

**"INDIGENOUS PEOPLES" IN INTERNATIONAL LAW: A  
CONSTRUCTIVIST APPROACH TO THE ASIAN CONTROVERSY**

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## "INDIGENOUS PEOPLES" IN INTERNATIONAL LAW: A CONSTRUCTIVIST APPROACH TO THE ASIAN CONTROVERSY

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Over a very short period, the few decades since the early 1970s, "indigenous peoples" has been transformed from a prosaic description without much significance in international law and politics, into a concept with considerable power as a basis for group mobilization, international standard setting, transnational networks and programmatic activity of intergovernmental and nongovernmental organizations.<sup>1</sup>

The development of "indigenous peoples" as a significant concept in international practice has not been accompanied by any general agreement as to its meaning, nor even by agreement on a process by which its meaning might be established. As the concept becomes increasingly important, international controversy as to its meaning and implications is acquiring greater legal and political significance. This article considers how to understand "indigenous peoples" as an international legal concept. To sharpen the focus, the discussion concentrates on the current practical dispute as to whether and how the concept of "indigenous peoples," formed and shaped in regions dominated by the history and effects of European settlement, might or should be adapted and made applicable in Asia and elsewhere. Both elements of the term—"indigenous" and "peoples"—are contentious, but the discussion here will focus on indigenouness.

Two broad approaches to relatively underspecified concepts such as "indigenous peoples" may be identified. The first, here termed a positivist approach, treats "indigenous peoples" as a legal category requiring precise definition, so that for particular operational purposes it should be possible to determine, on the basis of the definition, exactly who does or does not have a particular status, enjoy a particular right, or assume a particular responsibility. Once established, such definitions theoretically ground the interpretive process of determining the scope of application of particular legal instruments and rules. It will be argued that the experience of international agencies and associations of indigenous peoples demonstrates that it is impossible at present to formulate a single globally viable definition that is workable and not grossly under- or overinclusive. Any strict definition is likely to incorporate justifications and referents that make sense in some societies but not in others. It will tend to reduce the fluidity and dynamism of social life to distorted and rather static formal categories. One possible conclusion, that

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<sup>1</sup> For overviews, see, e.g., Douglas Sanders, *The Re-Emergence of Indigenous Questions in International Law*, 1 CAN. HUM. RTS. Y.B. 3 (1983); Chris Tennant, *Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993*, 16 HUM. RTS. Q. 1 (1994); and S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996). The history of international activity involving or relating to indigenous peoples is much longer, encompassing, inter alia, bilateral diplomacy by indigenous peoples, as well as attempts to petition and appear at the League of Nations, transnational operations of church groups and NGOs such as the Aborigines Protection Society and the Anti-Slavery Society in the 19th century, and the activities of the International Labour Organization from the 1920s onward.

"indigenous peoples" as a global concept is unworkable and dangerously incoherent, has some adherents. But it is a concept of great normative power for many relatively powerless groups that have suffered grievous abuses, and it bears the imprimatur of representatives of many such groups who are themselves shaping it while being shaped by it. As a concept designating a locus of groups and issues, albeit with some imprecision and uncertainties, it has proved remarkably serviceable, and there is no contending replacement. The aspiration for perfect positivist coherence is unachievable, but there is another way to understand the concept.

This second approach, here termed constructivist, takes the international concept of "indigenous peoples" not as one sharply defined by universally applicable criteria, but as embodying a continuous process in which claims and practices in numerous specific cases are abstracted in the wider institutions of international society, then made specific again at the moment of application in the political, legal and social processes of particular cases and societies.

Neither approach suffices entirely on its own. It will be argued that the constructivist approach to the concept better captures its functions and significance in global international institutions and normative instruments. In most cases the terminology and indicative definitions in global or regional instruments are too abstract and remote to provide a sufficient basis to resolve the infinite variety of questions that arise in specific cases, and it is misguided to expect that these global instruments can even purport to resolve all such detailed problems. These instruments often contain relevant principles and criteria abstracted from the specifics of past cases and debates, and each has stimulated a body of practice concerning its scope of application and the meaning of concepts it employs. But many specific problems as to the meaning of "indigenous peoples" and related concepts can be solved only in accordance with processes and criteria that vary among different societies and institutions. Only in such specific contexts is it possible adequately to answer such questions as: Is a waning traditional authority or a popular, but state-created, political body the proper representative of an indigenous group in a land claim?<sup>2</sup> Are children of a marriage between a group member and a nonmember entitled to be full members?<sup>3</sup> Who are the legal successors to a group whose leaders signed a treaty in the eighteenth century?<sup>4</sup> Does organization of a new political body by one clan from a larger indigenous community make the clan an indigenous people?<sup>5</sup> Which group is part of which other group for purposes of representation?<sup>6</sup> Who ought to benefit from royalty payments for a therapeutic drug derived from a plant known and used by several groups?<sup>7</sup> Can local villagers close a forest that is the supply of fuel wood for a community of landless migrants nearby?<sup>8</sup> To which groups in a particular country does the World Bank's policy on indigenous peoples apply?<sup>9</sup> Who will be eligible to represent indigenous peoples if, as is currently proposed, a permanent forum for

<sup>2</sup> For differing views on the adequacy of state-created aboriginal institutions to represent indigenous people in Australia, see Mick Dodson, *Towards the Exercise of Indigenous Rights: Policy, Power, and Self-Determination*, RACE & CLASS, Apr.-June 1994, at 65; and Paul Coe, *ATSIC: Self-Determination or Otherwise*, *id.* at 35.

<sup>3</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

<sup>4</sup> *Cayuga Indians (Gr. Brit. v. U.S.)*, 6 R.I.A.A. 173 (1926).

<sup>5</sup> U.S. Bureau of Indian Affairs, Branch of Acknowledgment and Research, Proposed Finding for Federal Acknowledgment of the Mash-she-pe-nash-she-wish Indian Tribe (visited Feb. 23, 1998) (<http://www.doi.gov/bia/matchsum.html>).

<sup>6</sup> UN Hum. Rts. Comm., Communication No. 205/1986, *Mikmaq Tribal Society v. Canada*, UN Doc. CCPR/C/43/D/205/1986 (1991).

<sup>7</sup> Sarah Laird, A. B. Cunningham & Estherine Lisinge, *Forests, Drugs, and Benefit Sharing: Putting the Formula to the Test—The Cameroon Case of *Ancistrocladus korupensis**, in *PEOPLE, PLANTS, AND JUSTICE* (Charles Zerner ed., forthcoming).

<sup>8</sup> Jesse Ribot, *Rebellion, Representation and Enfranchisement in the Forest Villages of Makacoulintang, Eastern Senegal*, in *id.*

<sup>9</sup> See *infra* p. 420 and pp. 441–45.

indigenous peoples is established in the United Nations.<sup>10</sup> Such questions can be resolved only through specific contextual decisions, often referring to detailed functional definitions, that are influenced by, and influence, the more abstract global concept.

Before the argument is developed, a caveat must be entered about the scope and generality of this article. It focuses on issues arising in east, southeastern and south Asia. Even with much of western and central Asia omitted, this region is so diverse as to issues pertaining to "indigenous peoples" that generalizations must be treated with the utmost caution.<sup>11</sup> There are overlapping themes, as well as considerable variation, between Asia and Africa in this regard, and the relevance or irrelevance of the concept of "indigenous peoples" in Africa is of great importance. Although to a lesser extent than Asian groups, a small number of African groups have become involved in the international indigenous peoples' movement,<sup>12</sup> and governments of a few African states have expressed concerns similar to those of Asian state governments considered in this article.<sup>13</sup> For clarity, specific issues concerning the concept of "indigenous peoples" in Africa are not considered in this article.

#### I. THE ASIAN CONTROVERSY: SEPARATING JUSTIFICATIONS, NORMS AND INSTITUTIONS

One of the central questions in the current controversy is whether the concept of "indigenous peoples" has any application to people in the group of major Asian states whose governments deny its relevance.

Following the pattern of group mobilization established in states dominated by European settlement—in the Americas, Australasia and the Nordic countries—groups based in different Asian states have more recently begun to participate in international institutions and gatherings of "indigenous peoples," and transnational networks have been formed in Asia under the rubric "indigenous peoples."<sup>14</sup> The concept of "indigenous

<sup>10</sup> Report of the Second Workshop on a Permanent Forum for Indigenous People within the United Nations System, UN Doc. E/CN.4/Sub.2/1998/11 (1997).

<sup>11</sup> See the thoughtful discussion in Yash Ghai, *Human Rights and Governance: The Asia Debate*, 14 AUSTL. Y.B. INT'L L. 1 (1994).

<sup>12</sup> A Member of the Tanzanian Parliament, Moringe Parkipuny, made two statements entitled "The Indigenous Peoples Rights Question in Africa" at the UN Sub-Commission Working Group on indigenous populations in 1989 and 1991 (see INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS [IWGIA], NEWSLETTER, No. 59, 1989, at 92-94, and *id.*, Sept./Oct. 1991, at 48), and an increasing number of groups from Africa have attended subsequent meetings of the working group. Organizations such as IWGIA have assisted such involvement. See generally " . . . NEVER DRINK FROM THE SAME CUP": PROCEEDINGS OF THE CONFERENCE ON INDIGENOUS PEOPLES IN AFRICA (Copenhagen, Hanne Veber, Jens Dahl, Fiona Wilson & Espen Wachle eds., 1993). Ken Saro Wiwa was one of the most prominent African participants in the international indigenous peoples' movement; his writings include GENOCIDE IN NIGERIA: THE OGONI TRAGEDY (Port Harcourt, 1992), and collections of short essays such as NIGERIA: THE BRINK OF DISASTER (Port Harcourt, 1991). He was a vice president of the Netherlands-based Unrepresented Nations and Peoples Organization. He was executed, with other Ogoni, by the Nigerian government in 1995. In a solemn session that year at the UN Commission on Human Rights Inter-Sessional Working Group on the draft declaration on the rights of indigenous peoples, "the Chairperson-Rapporteur, at the request of many governmental and indigenous delegations, paid tribute to the Nigerian writer and human rights activist, Mr Ken Saro Wiwa, who had given his life for the cause of human rights." Report of the Working Group Established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, 1st Session, UN Doc. E/CN.4/1996/84, para. 17.

<sup>13</sup> It may be indicative of the Nigerian government's sensitivity to the issue that Nigeria was the only sub-Saharan state not then a member of the Commission on Human Rights to have chosen to participate in both the first and second sessions of the intersessional working group. For an example of express governmental concern, see the comment of Niger on a UN report: "the absence of a definition of 'indigenous people' invited subjective interpretations, which poses dangers for those emerging nation-States in Africa that face recurrent tribal conflicts." Erica-Irene Daes, Protection of the Heritage of indigenous people: Final report, UN Doc. E/CN.4/Sub.2/1995/26, para. 6.

<sup>14</sup> For example, the Pacific-Asia Council of Indigenous Peoples, which has connections with the pioneering World Council of Indigenous Peoples, and the Asia Indigenous Peoples Pact (AIPP), established in the early 1990s and active as an international network. In 1996 the primary membership of the AIPP numbered 18 organizations, including the Naga Peoples Movement for Human Rights, BIRSA (Ranchi, India), Nepal Federation of Nationalities Federal Council, Chittagong Hill Tracts Peoples Council, Inter Mountain Peoples Educa-

peoples," or its local cognates, has become an important unifying connection in transnational activist networks, linking groups that were hitherto marginal and politically unorganized to transnational sources of ideas, information, support, legitimacy and money.<sup>15</sup> International institutions increasingly apply to parts of Asia policies, programs and specific rules concerning "indigenous peoples." The World Bank, for example, first adopted a policy on tribal peoples arising out of the dismal experience of projects in Latin America, but seeks as a global organization to apply its current policy on indigenous peoples to some of its projects in Asia; the relevant World Bank policies have also provided an influential model for the Asian Development Bank. The international activity has begun to shape national practice in many states, influencing political discourse, government policy, and some judicial and legislative action. The attitudes of governments in Asia to the application to their states of the concept of "indigenous peoples" differ considerably, but strong opposition has been expressed by China, India, Bangladesh, Myanmar and (for the most part) Indonesia.

The core of the current international controversy may be captured by juxtaposing two quotations, both originating in the context of ongoing efforts in the United Nations to draft a normative declaration on the rights of indigenous peoples. Each is representative of strongly held recurrent positions.

The first quotation is from a statement made in 1991 to the United Nations Working Group on indigenous populations in the names of members of the West Papuan Peoples' Front, the Karen National Union, the Jumma Network in Europe, the Indian Council of Indigenous and Tribal Peoples, the Alliance of Taiwan Aborigines, the National Federation of Indigenous Peoples of the Philippines (KAMP), Lumad-Mindanao, the Cordillera Peoples Alliance, the Ainu Association of Hokkaido, the Asia Indigenous Peoples Pact, the Naga Peoples Movement for Human Rights, the Homeland Mission 1950 for South Moluccas, and the Hmong People:

First and foremost, we want to bring to your attention the denial of some Asian governments of the existence of indigenous peoples in our part of the world. This denial presents a significant obstacle to the participation of many indigenous peoples from our region in the Working Group's deliberations. The denial also seeks to withhold the benefits of the Declaration from the indigenous, tribal, and aboriginal peoples of Asia. We hereby urgently request that peoples who are denied the rights to govern themselves, and are called tribal, and/or aboriginal in our region, be recognized, for the purpose of this Declaration, and in accordance with I.L.O. practice, as equivalent to indigenous peoples.<sup>16</sup>

The second quotation is from comments sent in 1995 by the People's Republic of China to a working group of the UN Commission on Human Rights:

The Chinese Government believes that the question of indigenous peoples is the product of European countries' recent pursuit of colonial policies in other parts of the world. Because of these policies, many indigenous peoples were dispossessed of their ancestral homes and lands, brutally oppressed, exploited and murdered, and in some cases even deliberately exterminated. To this day, many indigenous peoples still suffer from discrimination and diminished status. . . . As in the majority of Asian countries, the various nationalities in China have all lived for aeons on Chinese

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tion and Culture in Thailand Association, Partners of Community Organization (PACOS, Sabah), Arakhan Human Rights Centre, Kachin Land Foundation, Cordillera Peoples' Alliance, National Federation of Indigenous Peoples of the Philippines (KAMP), Lumad Mindanaw (Mindanao), Homeland Mission 1950 Maluku (Amsterdam), Alliance of Taiwan Aborigines, Adivasi Solidarity (Bombay) and Centre for Orang Asli Concerns (Petaling Jaya).

<sup>15</sup> See INDIGENOUS PEOPLES OF ASIA, esp. chs. 1-4 (R. H. Barnes, Andrew Gray & Benedict Kingsbury eds., 1995) [hereinafter PEOPLES OF ASIA].

<sup>16</sup> Reprinted as Declaration of the Asian Delegation, in IWGIA, NEWSLETTER, Sept./Oct. 1991, at 40.

territory. Although there is no indigenous peoples' question in China, the Chinese Government and people have every sympathy with indigenous peoples' historical woes and historical plight. China believes it absolutely essential to draft an international instrument to protect their rights and interests . . . . The special historical misfortunes of indigenous peoples set them apart from minority nationalities and ethnic groups in the ordinary sense. For this reason, the draft declaration must clearly define what indigenous peoples are, in order to guarantee that the special rights it establishes are accurately targeted at genuine communities of indigenous people and are not distorted, arbitrarily extended or muddled.<sup>17</sup>

As the first quotation indicates, representatives of a large number of groups in Asia are actively participating in international activities of indigenous peoples, and take the view that their groups fall within the international rubric of "indigenous peoples" even if a cognate expression has not hitherto been used in local politics. Conversely, several governments of Asian states argue that the concept of "indigenous peoples" is so integrally a product of the common experience of European colonial settlement as to be fundamentally inapplicable to those parts of Asia that did not experience substantial European settlement. The dispute as to the meaning and scope of this concept is of considerable importance to contemporary efforts in the United Nations to negotiate a declaration on the rights of indigenous peoples, and it has important implications for operational policy in institutions ranging from the World Bank to the Biodiversity Convention.

The controversy about the meaning and application of "indigenous peoples" as an international concept encompasses conflicting views about the *norms* applicable to indigenous peoples and their relationships with states and with individuals, and struggles over the potentially potent roles of *international institutions*; but the most fundamental problem is deep-seated differences over the *justifications* for institutional and normative programs based on recognition of a distinct category of "indigenous peoples." It will be argued that the best possibility of progress toward broad international agreement among different states and groups—an agreement that by no means exists at present—will be through continued bargaining on norms applicable to indigenous peoples, the continued evolution of distinct practices in different types of institutions, and a definition of "indigenous peoples" that is sufficiently flexible to accommodate a range of justifications.

In the area of international human rights, diplomatic negotiations have long utilized distinctions between norms, institutions and justifications as a means to facilitate consensus. A recurrent feature of international human rights instruments since 1945 has been the articulation of norms in universal terms, albeit with margins for different local interpretations and some acknowledgment of the relevance of cultural difference, accompanied by acceptance of wide discretion for states in choices of national and international institutional mechanisms to protect and promote human rights, and openness of international normative texts to divergent justifications of the norms concerned. At the same time, this pattern has been continuously contested by those seeking universality through convergence around tightly drafted norms, standardized court-centered national and

<sup>17</sup> Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. E/CN.4/WG.15/2 (1995) [hereinafter PRC Consideration]. In this and other statements, the PRC government chastises the UN Secretariat for inaccuracy:

In the materials it prepared for the World Conference on Human Rights, the [UN] Centre for Human Rights presumptuously categorized ordinary minority nationalities in many Asian countries as "indigenous peoples" and refused, despite collective and individual clarifications from the Asian countries, to rectify its mistake. This example amply demonstrates the necessity of an established definition of an indigenous people.

international institutions for enforcement, and explicit endorsement of Enlightenment-type justifications to be used to enhance interpretation of norms and effectiveness of institutions.

