2005

Book Review

S. James Anaya
University of Colorado Law School

is problematic. The discussions will nonetheless potentially be of great interest to readers wanting to probe the mind-sets of conservative Muslims who seek to justify their resistance to international human rights law, and also to readers wanting to explore official "Islamic" rationales for human rights violations.

ANN ELIZABETH MAYER
Wharton School

European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society. By Paul Keal. Cambridge, New York: Cambridge University Press, 2003. Pp. ix, 258. Index. $70, £45, cloth; $26.99, £16.99, paper.

European Conquest and the Rights of Indigenous Peoples is one of several recently published works that explore the place of indigenous peoples within international law and politics. Written by Paul Keal, a fellow of the Research School of Pacific and Asian Studies at the Australian National University, it draws upon history, international relations theory, and, to a lesser extent, contemporary international legal texts to argue in favor of recognizing indigenous groups as "peoples" with rights of self-determination. Placing special emphasis on the proposed adoption by the UN General Assembly of the Draft Declaration on the Rights of Indigenous Peoples,[1] Keal argues that such recognition is necessary in order to establish the legitimacy of states and of the international society they constitute. He makes the case that the international society of states is constructed upon a history of empire building and a complicit intellectual tradition that have oppressed indigenous peoples. The legacies of that oppression can be reversed, according to Keal, only by a transformation of thinking and power relationships based on a cross-cultural commitment to indigenous self-determination.

Within the last few decades, groups identified as "indigenous" have become a subject of ongoing discussion within the United Nations and other international institutions, as those groups themselves have collectively sought to achieve redress of historical and current grievances. The nomenclature of *indigenous populations* or *peoples* is now commonplace, although the outer boundaries of the scope of its application or relevance remain contested. While acknowledging the frequent difficulties that arise in identifying which groups appropriately fall within this rubric, Keal takes as his point of departure the often-quoted definition of "indigenous" found in a study by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights).[2] That definition counts as indigenous those groups that have (1) a historical continuity with precolonial societies whose presence predated that of now dominant groups living on the same territory or in close proximity, (2) a distinctive cultural or ethnic identity that is connected with ancestral land, and (3) the desire to transmit that identity to future generations. Following the now common trend, Keal adds to this definition the requirement of self-identification as an indigenous people.

As this definition suggests, the history of indigenous peoples is one of subjugation through colonization, which is the flip side of the rise of European power around the globe—beginning with Christopher Columbus's first adventure across the Atlantic. Keal links colonization and associated patterns of empire with the emergence of international society, understood to be the product of the expansion of the European society of states into one that is global in scope. The legitimacy of international society, including the agreed-upon norms that govern it, are brought into question by an examination of the historical processes by which the society came about and the related intellectual traditions that in one way or another encouraged those processes. Keal raises this legitimacy question forcefully and persuasively, although without making the reader fully aware of the extent to which he is, in fact, going over ground already covered.

In his landmark 1990 book, *The American Indian in Western Legal Thought*, Robert Williams Jr. surveyed many of the writings and lectures of major European thinkers and religious figures beginning from the time of European encounter with the indigenous peoples of the Americas and continuing through the ensuing period of colonization.[3] Williams revealed how the strains of doctrine

[1] UN Doc. E/CN.4/SUB.2/1994/2/Add.1 (1994) (reproduced in full at p. 224).

[2] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination Against Indigenous Populations, Vol. V., para. 379, UN Doc. E/CN.4/Sub.2/1986/Add. 4 (1986) (José Martínez Cobo, Special Rapporteur).

[3] *See* ROBERT A. WILLIAMS JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990).

and theory espoused by well-known European thinkers from the sixteenth century onward provided justification and putative moral cover for the often brutal subjugation of indigenous peoples and for the taking of their lands. Building upon Williams's work, other writers have shown how such lines of thought were embraced by, and integrated into, domestic legal systems, international law, and the related international political order.[4]

Keal devotes much of the first three chapters of *European Conquest and the Rights of Indigenous Peoples* to recounting the complicity of historical European political and legal theory with the patterns of European expansion that drove the formation of an international society of states. In many respects his account of this complicity is more refined and perhaps more accurate than previous ones, especially in its exposition of the views of particular historical writers. But his main contribution to the existing literature lies not in uncovering the nexus between normative strains of European thought and the spread of European power at the expense of indigenous peoples, as Williams and others have already done. Instead, his innovation is in his evaluation of that nexus in light of the works of the contemporary literature on political and international relations theory. Keal draws on a variety of contemporary authors to weave an intricate evaluation of the logic and rhetorical devices by which historical European thinkers justified colonization and empire building, and to show how those justifications contaminate the normative foundations of international society. Contemporary authors who illuminate critical understandings of cultural encounter and the intellectual foundations of the modern state system provide Keal with a lens through which to view the writings and lectures of de las Casas, Vitoria, Grotius, Vattel, Westlake, and other well-known European scholars of the distant past, and to understand the events with which those writings and lectures were associated. With this lens Keal succeeds in reconfirming the role of Western legal and political thought, and of many of its icons, in the devastation wrought upon indigenous peoples. In this respect, Keal's book should help lay to rest the persistent tendency among many to celebrate the "founders of international law" for their relative enlightenment while (unwittingly or not) ignoring or obscuring their roles in promoting and justifying colonization.[5]

