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Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination

The things which God Himself has made will pass away, how much sooner that which Romulus founded.

St. Augustine¹

But the international system itself is nothing other than a structure of ideas; and it has been made nowhere else than in the human mind. The international order forms the minds of those who make the international order. The masters of the world of tomorrow are the slaves of yesterday’s ideas.

Philip Allott²

Introduction³

It has been more than twenty years since I last saw Ithaca, New York. That was in the summer of 1970, when I arrived from New Haven to

¹. Quoted in Norman H. Baynes, The Political Ideas of St. Augustine’s “De Civitate Dei” 17 (1968). For a comparison of the mythological account of Romulus’s violent founding of Rome with the U.S. Supreme Court’s mythological account of the violent founding of the United States, see Milner S. Ball, Constitution, Court, Indian Tribes (1987).


³. A number of stepping stones led to this paper: the Twenty-fifth Anniversary Symposium of the Cornell International Law Journal, its staff’s choice of a timely theme in whose general area I was working, “The Nations Within,” and an invitation to participate with a reflective (i.e., few footnotes) essay on the subject, which would not take too much time away from a more orthodox (i.e., many footnotes) article I was preparing on the claims of indigenous peoples to self-determination. I am deeply grateful for these opportunities and for the insight and scholarship of all the contributors. The Editors and the Cornell International Law Journal have been a constant source of support and encouragement.
study Indonesian under a joint arrangement of the Cornell and Yale Southeast Asian programs. Relatively few Southeast Asians studied or lived in the United States then, and the Vietnam War was still raging. These factors, together with the natural gregariousness of our youth, made those of us at Cornell who had come from the Philippines, Indonesia, Malaysia, Thailand, Burma, Vietnam, Laos and Cambodia cling together in an unnamed but unmistakable community defined by rice, fish-sauce, ghost stories, and anti-imperialism. While few of us ever dared walk past the cemetery on Stewart Avenue alone at night, or even at twilight, many of us imagined that one day, U.S. degree in hand and middle-class parents properly placated, we would develop the courage necessary to join the revolutionary movements then energizing our respective countries. So indulgent were we of our socialist fantasies that one evening, only half in jest, we debated which of our countries should volunteer to retain capitalism so that there would remain, in our shared region, at least one place to which struggle-weary revolutionaries could repair for an occasional, good old-fashioned, capitalist fling. The person who volunteered his country for that task that night was the most capitalistically decadent and personally charming member of our group. As it turned out, he was also the only one of us to join a resistance movement upon returning home. I saw him a year ago; he was still delightful, still in the resistance.

I tell this story to mark my place in Cornell's lineage and simultaneously to place Cornell in a lineage that may be unknown to its current students. The story is also told to evoke the feeling of worlds within worlds and to suggest a sense of our century's crossing trajectories of momentary plans and enduring visions, all of which international law must now address. As I see it, international society today consists of, among other actors, states that tend to pursue focused political plans, and ethnic groups or peoples who tend to entertain comprehensive visions of their identities and destinies. The developments discussed in this paper presented here largely retains the exploratory spirit in which it was given at the Symposium.

4. To name the most obvious others: international organizations such as the United Nations and the International Monetary Fund, transnational corporations (TNCs) such as Dole and Phillip, and nongovernmental organizations (NGOs) such as Amnesty International and the World Wildlife Fund. Philip Allott, in his recent work, similarly casts the net of international society widely: "(1) Society is the collective self-creating of human beings. (2) International society is the society of the whole human race and the society of all societies. (3) Law is the continuing structure-system of human socializing. (4) International law is the law of international society." ALLOTT, supra note 2, at 3. He goes on to refute specifically the proposition that international society is nothing more than the society of nation-states. See id. at 4.

5. I use the word "tend" advisedly for, as the phenomenon of modern nationalism shows, states and peoples today, far from functioning apart, engage in intense mutual transubstantiation as each attempts to aggregate to itself that which most empowers the other: police coercion in the case of states, and cultural persuasion in
symposium, in which peoples challenge states, may thus be represented as a confrontation between plan and vision or, were it only so understood, a questioning of plan by vision.\(^6\)

In that confrontation, international law has traditionally privileged states and, by extension, their focused political goals. This privileging of states dates back to the 1648, Peace of Westphalia, which, it is generally agreed, formally established the interstate system in Europe.\(^7\) Today, three centuries later, the Westphalian-derived unidimensionality of international law encounters tremendous pressure, and approaches rupture, as other units in international society, among which ethnic groups may be the most potent, assert their presence and their visions.\(^8\)

Consequently, if international law is to continue to regulate interna-

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\(^{7}\) "The origin of the international community in its present structure and configuration is usually traced back to the Peace of Westphalia (1648) . . . ." ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 34 (1986). Noting that ordered intercommunity relations in Europe and the Middle East existed long before 1648, Cassese distinguishes such relations from those that Westphalia legitimized on two counts: the former did not involve centralized bureaucratic states, which had not yet emerged; and they remained, at least in Europe, formally subject to the ordering authority of both the Pope and the Holy Roman Emperor. Westphalia, for the first time, gave states both formal freedom from the Pope and de facto freedom from the Emperor. In other words, Westphalia invented sovereign and independent states. Id. at 34-38.

