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Indigenous Peoples and International Law Issues

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and leaders of their people, but their selection is almost invariably on a basis that Westerners would not identify as strictly democratic. There were plans to transform the Guurti into an upper legislative body in 1997, but it was not clear as of April 1998 whether these plans had been implemented. Nor have planned parliamentary elections been held.

A central administration has been established to supervise and encourage autonomous regional and district authorities. What is contemplated is a highly decentralized government with a great deal of power vested in regional and district authorities. Moreover, some resurgence of civil society can be observed in the creation of directly representative civic organizations over the past several years.

Somaliland appears to be on a path of cautious consensus building, with respect for local and regional autonomy. With the government accepting and incorporating most forms of traditional organization, clan autonomy will be largely recognized, as will the authority of local leaders. The powerful clans are independent and diffused loci of potential resistance to the state. They are also wholly legitimate in the eyes of the Somali people. This may be the Somali version of accountability.[4]

Conclusion

Postcolonial constitutions, and the institutions and governing structures they bequeathed, were almost uniformly not up to the task at hand in sub-Saharan Africa. This should give the international community pause, as we try again to utilize those same structures. The example of Somaliland offers an alternative route. Without any international assistance or input, the Somali people are attempting to build institutions that address their needs and respond to their cultural values and needs. The Somali experience suggests what might happen in the absence of international assistance, and gives clues as to how that assistance should be shaped. We who work in international affairs might try to help people build on what they are, instead of trying to shape them into what we believe they should be, which often amounts to nothing more than a replication of ourselves.

INDIGENOUS PEOPLES AND INTERNATIONAL LAW ISSUES

*by S. James Anaya**

I want to comment on the influence of indigenous peoples and their perspectives on certain aspects of the international legal system. In mainstream academic circles, indigenous peoples constitute a much overlooked category of non-state actors that are making their mark on the international system of rules, procedures and institutions. By *indigenous peoples* I mean the culturally distinctive and more or less cohesive groups whose ancestors were the original inhabitants of lands now dominated by others. These include Indian tribes or communities of the American continents and aboriginal peoples in Australia and New Zealand, as well as other insular groups whose origins predate the settler societies that have developed around them.

Largely as a result of indigenous peoples' own efforts over the last two decades, the United Nations, the Organization of American States (OAS), the International Labour Organisation (ILO) and other international institutions have established indigenous peoples as special subjects of concern. This international concern is manifested by the 1989 ILO Convention on Indigenous and Tribal Peoples, the ongoing efforts within the United Nations

[4]On various forms of accountability, see Maxwell Chibundu, *Law in Development: On Tapping, Gourding, and Serving Palm Wine,* 29 CASE W. RES. J. INT'L L. 169 (1997).

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and the OAS to develop declarations on indigenous rights, and various technical assistance and development programs for indigenous peoples, and it is symbolically highlighted by the UN General Assembly's declaration of an International Decade on the rights of indigenous peoples, which began in 1994. In general, this international concern can be seen as aimed at remedying the legacy of historical inequities and promoting the survival of indigenous peoples as distinct communities with their cultures intact.

A great deal of scholarly and popular literature has devoted attention to the subject of indigenous peoples in recent years, but it has tended to treat the subject in isolation from the larger issues of international law and relations that the subject implicates. At the same time, the scholarly literature that has sought to identify or shed light on the major trends and contours of international law has, for the most part, ignored developments regarding indigenous peoples. In short, the subject of indigenous peoples has been ghettoized within the scholarly discourse of international law.

I want to identify three distinct issue categories prominent in contemporary scholarly discussion about international law and relate them to developments concerning indigenous peoples. My intention is to illustrate how indigenous peoples and their perspectives, which have gained attention among international actors, are not simply matters of particularized concern but rather have direct bearing on the science of international law more generally.