Underlying the actions of Europeans during the age of encounter with non-European indigenous peoples in the Americas and elsewhere was a pervasive perception of indigenous peoples as morally and culturally backward and inferior. This perception was central to European political thought and philosophy in its various permutations, and by the end of the nineteenth century, it had become entrenched in the doctrine of international law, as Williams and others have demonstrated. Keal explores both the various manifestations in European thought of this perception of indigenous inferiority, and he shows how this perception was eventually embraced by international law. Stressing the role that radical cultural difference played in the development of European thought about colonization, Keal describes the "incommensurability of cultures and the construction of 'otherness' in ways that justified the dispossession of indigenous peoples" (p. 21). The inability of Europeans to understand people from non-European cultures in the others' own terms was embedded in the major theoretical strains of European thought that evaluated and sought to provide direction for European expansion.

Whereas doctrines of natural law and rationalism inclined toward the view that indigenous peoples were essentially human, perceptions of indigenous peoples as inferior fed various modes of thinking whose combined force was to deprive indigenous peoples of the same range of entitlements to territory and cultural continuity as the presumably superior Europeans. Keal explains how terms such as *wild men*, *savage*, and *barbarian* encapsulated diverse modes of regarding indigenous peoples as inferior. Among the erudite European thinkers, perceptions of indigenous inferiority allowed for moral understandings to be postulated in universalist terms and at the same time to justify, or at least not run afoul of, configurations of power that greatly disadvantaged indigenous peoples and that provided the groundwork for European expansion.

[4] *See, e.g.*, JAMES E. FALKOWSKI, INDIAN LAW/RACE LAW: A FIVE-HUNDRED-YEAR HISTORY (1992); PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS 61–88 (2002); S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 9–37 (1996).

[5] *Cf.* PAOLO G. CAROZZA, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25 HUM. RTS. Q. 281, 289–96 (2003) (a flattering portrayal of the sixteenth-century Spanish Dominican priest Bartolomé de las Casas and his writings on the Indians of the Americas, without any attention to the cultural biases in that writing as revealed by Keal and others).

By the same token, early assessments of, and attitudes toward, indigenous peoples led to categorizing them as "uncivilized" and hence not part of the "civilized" world upon which international society was constructed, as is reflected in the major international law treatises of the late nineteenth and early twentieth centuries.[6] According to the prevailing international law doctrine of that period, indigenous peoples were effectively, by definition, among the "uncivilized" and hence excluded from among the subjects of international law. Instead, international law upheld the sovereignty of states to the exclusion of indigenous peoples' rights and offered justifications for the dispossession of indigenous lands. Keal describes the main components of this historical international law doctrine to help seal his conclusion that there is a continuing element of illegitimacy in international society.

In the last three chapters, Keal describes contemporary developments concerning indigenous peoples at the United Nations. Siding with the indigenous protagonists in these developments, he argues for reversing the legacies of the past through recognition of indigenous groups as "peoples" with "the right to self-determination, both within constitutional law and international or emerging global law" (p. 217). Incorporating such recognition into the body of norms that govern international society, Keal argues, would substantially settle the question of the society's moral legitimacy with regard to indigenous peoples. He highlights the UN Draft Declaration on the Rights of Indigenous Peoples, which in its Article 3 affirms, in words that draw from the international human rights covenants, "Indigenous Peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The Draft Declaration was developed by a working group of the UN Sub-Commission on the Promotion and Protection of Human Rights, an expert body, with broad participation by indigenous representatives. It has been under discussion for several years in a working group of the UN Commission on Human Rights, where its fate remains uncertain owing in no small part to controversy over the wording of the self-determination provision. Keal urges adoption of the Draft Declaration—with its affirmation of self-determination and related norms intact. He considers the declaration's ultimate adoption by the UN General Assembly to be a singularly important step for curing the legitimacy deficit in international society.