\(^{8}\) A list of today's most serious, ethnically charged challenges to states would include those in Canada, the Amazon region of South America, Eastern Europe, the former USSR, the Middle East, India, Sri Lanka, Myanmar, East Timor, and West Papua. The tension and atrocities that ethnic-related conflicts unleash in these places certainly call into question my positive use of the term "vision" to describe the goals of ethnic groups. I hope to deal more adequately with this seeming contradiction in a later work, and I assert here only that the ugly urgency of history that have been largely generated by the destructive military and economic policies of the world's powerful states in the last five decades may have infected and distorted, but cannot negate, the memory and prescience encoded in the cultures of ethnic groups often
tional society, it may have to be reconceived, and its institutions restructured, so as to include peoples as well as states as its rightful subjects, entitled to engage in the mutual if differential construction, interpretation, and implementation of its norms. This, in any event, is the conclusion I have come to after observing the decade-old campaign of indigenous peoples to have their right to self-determination recognized at the United Nations.

I shall support my conclusion in a two-step argument. First, I will discuss certain conceptual and institutional features of the present international legal system that I believe unduly, and detrimentally, elevate states and suppress peoples. Second, I will suggest revisions to these features that, in my view, would support a more productive tension between states and peoples, or plans and visions, than international law currently allows. Again, both my critique and my proposals spring from my relative familiarity with the indigenous peoples' campaign at the United Nations for the recognition of their self-determination. Had I followed another campaign—for the protection of minorities, women, children, transnational labor, or the environment, for example—I might have developed yet another perspective on the changes needed in the concepts, practice, and institutions of international law. Each of the campaigns I have listed, therefore, merits careful attention as their issues are debated in the various arenas where international law is now in fact being proposed, negotiated, and made. Only by piecing together the stories told in these places will we discover where it is in

9. For a range of views on whether peoples, as distinguished from states and individuals, detain international rights and, additionally, are, or should be, subjects of international law, see THE RIGHTS OF PEOPLES (James Crawford ed., 1988). A similar discussion that focuses exclusively on indigenous peoples is found in Are Indigenous Peoples Entitled to International Juridical Personality?, Am. Soc'y Int'l L. Proc. 189 (1985) (panel discussion); and Russel Lawrence Barsh, Indigenous Peoples: An Emerging Object of International Law, 80 Am. J. Int'l L. 369 (1986).

10. I began to study the impact of Western law on indigenous Hawaiian land tenure in 1983 and to collaborate with indigenous Hawaiian activists soon thereafter. The latter were then reaching the conclusion that the recovery of their lands required the reassertion of their sovereignty and self-determination. Stimulated, I began the legal investigation of these subjects and went on to participate in the 1989 International Labour Organisation (ILO) session during which ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries was finalized, as well as the 1991 session of the United Nations Working Group on Indigenous Populations during which work on a Declaration of Indigenous Rights continued.

11. The formal sources of international law listed in Article 38 of the Statute of the International Court of Justice are: conventions, custom, general principles of law and, secondarily, the teachings of jurists. Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060 (1945), T.S. No. 993. Informally, however, law develops out of the raw material of social contest and conflict. Increasingly, it is the committees and specialized agencies of the United Nations, rather than its General Assembly, Security Council, or International Court of Justice, that receive and process this raw material. To the extent that non-state parties participate in that processing, as they more and more do, they are helping make law.
international society that blockages and breakthroughs occur and where, therefore, international law fails and where it still serves.

I. The Indigenous Campaign for Self-determination

In 1982, in response to significant lobbying efforts mounted by indigenous peoples and their supporters in nongovernmental organizations (NGOs), the U.N. Economic and Social Council created a Working Group on Indigenous Populations (Working Group), which it placed under its Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Sub-Commission, in turn, answers to the Commission on Human Rights, which itself answers to the Council. Five legal experts from around the world make up the Working Group. They are charged, first, with gathering information on the situation of indigenous peoples around the world and, second, with enunciating a set of standards, or Declaration of Indigenous Rights, that could guide and ameliorate the relations of indigenous peoples with their surrounding states. Since its inception, the Working Group has met almost every summer in Geneva to receive the views of indigenous peoples, states, and NGOs on the twin subjects of “what is” and “what should be.”

Indigenous peoples’ conception of “what should be” is far from monolithic and further subdivides into immediate, intermediate, and long-term goals. Where a group’s survival is imminently threatened, as in the Amazonian rainforest, indigenous peoples have urgently requested, and on occasion obtained, prompt and extraordinary Working Group intervention. In general, however, the Working Group prefers to direct its energies to the drafting of a Declaration of Indigenous Rights that could advance the intermediate indigenous goal of holding states accountable to international standards of respect and protection.
for indigenous peoples, lands, resources, and cultures.\footnote{The seven parts of the 1991 draft Declaration address these topics: self-determination; culture; lands and resources; institutions; relations with surrounding states; conflict-resolution; and the Declaration as a statement of minimum standards.} Finally, the Working Group has moved slowest on the long-term foundational question of self-determination. This, notwithstanding that self-determination is "the most strident and persistently declared demand voiced before the Working Group."\footnote{Robert A. Williams, Jr., Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World, 1990 DUKE L.J. 660, 693.}