In relation to questions concerning indigenous peoples, I argue that, while there are conflicts of interests and values relating to norms and institutions, the most fundamental and problematic disagreement is over the justifications inherent in the concept of "indigenous peoples" as currently understood. Controversy arises in particular from the implication that distinctive rights of indigenous peoples are justified by the destruction of their previous territorial entitlements and political autonomy wrought by historic circumstances of invasion and colonization. The best possibility of progress is to interpret the concept with sufficient flexibility to make clear that it accommodates a wider range of justifications. The next part examines the issues of justification through consideration of existing international definitions, views advanced by indigenous peoples, views held in a range of European settler states, and practice in various Asian states, concluding with analysis of the arguments advanced by the governments of China and India. The two subsequent parts briefly consider issues of norms and institutions as they bear on the controversy over the meaning of "indigenous peoples." Part V will defend a particular—and contested—constructivist view of how such international legal concepts as "indigenous peoples" work, and make the case for broadening the concept of "indigenous peoples" to accommodate a wider range of justifications. This is a difficult issue of philosophy and of judgment; there is an appreciable risk for the indigenous peoples' movement that the existing and highly functional international political distinction between indigenous peoples and ethnic and other minorities will erode, galvanizing opposition to claims of indigenous peoples. Building on the premises developed in part V, a specific proposal as to definition is presented in part VI.

## II. THE CONCEPT OF "INDIGENOUS PEOPLES" AND ITS JUSTIFICATIONS

### *International Definitions of "Indigenous Peoples"*

Three different approaches to the problems of definition are found in texts of the United Nations, the International Labour Organization (ILO) and the World Bank. The level of controversy and the perceived political stakes are highest in the United Nations, and no UN definition of "indigenous peoples" has been adopted. UN practice has to some extent been guided by a working definition in the 1986 report of UN Special Rapporteur Martínez Cobo:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that 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.

This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

- (a) Occupation of ancestral lands, or at least of part of them;
- (b) Common ancestry with the original occupants of these lands;
- (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc.);

- (d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- (e) Residence in certain parts of the country, or in certain regions of the world;
- (f) Other relevant factors.<sup>18</sup>

This definition takes a potentially limited, and controversial, view of "indigenous peoples" by requiring "historical continuity with pre-invasion and pre-colonial societies that developed on their territories." By contrast, the ILO has a more diffuse historical requirement, and includes in its legal definition an additional category of "tribal peoples"; it has firmly established the applicability of its treaties in all regions.<sup>19</sup> The World Bank has dispensed altogether with criteria based on historical continuity and colonialism, instead taking a functional view of "indigenous peoples" as "groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged," an approach clearly applicable in much of Asia.<sup>20</sup>

The contrasts between the approaches in these three interstate institutions suggest that "indigenous peoples" is not a precise term of art with a single fixed meaning. Numerous variations in relevant categories and rules of participation are evolving to meet different functional requirements, political conditions and regional mores. Nevertheless, in the absence of any unifying global concept, this functional divergence may come at the price of unsustainable fragmentation and inconsistency. I will argue that a

<sup>18</sup> José Martínez Cobo, Study of the Problem of Discrimination against indigenous populations, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, paras. 379-80.

<sup>19</sup> Article 1(1) of the Convention concerning Indigenous and Tribal Peoples in Independent Countries stipulates that the Convention applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

ILO Convention No. 169, June 27, 1989, 28 ILM 1382, 1384-85 (1989).

<sup>20</sup> The World Bank Operational Directive 4.20 states:

The terms "indigenous peoples," "indigenous ethnic minorities," "tribal groups," and "scheduled tribes" describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, "indigenous peoples" is the term that will be used to refer to these groups.

In providing more details to operations staff about groups to which the policy applies, the operational directive states:

Because of the varied and changing contexts in which indigenous peoples are found, no single definition can capture their diversity. Indigenous people are commonly among the poorest segments of a population. They engage in economic activities that range from shifting agriculture in or near forests to wage labor or even small-scale market-oriented activities. Indigenous peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:

- (a) a close attachment to ancestral territories and to the natural resources in these areas;
- (b) self-identification and identification by others as members of a distinct cultural group;
- (c) an indigenous language, often different from the national language;
- (d) presence of customary social and political institutions; and
- (e) primarily subsistence-oriented production.

Task managers (TMs) must exercise judgment in determining the populations to which this directive applies and should make use of specialized anthropological and sociological experts throughout the project cycle.

Operational Directive 4.20, *reprinted in* IWGIA, NEWSLETTER, Nov./Dec. 1991, at 19. This operational directive is at present being considered for revision under a reorganization of governance instruments within the Bank.



constructivist approach makes a global concept of "indigenous peoples" possible, while allowing functional specificity to meet diverse social circumstances and institutional requirements.

*Approaches Taken by Indigenous Peoples*

The early effort to build a vibrant international indigenous peoples' movement in the 1970s was driven primarily by groups from areas of European invasion and settlement. The World Council of Indigenous Peoples (WCIP), for example, was founded in 1975 at the initiative of George Manuel of the National Indian Brotherhood of Canada; its initial scope and the sources of its momentum are indicated by its early five-region structure, covering North, Central, and South America, the Nordic region and Australasia.<sup>21</sup> Asian groups were included under the umbrella of the international indigenous peoples' movement as such groups became more organized and active in international fora. Despite the initial hesitation of some individuals active in the "founding" regions of the World Council of Indigenous Peoples—people living in Japan, India and Thailand were permitted to speak only as observers at the Third General Assembly of the WCIP in 1981<sup>22</sup>—the WCIP subsequently decided to broaden its geographic scope, and a Pacific-Asia Council of Indigenous Peoples was established. While the WCIP is no longer as active as in its early years, the international indigenous peoples' movement is burgeoning, with numerous networks and loose organizational structures in which many groups from Asia are now involved.

The existence of an indigenous peoples' movement is a major factor in the diffusion and impact of "indigenous peoples" as an international legal concept. Groups and individuals participating in this movement have focused on elements of commonality that have helped the movement to cohere: connections with land and territory, aspirations for autonomy and self-determination, renewed interest in distinct cultures and languages, the historical experience of incursions by other groups, continuing consequences of dispossession and subordination, concerns over health and education, and relative disadvantages in child welfare, mortality, nutrition and income levels. A further element is the shared effects of modernity.<sup>23</sup> While the indigenous peoples' movement was made possible in some respects by modern communications, economy and politics, it is also a form of resistance to modernization and globalization, particularly to the convergence and homogenization they threaten to bring on. All of these factors affect the formulation of international normative programs and credos by various groups of organizations participating in the indigenous peoples' movement. Not surprisingly, structured political settings such as the UN negotiations on drafting a declaration on the rights of indigenous peoples have been heavily influenced by the agendas and demands of a small number of representatives of politically dominant groups skilled in the methods, politics and working languages of the United Nations, relatively few of whom are Asian.

The choice and evolution of an overarching self-conception to unify the international political movement of indigenous peoples has necessarily involved abstracting from a

<sup>21</sup> See generally DOUGLAS SANDERS, *THE FORMATION OF THE WORLD COUNCIL OF INDIGENOUS PEOPLES* (Copenhagen, 1977).

<sup>22</sup> IWGIA, *NEWSLETTER*, June 1981, at 5.

<sup>23</sup> These commonalities result from, e.g., the ubiquity of state interests in economic modernization and exploitation of resources, often in response to global demands for such commodities as timber, electricity, copper and gold; the transnational operation and global technologies of industries such as mining, nuclear power, large dams, tropical forestry and oil recovery; similarities among modern monetarized economies, and their connections through markets, brand names and tastes fostered by advertising; shared social technologies for the organization of important sectors from educational institutions and censuses to banking and insurance; and the global communications that simultaneously facilitate transnational connections of markets and networks of indigenous peoples.

highly diverse range of self-understandings and political discourses among different groups. The social and political concepts available to the movement are influenced by the concepts carried in its principal working languages. "Indigenous peoples" is now a well-established usage in English and Spanish, but it conveys an element of novelty even in French and is difficult to capture nonpejoratively in Chinese, Japanese or Thai except by new usages or translation from other languages. In ordinary language "indigenous peoples" connotes priority in time, if not immemorial occupancy. It also suggests continuity of group identity over a very long period, even as conditions have been altered by colonialism, influx, migration, or the frequent changes in group structures and ethnic identities.<sup>24</sup> These elements of historical priority and group continuity have acquired significance as "indigenous peoples" has evolved from ordinary language into a specialized term in transnational mobilization and normative instruments.

A comparison of two texts from the international indigenous peoples' movement illustrates the point, notwithstanding that the texts themselves proved evanescent. A preparatory meeting in 1974 to plan the 1975 conference that established the WCIP used a provisional working definition (for determining who qualified as delegates) that contains elements of priority and historical continuity, but also seems to acknowledge their fluidity and imprecision:

The term indigenous people refers to people living in countries which have a population composed of differing ethnic or racial groups who are descendants of the earliest populations living in the area and who do not as a group control the national government of the countries within which they live.<sup>25</sup>

By 1984, the developing collective political consciousness and confidence of the international indigenous peoples' movement produced, in the draft International Covenant on the Rights of Indigenous Peoples prepared for the WCIP, a sharpened and more reified view of these elements. An indigenous people is one:

- a) who lived in a territory before the entry of a colonizing population, which colonizing population has created a new state or states or extended the jurisdiction of an existing state or states to include the territory, and
- b) who continue to live in the territory and who do not control the national government of the state or states within which they live.<sup>26</sup>

This construction of a collective self-representation simultaneously challenges dominant conceptions of the state as the political embodiment of a nation comprising all of the people within that state, and emulates the representation of historical "nations" connected to particular territory as a foundation for many modern "nation-states."

The impacts on political consciousness of the modern territorial state, and the concepts of "nation" that have buttressed it, have been so strong that it is scarcely surprising that in some usages the concept of "indigenous peoples" has taken on a parallel structure. "Indigenous peoples" challenges totalizing views of "nation" and the "nation-state" that have frequently made it difficult for identities other than the "nation" to secure recognition and acceptance. "Indigenous peoples" would legitimize such cultural and political units in the way nation-states have been legitimized by "nations." "History" has often seemed to leave indigenous peoples not so much as participants and subjects but as marginal objects contained within a much broader account of the nation, promi-

<sup>24</sup> The CONCISE OXFORD DICTIONARY 692 (9th ed. 1995), defines "indigenous" as "1. a (esp. of flora or fauna) originating naturally in a region b (of people) born in a region 2. (foll. by to) belonging naturally to a place."

<sup>25</sup> See SANDERS, *supra* note 21, at 12.

<sup>26</sup> World Council of Indigenous Peoples, Draft Covenant (mimeo 1984).

nent perhaps as to customs and folk dances but peripheral in national politics and national law.

In a reaction against this view, the rhetoric of some international conceptions of "indigenous peoples" implies an approach to history similar to those nationalistic histories of "nations" probed skeptically by Elie Kedourie, Benedict Anderson and many others.<sup>27</sup> These approaches have proved highly functional for certain purposes. As Prasenjit Duara argues in a discussion of Chinese historiography:

[N]ational history secures for the contested and contingent nation the false unity of a self-same, national subject evolving through time. . . . It allows the nation-state to see itself as a unique form of community which finds its place in the oppositions between tradition and modernity, hierarchy and equality, empire and nation. Within this schema, the nation appears as the newly realized, sovereign subject of [Enlightenment] History embodying a moral and political force that has overcome dynasties, aristocracies, and ruling priests and mandarins, who are seen to represent merely themselves historically. In contrast to them, the nation is a collective historical subject poised to realize its destiny in a modern future.<sup>28</sup>

James Clifford captures exactly this element in his observation of the trial of a Native American land rights claim that under U.S. law was deemed to depend on establishing simple linear historical continuity of the group over hundreds of years—a romanticized continuity demanded by Western history with little regard to tribal history. In history,

[tribal] societies are always either dying or surviving, assimilating or resisting. Caught between a local past and a global future, they either hold on to their separateness or "enter the modern world." . . . But the familiar paths of tribal death, survival, assimilation, or resistance do not catch the specific ambivalence of life in places like Mashpee over four centuries of defeat, renewal, political negotiation, and cultural innovation.<sup>29</sup>

In struggles to put into question totalizing views of the "nation," it may be inevitable that the concept of "indigenous peoples" takes on some of the same characteristics. But such approaches risk some of the same hazards as extreme varieties of nationalism, and are likely in the future to meet with similar skeptical reconsideration. However, just as national projects have evolved or metamorphosed in many places, so the concept of "indigenous peoples" is often espoused flexibly both in international institutions and in more local politics.

<sup>27</sup> See, e.g., ELIE KEDOURIE, *NATIONALISM* (4th ed. 1993); BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 1991). The Solemn Declaration adopted at the 1975 WCIP meeting has a striking narrative line:

We the Indigenous Peoples of the world, united in this corner of our Mother Earth in a great assembly of men of wisdom, declare to all nations: We glory in our proud past: when the earth was our nurturing mother, when the night sky formed our common roof, when Sun and Moon were our parents, when all were brothers and sisters, when our great civilizations grew under the sun, when our chiefs and elders were great leaders, when justice ruled the law and its execution. Then other peoples arrived: thirsting for blood, for gold, for land and all its wealth, carrying the cross and the sword, one in each hand, without knowing or waiting to learn the ways of our worlds, they considered us to be lower than animals, they stole our lands from us and took us from our lands, they made slaves of the Sons of the sun. However, they have never been able to eliminate us, nor to erase our memories of what we were, because we are the culture of the earth and the sky, we are of ancient descent and we are millions, and although our whole universe may be ravaged, our people will live on for longer even than the kingdom of death. . . . We vow to control again our own destiny and recover our complete humanity and pride in being Indigenous People.

SANDERS, *supra* note 21, at 17.

<sup>28</sup> PRASENJIT DUARA, *RESCUING HISTORY FROM THE NATION* 4 (1995).

<sup>29</sup> JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE* 342 (1988).

The existence and recognition of "indigenous peoples" in international and transnational practice provides a legitimacy, perhaps even a language, for the pursuit of aspirations and grievances that may otherwise struggle for purchase or vocabulary. It provides access to transnational benefits supplied by private groups such as Oxfam, intergovernmental agencies such as the World Bank, and foreign governments such as the Netherlands and Norway, which have policies specifically targeted to overseas indigenous peoples;<sup>30</sup> and to political and institutional fora such as the United Nations, the UN Commission on Sustainable Development, the Conference of the Parties to the Biodiversity Convention, and associations of museum directors and national parks administrators. The category certainly has international purchase: publications and Internet postings of nongovernmental organizations (NGOs) seeking to appeal to a Western/Northern audience regularly emphasize adverse impacts of projects on ethnic minorities or indigenous groups with distinct cultures. Nevertheless, the precise justifications on which the concept of "indigenous peoples" depends for its appeal and effectiveness vary across different groups, societies and issues.

*Attitudes in States Dominated by European Settlement*

Not surprisingly, proponents of "national" projects in many states have resisted concepts of "indigenous peoples" that seem to challenge the unity of the "nation." This "national" view is evident in ILO Convention No. 107 of 1957, in which indigenous and tribal populations are identified as distinct social groups whose conditions of life ought to be ameliorated to promote their assimilation into the ambient population, leading eventually to national integration. Numerous adherents of such views can still be found in Europe, the Americas and Australasia, but it is remarkable how far the governments of many states in these regions have shifted to endorse a concept of "indigenous peoples" as enduring and distinctive collectivities internationally and within the polity. Many hesitations and exceptions remain, in these regions as elsewhere. The governments of France, Japan, Sweden, the United States and other states have expressed strong misgivings about international recognition of collective rights.<sup>31</sup> Several states argue that their constitutions do not permit the possibility of more than one "people" within the national territory,<sup>32</sup> and object to the use of such terms as "indigenous nations,"<sup>33</sup> or in some cases to recognition of autonomous indigenous legal and political systems.<sup>34</sup>

Nevertheless, the shift in government attitudes, for purposes of multilateral negotiations but often in specific dealings with indigenous peoples as well, has been substantial. Although to date such deep-rooted, nuanced, complex and in some cases contradictory developments is simplistic, significant shifts in formal policies of state governments concerning indigenous peoples in regions of European settlement have been evident in the United States (episodically), Peru (marred by subsequent violence), Canada, Denmark and to some extent Australia since the beginning of the 1970s; Colombia, New Zealand,

<sup>30</sup> See Memorandum from the Minister of Foreign Affairs, P. H. Kooijmans, and the Minister of Development Cooperation, J. P. Pronk, to the Netherlands Parliament, *Indigenous Peoples in the Netherlands Foreign Policy and Development Cooperation* (Mar. 29, 1993) (Eng. trans., mimeo).

<sup>31</sup> Report of the Second Session of the Working Group Established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, UN Doc. E/CN.4/1997/102, paras. 107-13 (1996) [hereinafter WG Second Report]. For comments by the U.S. government, see UN Doc. E/CN.4/1995/WG.15/2/Add.1 (1995).

