Remembering the Country of Their Birth: Indigenous Peoples and Territoriality

Maivân Clech Lâm

> The white man's dead forget the country of their birth when they go to walk among the stars. Our dead never forget this beautiful earth, for it is the mother of the red man. We are part of the earth and it is part of us… We know that the white man does not understand our ways. One portion of land is the same to him as the next, for he is a stranger who comes in the night and takes from the land whatever he needs. The earth is not his brother, but his enemy, and when he has conquered it, he moves on. He leaves his fathers' graves behind, and he does not care. He kidnaps the earth from his children. He does not care… His appetite will devour the earth and leave behind only a desert.[1]

The successive forces of mercantilism and colonialism that first surged out of Europe in the 15th century unleashed, over the next 500 years, a seismic shake-up of the native societies of the New World, Asia, Africa, and the Pacific. In the cases of Asia and Africa, the colonizers, if not also their influence, were in the main repulsed through nationalist movements that burgeoned while Europe fought World War II, and that delivered formal political independence in the decades following the founding of the United Nations in 1945. Where, however, westerners came not only to extract resources but also to settle en masse, as in the Americas, Australia, and Aotearoa/New Zealand, native societies barely survived, let alone found the opportunity to reconstitute into something like their former selves. In any event, western governments made sure as the war wound down that that opportunity would never effectively materialize, for either set of disrupted societies. In July 1944, a month before formal discussions began in Dumbarton Oaks on the creation of a new world organization to replace the defunct League of Nations, representatives of 45 states, most dominated at the time by either the United States or the United Kingdom, met in Bretton Woods, New Hampshire, to lay out a postwar economic world order, manifest today as global capitalism, that would safeguard the extensive extra-territorial economic interests of the west against the formidable threat then posed to them by the looming convergence of two ascending ideologies: Soviet socialism and Third World nationalism.[2]

Journal of International Affairs, Spring 2004, vol. 57, no. 2.

A stratagem that the trans-Atlantic states settled on to undercut these ideologies was the large-scale proffer, fraught with conditions and consequences, of American capital to a cash-strapped postwar world in dire need of reconstruction funds. The institutions that the alliance created to control the use of that capital included the International Bank for Reconstruction and Development (now the World Bank), the International Monetary Fund (IMF), and, three years later, the General Agreement on Tariffs and Trade; now the World Trade Organization (WTO).[3] To date, the Bretton Woods scheme has served its authors exceedingly well. Global capitalism runs the world, generating excessive wealth for some, comfortable sufficiency for many, and unbearable poverty for the rest, all the while rearranging natural and cultural landscapes at will or, as needed, at the side of the American imperium.[4] In the process, what ties there remain in the postcolonial world that still bind human beings close to the lands of their birth—ties spun from cultural communities' intimate knowledge of, and profound dependence on, their natural environments—are mindlessly slashed, if not severed.

In this story the peoples—comprising over 350 million individuals and 5,000 ethnolinguistic groups—whom international fora today recognize as indigenous are, virtually by default, those last wrenched from, or harassed in, their native spaces. As a consequence, they assert more vigorously than others earlier displaced their attachments and rights to homelands still experienced, or remembered, in the main as sufficient, animate, and meaningful. José R. Martinez Cobo, the Special Rapporteur appointed in 1971 by the UN Commission on Human Rights (UNCHR) to conduct its first-ever study of indigenous peoples, identified this land-rootedness as the primary marker of indigenous identity. He wrote, in his now classic description of indigenous peoples:

> 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.[5]

Cobo's description simultaneously captured the fundamental and unchanging message that indigenous delegations from around the world carried, beginning in the 1960s, to international fora where they seek international legal and institutional protection, impelled by the depredations of global capitalism in their territories as well as by the attendant impotence if not connivance of their enclosing states.[6] The message indigenous peoples deliver is a simple one: their ability to survive as distinctive peoples is inextricably tied to their right to occupy their traditional territories and control their resources. Translating the rights language of the message into its political correlate, indigenous peoples are in fact claiming territoriality, an attribute normally associated with sovereign statehood or independence to which, paradoxically, only a few aspire.[7]

The right of a people to preserve their distinctive culture, while not yet formalized as a treaty right, is arguably an emerging tenet of customary international law as the 1981 United Nations Educational, Scientific, and Cultural Organization (UNESCO) *Declaration of San José* suggests:

> Ethnocide means that an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language, whether collectively or individually. This involves an extreme form of massive violation of human rights and, in particular, the right of ethnic groups to respect for their cultural identity…. We declare that ethnocide, that is cultural genocide, is a violation of international law equivalent to genocide...[8]

Either way, indigenous representatives in international fora emphasize that territoriality is the *sine qua non* condition of their physical as well as cultural survival. For this reason, they insist that their rights to self-determination, and to control over territories and resources they traditionally occupied or used, be memorialized in instruments of international law. This paper assesses the response of the international law-making community to that message. It reviews a number of relevant developments in international fora; explains the key legal issues being contested in light of the paradigmatic dimensions of international law that they implicate; and ends with a call for states and the broader international community to embrace and elaborate a territorial prerogative for indigenous peoples.