Indigenous participants at ILO and Working Group sessions have repeatedly asserted that their peoples intend to exercise the right to self-determination to effect a free association with surrounding states rather than independence.\footnote{A 1988 statement of the National Coalition of Aboriginal Organizations of Australia to the ILO reads in part: "Secondly, we define our rights in terms of self-determination. We are not looking to dismember your States and you know it." National Coalition of Aboriginal Organizations of Australia, Statement During the ILO Conference 1988 (on file with author). The Statement of the Inuit Circumpolar Conference on Review of Developments (July 29, 1991) (submitted to the Working Group; on file with author) echoes this point, as do multiple statements of other indigenous peoples.} The association they envision, however, must include both a mutually satisfactory sharing of jurisdiction and the recognition that the indigenous share of that jurisdiction rests upon an inherent right, and not a revocable grant. These two demands, unadorned as they are, fundamentally challenge the principles of state sovereignty and exclusive jurisdiction that modern states have come to rely on. Their governments, consequently, vigorously resist the indigenous claim for self-determination that has launched this challenge. Preferring to ignore the call for free association, and the novel accommodations it requires, these governments instead raise the easy
specter of secession, which they claim self-determination inevitably entails.

States and nations, lest we forget, have long endured the ebb and flow of their boundaries. In this respect, the modern doctrine of the territorial integrity of states represents but a vainglorious attempt to interdict history. In this century alone, several cumbersome empires crumbled under the weight of war in Central Europe and the Third World. Their constituent ethnic parts, in the meanwhile, survived. The spectacle of the making and unmaking of states continues today as both political fusion and fission unfold in Western Europe, the former Germanys, the Baltics, and the late USSR. These cataclysmic changes, furthermore, take place against a backdrop of remarkable interstate tolerance and calm which, however, turns into positive skittishness when confronted by indigenous claims to self-determination that, by comparison, generally would not, and probably could not, alter borders.\textsuperscript{21}

States are not alone in assuming that the right to self-determination leads to a single predetermined end: secession.\textsuperscript{22} The Working Group generally joins them in this assumption, which on its face is not far-fetched since Third World peoples after World War II uniformly exercised their right to self-determination to achieve independence rather than association or incorporation with former colonial states. Nevertheless, the present extension of this assumption to a different issue, in a different world, illustrates the lag that has developed between legal theory or culture on the one hand (i.e., the settled expectation that self-determination is used to effect independence) and practice or history on the other (i.e., the actual indigenous preference for a self-determination that leads to equitable association). Or, to put it somewhat post-modernly, the persistence of the assumption demonstrates how the modernistically totalizing approach that "a rose is a rose is a rose" compels us to find a thorn even when the alchemical circumstances of the late, and interdependent, twentieth century have already transformed the defiant rose into an accommodating, if enigmatic, violet.

\textsuperscript{21} The "could not" follows from the relative material powerlessness of indigenous communities, many of which, in addition, are extremely small. For example, the Yaqi in Bolivia now number little more than 130 persons. Sandy Tolan & Nancy Postero, \textit{Accidents of History}, N.Y. TIMES, Feb. 23, 1992, § 6 (Magazine), at 38, 42.

To prevent misunderstanding, let me assert unambiguously that indigenous peoples are asserting some kind of distance from their surrounding states. The following U.N. working definition of indigenous peoples recognizes as much:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that have developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

... [a]n indigenous person is one who belongs to these indigenous populations through self-identification as indigenous ... and is recognized and accepted by these populations as one of its members ... 23

Some 250 million people, inhabiting all major regions of the globe, currently fit this description, which affirms a distancing of indigenous peoples from their surrounding states on three counts: territory, institutions, and subjective identification.24

But the point I raise is this: even here, where territoriality is claimed (let alone in other ethnic/state conflicts, where territoriality is not), need self-determination trigger secession? The small size of many indigenous groups alone renders secession improbable.25 Secondly, as previously noted, representatives of indigenous peoples, even as they assert distance, regularly represent to the United Nations that they do not seek secession. Instead, what is being proposed here, and I suspect in other state/ethnic conflicts as well, are visions of simultaneously connected and distanced relationships between peoples and their surrounding states. Whether states have the material and ideological flexibility to respond to these visions or not remains to be seen. If they do, then these visions can become a matter for the two parties most concerned (an indigenous people and its surrounding state) to negotiate, preferably under the protection of the U.N., which can best assure that both equity and order will be respected in the process of change. The question that would then arise for international law in this scenario is this: Can peoples' multiple and evolving visions of connection to, and distance from, their surrounding states be juridically and institutionally accommodated? Given the pronounced indeterminacy of international law, I would suggest that the answer depends as much on will as on

25. See supra note 21.
existing legal resources. But one must start with the resources: old, new, conceptual, and institutional.

II. Existing Concepts

While states oppose indigenous claims to self-determination on ultimately economic and political grounds, they justify and perhaps even conceive of this opposition in terms of international legal concepts whose meanings have been not so much declared as historically filled in. The key concepts at issue here are sovereignty, statehood, peoples, and self-determination. A quick and highly interpretive review of the genealogy of these concepts offers some explanation for the present impasse between states and indigenous peoples.