A first issue category has to do with *state sovereignty*, which is considered one of the bedrock doctrines of international law. The doctrine of sovereignty traditionally has shielded states from scrutiny over matters that are deemed to be within the realm of their domestic concern. A good deal of scholarly commentary has been devoted to identifying and explaining a weakening of the sovereignty shield over the last several decades. This weakening is attributed substantially to the international human rights regime that has developed since the adoption of the UN Charter and that imposes, in favor of the individual, external limitations on the exercise of state authority in the domestic realm. Indigenous peoples' demands, which have been deployed through the human rights regime, are resulting in a more radical altering of the state sovereignty norm than that brought about by the internationalization of individual rights. Indigenous peoples have claimed rights of group autonomy and collective rights of control over lands and resources. The assertion of such group rights challenges the primacy and sphere of state governing authority in a much more fundamental sense than classical individual rights do. International norms have developed and are further developing that in meaningful respects uphold the asserted group rights, as manifested in ILO Convention No. 169 on Indigenous and Tribal Peoples and the drafts of the UN and OAS declarations on indigenous rights. The weakening of the state sovereignty shield in this regard is dramatically evident in recent proceedings before the Inter-American Commission on Human Rights and the UN Human Rights Committee, in which states have been called to answer for their promotion of natural resource development schemes on lands claimed by indigenous peoples.[1]

A second and related issue category relates to the *concept of self-determination*, which is affirmed as a principle in the UN Charter and as a right of "all peoples" in the

[1]*See, e.g.*, Inter-Am. C.H.R., *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96 rev. 1, April 24, at 77–117 (examining impacts of oil development on indigenous lands): Case 11.577 (Nicaragua), *Annual Report of the Inter-American Commission on Human Rights*, OEA/Ser.L/VII.98, Doc. 7, rev at 46 (1998) (calling on Nicaragua to suspend, as a precautionary measure, concession for logging on indigenous-claimed lands); B. Ominayak, Chief of the Lubicon Lake Band v. Canada, Communication No. 167/1987, Hum. Rts. Comm., A/45/40, vol. II, annex IX.A (finding that state-permitted timber development in indigenous lands exacerbated historical inequities to constitute a violation of the International Covenant on Civil and Political Rights).

international human rights covenants. Much scholarly effort has gone into trying to explain the meaning of a right of all peoples to self-determination in the context of an international legal order that presumptively upholds the sovereignty, territorial integrity and political unity of states. Typically, self-determination has been understood to mean, in its fullest sense, a right to independent statehood, and hence the central focus of inquiry has been on identifying the necessarily limited universe of groups that are entitled to become independent states if they so chose. A premise underlying this approach is that the state is the highest form of self-determination for cultural or national communities. This premise is of course subject to question, if only because of developments in this century by which the state has diminished in importance in the face of both local and transnational spheres of community and authority.

In pressing their demands internationally, indigenous peoples have pointedly undermined the premise of the state as the highest and most liberating form of human association. Indigenous peoples are seen, and for the most part see themselves, as different from but not inferior to states both descriptively and normatively. The model that is emerging from the interplay of indigenous demands and the authoritative responses to those demands is one that sees indigenous peoples as simultaneously distinct from yet part of the states within which they live, as well as part of other units of social and political interaction that might include indigenous federations or transnational associations. Within this model, self-determination is achieved, not by independent statehood, but by the consensual development of context-specific arrangements that uphold for indigenous peoples both spheres of autonomy commensurate with relevant cultural patterns and rights of participation in the political processes of the states in which they live.

The final issue category is the theme of this conference, that is, *the role of non-state actors in international legal processes*. Indigenous peoples are among the numerous non-state actors that have managed to take advantage of openings in the international system and forge new ones in order to participate in and influence decision-making processes that extend into the international arena. For at least two decades, representatives of indigenous peoples have been appearing before UN human rights bodies in increasing numbers and with increasing frequency. Indigenous peoples have enhanced their access to these bodies as several organizations representative of indigenous groups have achieved official consultative status with the UN Economic and Social Council (ECOSOC), the parent body of the UN human rights machinery. Indigenous peoples also have invoked procedures within the OAS, particularly its Inter-American Commission on Human Rights.

