rights under Article 27 of the ICCPR and the rights of non-discrimination under the ICERD in the process of exploitation of the forest resources and in the decision on the prohibition of the hunting. Based on our knowledge of the actual decision-making processes, obviously limited to our field research, it seems doubtful that the involvement of the Oroqens during different stages of the decision-making on the economic development in the OAB would amount to an adequate form of participation based on the free, prior and informed consent of the Oroqens.

In relation to different stages of the process of settlement and the establishment of a sedentary way of life, it seems that the Oroqens were mainly subject to propaganda on the advantages of the change of ways of life and that the authorities tried to persuade them to finally become settled. Any alternative ways of life were not really taken into consideration despite the reported resistance of many Oroqens during the process, which according to the views of the HRC on Article 27 ICCPR could not have been considered meeting the standards of that article.

Moreover, it seems clear that the OAB autonomous organs even in view of the possibilities under the amended Forest Law, which could according to letter of the law have given the OAB authorities ‘increased autonomy’ and economic benefits from forest exploitation, were ineffective in having any influence on the process of forest exploitation in OAB to safeguard the rights and interests of the Oroqen people. Furthermore, despite the fact that the RNAL provides that the nationality exercising the autonomy shall be represented in the autonomous organs, the autonomous government and the people’s congress, we question whether the autonomous organs can be seen as legitimate form of representation in the OAB taking into account inter alia the change in the composition of the population since the establishment of the OAB.

160) Apirana Mahuika, ibid., para. 9.7, as well as paras. 5.12 and 5.13.
As to the hunting-prohibition, it was excluded from the procedures under the RNAL which could possibly have guaranteed a measure of participation of the Oroqens along the aims of the law. According to our research, it seems that the procedures which actually were used did not have as their objective to take into account the legitimate interests of the Oroqens to safeguard their culture and traditions in accordance with the 1982 Constitution of China and the RNAL.

There are many similarities when comparing the Oroqen case and the cases from the HRC presented above. In the Oroqen case, it is clear from our research that the Oroqens were divided in their opinions on the forest exploitation and the prohibition of hunting. However, as our research shows the final decision on the hunting-prohibition was not decided by the autonomous authorities, where Oroqens participate and different opinions of Oroqen individuals could possibly, according to the letter of the law, have been expressed, but in a different procedure in which it is not clear whether any diversified views of the Oroqen could have been expressed or taken into account. In respect of the preparation of this decision we did not find any organisation or Oroqen which could have provided different views than the involved cadres and CPC officials. This decision-making process cannot be said to have guaranteed the rights to effective participation according to Article 27 of the ICCPR.

5.5. The Interpretation of the Right to Self-determination and the Oroqens

The criteria that the HRC has developed to address a violation of Article 27 ICCPR, that is the participation or consultation of the group in the decision-making process and the sustainability of the culture related to economic activities of a group, become even clearer when Article 27 is interpreted in light of the right of self-determination as included in the commonly worded Article 1 of the ICCPR and the ICESCR. The HRC has emphasised the importance of the right of self-determination first as an ‘essential condition’ for the effective guarantee and observance of individual human rights, but also for the ‘interpretation of other rights’ in the ICCPR. In Diergaardt et al. v. Namibia, the HRC states: “Furthermore, the provisions of Article 1 may be relevant to the interpretation of other rights protected by the Covenant, in particular Articles 25, 26 and 27.” However, the HRC has determined that the collective right of self-determination

---

161) See supra Sections 2 and 3 of this article.
162) Article 31(2) VCLT stipulates that the text of the treaty as part of the ‘context’ in which the wording shall be interpreted.
163) CCPR General Comment 12, The right to self-determination of peoples (Article 1), para. 1.

cannot be made subject to an ‘individual’ complaint under the Optional Protocol to the ICCPR.\(^{165}\)