A. The Religious Lineage

My point of departure is the Christian West, from whose cultural and political milieu present international law springs. Christendom's foundational document, the New Testament, tells us that an agent provocateur once asked Jesus what the Jews should do: serve Rome, or the Jewish theocracy? Like a good lawyer, Jesus replied: "Give to Caesar what is Caesar's, and to God what is God's." The point, confirmed in St. Augustine's City of God, is that at its origin the Christian West recognized that two different lineages simultaneously fixed the human position: the secular and the religious. Although the interests of these two lineages intertwined, they remained conceptually distinct. They shared personal and territorial jurisdiction, so to speak, but bifurcated on subject-matter jurisdiction, as this 494 A.D. letter from Pope Gelasius I to Emperor Anastasius I shows: "For if the bishops themselves . . . obey your laws so far as the sphere of public order is concerned lest they seem to obstruct your decrees in mundane matters, with what zeal, I ask you, ought you to obey those who have been charged with administering the sacred ceremonies?"

The religious lineage marked all humans as the children of God, entitled to an irreducible dignity that secular power was bound to

26. The indeterminacy of U.S. municipal law identified by the Realist School is no longer seriously questioned. But the indeterminacy of international law is even more pronounced, as this question commonly posed in one form or another in international law textbooks makes clear: "Is international law really law?" MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 1 (1984).
28. Here the two civitates — the civitas of God and the civitas of the Devil — are contrasted. The latter seeks to serve the world, the former to serve Christ: one desires to rule in this world, the other to flee from this world; one slays, the other is slain; one labors for damnation, the other for salvation. It is thus from the schismatic that Augustine would seem to have borrowed the great contrast on which his work is founded. BAYNES, supra note 1, at 5-6.
respect. Protecting this dignity, the Dominican Friar Antonio de Montesinos railed against the Spaniards for their barbarous treatment of early sixteenth century Hispaniola natives: "Are these not men? Have they not rational souls? Are you not bound to love them as you love yourselves?"30 Another Spaniard, the jurist Franciscus de Vitoria, systematically elaborated on the rights of Indians. According to Vitoria, the natives of the New World were entitled not only to love but also to their own institutions. This, he reasoned, was not only because of their divine descent, but because of the inherent rationality and equal freedom accorded all men under the natural law that God has ordained.31 Robert A. Williams finds that Vitoria, generally innovative for his time, was planning, in that argument, the seeds of legal modernity, or secular universalism: "This singular innovation on Victoria's part initiated the process by which the European state system's legal discourse was ultimately liberated from its stultifying, expressly theocentric, medievalized moorings and was adapted to the rationalizing demands of Renaissance Europe's secularized will to empire."32 The rationalizing demands of Empire in time collapsed the structural tension that had been maintained through medieval times between the secular and the religious. The collapse was signalled by the Thirty Years' War, which bitterly embroiled Pope, emperor, and princes; it was consummated in the 1648, Peace of Westphalia, which ended that struggle.33 Though the Peace of Westphalia is usually depicted as a landmark in the secularization of Europe, Antonio Cassese underlines the ongoing role of religion after 1648, no longer as oppositional force, of course, but as formative ideology.

All the States above-mentioned had a common religious matrix: they were Christian . . . . Another strong unifying factor was the pattern of internal economic and political development. All Western States were the outgrowth of capitalism and its matching phenomenon in the political field: absolutism (followed in subsequent years by parliamentary democracy).34

While the Peace of Westphalia extricated the Pope and the Holy Roman Emperor from the affairs of states then, it did not extricate Christianity itself, which the new states could now use as their unmediated cultural tools in their quests for absolutism. Thus, even though the peoples governed by the European dynasties of the 17th Century remained the theoretical kindred of God, they became once-removed from Him and from the downward-flowing source of their dignity by the new device of the unopposed and sovereign state. Of the two lineages that fixed the human condition in early Christendom then, only one, the secular, remained in charge of men's earthly lives. The other,

30. Quoted in id. at 86.
31. Id. at 93-108.
32. Id. at 96-97.
33. See supra note 7.
34. Cassese, supra note 7, at 38-39 (emphasis added).
the religious, was evicted from its secular premises, but not before being purloined of its magic.

B. The Secular Lineage

The French Revolution of 1789 secularized this magic and reversed the direction of legitimacy.35 Untrammeled either by the grace of God or the pleasure of the King, the peoples of France now became sovereign in their own right and by their own original consent empowered a republican government to act on their behalf. I say peoples because, on the occasion of the creation of the modern French state, a French people did not yet exist, as only Bretons, Basques, Gascons, Auvergnats, etc., occupied France.36 To the extent that the ethnic French now exist, as they clearly do, it is as the later distillate of the common post-revolutionary experiences of their heterogenous forebears who, by their shared deeds, bit by bit transformed the culturally flat state of the 18th century into a symbolically plausible nation of the 20th.

While the French state searched for and successfully fashioned a people, the story of German unification is generally told as one of a people looking for a state. A recent study rejecting this truism asserts that it was the Prussian government, and not the German people, that called forth the German state.37 Indeed, the peoples who inhabited the former lands of the 300 sovereign states that constituted the Holy Roman Empire of the German Nation apparently strongly opposed Bismarck's project of unification. The rebuke the Austrian poet Franz Grillparzer administered to the Bismarck government is thought to reflect their sentiment: "You claim that you have founded a Reich . . . but all you have done is to destroy a Volk."38

However different or controversial in genesis, the French and German entities eventually converged on the common goal of uniting a single cultural people with a single sovereign state. Once again, then, there was merger: of the cultural and the political dimensions this time. This

35. Ernest Gellner suggests that the magic, while secularized, remained relatively unavailable to states organized as constitutional monarchies. West European monarchs "by symbolizing the continuity of the state or the nation . . . prevent elective leaders, who are responsible for decision and policies, from acquiring too much magic. It is a way of helping ensure that real power is not sacred." ERNEST GELLNER, CULTURE, IDENTITY, AND POLITICS 163 (1987).