<sup>32</sup> See, e.g., the decision of the French Conseil constitutionnel holding that a statute referring to the Corsican people is unconstitutional under Article 2 of the 1958 Constitution. Law no. 91-428 of May 13, 1991, J.O., May 14, 1991, p. 6318 (portant statut de la collectivité territoriale de Corse); Cons. const. 1991, Dec. No. 91-290.

<sup>33</sup> WG Second Report, *supra* note 31, paras. 132 (Brazil), 134 (Malaysia), 137 (Ecuador). See also *id.*, paras. 133 (Australia), 142 (Japan).

<sup>34</sup> *Id.*, paras. 233 (Brazil), 230 (Malaysia); see also *id.*, para. 239 (Japan).

Norway, Finland, and (more equivocally) Sweden, Brazil and Nicaragua since the mid-1980s; and Russia, Chile, Bolivia, Mexico, Argentina, Guatemala and other states from the late 1980s onward.

Explaining the generality of this largely contemporaneous shift in so many states remains a conjectural enterprise at present. In many states it has been facilitated by political and ideological changes accompanying democratic transitions. Over more than a century appreciable, if spasmodic, parallel shifts have taken place in government policies concerning indigenous peoples among clusters of states in these regions of European settlement. These parallels doubtless reflect similarities in demands of dominant political groups for access to land and resources, and to some extent are a natural consequence of the logics common to similar legal and political systems.<sup>35</sup> It is a plausible hypothesis that the recent shifts were also influenced by such factors as transnational linkages among indigenous peoples, pressures and incentives from international institutions, a degree of borrowing and mimesis, and the incipient emergence of common norms. However, little comparative social scientific work has yet been done on the causal impacts of such factors in this regard or the precise pathways through which they operate.

The dynamics of the international debate about "indigenous peoples" differ from those of the "human rights" debate in that the relation of Western states to indigenous peoples is much more ambivalent than their commitment at least to civil and political rights.<sup>36</sup> Similarly, the transnational connections of indigenous peoples are not quite like those of human rights groups or environmental activists; for different people they involve a commitment to a self-constituted "Fourth World," and much experience with conditions associated with the "Third World," as well as some elements of the more "First World" style of the major transnational NGOs.

It would be a misleading oversimplification to suggest that there is a consensus in the political West, or in the European settler states or the prosperous countries of the Organisation for Economic Co-operation and Development, as to the position of indigenous peoples in national politics and legal systems. First, the view of indigenous peoples as long-existing nations, as ancient collectivities with special entitlements arising from distant historical priority, is resisted by adherents of several of the strands of state nationalism that remain strong in most Western states.

Second, claims of indigenous peoples are presumptively dubious to those liberals who believe ethnic nationalism and ethnicized politics are dangers to be avoided. As a Ukrainian government representative put it, "claims for preferential treatment for indigenous peoples would not contribute to inter-ethnic peace and understanding in any society."<sup>37</sup> A powerful strand of Western liberalism takes the individual as the essential self-determining or at least freely choosing subject, is mistrustful of group-based claims extending beyond nondiscrimination, and calls for neutrality of the state and other social institutions with respect to competing substantive views among groups as to what is good and how to live.<sup>38</sup> Nevertheless, many political theorists in this tradition have resorted to

<sup>35</sup> On parallel legislation concerning individualization of indigenous peoples' land holdings in the United States and several South American states from the 1860s to the 1880s, see Sanders, *supra* note 1. For a comparison between post-1945 evolution of U.S. government policy concerning federal relations with Indian groups in Alaska and Swedish state policy in relation to Sami, showing convergence in the early 1970s and divergence in the 1980s, see Fae L. Kormso, *Empowerment or Termination: Native Resource Rights in Alaska and Swedish Lapland* (1992) (unpublished Ph.D. dissertation, University of New Mexico).

<sup>36</sup> On the human rights debate, see the literature and perspectives considered in Ghai, *supra* note 11; and Daniel Bell, *The East Asian Challenge to Human Rights: Reflections on an East-West Dialogue*, 18 HUM. RTS. Q. 641 (1996).

<sup>37</sup> WG Second Report, *supra* note 31, para. 187.

<sup>38</sup> See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

some conception of "the people" at the least to define the boundaries of a society,<sup>39</sup> and there is a close fit between such "liberal" concepts as the color-blind constitution and some varieties of nationalist projects.

Third, while many members of indigenous peoples are imbued with liberal values, Western liberals have struggled to give coherent accounts of issues posed for liberalism by indigenous peoples.<sup>40</sup> Quite apart from pervasive problems of ignorance and translation, many issues concerning indigenous peoples do not fit readily into structures of liberal thought. In a somewhat murky way, most liberals see something distinctive in "indigenous peoples," something that is not adequately captured in the standard human rights program, though most assert that the human rights program should be applicable, more or less. There are conflicting basic tendencies in contemporary liberal opinion. In one liberal view, indigenous peoples embody premodern cultural forms that are slowly being shed en route to liberal individualism, unmarked modernity and the puzzles of nationalism. In an alternative view, indigenous peoples attest that identity is not simply a matter of individuals and nations, and that life ordered by cosmology, hierarchy and status is still possible and intelligible. Another strand finds in indigenous peoples the possibilities of sustainable development and ecological alternatives to consumptive capitalism. In many settler societies, indigenous peoples are seen as offering something to make the society whole. More legalistic liberal models probe the meaning for indigenous peoples of the ambient society's commitment to equal concern and respect, the realization of pluralism and voice, and the extent of legal structures that value historic claims to property, honor, treaty promises and the righting of old wrongs. Finally, a liberal commitment to transnational civil society often coincides with the expectation that networks of indigenous peoples help to constitute that society, to embed the state through operating in part outside it.<sup>41</sup> At present there is considerable political support among Western liberals for "indigenous peoples," especially those in distant countries; but this support is tempered by unresolved concerns about consistency with other liberal precepts, and these concerns appear quickly in the face of such concrete issues as relations between group autonomy and individual human rights.

#### *Differing Impacts of Colonialism in Asia*

The use of "indigenous peoples" or cognate terms in political discourse, and attitudes of state governments toward the concept, vary considerably among Asian countries. Differences in the impacts and legacies of European, Japanese and United States colonialism, political dynamics, nationalist ideologies, and understandings of history all contribute to this variation. The concept of "indigenous peoples" has multiple lineages. In the era of decolonization, the term was regularly used by Afro-Asian state governments and colonial governments to refer to the non-European majority populations of European colonies in Asia and Africa; the international indigenous peoples' movement draws, in part, on the discourses and legal principles (especially self-determination) given currency by the Afro-Asian decolonization movement.<sup>42</sup> The concept of "indigenous peoples"

<sup>39</sup> E.g., John Rawls, *The Law of Peoples*, in *ON HUMAN RIGHTS* 41 (Stephen Shute & Susan Hurley eds., 1993). For the concept of "the people" in a theoretical explanation of written constitutions as commitments operating over many generations, see Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 *YALE L.J.* 1119, 1143-69 (1995). On the history of "the people" as a concept of U.S. constitutionalism, see EDMUND MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988).

<sup>40</sup> For a variety of approaches, see, e.g., JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (1995); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); and ANDREW SHARPE, *JUSTICE AND THE MAORI: THE PHILOSOPHY AND PRACTICE OF MAORI CLAIMS IN NEW ZEALAND SINCE THE 1980s* (2d ed. 1997).

<sup>41</sup> Benedict Kingsbury, *Whose International Law? Sovereignty and Non-State Groups*, 88 *ASIL PROC.* 1 (1994).

<sup>42</sup> The general association between the Afro-Asian decolonization movement and contemporary UN activity concerning indigenous peoples has become more attenuated, but the anticolonial and antidiscrimination

also has roots in colonial administrators' practice of establishing special laws and policies relating to distinct nonmajority groups. Security and the pursuit of cost-effective, if very rough, governance were often major reasons for establishing inner lines, scheduled areas, frontier zones and other special arrangements,<sup>43</sup> although the conscious motives of such administrators were in some cases also welfarist or religious.<sup>44</sup> In the nineteenth and early twentieth centuries especially, standards of good colonial administration were identified, espoused and disseminated to different parts of the world through metropolitan colonial offices and legislatures, missionary societies, NGOs such as the Aborigines Protection Society, and intergovernmental activity such as the 1884–1885 Berlin Conference and the 1889–1890 Brussels Conference. The impact of this diffusion of norms is evident, for example, in apparently mimetic colonial programs relating to aborigines adopted during Japan's rule in Formosa, which Japanese authorities publicized in a carefully produced English-language publication.<sup>45</sup> Such norms became more formal under the League of Nations mandate system and the rarely invoked provision in Article 23(b) of the League of Nations Covenant requiring just treatment of native inhabitants.

Colonial policies had enduring impacts on understandings of ethnicity and patterns of ethnic relations in postcolonial states.<sup>46</sup> Benedict Anderson defines a polar position in his contention that in contemporary southeast Asia "the politics of ethnicity have their roots in modern times, not ancient history, and their shape has been largely determined by colonial policy."<sup>47</sup> According to this thesis, the concept of ethnic minority was virtually introduced, and many ethnic identities largely created, by the imaginings of European colonial powers concerned in the late nineteenth and twentieth centuries with building majority coalitions to assuage their own vulnerability as minority rulers in an age when majority rule was increasingly a principle of legitimacy. Thus, groups favored by European rulers in the eighteenth century on the ground of having elevated themselves from others through embracing Christianity were by the late nineteenth century favored instead in census-defined ethnics as Moluccans or Karens. Such groups were cast stereotypically as honest and loyal, as opposed to larger and more threatening groups stereotyped as treacherous and feudal. As evidence for the thesis that ethnic classifications were designed to further coalition-building goals of the European colonists, Anderson asserts that in the last years of colonial administration, ethnic minorities were accorded disproportionate numbers of seats in "representative" bodies, these being occupied by individuals likely to act consistently with preferences of the colonial power.

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elements of the indigenous peoples' program have continued to find some resonance with governments of states active in the decolonization movement. For example, the Zambian government stated in 1994 that it

welcomes the establishment of a permanent forum in the United Nations for indigenous peoples. At the international level Zambia has traditionally been a strong supporter of the rights of indigenous peoples. This is evidenced by action taken in respect of the liberation of southern Africa and the eradication of apartheid in South Africa.

UN Doc. E/CN.4/Sub.2/AC.4/1995/7/Add.1. Whether this support will endure if it appears that the concept of "indigenous peoples" is being used to confer international legitimacy on groups and activities within such states is another matter.

<sup>43</sup> E.g., British designation of scheduled tribes and scheduled areas in India, see, e.g., CHRISTOPH VON FÖRER-HAEMENDORF, *TRIBES OF INDIA: THE STRUGGLE FOR SURVIVAL* (1982), scheduled areas in Burma, and the frontier districts subject to the Frontier Crimes Regulations in what is now Pakistan.

<sup>44</sup> See, e.g., VERRIER ELWIN, *INDIA'S NORTH-EAST FRONTIER IN THE NINETEENTH CENTURY* (1959); VERRIER ELWIN, *A PHILOSOPHY FOR NEFA* (Shillong, 2d ed. 1959); and Peter Robb, *The Colonial State and Constructions of Indian Identity: An Example on the Northeast Frontier in the 1880's*, 31 *MOD. ASIAN STUD.* 245 (1997).

<sup>45</sup> FORMOSA, BUREAU OF ABORIGINAL AFFAIRS, *REPORT ON THE CONTROL OF THE ABORIGINES IN FORMOSA* (1911).

<sup>46</sup> For a detailed survey, see DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* (1985).

<sup>47</sup> Benedict Anderson, *Introduction to SOUTHEAST ASIAN TRIBAL GROUPS AND ETHNIC MINORITIES 1* (Cambridge, Mass., 1987). This paragraph and the next focus on Anderson's account, but there is a considerable corpus of literature on histories of colonialism developing similar themes.

The legacy of colonial experiences has been the distinctive identification of "alien" minorities (particularly Chinese, who have been integrated into non-Chinese elites much more easily in uncolonized Thailand than in Indonesia), the presence in many states of local "coalition minorities" with modern and evolving identities who are able to exercise influence in statewide coalition building, and a category of what in international terms might now be called "indigenous peoples." These are "groups which, because they are small in numbers, geographically remote from the political center, marginal to the national economy and lacking in Western education, are insignificant to any conceivable majority."<sup>48</sup> In some cases these groups were mobilized by the colonial power to resist advancing nationalist causes, though more often they were left unincorporated into the coalition-building arrangements. Whether they were wholly unincorporated or belatedly mobilized and ineffectually incorporated, the colonial legacy continues to the present in their pronounced underrepresentation in military officer corps, universities, large state enterprises, private corporations and the senior civil service. Their leverage with the state government and elites is small. One strategy for such groups is to combine forces with other local groups and form a larger ethnic identity, but willingness to do this may be inhibited by the necessity of religious conversion (e.g., to Islam to join the broad Malay identity in Malaysia, to Buddhism to integrate with Thai identity or to Christianity to build other coalitions) and reluctance to accept cultural fusion and a surrender of autonomy.<sup>49</sup> Another possible strategy, pursued in tandem with or instead of this larger-ethnic strategy, is to join the international category of "indigenous peoples." Whether this international movement provides sufficient legitimation and leverage to shape national political outcomes varies with the state and groups involved, but in some circumstances this alternative has begun to prove attractive.

*Attitudes in Asian States and Impacts of International Legal Developments*

Practice within states, including not only governmental and judicial policy but the terms used by civil society organizations and aspiring claimants, is of central importance in shaping the future development of the international concept of "indigenous peoples" and in determining its utility. Recent practice of governments and claimant groups in different Asian states concerning recognition and identities of distinct groups shows wide variation and, in some cases, rapid evolution. In some states, such as the Philippines and Japan, the development of the international concept of "indigenous peoples" has begun to have a political and legal impact. In others the international concept has had little demonstrable impact, but distinct groups are recognized under other conceptual categories and may enjoy entitlements in legal or political practice comparable to those claimed by indigenous peoples elsewhere. In a few states recognition of separate group identities with political and legal status is not accorded or has limited political and legal salience. In many states concerns persist about the ethnicization of politics, disturbing political balances, and the hazards of encouraging or accepting some types of group-based claims. The positions taken by state governments within the United Nations and in dealings with international organizations broadly correspond with policies pursued within the state, although there may be disjunctions where different ministries are handling different aspects of the issue. The following very brief survey of practice within various Asian polities is intended merely to illustrate some of the problems of "indigenous peoples" as a global legal concept, and to indicate its potential as a constructivist concept with a more flexible range of justifications than those it currently encompasses.

<sup>48</sup> *Id.* at 10-11.

<sup>49</sup> *Id.* at 1-11.



*The Philippines.* In relation to indigenous peoples, the process of state formation in the Philippines shows some commonality with experience in the Americas. Spanish colonial rule left a significant number of groups "un-Hispanicized" or "non-Christian," and distinctions of this sort were reinforced by the U.S. regime, which established a Bureau of Non-Christian Tribes and drew on administrative policies relating to Indians in the United States. The category of indigenous cultural communities (ICC), covering between 10 and 20 percent of the population, has become well established in Philippine politics. In the Marcos era, resistance by indigenous groups in northern Luzon to large projects such as the Chico dams (which were eventually canceled) and the Cellophil pulp and processing operations in Abra increased political mobilization among Kalinga, Bontoc, Tinggians and others;<sup>50</sup> these projects were also associated with militarization of the region, considerable brutality and some tribal support for the New Peoples Army.<sup>51</sup> In Mindanao, in-migration and dispossession have long fueled militancy among Lumad and especially Moro groups, but the conflict intensified in the early 1970s with the rise of the Muslim separatist movement. An agreement on autonomy in Mindanao, reached in 1976 under the auspices of the Islamic Conference, was not fully implemented.

The political and legal dynamics of issues concerning indigenous peoples have changed since the Marcos period, and numerous highly effective civil society organizations dedicated to indigenous peoples' causes are flourishing, including the internationally prominent Cordillera Peoples' Alliance and other northern groups, Lumad Mindanaw and several other organizations in Mindanao, and national bodies such as the National Federation of Indigenous Peoples of the Philippines. The 1996 peace agreement in Mindanao establishes a renewed framework for the evolution of regional autonomy, but it is not yet clear that a workable balance has been struck between the majority and the various minorities. Bitter disputes about development projects continue, such as the opposition of Cordillera groups to the Newcrest and Newmont mining explorations, the controversy concerning the operations of Western Mining Corp. in Mindanao,<sup>52</sup> and resistance to forced land sales and the exclusion of indigenous peoples by commercial plantation projects. The international concept of "indigenous peoples" is currently influential, and is accepted by the government as applicable to the ICCs. The 1997 Indigenous Peoples Rights Act amalgamates the Philippine category of ICCs with the international category of indigenous peoples, and was heavily influenced by both the UN draft declaration and ILO Convention No. 169. Full implementation of the ambitious provisions of this statute would be a remarkable feat, although it builds on a preparatory process of issuing Certificates of Ancestral Domain Claims to groups among the ICCs that has proceeded apace for several years, albeit with some problems and unevenness.<sup>53</sup>

*Japan.* Substantial Japanese northward movement in Hokkaido in the Edo and Meiji periods had a major impact on Ainu. An assimilationist philosophy was embodied in the principal Meiji legislation, the Hokkaido Former Indigenous Protection Act of 1899. Until the late 1980s, the government of Japan remained unwilling to accept that Ainu consti-

<sup>50</sup> See, e.g., Richard Dorall, *The Dialectic of Development: Tribal Responses to Development Capital in the Cordillera Central, Northern Luzon, Philippines*, in TRIBAL PEOPLES AND DEVELOPMENT IN SOUTHEAST ASIA 37 (Kuala Lumpur, Lim Teck Ghee & Alberto G. Gomes eds., 1990) [hereinafter TRIBAL PEOPLES].