The efforts of indigenous peoples are especially noteworthy in at least two respects. First, without any political clout to speak of, indigenous peoples have been fairly successful in using the language and methods of human rights to advance their demands. Grounding their demands in generally applicable human rights principles, they have articulated a vision of themselves different from that previously advanced and acted upon by dominant sectors, and they have greatly influenced the international agenda of activities that has proceeded in response to those demands. In a relatively short time, they have managed to shift prevailing attitudes away from a norm of assimilation and toward one of respect for indigenous cultures and group identity. Even though this shift has not progressed sufficiently to satisfy most indigenous groups, and its implementation on the ground has been slow to follow, the shift nonetheless is clearly perceptible in the collective and individual utterances by states and other actors, and in texts.

Second, indigenous peoples appear to be gaining recognition as having a unique or *sui generis* status among non-state actors within the international arena; associated with that unique status is an enhanced level of participation. Indigenous peoples are unlike ordinary nongovernmental organizations (NGOs) in that indigenous peoples are not simply groups

organized around particular interests. Rather, indigenous peoples are by definition long-standing communities with historically rooted cultures and distinct political and social institutions. They seek to have a presence in their own right as peoples in the international arena, and not just as representatives of a segment of so-called civil society. Within the United Nations and other international institutions, various extraordinary mechanisms have been devised to allow representatives of indigenous peoples to participate in discussions that affect them. In 1993, the UN General Assembly authorized the Commission on Human Rights to consider developing a so-called permanent forum for indigenous peoples. At present, states appear unlikely to go along with a configuration of the permanent forum that would include indigenous peoples on an equal footing of participation with states. However, the idea behind the proposed permanent forum—providing indigenous people a unique and extraordinary level of participation in UN decision making—appears to be generally accepted.

In conclusion, I hope it is apparent from my comments that developments concerning indigenous peoples are having identifiable impacts on the international legal system and the way international affairs professionals should think about it. In sum, these developments are breaking new ground on issues concerning state sovereignty, self-determination, and non-state actors—among numerous other issues I have not mentioned today—with a central feature being a challenge to the state as the sole or primary means of locating power and community.

INTERNATIONAL LAW MOVES IN A CROSS-DISCIPLINE REGISTER

*by Sharon K. Hom**

Gerry J. Simpson begins his review essay of Thomas M. Franck's 1995 book *Fairness in International Law and Institutions* by observing, "International legal theory is a blossoming academic industry."[1] Whether this reference is metaphor or mimesis, the innocuous reference to industry is a useful point of departure for my remarks today. This invocation of academia and business collapsed into an apparently nonoxymoronic reference suggests fundamental questions about the nature of the international law enterprise. For a relative newcomer, the theoretical questions that characterize the field present a daunting intellectual landscape. Is international law, law? Is it fair? Is it legitimate? How do we define, measure and justify competing definitions of fairness, legitimacy and even law? Do rules matter? To whom? Is there a rapprochement between international relations and international law? Is international law just epiphenomenal, peripheral to the "real" world outside academia, or, as legitimation for state sovereignty, is it the secret "love object" of governments, as one commentator has suggested?[2] What about more programmatic questions that direct attention to particular visions of fairness, multiculturalism or world order? Are we heading toward end-of-the millennium chaos or is this another Grotian moment with a postmodernist twist? What James Boyle calls "concept fatigue" begins to come to mind.[3]

Nevertheless, I welcome and appreciate this invitation to participate. Beyond legal theory, I want to refer to international law more broadly, that is, as an academic formation, as a field of law practice and as competing discourses and metadiscourses that are

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[1]Gerry J. Simpson, *Is International Law Fair?*, 17 MICH. J. INT'L L. 615 (1996).

[2]Philip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 833 (1990).

[3]James Boyle, *Ideals and Things: International Legal Scholarship and the Prison-House of Language*, 26 HARV. INT'L L.J. 327, 329 (1985).