36. A work rich in data and theory on this subject is EUGEN WEBER, PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE 1870-1914 (1976). While Weber concentrates on the years 1870-1914, one-third of his book relates "The Way Things Were," providing pre-revolutionary data. Even a century after the Revolution, however, Weber notes that France was still not quite a nation. "In 1863, according to official figures, 8381 of France's 37,510 communes spoke no French: about a quarter of the country's population." Id. at 67. "The Third Republic found a France in which French was a foreign language for half the citizens." Id. at 70. "It is clear that France around 1870 did not conform to Mauss' model of a nation. It was neither morally nor materially integrated; what unity it had was less cultural than administrative." Id. at 485.


38. Quoted in id. at 911.
German/French invention, denominated the nation-state, came not only to dominate Europe but was also the only European political model of ethnic/state relations exported to Asia, Africa, Oceania, and the Americas during the colonial period. Those whom the model convinced in these overseas territories, i.e., the elite, consequently developed the view that the non-state institutions that traditionally played a political role in their communities—such as the family, the ethnic group, the church, the mosque, and the village—represented but so many incidental, backward, and even illegitimate legacies that needed to be curtailed, if not discarded, on the road to modernity.

C. The Early Twentieth Century

Ironically, the political models that were not exported from Europe might have better suited the ethnically complex circumstances of the colonies. I think, for example, of Switzerland, where many ethnic groups continue to maintain a shared state; or even of the Ottoman, Austro-Hungarian and Czarist Empires, which came closer in function to the system of tributary relationships that criss-crossed Southeast Asia than the nation-state ever could. The second irony is that the nation-state concept straight-jacketed even Europe, and may have hastened the outbreak of the First World War, which may have been the first war fought over nation-stateness as such: its presence, as well as its absence.

The League of Nations, certainly, gave itself the ambitious task after the war of rearranging the peoples and boundaries of Europe in such a way as to obtain a maximum fit between ethnicity and statehood. It fragmented the Ottoman and Austro-Hungarian empires into their ethnic parts as much as possible and, where ethnically or politically unfeasible, it created autonomous regimes for peoples enclosed within heterogeneous states. Both actions were justified on the principle of the self-determination of peoples, which Lenin had enunciated, and which Woodrow Wilson attempted to appropriate, if only eventually to redirect and constrict at the urging of Churchill, who rightly understood the concept's power to dismantle the British Empire. The League secured several autonomous regimes for ethnic minorities by first negotiating, and later supervising, minority treaties with target states. Significantly, the peoples protected by these treaties played no formal role in either

39. See Anderson, supra note 6; Chatterjee, supra note 6; Gellner, supra note 6; and Young, supra note 6.

40. Id.

41. The many intricate, layered, overlapping, and interchangeable patterns of cultural identity, political control, and economic interaction that developed in Southeast Asia are described in: John K. Fairbank, The Chinese World Order (1968); Kenneth R. Hall, Maritime Trade and State Development in Early Southeast Asia (1985); Edmund R. Leach, Political Systems of Highland Burma (1964); O. W. Wolters, Early Indonesian Commerce (1967).


43. Cassese, supra note 7, at 131-32.
their construction or implementation.\textsuperscript{44}

If Westphalia invented the modern state, and the French Revolution idealized its cultural unity, then the League invented the foil for the ideal: League wardship. Whether League wardship could have delivered order and justice to states and ethnic minorities will never be conclusively known, for the rise of fascism in Europe prematurely thwarted the experiment. A much older wardship system, however, i.e., U.S. federal Indian policy, has been tested, and proven legally untenable, as well as humanly unjustifiable in its impact on Native Americans.\textsuperscript{45} The major fault policy, as in the League system, in my opinion, is that ultimate decision-making powers affecting indigenous and minority peoples in the two circumstances rested exclusively with the surrounding state, or the League, and not the peoples themselves.

D. The Late Twentieth Century

The League, under pressure from the European colonial powers, wholly side-stepped the issue of the self-determination of non-European peoples after World War I.\textsuperscript{46} By the close of World War II, however, the Churchillian position on this question became wholly untenable. The War had loosened Western Europe’s hold over its colonies, Third World nationalism was on the rise, and the victorious Soviet Union squarely supported decolonization. Recolonization became unthinkable to the Third World/Socialist majority voting block that coalesced at the United Nations after the War.

It was in this context that the U.N. included, in Article 1 of its 1945 Charter, the following reference to the principle of self-determination:

\begin{quote}
[the Purposes of the United Nations are:] . . .

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.
\end{quote}

Fifteen years later, the 1960 U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples ("Declaration") called the principle a right, and defined it. The definition was reproduced in 1966 in the two U.N. human rights Covenants.\textsuperscript{47} Yet, neither the Charter, the Declaration, the Covenants, nor any other international law instrument

\textsuperscript{44} Bilder, supra note 42.


\textsuperscript{46} Already at Versailles, where the Treaty that formally ended World War I was signed, the colonized received their rebuff. Ho Chi Minh, for one, had gone there on his own initiative to present his eight-point program, based on President Woodrow Wilson's 14-point program, for a degree of self-government for Vietnam. Wilson refused to see him. Jean Lacouture, Ho Chi Minh 24 (1968). Ho Chi Minh then went on to Moscow where he was not only received, but celebrated, and thereafter consistently supported by the Comintern. Id.