<sup>51</sup> For a historical survey, see Maria Elena R. Reggala, *Resistance in the Cordillera: A Philippine Tribal People's Historical Response to Invasion and Change Imposed from Outside*, in *id.* at 112.

<sup>52</sup> The Philippine Mining Act of 1995, the 1996 Implementing Rules and Regulations of the Philippine Mining Act, the Financial or Technical Assistance Agreement made with Western Mining, and other instruments were challenged on constitutional and other grounds in judicial proceedings launched in the Philippines Supreme Court in 1996-1997.

<sup>53</sup> See OWEN LYNCH & KIRK TALBOTT, *BALANCING ACTS: COMMUNITY BASED FOREST MANAGEMENT AND NATIONAL LAW IN ASIA AND THE PACIFIC* (Washington, 1995); David Daoas, *The Rights of Cultural Communities in the Philippines*, in " . . . VINES THAT WON'T BIND . . .": INDIGENOUS PEOPLES IN ASIA 97 (Copenhagen, Christian Erni ed., 1997); WG Second Report, *supra* note 31, para. 314.

tuted even an ethnic minority under the International Covenant on Civil and Political Rights.<sup>54</sup> In subsequent years the government acquiesced to interacting domestic and international pressures and abandoned its insistence on the homogeneity of Japan. It has accepted de facto that the Ainu people are a distinct group properly associating themselves with the international indigenous peoples' movement. The 1899 statute was finally replaced in 1997, but this new legislation did not satisfy all concerns expressed by Ainu groups. In particular, while the legislation charts a clearly nonassimilationist policy, it reflects the government's continuing reluctance formally to accept that Ainu should be regarded as "indigenous" or an "indigenous people."

*Malaysia.* In Malaysia a concept of indigeneness features prominently in political discourse as an underpinning for the *bumiputra* (son of the soil) policy. In peninsular Malaysia this policy is designed to maintain and advance the position of Malays. "Malay" is defined in the Constitution as "a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom" and descends from one who at the date of independence had been born in or was domiciled in the Federation.<sup>55</sup> In a separate constitutional category are "aborigines" of the peninsula, usually known collectively as Orang Asli, whose legal status has been regulated (in the exercise of federal rather than state power) primarily by a series of Aboriginal Peoples' Acts.<sup>56</sup> The philosophy of the legislation and of the administration of the relevant government agency, the Jabatan Hal Ehwal Orang Asli, has been protectionist, with some aspiration of long-term assimilation of Orang Asli into Malay communities and very little endorsement of active self-determination. However, since the 1980s Orang Asli organizations, led in particular by members of the growing cadre of Orang Asli who have gone through state educational institutions but supported also by non-Orang Asli, have been increasingly active in urging new approaches and initiatives.<sup>57</sup>

As to East Malaysia, the Constitution identifies a category of "natives" of Sabah and Sarawak, and in the case of Sarawak lists a large number of "races . . . indigenous to Sarawak" who count as "native."<sup>58</sup> This category includes Malays, and formally these "native" groups are on much the same footing as Malays in Malaysia as a whole. In practice, the legal and political dynamics in East Malaysia have differed markedly from those obtaining in the center of federal power on the peninsula, and considerable opposition to deforestation and land alienation has emerged, involving numerous organizations including the Sarawak Indigenous Peoples' Alliance,<sup>59</sup> as well as debate about the direction and effects of rapid economic development.<sup>60</sup> Constitutional recognition of Orang Asli and natives of Sarawak and Sabah as indigenous is in some respects a

<sup>54</sup> Article 27 of the Covenant, Dec. 16, 1966, 999 UNTS 171, refers to ethnic, religious and linguistic minorities. The Japanese government stated in 1980 that "minorities of the kind mentioned in the covenant do not exist in Japan." UN Doc. ICCPR/C/10/Add.1 (1980). In 1988 the government adopted a delicate formulation stating with respect to "the people of the Ainu" that "it is recognized that these people preserve their own religion and maintain their own culture." UN Doc. ICCPR/C/42/Add.4 (1988). See *infra* p. 438.

<sup>55</sup> CONST. Art. 160(2).

<sup>56</sup> For a brief overview, see Sothi Rachagan, *Constitutional and Statutory Provisions Governing the Orang Asli*, in TRIBAL PEOPLES, *supra* note 50, at 101. See also ISKANDAR CAREY, ORANG ASLI: THE ABORIGINAL TRIBES OF PENINSULAR MALAYSIA (1976). The Malaysian Constitution, ninth schedule, allocates "welfare of the aborigines" to the federal power, whereas "native law and custom" is a matter of state power for Sabah and Sarawak.

<sup>57</sup> Several works of Colin Nicholas address this issue, e.g., *In the Name of the Semai? The State and Semai Society in Peninsular Malaysia*, in TRIBAL PEOPLES, *supra* note 50, at 68.

<sup>58</sup> CONST. Art. 161A.

<sup>59</sup> See, e.g., remarks by a leader of this organization, Anderson Muutang Urud, *Statement to the United Nations General Assembly, 10 December 1992*, in VOICE OF INDIGENOUS PEOPLES: NATIVE PEOPLE ADDRESS THE UNITED NATIONS 103 (Santa Fe, N.M., 1994). For a summary by a community organizer from PACOS in Sabah, see Jannie Lasimbang, *Judicial Rights of Indigenous Peoples and Their Relations to the State and Non-Indigenous Peoples: The Case of Sabah*, in VINES THAT WON'T BIND, *supra* note 53, at 109.

<sup>60</sup> Victor King, *Indigenous Peoples and Land Rights in Sarawak, Malaysia: To Be or not To Be a Bumiputra*, in PEOPLES OF ASIA, *supra* note 15, at 289.

continuation of British practice, overlain by the *bumiputra* policy. This policy actively privileges, on grounds of indigenesness, a politically dominant and economically influential Malay group and confers juridical recognition, if more limited practical benefits, on native groups in Sabah and Sarawak where they collectively constitute numerical majorities but wield an uneven degree of political influence and economic power. Against this complex background, it is not surprising that the final position of the Malaysian government on the developing concept of "indigenous peoples" in the United Nations has yet to emerge.

*Thailand.* A category of "hill tribe" people in north and northwest Thailand has been recognized and actively addressed as a subject of government policy since the 1950s, initially in response to concerns about opium cultivation and insurgency related to the Cold War, and more recently as part of forest policy and community development schemes. The complex demography of the hill regions includes many groups who moved into forest areas they now occupy within historical memory, often during the past century, and who came mainly from presentday Burma, Laos, and in some cases China.<sup>61</sup> At present the discourse of "indigenous peoples" appears scarcely to figure in national politics or in claims made by non-ethnic-Thai tribal groups. Nevertheless, many points of similarity can be found between issues in northern Thailand and those arising in other parts of the world. A major concern in northern Thailand is lack of recognized rights to the land that a particular group may have occupied or used for many decades; often the state has purported to obliterate such land claims through the proclamation of forest reserves or national parks.<sup>62</sup> Chayan reports that a 1995 demonstration by hill-tribe people, mainly Karen, against Forest Department programs to depopulate watershed areas and relocate the inhabitants was "the first such event in modern Thai history."<sup>63</sup> In 1992 the government indicated to the United Nations its view that hill tribes are ethnic groups but "are not considered to be minorities nor indigenous people but as Thais who are able to enjoy fundamental rights . . . as any other Thai citizen."<sup>64</sup> However, the government seems not to have taken a final position on the application to Thailand of the international concept of "indigenous peoples."

*Taiwan.* The position of indigenous peoples in Taiwan has changed appreciably with the end of martial law and the democratization of politics, spurring the recent proliferation of indigenous organizations. The impact of these changes is illustrated by the campaign of Yami people against the Taiwan Power Company's use of Lanyu Island to store nuclear waste from power generation. Little progress was made under martial law, but in 1996 Yami succeeded in turning away a ship bringing more waste, and Taipower promised to remove all the waste by 2002.<sup>65</sup> This achievement of such a small group—fewer than four thousand people are officially classified as Yami—reflects the growing political salience of environmental activism in Taiwan, reinforced to some extent by the involvement of international NGOs such as Greenpeace. There are clear connections between the developing international concept of "indigenous peoples" and the political

<sup>61</sup> Some implications of population movements are discussed in Cornelia Ann Kammerer, *Territorial Imperatives: Akha Ethnic Identity and Thailand's National Integration*, in *ETHNICITIES AND NATIONS* 274 (Remo Guidieri, Francesco Pellizzi & Stanley Tambiah eds., 1988).

<sup>62</sup> See the powerful 1973 statement against this government practice by King Bhumibol, quoted in LYNCH & TALBOTT, *supra* note 53, at iii.

<sup>63</sup> Chayan Vaddhanuphuti, *The Present Situation of Indigenous Peoples in Thailand*, in *VINES THAT WON'T BIND*, *supra* note 53, at 79, 83.

<sup>64</sup> Thailand government statement, Hill-Tribe Welfare and Development, UN Doc. E/CN.4/AC.2/1992/4.

<sup>65</sup> Taipower's 1997 proposal to export the waste to North Korea, a country in desperate need of revenue but unlikely adequately to manage such waste, led to strong protests in South Korea and from international NGOs, and caused disquiet among Yami and other campaigning groups in Taiwan. A further contentious issue for Yami arises from plans to turn a cleaned-up Lanyu into a national park, threatening to limit Yami economic opportunities and to promote a commodity-oriented tourist culture.

and legal demands of some groups in Taiwan,<sup>66</sup> although many of the most active groups within Taiwan do not seem to attach great importance to the international concept. The most frequent participant in international gatherings of indigenous peoples has been the Alliance of Taiwan Aborigines (ATA), organized in 1984. It has met with mixed success in its objective of coordinating political action among the nine major indigenous groups, whose combined populations by official estimates exceed 350,000.<sup>67</sup> Campaigns have focused on such issues as land rights and land use, political status and representation, education, cultural protection and autonomy, economic opportunities, sexual exploitation of women and girls, and names. The requirement to Sinify personal names was reversed by the Taiwan authorities in 1995. In 1994 the Constitution of the Republic of China was amended to excise references to *shan-pao* (mountain compatriots, also *shan-ti tung-pao*); the official constitutional usage is now *yuan-chu min* (the people who lived here first). The ATA has made a similar argument in the United Nations Working Group on indigenous populations, challenging the UN translation of "indigenous peoples" as *tuzu renmin*. This usage is apparently supported by the People's Republic of China (PRC) in the United Nations, but is widely regarded as connoting "primitive" or "low cultural level." The ATA has urged the United Nations to adopt *yuanzu minzu* (indigenous peoples) or *yuanzu min* (indigenous people) instead.<sup>68</sup>

*Bangladesh.* The major questions shaping attitudes toward the concept of "indigenous peoples" in Bangladesh relate to the Chittagong Hill Tracts (CHT). From the early 1970s a government program to resettle in the CHT large numbers of people from other parts of Bangladesh has encountered fierce resistance by members of tribal groups who regard the land as theirs and see their economic circumstances deteriorating in the transformation from swidden agriculture to plantation wage labor. The conflict became heavily militarized, causing large refugee flows and numerous deaths before a peace agreement was finally reached in December 1997.<sup>69</sup> Deliberately isolated from Bengali settlement during British rule, the diverse groups who have long inhabited the area have sought to build unity among themselves in the face of increasing interactions with the Pakistani and Bangladeshi states and massive Bengali settlement. This unity has been constructed around the term *jumma* as a new collective self-designation of these inhabitants of the CHT, and there are now frequent references among CHT people to the Jumma people or the Jumma nation. In Van Schendel's assessment, *jumma*, "[a]n old pejorative term for a swidden cultivator in the Chittagonian dialect of Bengali," was appropriated by the Jana Samhati Samiti (the main nonsettler CHT political organization, whose military wing is the Shanti Bahini) "in an attempt to unify all the hill people under one social umbrella."<sup>70</sup> Externally, however, the issues raised by the CHT groups are increasingly being couched as issues of indigenous peoples. As one CHT activist put it prior to the peace agreement:

<sup>66</sup> See, e.g., Alliance of Taiwan Aborigines, I Chiang & Lava Kau, *Report on the Human Rights Situation of Taiwan's Aborigines*, in PEOPLES OF ASIA, *supra* note 15, at 357.

<sup>67</sup> Also increasingly active are the Union of Native Taiwanese Villages, founded in 1994, and other social movements.

<sup>68</sup> Statement by the Delegation of Taiwan Aborigines, United Nations Working Group on indigenous populations, 11th Sess. (July 1993) (mimeo, UN files). Although the Romanization differs, the Chinese characters in *yuan-chu min* and *yuanzu min* are identical.

<sup>69</sup> Peace Agreement between the Government of Bangladesh National Committee on Chittagong Hill Tracts Affairs and the Parhatya Chattagram Jana Sanghati [Samhati] Samiti, Dec. 2, 1997, DAILY STAR (Dhaka), Dec. 3, 1997 (Eng. trans.). On the conflict, see CHITTAGONG HILL TRACTS COMMISSION [a nongovernmental outside group], *LIFE IS NOT OURS: LAND AND HUMAN RIGHTS IN THE CHITTAGONG HILL TRACTS, BANGLADESH* (London, 1991). The Peace Agreement is opposed by the main opposition Bangladesh Nationalist Party.

<sup>70</sup> Willem Van Schendel, *The Invention of the "Jummas": State Formation and Ethnicity in Southeastern Bangladesh*, in PEOPLES OF ASIA, *supra* note 15, at 121, 139. Van Schendel notes, at 139: "It is remarkable that this term was adopted at a time when many hill people had been forced to give up swidden cultivation."

The Government of Bangladesh does not recognize us as indigenous peoples in the constitution. We have no constitutional rights as indigenous peoples. The government is very carefully trying to avoid the international recognition of indigenous peoples in Bangladesh. The constitution has recognized the rights of citizens in general, but we have clear linguistic, cultural and socio-political distinctiveness from the majority Bengali people. That is why we want the right to a "separate status" in the constitution as indigenous peoples.<sup>71</sup>

The peace agreement concluded under the Awami League administration accords some recognition to "tribal" groups in the CHT, who together are allocated the majority of seats in the new Regional Council. Whether this will affect Bangladesh's position in UN negotiations concerning "indigenous peoples" is not yet clear.

Like that of Bangladesh until 1997, the government of Burma/Myanmar has been engaged in military conflicts with ethnically based groups for almost all of the country's postindependence history. Myanmar, like Bangladesh, has argued against any United Nations definition that would legitimate claims by particular south Asian ethnic groups to be "indigenous peoples."<sup>72</sup> The most fully elaborated of these arguments have been made by the governments of India and China, and these will now be examined.

*Arguments against Applicability of "Indigenous Peoples" to Asia*

Since the establishment of the UN Working Group on indigenous populations in 1982, India has espoused the position that the concept of "indigenous peoples" does not apply within its borders.<sup>73</sup> In recent years, the People's Republic of China has taken assertive public positions against the applicability of the concept in China. In legal terms, the major controversy in the United Nations concerns the proposed requirement of historical continuity with a preinvasion or precolonial society established on the territory. Maintenance of a strict requirement of such continuity—a requirement that owes at least part of its inspiration to perceptions and experience in areas of European settlement—would be likely both to complicate and to restrict,<sup>74</sup> without altogether excluding, the applicability of the concept of "indigenous peoples" in other parts of the world.

The precise grounds for opposition among Asian governments vary and have not all been made fully explicit. At least three kinds of arguments are involved: definitional, practical and policy. The definitional arguments are lexical, resting on a view of "indigenous" as entailing prior occupancy, and stipulational, associating "indigenous peoples" with the deleterious effects of European colonialism. The practical argument is that it is impossible or misleading to seek to identify the prior occupants of countries and regions with such long and intricate histories of influx, movement and melding. The policy argument is the powerful one that recognizing rights on the basis of prior occupation for particular sets of groups will spur and legitimate mobilization and claims by a vast range of groups, undermining other values with which the state is properly concerned.

<sup>71</sup> Sanchay Chakma, *The Legal Rights Situation of the Indigenous Peoples in Bangladesh*, in VINES THAT WON'T BIND, *supra* note 53, at 151. Chakma, a student in Dhaka, is General Secretary of the Greater Chittagong Hill Tracts Hill Students' Council.

<sup>72</sup> U Win Mra, Statement on Behalf of the Delegation of Myanmar to the United Nations Working Group on Indigenous Populations (July 31, 1991) (UN files, mimeo). Members of Karen and other groups in Burma have participated in UN fora and other international activities relating to indigenous peoples. See, e.g., the statement by a Chin student, Zo Tum Hmung, *The Juridical Rights of the Indigenous Peoples in Burma*, in VINES THAT WON'T BIND, *supra* note 53, at 89. However, this participation has been modest in relation to the numerical size of such groups and the scale of the issues involved. The impact in Burma of the international concept of "indigenous peoples" does not appear to have been great. On the conflicts in Burma, see BURMA: THE CHALLENGE OF CHANGE IN A DIVIDED SOCIETY (Peter Carey ed., 1997).

<sup>73</sup> See, e.g., Lakshmi Puri, Statement on Behalf of the Delegation of India to the United Nations Working Group on indigenous populations (Aug. 12, 1983) (UN files, mimeo).

<sup>74</sup> Alternatively, the Bangladesh government has argued that all Bangladeshis are indigenous people who existed in the territory prior to British colonization and are now, fortunately, liberated.