Keal is correct in understanding that the principle or right of self-determination is central to the chorus of indigenous peoples' demands heard at the United Nations and other venues, and that the self-determination rhetoric embraces the core of indigenous peoples' aspirations in the face of historical and ongoing grievances. But in focusing on the fate of the Draft Declaration and an explicit affirmation of a right of indigenous "peoples" to "self-determination," he succumbs to a formalism that is uncharacteristic of the overall method and thrust of his book, and that leads him to overlook important other developments or to miss their significance in relation to his project.

Keal accurately observes that indigenous peoples generally do not seek to establish their own states but rather see self-determination as an expression of the desire to continue as distinct groups within their traditional lands and to maintain control over their own destinies. He argues for an understanding of self-determination along these lines and, accordingly, advocates divorcing self-determination from long-standing conceptual or doctrinal linkages to attributes of sovereignty and a state-centered view of the world. Still, traditional legal rhetoric, with its formal categories, frames his ultimate argument. If indigenous groups gain recognition as "peoples" with rights of "self-determination" through adoption of the Draft Declaration, he argues, they would then become "subjects" as opposed to "objects" of international law and consequently gain "clear means of appeal against the states in which they are located" (p. 220). He does not explain why this would be so in a practical sense, other than to reference the generally understood relationship between UN resolutions and the consolidation of new international norms. Moreover, by closely linking the international recognition of indigenous peoples' rights with the adoption of the Draft Declaration yet to come, he bypasses discussion of significant developments that have, in fact, already led to international recognition of indigenous group rights of the type that he, as well as indigenous peoples themselves, associates with self-determination.

On the basis of existing international instrumental, a growing body of decisions and resolutions by various UN and regional human rights institutions has affirmed the collective rights of indigenous peoples in ways advocated by Keal,

[6] *See* THORNBERRY, *supra* note 4, at 72–74; ANAYA, *supra* note 4, at 26–31.

although without explicitly declaring indigenous groups as "peoples" entitled to "self-determination." In 2001, the Inter-American Court of Human Rights, in the *Awas Tingni* case,[7] upheld the collective rights of an indigenous community to its traditional lands against Nicaragua's assertions of authority to control those lands for its own ends as state-owned property. The Court's expansive interpretation of the right to property of the American Convention on Human Rights has been followed in subsequent decisions by the Inter-American Commission on Human Rights in other cases initiated by indigenous peoples.[8] The UN Committee on the Elimination of Racial Discrimination has issued a general recommendation in which it interprets the Convention on the Elimination of All Forms of Racial Discrimination to require that state parties recognize indigenous peoples' distinctive cultural identities and also the collective rights associated with those identities, including rights over lands and natural resources and to participate in all relevant decisions. The UN Human Rights Committee similarly has affirmed the collective rights of indigenous peoples on the basis of interpretations of provisions of the International Covenant on Civil and Political Rights, and has even applied the right of self-determination that is affirmed in general terms in Article 1 of the Covenant in defining the scope of state responsibility toward indigenous peoples.[9]

Although it may be that these and similar developments—from the late 1990s on—occurred too late for inclusion in Keal's book, the same cannot be said for the entry into force, well over a decade ago, of the International Labour Organization Convention (No. 169) on Indigenous Tribal Peoples, which Keal mentions only in passing and without attributing it much significance for his project. The basic thrust of Convention No. 169 is indicated by its preamble, which recognizes "the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live."[10] Upon this premise, the Convention includes provisions advancing indigenous cultural integrity, land and resource rights, and nondiscrimination in social welfare spheres, and it generally demands that states respect indigenous peoples' aspirations in all decisions affecting them. To be sure, many indigenous advocates have criticized Convention No. 169 for not going far enough or, indeed, for being seriously deficient. But many others, especially in Latin America (where the Convention has been widely ratified), have made it a prominent feature of efforts to transform the state societies within which they live.[11]

Convention No. 169 ascribes collective rights to indigenous "peoples" as such, although it includes a savings clause that denies any implication of rights that attach to the term as used elsewhere in international law. This savings clause was inserted to avoid taking sides in the controversial discussion of whether or not indigenous groups are "peoples" with rights of "self-determination," in light of the common understanding that self-determination in its fullest form means a right to independent statehood. While thus falling short of an explicit affirmation of the right of indigenous peoples to self-determination, the Convention recognizes indigenous peoples as distinct groups with certain rights as such in a way that places those rights and conceptions of indigenous identity apart from attributes of statehood, much in the way that Keal appears to advocate in his call for an alternative conception of self-determination. In any case, it is hard to avoid seeing the Convention's use of the term "peoples" in its various provisions as an affirmation

[7] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 79 (2001).