\textsuperscript{47} See supra note 17 and accompanying text.
defines the "peoples" who hold this right. As a result, the meanings of both "self-determination" and "peoples" remain contentious, and fluctuate with U.N. practice.

That practice was powerfully marked by three dominant concerns of the Third World/Socialist alliance of the post-war decades: termination of European rule in Asia, Africa, and Oceania; vigilance against its reappearance in a new form; and preservation of the territorial shells that the Europeans had left behind. The 1960 Declaration and its subsequent elaboration in various General Assembly resolutions record these concerns. For example, the 1960 Declaration begins: "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation." Resolution 1541, passed the following day, specified that the term "colonial country" in the Declaration meant a non-self-governing territory which (note the alchemy) in turn referred to an entity geographically and ethnically separate from the administering state. The Resolution thus elliptically reproduced what speeches made in the General Assembly stated more directly: that only peoples separated by "blue-water" or "salt-water" from their subjugator, i.e., the distance from the Third World to Europe, could qualify for decolonization, or the reassertion of self-determination. All other peoples subjugated by surrounding states, and this includes most of the world's indigenous and tribal peoples, would have their grievances individually addressed via the fast-developing body of human rights law or, collectively, via the wardship concept of self-government, self-rule, or autonomy, where they were available.

The debate on self-determination for indigenous peoples and other ethnic groups that neither aspire to statehood nor fit the classic "blue-water" model thus flounders on four obstacles: the Westphalian-derived theory that the nation-state is the perfected form of political organization towards which all political energy necessarily aspires; the League of Nations practice of treating peoples as wards of surrounding states or of the international community; the assumption that collective grievances are reducible to individual ones; and, finally, the conceit that, to paraphrase Orwell, some families of subjugation (blue-water) are more equal than others.

III. Existing Institutions

In addition to the conceptual rigidities discussed above, institutional rigidities exist as well. The U.N. today does not provide for ethnic

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48. Declaration, supra note 17.
groups not constituted as states to participate on a regular basis in U.N.
deliberations, let alone U.N. lawmaking. The reason for this cannot be
that there is an absolute theoretical bar against non-state participation
since other non-state parties have been given votes and international
legal personality in the U.N. system. I think, for example, of the
employer and union representatives who vote at the ILO, and of present
or former subjects of international law such as the U.N. and other inter-
national agencies, the Vatican, the former internationalized territories of
Danzig, Trieste, and Memel, and of the various NGOs that have
achieved active U.N. observer status for one purpose or another.\textsuperscript{50}

When indigenous representatives first attended sessions of the ILO
and the Working Group, they “borrowed” the identity and voice of
these non-state, non-ethnic groups. A Native American would thus sit
and speak as a delegate of the International Commission of Jurists or
other NGO,\textsuperscript{51} and a Maori would relay his people’s concerns in his role
as a New Zealand trade unionist.\textsuperscript{52} To its credit, the Working Group
soon did away with the need for this formalistic contrivance and now
invites all concerned parties to speak in their true representative capac-
ity. But the Working Group remains the exceptional U.N. forum in this
regard; moreover, it exists only by grace of the Economic and Social
Council, which could terminate its work at any time. Ethnic group par-
ticipation in the U.N.’s work thus remains uninstitutionalized and
problematic.

Invitations to participate in the work of the United Nations depend
perhaps less on a party’s statist or non-statist position than on the
nature of the discourse the party is expected to present. Today, the
U.N. formally privileges three kinds of discourse: the politically hege-
monic, the politically democratic, and the “apolitically” technical. The
first takes place in the Security Council (which could as well be renamed
the Hegemony Council), the second in the General Assembly, and the
third in the several U.N. specialized agencies, ad hoc committees, and
working groups. These discourses share one thing in common: being
political, or utilitarian, or both, they focus on the narrow historical
moment.

A fourth type of discourse, which I call visionary, and which Cornel
West might call prophetic pragmatic, has insinuated itself at the U.N.,
but remains marginal.\textsuperscript{53} It is a discourse that, to date, NGOs generally
employ. It tends to juxtapose “what is” with “what should be,” the gain
of humans against the loss of nature, the power of states against the
needs of peoples, historical expediency against cultural memory and
vision. While I personally prefer the second member of each of these
pairs, I am not privileging either; anthropologists know that it is the dia-
lectic between the members of the pairs, between history and culture, so

\textsuperscript{50} See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 58-70 (1990).
\textsuperscript{51} See Coulter, supra note 12, at 31-34.
\textsuperscript{52} Personal observation, 1989 meeting of the ILO; see supra note 10.
to speak, that serves as the key to creative human adaptation and survival. Lawyers need also to recognize this and, in the U.N.'s case, explicitly provide for the dialectic. I will now summarize where I think the dialectic has already insinuated itself, and where it can be taken.

IV. Insinuated Concepts

The concepts of sovereignty, statehood, peoples and self-determination retain ambiguities that may be developed to move us from one historical moment to the next. The right of self-determination formulated immediately after World War II to undo "blue-water" colonization has, in the 70s and 80s, been extended to support peoples' liberation from racist and alien domination by adjacent populations, as in the cases of South Africa and the West Bank. The Western Sahara case, decided by the International Court of Justice (I.C.J.) in 1975, opens up even greater space. In a display of admirable anthropological sensitivity to the specific cultural features of North African nomadic societies, the I.C.J. held that an ethnic people—defined by their sense of collective identity, mode of political self-regulation, and predictable territory of economic activity—could, absent traditional indices of formal government, stable population, and demarcated territory, still claim sovereignty and assert self-determination.