*Definitional arguments.* The views of the PRC government on the meaning of the concept of "indigenous peoples" are exemplified by its 1995 comments concerning a draft UN declaration, quoted above.<sup>75</sup> China's position is that the concept is inextricably bound up with, and indeed a function of, European colonialism. This is in one way a continuation of the UN General Assembly's practice of treating the entire nonsettler or non-European population of European colonies (e.g., the entire local population of Mozambique under Portuguese rule) as indigenous peoples. In this respect, indigenous peoples are those who, not having obtained liberation from European rule, are continuing victims of sufferings caused by the settlers' colonialism—the losers, in a sense, in the formation by Europeans of states outside Europe. China has thus supported in general terms a definition under which indigenous peoples were "living on their lands before settlers came from elsewhere; . . . descendants . . . of those who inhabited a country or a geographic region at the time when peoples of different cultures or ethnic origins arrived, the new arrivals becoming dominant through conquest, occupation, settlement or other means."<sup>76</sup>

India, Bangladesh and Myanmar have made similar arguments, stressing that indigenous peoples are descendants of the original inhabitants who have suffered from conquest or invasion from outside.<sup>77</sup> While these arguments do not refer expressly to the notion of "saltwater colonialism," used by the Group of 77 developing nations to distinguish European colonialism from practices by non-Europeans that might share some characteristics with it, China's approach strongly suggests that the "historical misfortunes of indigenous peoples" that set them apart are the misfortunes of saltwater settler colonialism. China's position is in one sense a continuation of the rejection by G-77 states of the "Belgian thesis," an assertion in the early 1950s that United Nations scrutiny of treatment of nonautonomous peoples under Chapter XI of the UN Charter should not be confined to the indigenous inhabitants of European colonies, but ought to extend to indigenous peoples in independent states, who were just as deserving of international protection. Peoples in many of the anticolonial states, including India, Indonesia, the Philippines and the Soviet Union, were described by Belgium as falling within this category.<sup>78</sup> The Belgian thesis was plausibly regarded at the time as a somewhat cynical aspect of the rearguard defense of European colonialism.<sup>79</sup>

Implicit in the contemporary position of China and other Asian states is the suggestion that the attempt to impose the concept of "indigenous peoples" upon various states in the region is a form of neocolonialism. In this view, the concept, which was made relevant and necessary in Western states (including Latin America) by the enduring human consequences of the European incursion and settlement that gave these states much of their present form and character, is now applied at the initiative of many of these same states to Asian states that either staved off Western colonialism or rid themselves of its most direct effects in the struggle for decolonization.

*Practical arguments.* Building on the notion of indigenous peoples as the peoples who came first (or at least earlier than the others who are now dominant), representatives of the government of India have made the practical argument that the concept cannot

<sup>75</sup> PRC Consideration, *supra* note 17.

<sup>76</sup> *Id.*; see also WG Second Report, *supra* note 31, para. 106; Report of the Third Session of the Working Group Established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, UN Doc. E/CN.4/1998/106, para. 37 (1997).

<sup>77</sup> Government of India, Observations, UN Doc. E/CN.4/Sub.2/1984/2/Add.2; Government of Myanmar, Observations, UN Doc. E/CN.4/Sub.2/1989/33/Add.1. For Bangladesh, see Report of the Working Group on indigenous populations on its fourteenth session, UN Doc. E/CN.4/Sub.2/1996/21, para. 34.

<sup>78</sup> BELGIAN GOVERNMENT INFORMATION CENTER, THE SACRED MISSION OF CIVILIZATION: TO WHICH PEOPLES SHOULD THE BENEFITS BE EXTENDED? THE BELGIAN THESIS (1953).

<sup>79</sup> INIS-L. CLAUDE, NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM 172 (1955).

apply there because, after centuries of migration, absorption and differentiation, it is impossible to say who came first. (This position is echoed in China's argument that all of the nationalities in China have lived there for aeons.) Thus, in 1991 the representative of India in the Working Group on indigenous populations commented that most of the tribes in India share ethnic, racial and linguistic characteristics with other people in the country, and that three to four hundred million people there are distinct in some way from other categories of people in India.<sup>80</sup>

Prescription of ethnicity by administrative fiat or self-designation involves numerous problems and is open to much criticism, and there are difficult cases under any approach. Nonetheless, it has proved possible as a practical matter to enumerate detailed lists of scheduled tribes under the fifth and sixth schedules to the Indian Constitution; these constitutional categories have provided a practical starting point for identification of groups to whom policies of international agencies relating to "indigenous peoples" have been applied in India.<sup>81</sup> Similarly, in China, in a major project conducted largely in the 1950s, the Nationalities Commission has identified fifty-five minorities to whom various preferential policies are supposed to apply.<sup>82</sup> Whether this was as much a process of enumerating preexisting groups as of creating identities in accordance with particular historico-political views, and what the effects of distinctive treatment have been, are serious questions, but of policy rather than practicalities. This is not to downplay the practical problems, which in many areas may be severe. But the practical objections seem to respond to the imposition of a foreign concept to which strong policy objections are made.

*Policy arguments.* The Indian government's position contains an implied argument that a forensic inquiry into who appeared first in India would be unhelpful and undesirable, for two reasons. First, some groups meriting special protection would be excluded, while others not in need of such protection might be included. Second, recognition of special rights and entitlements for having been the earliest or original occupants might spur and legitimate chauvinist claims by groups all over India, many of which might be very powerful locally while in some sense "nondominant" nationally. Claims to historical priority already feature in some "communal" conflicts, and incipient chauvinist movements abound, as with the pro-Marathi, Hindu-nationalist Shiv Sena party in Maharashtra.<sup>83</sup> In effect, if some people are "indigenous" to a place, others are vulnerable to being targeted as nonindigenous, and groups deemed to be migrants or otherwise subject to social stigma may bear the brunt of a nativist "indigenist" policy. Once indigenism or "sons of the soil" becomes the basis of legitimation for a politically or militarily dominant group, restraints on abuses of power can be difficult to maintain.<sup>84</sup>

<sup>80</sup> Prabhu Dayal, Statement on Behalf of the Delegation of India to the United Nations Working Group on indigenous populations (July 31, 1991) (UN files, mimeo).

<sup>81</sup> CONST. Arts. 244, 342; and numerous presidential designating orders, e.g., Constitution (Scheduled Tribes) Order 1950. On some of the complexities of these categories in practice, see MARC GALANTER, *Group Membership and Group Preferences in India*, in LAW AND SOCIETY IN MODERN INDIA 108 (1989).

The constitutional classifications of "scheduled tribes" and "tribal areas" are utilized explicitly by the World Bank Group in the International Development Association-Government of India Development Credit Agreement, Dec. 22, 1994, for the India: Andhra Pradesh First Referral Health System Project (C2663), Art. I & schedule 2, pt. C. They are utilized implicitly by the same parties in requirements that the borrower ensure implementation of a "Tribal Development Plan" (this being a mutually acceptable means to satisfy the World Bank's internal policy requirement for an Indigenous Peoples Development Plan) in the Agreement, Mar. 9, 1994, for the India: Andhra Pradesh Forestry Project (C2573), schedule 2, pt. B; and the Agreement, Aug. 12, 1993, for the India: Rubber Project (C2409), Art. III §3.08.

<sup>82</sup> For consideration of some of the consequences of this process, see CULTURAL ENCOUNTERS ON CHINA'S ETHNIC FRONTIERS (Stevan Harrell ed., 1994).

<sup>83</sup> MARY FAINSDOT KATZENSTEIN, ETHNICITY AND EQUALITY: THE SHIV SENA PARTY AND PREFERENTIAL POLICIES IN BOMBAY (1979); Clare Talwalker, *Shivaji's Army and Other "Natives" in Bombay*, 16 COMP. STUD. S. ASIA, AFR. & MIDDLE E. 114 (1996).

<sup>84</sup> See HOROWITZ, *supra* note 46, at 201-16.

This has been a crucial issue in the national politics of states such as Malaysia and Fiji, and is a potential source of bitter division in many other polities. Strong policy arguments militate against legitimating the opening of fissures that may engulf an entire society in violence and intimidation. Perhaps because of the sensitivity of what it involves, this second point is not often developed explicitly in government statements, but it seems to have animated India's long-standing concern to keep the concept of "indigenous peoples" at a safe distance.

Even in societies that do not face imminent risks of division and heightened violence through legitimation of one powerful group as against others, the active privileging of the historically prior inhabitants carries risks. More recent arrivals, or seasonal migrant working families who themselves live at the very margins, can be lost from view in public policy and legal advocacy. Enthusiasm for the local and the historical can undercut desirable arrangements for taking some decisions at other levels to protect other deserving interests, and for valuing innovative and hybrid forms that do not qualify as traditional.

All these considerations underpin the point that a functional concept of "indigenous peoples" applicable in all regions will be viable only if it is broad enough to permit of alternative justifications. A concept that depends wholly on arguments of priority in time and historical continuity from ancient times to the present may work well enough in some regions but is unlikely to be adequate and workable in all regions.

### III. INTERNATIONAL LEGAL NORMS AND "INDIGENOUS PEOPLES"

Many claims made by indigenous peoples or their members do not depend directly on any particular status of the group as an "indigenous people," and juridical responses to these claims likewise need not depend on an exact definition of "indigenous peoples" or cognate categories. Claims involving indigenous peoples may draw on the law of the sea;<sup>85</sup> the law of treaties;<sup>86</sup> the law of diplomatic protection;<sup>87</sup> rules pertaining to title to territory;<sup>88</sup> international environmental law;<sup>89</sup> procedural doctrines such as those relating

<sup>85</sup> E.g., *Muriwhenua Fisheries*, Wai-22 (Waitangi Tribunal, NZ, 1988).

<sup>86</sup> E.g., the "Lapp Codicil" to the Norway-Sweden Treaty of 1751, discussed by the SAMERETTSUTVALGET [Norwegian Sami Rights Committee], OM SAMENES RETTSSTILLING (NOU No. 18, 1984).

<sup>87</sup> E.g., *Cayuga Indians* (Gr. Brit. v. U.S.), 6 R.I.A.A. 173 (1926).

<sup>88</sup> Some of the issues are discussed in José Woehrling, *Les Revendications du Canada sur les eaux de archipel de l'Arctique et l'utilisation immémoriale des glaces par les Inuit*, 30 GER. Y.B. INT'L L. 120 (1987); and W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AJIL 350 (1995).

<sup>89</sup> A prominent example of transnational environmental litigation in Australia relates to harm to the Ok Tedi and Maun Rivers and to the well-being of local people arising from the operation, by a company partly owned and controlled by the Australian mining company BHP, of the Ok Tedi mine in Papua New Guinea. Preliminary rulings in the Supreme Court of Victoria in 1995 struck out some of the plaintiffs' causes of action but left open a possibility that the case would reach a trial on the merits. *Dagi v. BHP* (No. 2), [1997] 1 V.R. 428; *Dagi v. BHP* (Nov. 10, 1995) (Byrne, J.), 1995 VIC LEXIS 1182. Following public pressure on BHP and the company's alleged involvement in a proposal to amend Papua New Guinea's criminal law to prevent civil suits in Australia, see [1996] 2 V.R. 117, a settlement was reached in 1996 under which BHP paid compensation and took ameliorative measures in the affected areas. An example of increasingly frequent cases in which environmental and human rights arguments are combined is opposition to the Freeport-McMoRan mining and metal milling operation at Grasberg, West Irian. The western portion of Papua, a generally Melanesian area colonized by the Netherlands but not greatly developed under Dutch rule, was incorporated into Indonesia only during the 1960s, by which time a distinctive self-identity had begun to evolve. Armed conflict continues on a limited scale between the Indonesian army and the Free Papua Movement (Organisasi Papua Merdeka). Civil conflicts connected in some way to the Grasberg project have been frequent, and concerns about human rights abuses and environmental problems have been expressed within Indonesia by groups such as the Indonesian Human Rights Commission and church organizations; but the main pressure has come from outside. The U.S. government investment promotion agency, the Overseas Private Investment Corp., terminated its political risk guarantee to Freeport in 1995, reinstating it temporarily in 1996 with some encouragement from environmental NGOs keen to see Freeport held to stronger environmental conditions. Lawsuits against Freeport-McMoRan alleging human rights violations and breaches of international environmental obligations were filed in state and federal courts in Louisiana (where Freeport's corporate head office is



to estoppel, acquiescence, good faith, abuse of rights and laches;<sup>90</sup> and a host of other principles and rules of general international law.

Three well-established structures of general international law are used with great frequency in claims involving indigenous peoples: human rights, minority rights and self-determination.<sup>91</sup> Thus, claims arising from slavery, genocide, discrimination, infant malnutrition and pollution of water supplies are cognizable under the general international law of human rights.<sup>92</sup> Claims against state action preventing the practice and enjoyment of a group's religion, culture and language draw upon international law standards concerning minorities. In current international negotiations, general claims by indigenous peoples to self-determination are often based not on particular rights of *indigenous* peoples, but on entitlements that pertain, it is argued, equally to all peoples; proponents frequently argue that the most deep-seated problem for indigenous peoples in contemporary international law is unjustified discrimination with respect to enjoyment of the right to self-determination.<sup>93</sup>

Yet, when tested in practice, many of the issues raised as matters of human rights or minority protection or self-determination display distinctive elements vis-à-vis indigenous peoples. Among these distinctive elements, four in particular may be noted: the central importance of land and territory to group identity and culture; the emerging view of self-determination in relation to indigenous peoples as referring more often to autonomy and control of the group's own destiny and development than to formation of independent states; the development of norms concerning participation by the group and its members in decisions affecting them; and the increasing support for self-identification as a basis of group definition. These four sets of norms, and the practices of claim, application and contestation relating to them, implicate some of the main justifications for "indigenous peoples" as a distinct legal category.

#### *Land and Culture*

The special relations of many indigenous peoples to land is a recurrent theme in reports of international human rights institutions, which focus on such matters as racial and cultural discrimination in state treatment of indigenous peoples' land rights,<sup>94</sup> the violence associated with attempts to dispossess indigenous groups of land, the social and economic deprivation that results from dispossession, and the problems of securing and

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located) in 1996 and 1997. *Yosofa Alomang v. Freeport-McMoRan*, 1996 U.S. Dist. LEXIS 15,908 (E.D. La. Oct. 17, 1996) (declining Freeport's motion to remove the case from state court to federal court); *Tom Beanal v. Freeport-McMoRan*, 1997 WL 178,637 (E.D. La. Apr. 10, 1997) (dismissing plaintiff's claim). An amended complaint was thereafter filed in the latter case in which an Amungme tribal organization, Lembaga Musyawarah Adat Suku Amungme, was also a plaintiff, but problems in the pleading of the plaintiffs' claims in this case continued. 1997 U.S. Dist. LEXIS 12,001 (E.D. La. Aug. 8, 1997).

<sup>90</sup> Some such procedural issues were considered in *Cayuga Indians*, 6 R.I.A.A. 173 (1926).

<sup>91</sup> Benedict Kingsbury, *Claims by Non-State Groups in International Law*, 25 CORNELL INT'L L.J. 481 (1992).

<sup>92</sup> An example is litigation concerning the projected Yadana natural gas pipeline, which runs from the Yadana offshore field under the Andaman Sea and through the Tenasserim region of Burma to the Thai border, where it will meet projects on the Thai side. The onshore portion passes through areas populated by non-Burman ethnic groups that have often been in conflict with the military regime, and opposition to the pipeline is bound up with opposition to the regime. A civil suit brought in the United States against the oil company Unocal and other defendants focused not on issues particular to indigenous peoples but on general human rights violations related to the project, particularly forced relocation and the use of forced labor. *Doe v. Unocal*, 963 F.Supp. 880 (C.D. Cal. 1997). See also the similar but separate proceedings, with different plaintiffs' lawyers, in *National Coalition of Union of Burma v. Unocal*, 176 F.R.D. 329 (C.D. Cal. 1997).

<sup>93</sup> This is the view taken by Erica-Irene Daes, *Dilemmas Posed by the UN Draft Declaration on the Rights of Indigenous Peoples*, 63 NORDIC J. INT'L L. 205 (1994); Erica-Irene Daes, *Equality of Peoples under the Auspices of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, 7 ST. THOMAS L. REV. 493 (1995).

<sup>94</sup> E.g., Committee on the Elimination of All Forms of Racial Discrimination, Concluding Observations: Mexico, UN Doc. A/50/18, paras. 353-98 (1996).

regaining enforceable rights to land and territory.<sup>95</sup> The close connections between the cultures of indigenous peoples and issues of use and control of land and natural resources have been recognized as adding a different dimension to minority rights decisions under Article 27 of the International Covenant on Civil and Political Rights (ICCPR). In its final views in the *Lubicon Lake Band* case, the Human Rights Committee opined that a violation of Article 27 was entailed because the band's way of life and culture were threatened by a combination of the inequitable historical failure to assure the band a land base to which it had a strong claim, and current large-scale extractive resource development by outsiders, which together are associated with miserable economic and social conditions of band members.<sup>96</sup>

National tribunals have followed this interpretation of Article 27 in cases involving indigenous peoples.<sup>97</sup> The Sapporo District Court held in 1997 that, in taking Ainu lands for a dam on the Saru River in Hokkaido, the government had failed to meet the duty under Article 27 to consider the impact on Ainu culture. The court's finding that the article created obligations cognizable in a Japanese court was consistent with other lower court decisions on the ICCPR in Japan, although the status of the Covenant in general and Article 27 in particular in Japanese law has not yet been conclusively settled. For present purposes, the notable feature of the decision is that the court did not regard it as sufficient simply to determine that Ainu are a minority under Article 27 (a view the Japanese government now accepts), but made the further finding that Ainu are an indigenous people (a view not currently accepted by the Japanese government). Apparently drawing its understanding of "indigenous peoples" (*senju minzoku*) from international instruments, particularly ILO Convention No. 169, the court found:

The Ainu people are the original inhabitants of Hokkaido and its adjacent areas and constituted a distinct culture before Japan extended jurisdiction over their land. Their land was incorporated by the Japanese government and they suffered economic and social dispossession under the governmental policies imposed by the majority Japanese. Even under these circumstances, the Ainu still maintain their distinct identity as an ethnic group. Thus, they may well be regarded as indigenous people.<sup>98</sup>

In making this finding, the court may have intended to pave the way for further legal recognition of rights held by Ainu but not accorded to other minorities.