Self-determination is understood as a continuing process, requiring a system of governance accommodating the pluralistic views of the people as a whole in order to guarantee their free determination of their economic, social and cultural development.\(^{166}\) Article 1(1) of both the ICCPR and the ICESCR provide for the rights to free economic, social and cultural development of peoples. Furthermore, the second paragraph develops the economic aspects and links the free disposal of natural wealth and resources to the right of self-determination. It states: “All peoples may, for their own ends, freely dispose of their natural wealth and resources…” The absolute bottom line is set in the last sentence of paragraph 2, reading: “in no case may a people be deprived of its own means of subsistence”. Looking at this aspect of the right of self-determination its realisation is linked not only to Article 27 of the ICCPR but also to other rights in the covenants such as the right to an adequate standard of living, the right to health, Articles 11 and 12 of the ICESCR,\(^{167}\) and in extreme cases it could even be linked to the right to life included in Article 6 of the ICCPR.\(^{168}\)

The cultural and economic aspects of the survival of the Oroqens as a group are closely interlinked. Whether considered as a ‘people’ or as a minority as part of a ‘people’ under Article 1 of the ICCPR or the ICESCR, it seems that the Oroqens should have the right to use the forest for their own individual survival or be compensated for any loss caused by the economic development.\(^{169}\) However, in this area of law the applicable standards are under development, a development which the UN Declaration on Indigenous Peoples of 2007 among other instruments may influence despite not being legally binding.\(^{170}\)

The importance of the interpretation of the right to self-determination to include the rights of persons belonging to minorities and indigenous has been emphasised in the interpretation of the ICERD. The CERD has pointed out that

in order to respect fully the rights of all peoples within the state, and to eliminate racial discrimination in all its forms, governments, in accordance with Article 2 of the ICERD and other relevant documents,

should be sensitive towards the rights of persons belonging to ethnic groups, particularly their rights to lead their lives in dignity, to preserve their culture, to share equitably in the fruits of national growth and play their part in the Government of the country of which they are citizens. Also, Governments should consider, within their constitutional frameworks, vesting persons belonging to ethnic or linguistic groups comprised of their citizens, where appropriate, with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.\(^\text{171}\)

Thus, in order to eliminate racial discrimination states should take measures, particularly in relation to indigenous peoples, to provide conditions allowing for sustainable social and economic development in accordance with their cultural characteristics.\(^\text{172}\)

In the interpretation of the right of self-determination the internal aspects of the right has developed, directed towards democracy as the choice of government which is representative of the whole people. The CERD has highlighted that in accordance with the obligations under Article 5 of the ICERD the legal and political processes which guarantee the internal right of self-determination shall not be discriminatory on the basis of race, color or national or ethnic origin; otherwise the government cannot be seen as representing the whole people. Furthermore, the CERD states unequivocally that the right of self-determination requires every state to adhere to and implement fully international human rights instruments, and the CERD draws attention to the UN Minority Declaration,\(^\text{173}\) in which the right to effective participation in decision-making and in economic development is emphasised in Articles 2(3) and 4(5).

In relation to measures to combat discrimination against indigenous peoples, CERD emphasises the effective participation and the necessity of ‘informed consent’ for “any decision directly relating to their rights and interests”.\(^\text{174}\) The requirement of consent may actually give the indigenous peoples a kind of ‘veto power’ over such decisions, while the criteria developed in the practice of the HRC does not include this element. The question of how far-reaching effects this requirement will have depends on the interpretation of the wording ‘directly

---

\(^\text{171}\) CERD General Recommendation 21, Right to self-determination, UN Doc. A/51/18, para. 5.
\(^\text{172}\) CERD General Recommendation 23, Indigenous Peoples, UN Doc. A/52/18, Annex 5, para. 4(c).
\(^\text{173}\) CERD General Recommendation 21, Right to self-determination, UN Doc. A/51/18, paras. 4, 5.
relating to’. On the basis of our information, the decision on prohibiting the hunting in the OAB seems clearly to be such a decision for the Oroqen hunters.