Then too, notwithstanding the official doctrine that the right of secession ended upon the liberation of all "blue-water" colonies, the earlier break-up of Pakistan, and now of the Soviet Union and Yugoslavia, unrolled, or is unrolling, in an atmosphere of great international anxiety but not prohibition. Indeed, if now Quebec, whose ethnic "depth" as Quebecois (as opposed to French) is chronologically shallower than that of any other cultural group presently claiming self-determination, also receives a hushed response from both Canada and the interstate system to its secession threat, what then remains of the prohibition against secession other than the selective and arbitrary exercise of raw power? Indigenous representatives from Canada attending last summer's Working Group session in Geneva passionately argued that a

54. For an account of the interaction of culture and history in the context of the encounter between Hawaii and the West, see Marshall Sahlins, Historical Metaphors and Mythical Realities (1981).
56. Western Sahara, 1975 I.C.J. 3 (Jan. 3).
57. See Grand Council of the Crees of Quebec, Submission: Status and Rights of the James Bay Crees in the Context of Quebec's Secession from Canada, (Feb. 1992) (on file with author). The Grand Council is a corporation of the James Bay Cree Nation (Eeyouch) and a nongovernmental organization in consultative status (roster).
self-respecting international law cannot apply as lofty a principle as self-determination in a racially discriminatory manner: “yes” for whites in Quebec, “no” for indigenous peoples throughout Canada.\textsuperscript{58}

Perhaps this impassioned plea, combined with the ongoing dissolution of states in nearby Eastern Europe and the former Soviet Union, prompted the Working Group at its 1991 session to include for the first time a provision, albeit ambiguous, recognizing a right of self-determination for indigenous peoples in its draft Declaration:

Indigenous peoples have the right to self-determination in accordance with international law. By virtue of this right, they freely determine their relationship with the States in which they live in a spirit of co-existence with other citizens and freely pursue their economic, social and cultural and spiritual development in conditions of freedom and dignity.\textsuperscript{59}

V. Insinuated Practices

If the issues of self-determination and secession are again open to debate and extension, what of the institutions that could support the debate and extension? Here, too, a number of useful practices are insinuating themselves.

The Working Group on Indigenous Populations is doing on a small scale for indigenous and tribal peoples what the General Assembly once did for the Third World: which is to provide a forum for the world’s powerless to voice their vision of identity and destiny in a setting of formal equality with others materially far more powerful than they. In the U.N.’s early years, many Third World representatives appearing in the General Assembly had little in the way of political plans, or even state structure, to present or represent. Western commentators frequently criticized their lack of positivist legal acumen and derided their aspirational speeches.\textsuperscript{60} But there was no backtracking: the U.N. had committed itself to the principle of political democracy in the General Assembly. Today, that principle permits a state such as Kiribati, with fewer than 100,000 inhabitants, to cast a vote of equal weight with China, a country of more than one billion. Incongruous as this result may seem, it reproduces in form, if no longer in spirit, the original purpose of the General Assembly, which was to be a one-vision-one-vote chamber, so to speak. I say form and not spirit because those early General Assembly visions as well as the generation that dreamt them have by now departed, exiting international history to enter international culture. The General Assembly’s work currently rests with state technicians

\textsuperscript{58} See Statement of the Inuit Circumpolar Conference, supra note 20, at 4-6.
\textsuperscript{59} See Discrimination Against Indigenous Peoples, supra note 13, at 31.
\textsuperscript{60} Two works that note, and counter, the critical Western reaction to the participation of Third World, and particularly African, countries in the United Nations in the early days are: YILMA MAKONNEN, INTERNATIONAL LAW AND THE NEW STATES OF AFRICA (1983); NASILA S. REMBE, AFRICA AND THE INTERNATIONAL LAW OF THE SEA: A STUDY OF THE CONTRIBUTION OF THE AFRICAN STATES TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 7-15 (1980).
who appear content to confirm the Security Council's politics, which from the beginning were designed to be the politics of hegemony.

Outside, around, and beyond these two primary U.N. institutions are the untidy, relatively unsupervised, and often under-budgeted appendages of the U.N. where the inspired, the concerned, the wretched, or simply the unseated of the earth now congregate to relate their visions. At these margins, marginal people, whose role it is to tell us where international society's blockages are, and where breakthroughs might be, continue to gather as they once did at the General Assembly. The Working Group is a classic example of such a margin, where the interstate system interfaces with the network of indigenous peoples, and interested NGOs.

The interface occurs across several permeable surfaces. To begin with, Working Group members are official agents of the United Nations, and thus of its Member States. This means that they remain apprised of states' general perspectives on the tasks they have been assigned, including the task of drafting a Declaration of Indigenous Rights. On the other hand, because Working Group members are designated "independent experts" under contract, the U.N. must accord their professional freedom and competence a certain measure of respect. Furthermore, because members work for the entire U.N., and not for particular states, they remain relatively invulnerable to specific political pressure. The Working Group, in other words, is a creation of states, but not its creature.