#### *Self-Determination*

Notwithstanding the strong rhetorical and textual support for the proposition that self-determination is an equal right of all peoples, the reality is that during European decolonization international law was concerned less with "peoples" as social collectivities than with "peoples" as juridically defined groups associated with territorial units. Real

<sup>95</sup> See, e.g., Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Brazil 93-113, OEA/Ser.L/V/II.97 (1997).

<sup>96</sup> Communication No. 167/1984, *Ominayak v. Canada*, UN Doc. A/45/40, Annex IX.A, at 27 (1990). See also Communication No. 197/1985, *Kitok v. Sweden*, UN Doc. A/43/40, at 221 (1988). In its General Comment on Article 27, the Committee observed that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law." General Comment No. 23(50), UN Doc. A/49/40, Annex V, at 109 (1994).

<sup>97</sup> E.g., *Kasivarsi Reindeer Herders' Cooperative v. Ministry of Trade & Industry* (Sup. Admin. Ct., Fin., May 15, 1996) (slip op. trans. Heljä Tilli & Martin Scheinin). The court held that the Ministry's decisions to issue a mining company certain deeds enabling mining in Sami reindeer-herding areas should be quashed for failure to consider the legal obligations of Finland arising from Article 27 of the ICCPR, and that reindeer herding was part of Sami culture under Article 27.

<sup>98</sup> *Nibutani Dam Jiken Hanketsu [Kayano & Kaizawa v. Government of Japan]*, HANREI JIHO, No. 1598, 1997, at 33 (Sapporo Dist. Ct. Mar. 27, 1997). This translation is an amalgam of work by Professors Sonohara Toshiaki, Hosokawa Komei, and Oota Hiroyuki. For commentary, see Sonohara Toshiaki, *Toward a Genuine Redress for an Unjust Past: The Nibutani Dam Case*, MURDOCH ELECTRONIC L.J., June 1997.

engagement with the interests and aspirations of social collectivities involves a much more complex actualization of self-determination than the law of decolonization has established. The claims made by indigenous peoples and the development of practical resolutions in a myriad of cases involving these groups are beginning to contribute to normative development in this area.<sup>99</sup> A few examples may illustrate how the practice and meaning of self-determination are evolving in response to the claims and circumstances of indigenous peoples. In the Philippines, the Indigenous Peoples Rights Act of 1997 provides for recognition of communal and individual rights of indigenous peoples to ancestral lands and ancestral domains, continued state support for autonomy arrangements in the Cordilleras and Mindanao, and the recognition by the state of "the inherent right of ICCs/IPs to self-governance and self-determination," and thus "the right of ICCs/IPs to freely pursue their economic, social and cultural development" within the framework of the Constitution and national unity and development. In Canada, claims settlement agreements between state authorities and indigenous peoples have incorporated increasingly extensive commitments to self-government for indigenous groups. In Australia, the 1997 report of a government commission on the ordeals of thousands of aboriginal children deliberately removed from aboriginal families over the past century recommended that self-determination for aboriginal people be a core principle for the future.<sup>100</sup> In each case, self-determination is envisaged as operating within existing states.

#### *Participation and Consultation*

Closely related to self-determination is the question of the ability of indigenous peoples to shape decisions affecting them. The 1989 ILO Convention No. 169 on Indigenous and Tribal Peoples, which has been strongly criticized by indigenous groups and other advocates for not referring to the right of self-determination and for focusing more on duties of states than rights of indigenous peoples,<sup>101</sup> has nevertheless had an impact on this question by providing that indigenous and tribal peoples "shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use."<sup>102</sup> In February 1997, the Colombian Constitutional Court, in a decision on oil operations affecting U'Wa people, held that an exploration license should not have been granted because the indigenous people had not been properly consulted, contrary to the right of participation contained in the Colombian Constitution and in ILO Convention No. 169.<sup>103</sup> The 1993 UN Draft Declaration on the Rights of Indigenous Peoples goes further than Convention No. 169, asserting:

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources,

<sup>99</sup> See S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROB. 131 (1993); Russel Lawrence Barsh, *Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force*, 18 HUM. RTS. Q. 782, 796-800 (1996); Erica-Irene Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROB. 1 (1993); Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1 (1993); Catherine Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199 (1992); Benedict Kingsbury, *Self-Determination and "Indigenous Peoples"*, 86 ASIL PROC. 383 (1992); MODERN LAW OF SELF-DETERMINATION (Christian Tomuschat ed., 1993); Mary-Ellen Turpel, *Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 CORNELL INT'L L.J. 579 (1992).

<sup>100</sup> HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME (1997).

<sup>101</sup> For a forceful statement of this view, see Howard Berman, *Indigenous Peoples and the Right to Self-Determination*, 87 ASIL PROC. 190 (1993).

<sup>102</sup> ILO Convention No. 169, *supra* note 19, Art. 7.

<sup>103</sup> Petition of Jaime Córdoba Triviño, Defensor del Pueblo, en representación de varias personas integrantes del Grupo Etnico Indígena U'Wa, Sentencia No. SU-039/97 (Corte constitucional, Feb. 3, 1997).

including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.<sup>104</sup>

The central importance to indigenous peoples of involvement in decision making, of having weight attached to their viewpoints and concerns, is often undervalued in popular Western imagery of these peoples as victims of "development,"<sup>105</sup> and in some of the more romantic attachments to cultural diversity and saving indigenous peoples from "vanishing." In some cases indigenous peoples may have cause to feel themselves victims as much of "conservation" as of "development"—when confronted, for example, with the restrictions on swidden agriculture introduced in most Southeast Asian countries, the displacement of people to make room for national parks, the blanket protection of depleted wildlife stocks, the denial of access to minor forest produce to prevent deforestation. But in either case the imagery of passive victims living at one with nature and beset by unwelcome modernity is misleading as a general account of the practices and aspirations of many of the groups participating in the indigenous peoples' movement. Most of these groups are active agents and practitioners of "development" and "conservation," and they vary considerably in their practices and attitudes relating to resource exploitation and environmental maintenance.<sup>106</sup> This reality is explicitly recognized in programs ranging from community forestry and biodiversity maintenance to opium crop substitution and peoples-and-parks. Nevertheless, while aspirations for self-determination and a substantial role in development decisions seem to be widely shared by indigenous groups, they are often far from being realized in practice. There remains, in Asia as elsewhere, a gulf between the self-determination advocated by indigenous peoples in the United Nations—or even the doctrines of consultation, participation and choice espoused in some international institutions—and the actual experiences of indigenous peoples with externally driven development and conservation.

### *Self-Identification*

The historical experience of many such groups of being defined, disparaged or treated as nonexistent by others adds to the strength of arguments by indigenous peoples for self-identification as the essential solution to the problem of definition. Self-identification is also buttressed by the ethos of self-determination. ILO Convention No. 169 provides that self-identification as indigenous or tribal is a "fundamental criterion" for determining the groups to whom the Convention applies, and a similar statement appears in the Draft American Declaration on the Rights of Indigenous Peoples proposed by the Inter-American Commission on Human Rights.<sup>107</sup> The diametrically opposed approach adheres to the traditional view of indigenous peoples as objects of international law, to be

<sup>104</sup> UN Doc. E/CN.4/Sub.2/1993/29, Annex 1.

<sup>105</sup> E.g., JOHN H. BODLEY, *VICTIMS OF PROGRESS* (2d ed. 1990); and *TRIBAL PEOPLES AND DEVELOPMENT ISSUES: A GLOBAL OVERVIEW* (John H. Bodley ed., 1988).

<sup>106</sup> For a mixture of assessment and advocacy, see PETER BROSIUS, *AFTER DUWAGAN: DEFORESTATION, SUCCESSION AND ADAPTATION IN UPLAND LUZON, PHILIPPINES* (Ann Arbor, 1990); *THE STRUGGLE FOR LAND AND THE FATE OF THE FORESTS* (Penang, Marcus Colchester & Larry Lohmann eds., 1994); and *INDIGENOUS PEOPLES AND PROTECTED AREAS* (London, Elizabeth Kemp ed., 1993). The image of indigenous peoples as active consumers is evident in advertising in many of the places where the cash economy and mass commercial communication reach. See, e.g., *NATION MAKING: EMERGENT IDENTITIES IN POSTCOLONIAL MELANESIA* (Robert J. Foster ed., 1995), and Foster's forthcoming work on advertising in Papua New Guinea and other parts of Melanesia.

<sup>107</sup> OAS Doc. OEA/Ser.L/V/II.95, doc. 6, Art. 1(2) (1997).

defined either by criteria formulated by states or through recognition by states. The government of the People's Republic of China has advocated a position of this sort.<sup>108</sup> The antinomy between self-identification and state recognition obscures distinctions among the situations in which problems of identification arise. The general right of each indigenous people to recognition as a distinct group defined in terms of its conception of itself in relation to other groups is increasingly accepted among states, although national legislation is highly variable on this issue, and states frequently take active positions when controversies over identity arise between or within groups. A power to determine at the intergroup or international level which groups are indigenous peoples, through either general rules or specific decisions, has also been claimed by many indigenous peoples' groups. Some have begun to seek the exclusion of certain groups (e.g., Rehoboth Basters, a group of European descent living in Namibia) from participation as indigenous peoples in the UN Working Group on indigenous populations, a perilous venture that the United Nations has not for the time being hazarded to undertake. States are less likely to surrender the power to influence institutional decisions about participation and entitlements, but some sharing of power in this regard seems likely. A separate set of self-identification issues concerns the formation of political institutions and representative structures within indigenous groups. Structures of representation are seldom purely autochthonous—in many cases they will continue to be influenced by states, NGOs, interstate institutions and other indigenous groups with which these political representatives deal. Finally, the view that self-identification entails the power of the group to set and apply membership rules receives some support in practice but is tempered by international human rights standards and by some involvement of state legal and administrative agencies. In summary, norms of self-identification are important, but they do not obviate the need for some agreed criteria or for institutional procedures of assessment in certain situations.

Experience confirms the view of many representatives of indigenous peoples that not all of their claims can be totally subsumed without adaptation into such established generic legal structures as human rights, minority rights and self-determination, even while such claims draw heavily on these and other areas of legal doctrine. The distinctive *sui generis* concept of "indigenous peoples" is important to the development of international legal norms and institutional practice; its nature and meaning therefore require careful consideration.

#### IV. INTERNATIONAL INSTITUTIONS AND "INDIGENOUS PEOPLES"

The ILO and the World Bank have each been able to adopt broad and flexible indicative definitions of "indigenous peoples" in terms that have met the practical needs of these agencies without provoking unmanageable state opposition. Nevertheless, each of the functional agencies has found issues of "indigenous peoples" to pose distinctive challenges in the practical operations of the institution. Each is required to engage in difficult negotiations with recalcitrant state governments while endeavoring to be somewhat responsive to constituencies of indigenous peoples and their supporters. The leverage available to the Bank is typically greater, but it often has conflicting interests, especially in dealing with very large borrowers needed by the Bank, above all China. Neither in the World Bank nor even in the ILO have indigenous peoples been nearly as fully involved in the processes of formulating and implementing normative standards as many such groups would wish. In the UN Working Group on indigenous populations, by contrast, indigenous peoples have been more extensively involved, together with state

<sup>108</sup> See UN Doc. E/CN.4/1998/106, para. 37 (1997).

governments, but the highly politicized setting and the realization that any definition adopted could have very wide ramifications have hitherto rendered any serious negotiation on the question of definition impossible.<sup>109</sup> In the World Bank policies are drafted mainly by the staff, with some external consultation as well as involvement of the executive directors, and focus directly on the lending and other development-related functions of the World Bank Group, whereas in the United Nations the drafting and adoption of normative instruments and work programs ordinarily are heavily influenced by member states and, increasingly, other actors such as NGOs and indigenous peoples' groups. With regard to issues concerning indigenous peoples, the United Nations as an institution enjoys less autonomy from both the member states and indigenous peoples, and its practice concerning a definition potentially has more potent political implications.

The only general, binding interstate treaties concerning indigenous peoples have been adopted by the International Labour Organization.<sup>110</sup> Convention No. 107 of 1957 remains in force for twenty-one states, including Bangladesh, India and Pakistan.<sup>111</sup> Convention No. 169 of 1989 was intended to supersede No. 107,<sup>112</sup> but by May 1998 had only twelve states parties,<sup>113</sup> with none in Asia, although the Philippines has seriously considered ratification. Acting under Convention No. 107, the ILO Committee of Experts on Conventions and Recommendations has raised concerns with Bangladesh about abuses in the Chittagong Hill Tracts, and with India about the Narmada dams and other natural resource projects.<sup>114</sup> The ILO has undertaken a program to promote Convention No. 169 in south and southeast Asia and southern Africa, convening workshops with the governments of Thailand and the Philippines. ILO technical assistance programs

<sup>109</sup> The consensus among the five members of the UN Working Group on indigenous populations appears to be that it is not realistic or useful to try to adopt a definition at present. See Report of the Working Group on indigenous populations on its fifteenth session, UN Doc. E/CN.4/Sub.2/1997/14. Earlier, Chair-Rapporteur Daes had suggested that the solidarity and experience built up in gatherings of indigenous peoples, states and working group members since 1982 might provide a platform on which that body might construct an agreed definition in the future. Erica-Irene Daes, Note on Criteria Which Might be Applied when considering the concept of indigenous peoples, UN Doc. E/CN.4/Sub.2/AC.4/1995/3 [hereinafter Daes, Criteria]. It is most improbable that the working group would confine the concept of "indigenous peoples" to areas of European settlement. Daes, Working Paper on the Concept of "Indigenous People," UN Doc. E/CN.4/Sub.2/AC.4/1996/2 [hereinafter Daes, Working Paper]. However, one long-serving member, Miguel Alfonso Martínez, has advocated distinguishing European colonialism from invasions by a group's neighbors, and has expressed skepticism about the broad applicability of the concept of "indigenous peoples" in much of Africa and Asia, while conceding that it may be pertinent in special circumstances. Miguel Alfonso Martínez, Study on Treaties, Agreements and Other Constructive Arrangements between States and indigenous populations: Second progress report, UN Doc. E/CN.4/Sub.2/1995/27, paras. 94-129.

<sup>110</sup> The ILO has a specialized mandate but for historical reasons has become involved in a broad range of indigenous peoples' issues that extend beyond the scope of other ILO activities.

<sup>111</sup> The others are Angola, Argentina, Belgium, Brazil, Cuba, the Dominican Republic, Ecuador, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, Iraq, Malawi, Panama, Portugal, Syria and Tunisia. See the ILO Web site (visited May 18, 1998) (<http://ilolex.ilo.ch:1567/public/english/50normes/infleg/iloeng/index.html>). For Convention No. 107, see 1 ILO, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1991, at 627 (1992).

<sup>112</sup> For an overview by an ILO official closely associated with Convention Nos. 107 and 169, see Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY U. L. REV. 677 (1990).

<sup>113</sup> In order of ratification: Norway, Mexico, Colombia, Bolivia, Costa Rica, Paraguay, Peru, Honduras, Denmark, Guatemala, the Netherlands and Fiji. As the ratification pattern suggests, Convention No. 169, *supra* note 19, has been particularly influential in Latin America. Its provisions on definition were a model for the Inter-American Commission on Human Rights. In 1995 the Commission was unable to agree on a definition in its Draft Declaration on the Rights of Indigenous Peoples, partly because of disagreements about particular free communities founded by people brought involuntarily from Africa to the Americas by the slave trade. In 1997 it reached a compromise that avoided any definition of "indigenous peoples," while making clear that the prescribed norms applied not only to the undefined category of indigenous peoples, but also to a category of groups corresponding to those treated as "tribal" in Article 1(1)(a) of the ILO Convention, which apparently includes the free communities in question. See OEA/Ser.L/V/II.95, doc. 6, *supra* note 107.

<sup>114</sup> ILO, REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, Report III (Part 4A), IL Conf., 83d Sess. 265-67, 268-69 (1996).

concerned with titling and demarcation of indigenous peoples' lands perforce involve taking positions on specific problems of group identity, but in dealing with broad categories of groups the ILO has sought to harmonize the classifications in the two Conventions with categories accepted by the member governments whose consent is required. Thus, projects in India deal with the constitutional category of "scheduled tribes," and a project in Cambodia works with the Inter-Ministerial Committee on Highland Peoples Development.