[8] *See, e.g.*, Dann v. United States, Case No. 11.140, Report No. 75/02 (Inter-Am. C.H.R. Dec. 27, 2002) (finding that the United States violated the due process and property rights of Western Shoshone people by inadequately addressing Western Shoshone claims to ancestral lands); Maya Indigenous Communities v. Belize, Case No. 12.053, Report No. 40/04 (Inter-Am. C.H.R. Oct. 12, 2004) (finding that Belize violated the property rights of Maya communities by granting concessions for logging and oil development on Maya traditional lands and by failing to recognize Maya rights in those lands under domestic law).

[9] These and other international developments concerning indigenous peoples are summarized in S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13 (2004), and are analyzed more extensively in S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed. 2004).

[10] Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, preambular para. 5 (entered into force Sept. 5, 1991), *at* <http://www.ilo.org>.

[11] *See generally* DONNA LEE VAN COTT, THE FRIENDLY LIQUIDATION OF THE PAST: THE POLITICS OF IDENTITY IN LATIN AMERICA (2000) (including a discussion of the role of Convention No. 169 in the indigenous rights movement).

of collective group identity and existence of the kind at least approaching what Keal calls for. If Keal believes otherwise, he should have provided at least some explanation of why such a natural interpretation of the Convention is mistaken.

Rather than highlight developments already leading to recognition of indigenous group rights in more or less the terms he advocates, Keal presents a catalogue of conceptual and doctrinal impediments to such recognition. These impediments include the uneasy place of collective rights in human rights discourse, lingering cultural barriers, dominant strains of legal and political thought with their foundations in classical theory, and the walls projecting from the central edifice of state sovereignty. His analysis of these and related impediments to international recognition of indigenous group rights is insightful and useful, helping to explain the tensions that are evident in the efforts to achieve that recognition and marking the challenges that must be overcome. Yet that very analysis and his argument for change omit an adequate account of the advances that have already occurred toward meeting these challenges.

Although it renders questionable Keal's assessment of the extent to which international law or society still fails to recognize indigenous peoples and their rights, his neglect of existing advances does not undermine the force of his argument in support of such recognition. Building on what he argues to be the need to address the legitimacy problem of international society and the states that constitute it, Keal demonstrates that dominant attitudes about cultural difference, with their historical roots, have harmed indigenous peoples and continue to do so by reinforcing power relationships that disadvantage them. He argues that states—at least those that promoted or have benefited from colonialism—individually and jointly bear responsibility for the historic injustices faced by indigenous peoples. He also addresses the complex matter of intergenerational responsibility and rebuts the proposition that such injustices are superseded by the passage of time. In broad and largely theoretical terms that draw on selected writings that take critical and postmodern approaches, Keal provides ideas on how that responsibility can be met in order to bring legitimacy to modern states and the international order they constitute. A first step is to achieve awareness of, and to break down, the intellectual barriers that impede cross-cultural understanding and genuine respect for diversity. Keal discusses forms of political community that can then be established to accommodate indigenous peoples' claims—forms that are alternatives to the traditional Westphalian state and that embrace multiple identities and spheres of authority.

Adoption of the UN Draft Declaration on the Rights of Indigenous Peoples, without changes that would undercut its basic principles, would no doubt be a major impetus for states and the international system to move further in the direction that Keal advocates and that indigenous peoples worldwide clearly want to go. That adoption would build upon and help consolidate developments that have already helped to advance recognition of indigenous peoples and their collective rights. Keal has made a strong showing of the justification for such recognition. He has shed light on the intellectual traditions that contributed to the oppression of indigenous peoples, on the way in which that oppression undermines the legitimacy of states and the international society they constitute, and on what is required to remove that oppression and to advance a global order in which *all* peoples—indigenous among them—effectively enjoy self-determination.

S. JAMES ANAYA
University of Arizona, Rogers College of Law

BRIEFER NOTICE

International Institutional Law: Unity Within Diversity (4th rev. ed.). Edited by Henry G. Schermers and Niels M. Blokker. Leiden, Boston: Martinus Nijhoff, 2003. Pp. xxxiv, 1302. Index. $386, cloth; $92, €64, paper.

The revised fourth edition of *International Institutional Law: Unity Within Diversity* accomplishes the objectives detailed in the introduction: (1) to describe and analyze international institutional law, thus providing a "systemic mapping" of institutional rules, (2) to contribute to improvements in practice that may provide some guidance for other organizations, and (3) to advance understanding of international institutional law. Like its predecessors—published in 1972, 1980, and 1995—this version presents a wealth of material on international institutions both carefully and clearly. Information on specific issues is easy to locate. Although the authors give primary attention to the United Nations and the European Union,