It may be argued on the basis of the ICERD that the Oroqens actually should give their ‘informed consent’ to decisions directly relating to their rights and interests, and the decision on prohibiting the hunting in the OAB seems clearly to be such a decision for the Oroqen people. However, in view of the representation of the Oroqen in the People’s Congress of the OAB, such powers could not have been guaranteed even if the decision would have been submitted to this autonomous organ.

6. Conclusion

From OAB chronicles we learn the pride of the Chinese State in announcing the great ‘three historical leaps’ of Oroqen social progress, the ‘civilisation’ projects for the Oroqen hunters. The OAB, the autonomous banner in China first established in 1951, is shown as the model of the CPC’s ‘kind deliberation’, exemplifying a preferential treatment towards minority nationalities and minority empowerment in the practice of regional national autonomy. However, the Oroqen hunters are now totally prohibited from hunting and their way of life in their homeland is fundamentally changed. The exercise of regional national autonomy in OAB, taken from the above facts, shows that: it failed to prevent or influence the deforestation undertaken by the state in the Great Xing’an Mountains upon which the Oroqens’ way of life depends; it also failed to prevent or to have any impact on the large scale immigration organised by the state, which introduced fundamental alterations for the exercise of autonomy in the OAB; and the organs of self-government in OAB failed to function appropriately and effectively as representative agencies of the Oroqens in deciding on the hunting-prohibition, with hunting being the essential element of the Oroqens’ identity. The organs of self-government in the OAB have been acting primarily as organs of the state, which should put the interests of the state above anything else according to the RNAL. Therefore, in the Oroqen case the system of regional national autonomy, which is acclaimed to establish the minority nationalities as ‘masters’ of their internal affairs where they live in concentrated communities, failed to meet its stated aim in practice.

The continuous political campaigns from the 1950s to the 1970s interrupted the exercise of regional national autonomy. It may not be justified to blame the catastrophic results of the devastated nature of the Great Xing’an Mountains and the culture of Oroqen people in OAB on the exercise of regional national autonomy. While regional national autonomy do provide a certain kind of participation and preferential treatment to the ‘nationality exercising regional autonomy’, the existing framework of the RNAL lacks a mechanism that may guarantee that
the Oroqens as a group can formulate their ‘group will’ as the ‘nationality exercising regional autonomy’ and are adequately represented in decision-making which may substantially affect their way of life and identity. It is a problem of institutional design of the autonomy system, rather than the problem of implementation of the regional national autonomy law. The legal framework of RNAL does not provide a system for the protection and promotion of minority nationalities’ rights and interests which is accountable to those concerned. In addition, there is a huge gap between the domestic law in practice and the international commitments of the state.

In an international law perspective, the legal rights of Oroqens provide some food for thought. First of all, there is no doubt that the state has legal obligations to refrain from actions that are tantamount to the disrespect of the individuals’ dignity and cultural freedom, and to take measures to protect and facilitate the realisation of the Oroqens’ rights to exercise and enjoy their own culture and to effective participation, based on domestic legislation as well as its ratified international conventions. The interpretation of the rights of the Oroqens to enjoy their culture and to effective participation in light of the right to self-determination can strengthen these rights. Second, although some relevant international norms discussed in relation to the Oroqens’ situation are not legally binding on the Chinese State, they could serve as a source of inspiration for relevant institution-building and reform since China has expressed its willingness and commitment towards rule of law and the protection of human rights during the last two decades. Third, the description of the Oroqen case shows that the interests of the state, of the localities and of the minority nationalities are not always consistent with each other in the process of economic development, especially when exploring natural resources in the minorities’ homeland. From the Oroqen case we learn that ‘development’ may not only be in conflict with the interests of minority nationalities but it may even endanger their survival as a group. By cherishing the aim and spirit of respecting the minority nationalities as their own masters deciding their own priorities of development in the light of their peculiar values, traditions and ways of life under the system of regional national autonomy, the Chinese domestic legal framework should be improved to provide more effective protection for Oroqens to exercise a meaningful autonomy in line with the development of international law.