Under Operational Directive 4.20, promulgated in 1991, the World Bank imposes special requirements on certain projects affecting indigenous peoples.<sup>115</sup> The normative positions taken by the Bank significantly affect project design and wider policies of borrowing countries. The operational directive promotes "legal recognition [by the state] of the customary or traditional land tenure systems of indigenous peoples," and "participation by indigenous people in decision making throughout project planning, implementation, and evaluation." The broad and in some respects contentious objective is to qualify, but not to displace, the Bank's general policies on financing projects: the aim is thus "to ensure that indigenous peoples do not suffer adverse effects during the development process . . . and that they receive culturally compatible social and economic benefits." The aspirations of the policy go further than minimization of harmful impacts of Bank projects, requiring active measures, including in many cases preparation of an "indigenous peoples development plan." Drawing upon its own experience and that of the World Bank, the Asian Development Bank in April 1998 adopted a similar policy. Both use the term "indigenous peoples" in a wide and inclusive way, with emphasis on cultural distinctiveness and special attachments to land and with recognition of the need for a definition capable of sensible application in diverse social contexts. Nevertheless, the policies differ slightly in their definitional sections. In particular, the World Bank notes that classifications of groups by states provide only a "preliminary basis" for identifying indigenous peoples to whom the Bank's policy applies. The ADB omits the "preliminary" element but refers to international law and to objective criteria, softening earlier indications of greater (and potentially excessive) deference to state governments.<sup>116</sup> ILO Convention No. 169 is indicative of a different approach in international law, providing in Article 1(1)(b) that groups satisfying the prescribed criteria shall be regarded as indigenous peoples under the Convention "irrespective of their legal status [under national law]."

Internal procedures of the World Bank endeavor to assure compliance with its policies in projects in which it is involved, although there have been several cases, in Asia and elsewhere, in which the operational directive on indigenous peoples was applicable but was not fully respected, partly because of uncertainties of interpretation and significant practical difficulties of implementation, but partly also because of the innovative character of the policy and the unfamiliarity of some task managers with indigenous peoples' issues. The situation is rendered substantially more difficult in countries such as Indonesia and the People's Republic of China where the government does not accept that there are many or any "indigenous peoples" to whom the Bank's policy applies. Where standard internal procedures do not secure the requisite result, the matter may be referred to the Bank's internal but independent Inspection Panel, which has proved more vigorous than many of the executive directors and borrowing countries seem to have wished in calling for full inspections and in pointing to violations of the Bank's

<sup>115</sup> Operational Directive 4.20, *supra* note 20. The Bank is considering converting this directive to conform it to the Bank's new system of internal policy instruments, leading to complex discussions about the conversion process, the formulation of key principles, and the level and type of standards that are normatively proper and operationally and politically viable.

<sup>116</sup> Asian Development Bank, Working Paper on Indigenous Peoples, paras. 6-8 (mimeo Oct. 25, 1994).

normative standards.<sup>117</sup> The World Bank's policies thus have considerable practical importance, although their effective application in particular cases depends heavily on the borrowing state and on the Bank staff involved.

The political salience of debates about the concept of "indigenous peoples," and much of the legal controversy, have been heightened by conflicts over land, forests, mineral resources, fishing rights and other valuable natural resources. These conflicts arise in the context of rapid economic change, often precipitated by government-supported "development" projects in which international institutions such as the World Bank are involved. If "indigenous peoples" are deemed in international practice to have particular entitlements to land, territory and resources, based on historical connections, customary practices, and the interdependence of land and culture, the question whether a particular group is an indigenous people may take on great political and legal importance. Even where governments do not accept that any of the groups in their states are indigenous peoples, international agencies, multinational corporations and the governments of foreign states may continue to press a particular case on the basis that relevant international standards apply. The Narmada River projects in western India illustrate the potential significance of the policies of the World Bank and comparable financing agencies.

The World Bank initially played a major role in international financing of the Sardar Sarovar dam and canal project, together with related projects in the Narmada River Basin. These projects have met with strong opposition from a wide variety of groups since they began to take clear shape in the early 1980s.<sup>118</sup> Groups subjected to or threatened with involuntary displacement, particularly tribal people whose undocumented customary land holdings did not meet the Indian states' requirements to prove title and who were thus deemed ineligible for land-for-land compensation, have engaged in direct protests such as peaceful occupations and hunger strikes.<sup>119</sup> Investigations, reports and litigation have been organized by these and many other Indian groups, including well-known social activists, students and environmental NGOs, as well as numerous foreign NGOs and transnational networks.

Following intense criticism in India and abroad, withdrawal of support for the project by the government of Japan, and the 1992 independent review commissioned by the World Bank that found the project to fall far short of the Bank's own policies regarding resettlement of oustees, compensation to affected people and environmental protection, the Bank in 1993 ceased further participation.<sup>120</sup> The authors of the review took the position that the Bank had adopted explicit policies for the benefit of indigenous and

<sup>117</sup> Such a recommendation was made to the executive directors in December 1996 in the case of the Argentina/Paraguay Yacretá Hydroelectric Project, which involved numerous issues, including disruptive treatment and inadequate resettlement of indigenous peoples. For a brief overview, see Richard E. Bissell, *Recent Practice of the Inspection Panel of the World Bank*, 91 AJIL 741 (1997).

<sup>118</sup> The way was cleared for the projects after the 1979 decision of the Narmada Water Disputes Tribunal allocated water rights among the interested riparian and nonriparian states. The tribunal also set a basic requirement of land-for-land compensation, as well as modest compensation for "landless" oustees. On the Narmada projects, see TOWARD SUSTAINABLE DEVELOPMENT? STRUGGLING OVER INDIA'S NARMADA RIVER (William F. Fisher ed., 1995). For a critical view of the World Bank's involvement, see, e.g., SUMI KAZUO, SEIKAI GINKO KAIBATZU KINYIN TO KONKYO: JINKEN MONDAI [The World Bank: Development Finance and the Issue of Human Rights] 265-69 (Tokyo, 1994) (kindly translated from the Japanese by Funahashi Junko).

<sup>119</sup> For example, the Bargi Bandh Visthapit Aur Prabhavit Sangh (an association of oustees displaced by the already-complete Bargi Dam) organized a satyagraha on the banks of the reservoir to try to prevent a further rise in its level in 1996; and litigation has been pursued by the Narmada Bachao Andolan. Groups organized around the issues of displacement and resettlement take a wide range of positions; many do not oppose, indeed support, the dam and canal projects, but are concerned about specific features of the projects or gross inadequacies in their implementation.

<sup>120</sup> This action followed a request from the government of India to end further disbursements, made in the context of the Bank's concerns about the project and the government's concerns about external pressure.



tribal peoples in development projects, that "[c]oncern for such groups is an aspect of the world's increased awareness of how isolated cultures have all too often paid an appalling price for development," and that as a functional matter many aspects of tribal culture involved distinctive issues that required special consideration in implementing the project.

A basic disjunction was at the heart of this element of the project:

From the point of view of the people themselves, the intent of the Indian Constitution, basic anthropological findings, and the criteria embedded in World Bank policy directives for tribals and indigenous peoples in Bank-aided projects, a substantial proportion of those likely to be affected by Sardar Sarovar Projects are tribal people and entitled to the benefit of special measures that will defend and secure their distinctive interests. . . . [Yet] no policies have been devised by the Governments of Gujarat, Maharashtra, or Madhya Pradesh that pay attention to the particular needs and concerns of Sardar Sarovar tribals.<sup>121</sup>

In a bold decision, assisted by the expertise of the Indian NGOs in gathering data and presenting arguments, and perhaps facilitated somewhat by the previous developments in international bodies, the Supreme Court of India in December 1995 issued a temporary order restraining continued construction of the Sardar Sarovar dam pending full judicial consideration of resettlement, environmental impact and other issues, although the Indian government and the state governments remained more or less committed to the scheme.

Technocratic functional agencies such as the World Bank and even the ILO have not moved so far in this direction, but participation by indigenous peoples in international institutions dealing with issues of direct concern to them is becoming an important criterion of legitimacy, spurring rapid innovation in institutional design. For certain organizations of indigenous peoples, the Arctic Council has established a category of "permanent participants," which imparts a status higher than that of NGOs and comparable to that of member states, apart from exclusion from the right to vote when consensus decision making breaks down. In 1997 the Conference of the Parties to the Convention on Biological Diversity inaugurated an intersessional workshop on Article 8(j) of the Convention, in which "indigenous and local communities" were able to play a substantial role.<sup>122</sup> The United Nations is beginning to consider establishing a permanent forum for indigenous peoples; it is proposed that indigenous peoples and states be represented in the forum on the same terms and in equal numbers.<sup>123</sup>

The rapidly rising status and involvement of indigenous peoples' groups in international institutions, and the requirements of consistency where the same states and groups are dealing with each other in multiple fora, probably will eventually require some unity in the underlying concepts and increasingly specific rules of eligibility, membership, representation and accountability. The competing pressures for highly diverse and functional institutional practice, on one hand, and for some unity across different fora, on the other, together make a case for the dynamic constructivist view of the concept of "indigenous peoples" advanced here.

<sup>121</sup> BRADFORD MORSE & THOMAS BERGER, *SARDAR SAROVAR: REPORT OF THE INDEPENDENT REVIEW* 77-78 (Ottawa, 1992). The two authors of the review are, respectively, a U.S. citizen who served as a prominent international civil servant and formerly as head of the United Nations Development Programme, and a well-known Canadian jurist who has been involved extensively in indigenous issues relating to development projects in North America.

<sup>122</sup> Report of the Workshop on Traditional Knowledge and Biological Diversity, UNEP Doc. UNEP/CBD/TKBD/1/3 (1997).

<sup>123</sup> Report of the Second Workshop on a Permanent Forum for Indigenous People within the United Nations System, *supra* note 10.

participants and requiring commonality of values or capacity.<sup>125</sup> Thus, a global institution such as the World Bank might be able to adopt a more robust policy on indigenous peoples if it applied only to a set of borrowing countries with similarly expansive national commitments. But international institutions have been effective agents in the diffusion of policies, transmitting values and expertise, financing law reform and training of officials, and providing leverage to civil society organizations. In their day-to-day practice, international institutions continuously trade off perfect implementation for overall effectiveness in pursuit of their goals, but seldom will these global institutions fulfill their mandates adequately by deciding in principle to confine their policies concerning indigenous peoples and such matters as involuntary resettlement and environmental assessment to the like-minded. Optimizing participation and effectiveness is a more difficult conceptual problem with regard to the adoption by states of international normative instruments such as the UN draft declaration or international treaties pertaining to indigenous peoples. A constructivist approach offers the flexibility necessary to tackle such problems of optimization.

A third issue is the obvious significance the opposition of several major Asian state governments to application of the concept of "indigenous peoples" in their territories might have for the politics of matters relating to indigenous peoples in the United Nations. Having called for a clear, scientific, objective and practical definition of indigenous peoples that can clearly be interpreted as not applying to any groups in the PRC, China commented: "Until a clear definition of indigenous peoples has been established, the Chinese Government cannot formulate specific opinions on individual clauses of the draft declaration . . . ."<sup>126</sup> The PRC's position makes clear what is implicit: at least some Asian governments may support—or at a minimum not block—stronger provisions in the UN draft declaration if they are reasonably confident that those provisions will not be applied to groups within their states. A negotiating position is thus indicated: a draft declaration with a wide or open-ended definitional provision, or with no definitional provision at all, may well meet with opposition or proposals for severe attenuation, whereas a draft declaration with a narrow and precise definitional provision may well be supported.

Questions about the applicability of the international concept of "indigenous peoples" in various Asian states are, in part, questions about the suitability of the international concept in the context of competing visions of identities of particular groups and of national societies and politics.<sup>127</sup> Much of this complex problematique has to do with the evolving dynamics of identities and politics in these changing societies, but I argue that it also involves the terms of the international concept, and that the justifications of this concept are a central issue. China, like India, disputes the applicability of the concept while maintaining substantial policy programs intended to benefit constitutionally recognized categories of ethnic groups thought to face risks of disadvantage. In the early 1930s, drawing on Soviet nationalities theory, the Chinese Communist Party adopted a policy favoring self-government for minority peoples with the possibility even of independence. This policy was attenuated from the late 1930s, but recognition of various freedoms for minorities was incorporated in the first Constitution of the PRC.<sup>128</sup> The Anti-

<sup>125</sup> See generally GEORGE DOWNS & DAVID ROCKE, *OPTIMAL IMPERFECTION? DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS* (1995); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1998).

<sup>126</sup> PRC Consideration, *supra* note 17.

<sup>127</sup> See, e.g., Tania Murray Li, *Images of Community: Discourse and Strategy in Property Relations*, 27 DEV. & CHANGE 501 (1996).

<sup>128</sup> ZHANG XIAOHUI, *ZHONGGUO FALU ZAI SHAO SHUMINZU DIQU DE SHI SHI* [The Enforcement of Law in Minority Areas in China] 27–29 (Kunming, 1994); WALKER CONNOR, *THE NATIONAL QUESTION IN MARXIST-LENINIST STRATEGY* 67–100 (1984). Thanks to Hu Jun for translating Chinese-language sources referred to here.

Rightist Movement and the Cultural Revolution had severe impacts on minorities,<sup>129</sup> but in Yunnan province, for example, current official policy favors some provision for education in minority languages,<sup>130</sup> scholarships and special admission arrangements to promote minority involvement in higher education,<sup>131</sup> some preferential recruitment of minorities to government jobs,<sup>132</sup> some leniency and weighing of minority customs in judicial proceedings,<sup>133</sup> and special measures for political representation of minority areas and for the provision to members of minorities of positions in local government, as well as some involvement at higher levels of government.<sup>134</sup> Yunnan researchers have noted minority issues broadly similar to those faced by indigenous peoples in many parts of the world, such as disruption of land-use cycles because of diminishing land bases, unrestituted dispossession of natural resources, limited access to lands due to encroachment of rubber plantations and other industries, uneven terms of economic exchange with the Han majority, Han control of major economic activities, and neglect of health problems facing women.<sup>135</sup>

It seems unlikely that the PRC's objection to application of the concept of "indigenous peoples" to China is an objection in principle to the identification of distinct groups facing special problems. Nor is it necessarily a permanent objection to international law's touching "domestic" affairs: the PRC is considering accepting the norms of the International Covenant on Civil and Political Rights and is negotiating entry into the World Trade Organization, an institution much more intrusive than those pertaining to indigenous peoples. The PRC has concerns similar to those of India about the extension to nonstate groups of norms of self-determination, especially in relation to Tibet and Xinjiang, and some uneasiness about religious groups and cross-border ties of coreligionists.<sup>136</sup> The PRC may for some time take the view that its interests are better served by resisting application of the normative and institutional elements of the indigenous peoples' program, but interests change. More far-reaching is the conflict between views of China's history and the concept of "indigenous peoples" as victims of settler colonialism and oppression from an externally derived state constructed in their territories. The strong orthodoxy is of China not as colonizer but as a victim of colonialism, liberated by the revolution. As Zhou Enlai put it:

[T]he whole country was one that suffered imperialist aggression, one that had become a semi-colony, or, in some regions, a colony . . . [A]mong our various nationalities, they have shared weal and woe and cemented a militant friendship in the revolutionary wars, culminating in the liberation of this big family of nationalities.<sup>137</sup>

It is possible, without gravely weakening the concept of "indigenous peoples," to broaden the range of justifications it accommodates so as to avoid its interdependence

<sup>129</sup> ZHANG XIAOHUI, *supra* note 128, at 92-93; WANG LIANFANG, MINZU WENTI LUNWENJI [Essays on the Problems among Races] 335-40 (Kunming, 1993).

<sup>130</sup> ZHANG XIAOHUI, *supra* note 128, at 16-17.

<sup>131</sup> MA QU, YUNNAN MINZU GONGZUO SISHI NIAN [Forty Years of Yunnan Minority Administration] 97 (Kunming, 1994).

<sup>132</sup> Cf. the problems noted in 1988 by WANG TIANXI, MINZU FA GAI LUN [Introduction to Nationalities Law] 247 (Kunming, 1988).

<sup>133</sup> ZHANG XIAOHUI, *supra* note 128, at 36-39.

<sup>134</sup> MINZU QUYU ZIZHI JIANMING DUBEN [Pamphlet on Minority Autonomous Districts] 37 (Kunming, Zhou Ruihai & Ha Jian eds., 1993).

<sup>135</sup> WANG LIANFANG, *supra* note 129, at 90-128; YUNNAN LONGCUN FUNU XIANZHUANG YANJIU [Analysis of the Reality of Women in Yunnan] 199-261 (Kunming, He Zhonghua & Qiao Hengrui eds., 1995).

<sup>136</sup> As to concerns about foreign religious penetration, see, e.g., WEIHU JIGUO TONGYI BAOCHI SHEHUI WENDING [Sustain the Unity of China, Maintain the Stability of Society] 62 (Kunming, Feng Dazhen & Yang Faren eds., 1993).

<sup>137</sup> Zhou Enlai, *Some Questions*, BEIJING REV. (1980), quoted in CONNOR, *supra* note 128, at 90-91.

with the historical patterns of European colonial settlement. This kind of broadening depends on understanding the global concept of "indigenous peoples" not primarily in positivist terms, but as a dynamic construct that itself has a shaping effect on social meanings and legal development. The international concept of "indigenous peoples" may be understood as an abstraction from a vast set of complex particular realities. These realities involve divergent self-perceptions and political discourses of groups and national societies, and diverse state-society relations. The abstract international concept of "indigenous peoples" has the potential to be drawn from international society back into national society; the abstract concept is worked out and made particular in a specific context.<sup>138</sup> This happens most obviously in those national societies where legal and political decision making gives weight to international practices and texts referring to indigenous peoples, and to decisions and models in other countries that are understood as involving indigenous peoples.<sup>139</sup> In different ways this concretization also occurs where groups draw upon the international concept of "indigenous peoples" in constructing their own identities: thus, groups whose self-concept might not have centered on prior possession may come to identify themselves as indigenous peoples with experiences and worldviews shared with other indigenous peoples.