In addition to states, the Working Group deals with NGOs and organizations of indigenous peoples. NGO representatives, like Working Group members, frequently issue from professional ranks. As such, the two groups share traditions of knowledge, of activities, and of knowing. NGOs supporting indigenous proposals perform a dual function vis-à-vis Working Group members. As independent agents, NGOs both entice the semi-independent Working Group members to tread new territory and professionally validate that treading in the eyes of states when it occurs.

The relationship between U.N. experts and indigenous peoples is a novel one that has evolved through mutual criticism, accommodation, and perhaps also appreciation. Culturally, socially, and professionally, Working Group members generally have far more in common with representatives of states and NGOs than they do with indigenous spokespeople. For example, not a single indigenous lawyer, and certainly there are many that the U.N. could have chosen, sits on the Working Group. Nevertheless, whether by chance, by the good-will of the remarkable chair of the Working Group, Professor Erica Daes of Greece, or by the insistence of indigenous representatives, the dialogue between indigenous representatives and members of the Working Group in
Geneva has been surprisingly productive.61

Discussions in the Working Group lack the formality and tokenism that marked the ILO deliberations on ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, where indigenous representatives spoke only at the whim of the chair of the session, and not by design or right.62 The Working Group, by contrast, actively promotes and eases, financially and otherwise, maximal access to its forum for indigenous peoples. Its sessions permit and encourage a supervised exchange of information between states, indigenous peoples, NGOs, and even individuals who speak simply because they ask to. Indigenous peoples in Geneva speak in their own voice, and states are obliged to respond to them as fellow negotiators, not wards. Year after year, the Working Group redrafts its Declaration in response to positions and counter-positions expressed at these sessions. Overall, the successive drafts have moved from the minimalist position of states, to the visionary one of indigenous peoples.63

Conclusions

In conclusion, I offer two concrete proposals, and a general justification, for making room for peoples at the United Nations. My minimalist proposal is that the U.N. make available, on a regular basis, and in the spirit of the Working Group, fora for indigenous peoples and other ethnic groups to question state decisions and arrangements that affect them. The time, place, and structure of such fora should be tailored to the particular needs that call them into existence. Beyond that, they should primarily provide a “level” field in which communities of peoples, under the observation of the U.N., may begin the process of negotiating and renegotiating their relationships with states.

My more ambitious proposal is that the U.N. formally acknowledge the right to self-determination of indigenous peoples so that they may become recognized subjects of international law competent to represent their interests in the international arena. I propose that this right be extended to indigenous peoples regardless of whether a particular people professes to exercise it to remain attached to its present state, to separate from it, or to form a compact of free association with it or another state. Indigenous peoples, more than other ethnic groups, rely on their connection to the territory of their ancestors to reproduce their place-specific cultures. As such they, more than other groups, require the protection of territory that the right to self-determination confers but that mere human rights, for example, would not. At the same time, the U.N. should set out criteria for, and be prepared to supervise, the fair and orderly negotiation of the exercise of these choices. The latter

61. For a highly positive appraisal of the work of the Working Group, see Williams, supra note 16.
62. See supra note 10.
63. See supra note 53 and accompanying text.
should not be irreversible, but can be constrained by reasonable notice and mutual compensation provisions.

As for justification, I offer the value of multiple inheritance. Anthropologically speaking, we all have but one task as a species: the creation of our survival with the materials inherited. The biological material we have inherited is the literally ambivalent double helix, and the creation is the manner in which its genes recombine and mutate through the generations. Biological determinism in this respect is a misnomer. It is rather culture, that other means of human survival, which has become ominously deterministic in the late twentieth century.\^\textsuperscript{64} The double helixes of the sacred and the secular collapsed at Westphalia, of culture and polity in the French Revolution, of the Security Council and the General Assembly during the Gulf War if not before. The demands of indigenous peoples for voice and self-determination deeply trouble the unidimensionally statist international society we have become precisely because they seek to reinstate ambivalence, recombination, and mutation. Yet that reinstatement could be vital to the reproduction of international society which, like any other, relies on sources of difference for adaptation and survival.

At the U.N., the reinstatement could assume the form of a double helix consisting of the pragmatic strand of the system of states, and the prophetic strand of the network of peoples, engaged in dynamic genetic conversation, so to speak.\^\textsuperscript{65} These strands are by no means equal in power. Neither are they, nor should they be, coeval in function like two sets of chromosomes. The analogy ends at some point. What remains is that the perplexity as well as the safety in social life, whether domestic or international, lodge together in the space called indeterminacy. Not an "everything goes and nothing matters" indeterminacy, but one where existing hierarchies, generosities, promises, and abuses can be continually questioned, reviewed and restructured in the light of both present exigencies, past dreams, and future visions.\^\textsuperscript{66} States, I think, are generally structured to function best in the realm of expediency, but cultural communities remain the better guardians of the past and of the future. The United Nations—a pleasantly ambiguous term that covers both peoples and states—needs to bring them together in their separate but intertwining identities.

\^\textsuperscript{64} For overviews of the disastrous impact of the globalization of industrial economy and culture on indigenous and tribal peoples, see JOHN H. BODLEY, VICTIMS OF PROGRESS (1990); BURGER, supra note 24; and BURGER, supra note 5.

\^\textsuperscript{65} I am by no means advancing a case for sociobiology. For a case against it, see MARSHALL SAHLINS, THE USE AND ABUSE OF BIOLOGY (1976).