The vitality of the concept of "indigenous peoples" in states such as Canada, Chile and Norway will not be eroded by an understanding of the global concept in broad constructivist terms, for the legitimacy of group claims within each society depends on interaction between a relatively amorphous global concept and the types of justification that resonate within that polity. A more open-ended global concept lacks certainty in its application but has the advantage of allowing scope for some variation when the concept is instantiated for purposes of positive law in different societies and institutional contexts. The effective application of such global concepts requires some overall indication of meaning and content, but beyond that depends much more on dynamic processes of claim, legitimation, and political and legal endorsement than on a single rigid definition.

*Are "Local Communities" Functional Alternatives to "Indigenous Peoples" in Asia?*

It remains to consider possible alternatives to the concept of "indigenous peoples." Alternative global concepts, such as "tribe" and "minority," have some legal purchase. "Tribal peoples" are specifically included in the relevant instruments of the ILO and the World Bank, but "tribal" is not easy to define, and its implicit emphasis on social structure does not mesh well with the dynamic societies, cultures and political forms of many of the groups in the internationally active indigenous peoples' movement. "Minority" is long established as a legal category but because of its generality and ubiquity is unlikely to be the basis for the kind of ambitious normative program, international institutional commitments and transnational networks that have built up around the concept of "indigenous peoples."

One broad alternative to a focus on "indigenous peoples" is a focus on local communities. Enhancing the salience of local residents' interests has been a major strategy in the field of international development, advocated even by environmental NGOs whose preferences and priorities may diverge sharply from those expressed by local people.<sup>140</sup>

<sup>138</sup> See PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD*, chs. 10, 16 (1990).

<sup>139</sup> On Australia, Canada, and New Zealand, see Kingsbury, *supra* note 41.

<sup>140</sup> Note, for example, Rangan's observation of differences in the Garhwal Himalayas, home of the Chipko tree-protection movement made famous and celebrated by international environmentalists, between "images of self-contained village communities living in harmonious ecological utopias" and the desire of many residents to resume their long-standing involvement in the commercial use of the forests and other activities necessary to make a living. Haripriya Rangan, *Romancing the Environment: Popular Environmental Action in the Garhwal Himalayas*, in *IN DEFENSE OF LIVELIHOOD: COMPARATIVE STUDIES ON ENVIRONMENTAL ACTION* 151, 162 (John Friedmann & Haripriya Rangan eds., 1993).

Support for an "indigenous peoples" approach to enhancing local influence, however, may be tempered by concerns that the category of "indigenous peoples" is underinclusive or inequitable. Thus, in a village in India affected by land encroachments from a coal mine, people from one or more "scheduled tribes" may be interspersed with nontribal Hindus, some of whom are almost equally disadvantaged in economic vulnerability and social status under the caste system.<sup>141</sup>

Special factors relating to means of consultation and to compensatory development initiatives may apply to tribal families but not to others; but many of the economic and social issues may be similar. Tania Murray Li comments with reference to Indonesia that most "rural areas, both on and off Java, are complex mosaics of cultural groups and social classes, products of diverse agrarian histories and centuries of interaction with market and state."<sup>142</sup>

Reacting to concerns that "indigenous" or "tribal" is too narrow for certain functional purposes, some practitioners and policy activists concerned with sustainable development in Asia instead emphasize the role of local "communities" in such activities as development planning, common property management and sustainable forestry.<sup>143</sup> As a practical matter, in many situations local "communities" are in much the same position vis-à-vis the state or vis-à-vis development projects whether or not these communities or portions of them might be described as "indigenous." In practice, there will often be no sharp line between policies applicable wherever indigenous peoples are involved and policies applicable in cases of similarly situated "communities." Common to the concepts of "indigenous people" and a defined "community" are the challenging problems of how such abstract concepts are rendered operational in practice. As Li notes, the interests and voices of women, distress migrants and underclasses may be submerged in a focus on community that "leaves begging the central question of who is enabled or constrained: whose economic circumstances or security of tenure is at stake."<sup>144</sup> Internationally controversial projects, such as the enormous Arun III dam project in Nepal and logging of tropical forests in Sarawak, may attract the support of some members, on occasion even most members, of indigenous or local groups, whether on grounds of inevitability, the best interests of the community, or more personal benefits realized or hoped for.<sup>145</sup> Evaluating the cancellation in 1995 of the Arun III project, notwithstanding the apparent support of most residents of the remote Arun Valley for the roads and communications the project would bring, Ann Armbrrecht Forbes comments that "the search for the real 'local' is an incomplete and thus a potentially misguided search. . . . Factors such as who speaks up, who claims to speak for whom, who chooses to remain silent and why, all influence which

<sup>141</sup> Issues of this sort have arisen in the operations of Coal India Ltd. covered by the World Bank's India Coal Sector Rehabilitation Project. For comments on this project, see Ratnakar Bhengara, *Coal Mining Displacement*, ECON. & POL. WKLY., Mar. 16, 1996, at 647.

<sup>142</sup> Li, *supra* note 127, at 508.

<sup>143</sup> See, e.g., the debate between Owen Lynch and James Anderson, in *CRITICAL DECADE: PROSPECTS FOR DEMOCRACY IN THE PHILIPPINES IN THE 1990's* (Berkeley, Cal., Dolores Flamiano & Donald Goertzen eds., 1990). See also, e.g., LYNCH & TALBOTT, *supra* note 53, at 23, whose "definition" of "community" seems underspecified for many practical purposes; it is so broad as to encompass virtually any enduring mutual benefit arrangement. The relevant features are: "1) extensive participation by its members in the decisions by which its life is governed; 2) the community as a whole takes responsibilities for its members; and 3) this responsibility includes respect for the diverse individuality of these members." See further HERMAN DALY & JOHN COBB, *FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARD COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTURE* 168-75 (1989).

<sup>144</sup> Li, *supra* note 127, at 505 (quoting Melissa Leach, *Endangered Environments: Understanding Natural Resource Management in the West African Forest Zone*, IDS [Inst. Dev. Stud.] BULL., Oct. 1991, at 17, 18).

<sup>145</sup> Ann Armbrrecht Forbes, *Defining the "Local" in the Arun Controversy: Villagers, NGOs, and the World Bank in the Arun Valley, Nepal*, CULTURAL SURVIVAL Q., Fall 1996, at 31; J. Peter Brosius, *Prior Transcripts, Divergent Paths: Resistance and Acquiescence to Logging in Sarawak, East Malaysia*, 39 COMP. STUD. SOC'Y & HIST. 468 (1997).

voice is eventually labeled as the 'local'.<sup>146</sup> Whether the focus is on local communities or indigenous peoples, complex issues arise as to decision making and representation in communities that may be undemocratic in structure, poorly informed about the long-term consequences of proposed projects, diverted by disputes with other groups, and vulnerable to suborning and coercion.<sup>147</sup>

For some purposes "local" is highly imprecise, and it is not very helpful to rely on an underspecified unit of "community" as somehow bounding legitimate involvement and concern. The sheer scale of large projects and the transformations they effect can overwhelm not only small groups with distinctive cultures, but much larger and more distant communities as well. As Forbes argues with respect to Nepal, a small country subject to enormous impact from such a project: "A 'local' in the Arun controversy . . . includes those living within an hour's walk of the dam site, as well as those in Kathmandu whose work is disrupted by electric shortages, as well as those worried about Nepal's foreign debt."<sup>148</sup>

Both local communities and indigenous peoples face the difficulty that their viewpoints may become minor elements, sometimes manipulated, of larger struggles. Where large projects draw on capital and support from intergovernmental agencies or foreign corporations, international campaigners have found points of leverage outside the host state that generate publicity and intensify pressure. In such cases issues arise as to who knows best and whose voice counts, entailing problems of representation, accountability and decision making in NGOs and in overseas lawsuits, as well as in governments and international organizations. High-visibility transnational campaigns against development projects attract the attention of many outside the area directly affected, but the objectives of such campaigns and their criteria of success may be radically different for national NGOs, transnational groups and local residents. In some cases campaigns of national and transnational NGOs and foreign governments on a specific development issue may be part of a wider political struggle concerning national leadership, in which indigenous peoples may or may not be active participants and in which their claims may be used to further quite different interests of others. National groups may focus on achieving victories in national courts, and thus set precedents requiring public access to environmental information or obliging the government to ensure consultation with affected groups. Transnational groups may seek to secure critical rulings from bodies such as the World Bank Inspection Panel and courts in the United States and elsewhere, and to change the broad policies of institutions such as the World Bank, the Export-Import Bank and the Overseas Private Investment Corporation. Campaigns are often directed at canceling projects; it is much more difficult for campaigners to promote and deliver positive alternatives that meet the development needs of local people. The actual consequences of a court victory, a policy change or cancellation of a project are not necessarily experienced in the same way by the local populace as by more distant NGOs, which can declare the battle over and move on. The indigenous peoples' program, with the status it confers on groups and the recognition of their active agency through institutions and the normative emphasis on participation and self-determination, may offer more potential for overcoming these problems than a focus on "local communities," which may lack sociopolitical individuation and capacities to act.

Promotion of the interests and agency of "local communities" is broadly compatible with the international indigenous peoples' program. Despite acute conflicts, as between settlers and natives in transmigration schemes, the two conceptual programs coexist and

<sup>146</sup> Forbes, *supra* note 145, at 31.

<sup>147</sup> Marcus Colchester, *Indigenous Peoples' Rights and Sustainable Resource Use in South and Southeast Asia*, in *PEOPLES OF ASIA*, *supra* note 15, at 59, 73-76.

<sup>148</sup> Forbes, *supra* note 145, at 31.

overlap. The concept of "local communities," however, is not a sufficient substitute for "indigenous peoples." The international concept of "indigenous peoples" connotes emphasis on self-determination and the role of groups in decisions affecting them, respect for different cultures shaped over long periods of history, recognition of special relations with land and territory and unique knowledge about their use and management, and awareness of the disastrous consequences for these peoples of many prior policies of states and international institutions. The concept thus bears a range of justifications, variously based on equity, history, the value of diversity, functional criteria, politics and law. Some of these are undervalued by an exclusive focus on "local communities." In particular, "local communities" is not so clearly a concept of history, of long association with territory, of cultural distinctiveness, of the political agency of autonomy and self-determination. By dint of its diffuse nature, it is unlikely ever to attain the normative purchase or institutional commitment of "indigenous peoples," and is a complement rather than a substitute.

#### VI. A PROPOSAL CONCERNING DEFINITION: REQUIREMENTS AND INDICIA

For the purposes of international legal instruments intended to have general rather than regional or highly specific application, four factors seem relatively unproblematic as requisites for a group to be an "indigenous people": self-identification as a distinct ethnic group; historical experience of, or contingent vulnerability to, severe disruption, dislocation or exploitation; long connection with the region; and the wish to retain a distinct identity. These four criteria establish a set narrower than "ethnic group" and more focused than "ethnic minority," but still overly broad to delimit the category of "indigenous peoples" as it is employed in contemporary practice. Three further criteria are highly relevant, but in each case some flexibility is required if special cases are not to be arbitrarily excluded.

The first of these is nondominance in the state or region. This criterion is virtually a requisite, but the exact meaning of "dominance" is difficult to capture in many situations. Most obviously, numerical dominance is not *ipso facto* exclusionary where a group has little political or economic power. More complex situations arise where small groups are part of uneasy ruling political coalitions but have little power; or where a very few members of a group exercise considerable national political power but most are entirely marginal to this process. Even where a group is numerically and politically dominant in a state, the state may be so small that, *vis-à-vis* international lending agencies, transnational mining and logging corporations, dumpers of hazardous waste, foreign fishing fleets, mercenaries and other powerful actors, the people of the state may face many of the same problems as "indigenous peoples" within states.<sup>149</sup>

Second is the requirement that a group have close cultural affinity with a particular territory or area of land. Many indigenous peoples regard this feature as essential to their own identities. It is not necessary for the group to have been associated with the particular land or territory for countless generations; groups have often moved, joined with other groups, or been forcibly relocated. Yet to make this requirement strict would

<sup>149</sup> The government of Fiji suggested in the Commission on Human Rights working group that a self-identifying group whose members are historically prior occupants with a unique cultural bond with the land may be an indigenous people even though they suffer no repression. The intended implication that the declaration will apply to groups controlling the government and the military in a state is highly problematic. If the nondominance criterion is relaxed as Fiji suggests, there are almost insuperable risks that dominant groups in deeply divided societies who regard themselves as threatened will use the declaration to bolster their chauvinist claims. Fiji itself opposed a proposal by the government of Bangladesh that all peoples threatened by globalization and Westernization, including those controlling postcolonial governments in Africa and Asia, should be covered by the declaration. See Barsh, *supra* note 99, at 792-93.

argument about the concept of "human rights." Like the human rights argument, the charge of Eurocentrism is politically colorable when made against aggressive global assertion of Western concepts by governments and transnational networks based in the West, but it depends on notions of false consciousness, manipulation or opportunism when made against claims by local groups identifying themselves as indigenous peoples.

Some of the legal texts formulated under the *normative program*, particularly the UN draft declaration, assert rights of indigenous peoples, or rights of individual members of indigenous peoples, and related duties of states and other obligees; but on these issues debate about the suitability of the language of rights does not simply oppose "Asia" to "the West." Objections to the substantive norms by some Asian states pertain mainly to self-determination and rights to land and resources, but these are unlikely to be more severe than those of some European settler states in which the concept of "indigenous peoples" is now uncontested (e.g., Brazil). The normative program does not formally depend at the global level on a precise definition of "indigenous peoples"; the disputes over relevant norms of land and resource rights, autonomy and self-determination, and equality and equity involve clashes of interests and values within states in all regions. Nevertheless, some formulations of elements of the normative program are bound up with particular views about justifications of the norms that are deeply contested.

The complexity of issues raised by indigenous peoples is reflected in the range of national, transnational and interstate *institutional mechanisms* deployed. International mechanisms include formal judicial or rule-governed approaches, special commissions, joint decision-making bodies, fact-finding and mediating bodies, consultative groups and negotiating fora. These overlap with individual human rights mechanisms, and additional mechanisms confer status on nonstate groups.<sup>155</sup> Not surprisingly, some states object to the institutional elements, particularly the availability of international platforms to criticize the state, the potential "meddling in internal affairs" by international agencies, the energetic activities of extensive transnational networks of indigenous peoples and interested NGOs, and extraterritorial proceedings in foreign courts.<sup>156</sup> But the give-and-take of bargaining within such institutional structures is the ordinary stuff of international law and politics, and it is to be expected that practical accommodations (however much open to criticism) can be reached, as has been demonstrated in the practice of some of the functional agencies such as the ILO and the World Bank, and in the evolution of the innovative practices of the UN Working Group on indigenous populations.

The concept of "indigenous peoples" carries within its grounds of *justification* related to prior occupancy, dispossession and group identity. While conceptual issues and more instrumental political and legal concerns are inevitably mixed, the principled objection, for example, of the Indian government to applying international instruments concerning indigenous peoples to India is above all an objection to a specific justification perceived to be inherent in the concept of "indigenous peoples," a justification that is not simply a product of European expansion but that nevertheless does not accurately capture identities and outlooks in some regions not structured by waves of recent invasion and migration.<sup>157</sup> Two paths are currently open. One is to adhere to the requirement of historical continuity of prior occupants, which would assure the political viability of the international concept of "indigenous peoples" and perhaps open the way for greater

<sup>155</sup> See Kingsbury, *supra* note 91.

<sup>156</sup> See RALPH LITZINGER, *THE WORK OF CULTURE AND MEMORY IN CONTEMPORARY CHINA* 7-8 (Duke University Working Papers in Asian/Pacific Studies No. 95-03, 1995).

<sup>157</sup> This argument about India may well apply also to the position of the Chinese government; and the views of the governments of Bangladesh and Myanmar may follow this track, but are difficult to analyze independently of issues of insurgency, state building and central political/military control.



normative and institutional development, while avoiding some of the serious policy problems of a potent, but uncircumscribed and open-ended, category.

The other is to treat historical continuity as an indicator rather than a requirement. This approach emphasizes the commonality of experiences, concerns and contributions made by groups in many different regions, and argues that functional matters such as dispossession of land, cultural dislocation, environmental despoliation and experiences with large development projects establish a unity that is not dependent on the universal presence of historical continuity. This approach recognizes that the concept of "indigenous peoples" must be circumscribed to be useful but proposes to achieve this delimitation through a different means of definition, as set forth in this article. Where a broader range of groups is potentially involved, normative and institutional development will be more complex and more flexibility may be necessary, but the ILO and the World Bank have established that such an approach is, at a minimum, possible.

The flexible approach to definition advocated here would be problematic if the concept of "indigenous peoples" were understood as operating primarily in the positivist sense of defining and delimiting a category of right holders. Although this is one of its functions, the concept must be viewed not simply in static terms. The basic question is how a single concept of "indigenous peoples," potentially global in scope, can be both abstracted from and germane to the enormous variety of local self-conceptions and political contexts to which its relevance is asserted. It has been argued here that such concepts are better understood in the constructivist fashion sketched in this article, and that on balance more is gained than lost by adopting a flexible approach. This article therefore advocates setting forth flexible, but focused, international criteria as to the meaning of "indigenous peoples," with a combination of requirements and indicia, and relying on the dynamic processes of negotiation, politics, legal analysis, institutional decision making and social interaction to work out the application of these criteria to the innumerable nuances of specific cases.