Developments in International Fora[9]

The first recorded intervention by an indigenous advocate in an international forum occurred in 1922 when Chief Deskaheh, a leader of the Six Nations Iroquois Confederacy, petitioned the League of Nations in Geneva to prevent Canada from taking over Iroquois lands. Deskaheh's mission failed, but not before the sympathetic Dutch, Panamanian, Estonian, and Persian delegates of the day administered sound rebukes to the United Kingdom and Canada for their treatment of the indigenous peoples under their rule.[10] When, two decades later, an Iroquois delegation again tried to address a world body, at the founding of the UN in San Francisco, the U.S. warded off the attempt by arguing that the UN could not receive submissions from private parties, only from states.[11] The next development of note in this area happened in 1957, when the International Labour Organization (ILO), on its own initiative and with little evident indigenous input, adopted the well-intentioned but markedly assimilationist *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (ILO Convention 107). Notwithstanding its limitation, ILO Convention 107 performed the valuable task of inscribing for the first time in international law the category of indigenous and tribal peoples, whom it correctly represented as deserving of special attention.[12]

Sustained indigenous participation in international bodies did not materialize until the 1970s, and then primarily in NGO fora. By 1982, however, the UN Commission on Human Rights, urged on by ever more activist NGO communities, as well as by the findings of its own Special Rapporteur Cobo, set up a Working Group on Indigenous Populations (WGIP) composed of five independent experts, albeit appointed by states, whom it entrusted with a dual mandate: to monitor developments affecting indigenous peoples, and to formulate standards to guide the behavior of states toward them. From its inception, the WGIP attracted an impressive number of indigenous participants, but remarkably few states, to its summer sessions in Geneva. As a result, when the WGIP experts in 1994 completed and unanimously recommended their standard-setting UN Draft Declaration on the Rights of Indigenous Peoples (DD) to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission), which in turn unanimously passed it on to the UNCHR, the text was found to have incorporated the main demands of indigenous representatives.

From the indigenous perspective, the DD's most prized provisions are those relating to self-determination and territoriality. Two articles, placed far apart, specifically mention self-determination:[13]

> Article 3. 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.
>
> Article 31. Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Article 3 faithfully reproduces the standard formulation of the right of self-determination contained in prior instruments of international law.[14] Article 31, on the other hand, if adopted, would constitute the first time that the term "right to autonomy" appears in an international norm-building document. DD articles 25 to 30 address territorial issues. The first two of these are foundational on the subject and merit full quotation:

> Article 25. Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.
>
> Article 26. Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or use (emphasis added).[15]

The remaining articles 27 to 30 forbid military activities and placement of hazardous materials on indigenous territory; legitimize indigenous land-tenure systems; obligate states to "prevent any interference with, alienation of or encroachment upon these rights"; and, most importantly, require states to obtain the "free and informed consent" of indigenous peoples for any project that affects what the DD calls, in a tripartite rubric, their "lands, territories and resources."[16]

Given that states have long reserved to themselves the legal and political attribute of territoriality, it comes as no surprise that these very same articles on self-determination and territories are what is generating the bulk of the controversy now engaging the body that the UNCHR created in 1995 to advise it on the DD, the Working Group on the Draft Declaration (WGDD). The WGDD, unlike the WGIP, is controlled by states rather than independent experts. Like the WGIP, however, it draws a large and seasoned group of indigenous participants to its annual fall sessions in Geneva. Reprising the practice they first developed in the WGIP, these participants coalesce as an Indigenous Caucus that speaks, as much as possible, with a single forceful voice on key issues. The WGDD's mandate expires at the end of 2004. From 1995 until the present, its member-states have reached consensus on only two of the DD's 45 articles. What will happen next is unclear. The UNCHR could renew the mandate of the WGDD, probably for a much shorter spell this time given the difficulty of justifying additional funding for a seemingly unproductive body. Alternatively, the UNCHR could table the DD and indefinitely postpone the resolution of the controversies it has generated between the Indigenous Caucus and a number of states, most notably the U.S.

The fate of the DD remains of utmost concern to indigenous activists around the world given its prospectively universal, albeit non-binding, reach as a UN declaration. However, indigenous peoples also promote their rights to self-determination and territoriality in a number of other bodies that generate or implement international or regional laws and norms. For groups that live in states that have ratified the 1989 ILO *Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries*,[17] which both renounces the assimilationism embodied in the earlier ILO Convention 107 and replaces the latter instrument in states that have signed both, the ILO Secretariat itself is an important site of activism, as it proffers mechanisms for receiving and investigating indigenous peoples' complaints against non-compliant states. Like its predecessor, ILO Convention 169 remains the only extant instrument of international law to specifically address the needs and rights of indigenous peoples. While it offers less generous territorial control to indigenous peoples than the later born DD extends, ILO Convention 169 nonetheless offers enforceable treaty rights, which a declaration, being largely aspirational, does not, even if it is eventually adopted by the General Assembly. In the matter of lands, territories, and resources, ILO Convention 169 recognizes a range of cognizable rights in indigenous peoples: of possession, co-use, co-management, co-conservation, and non-removal or relocation without "free and informed consent."[18] Unlike the "soft-law"

DD, then, ILO Convention 169 stops short of conferring on indigenous peoples a unilateral right to give or withhold their free and informed consent, i.e. a veto right, over all activities affecting the spaces that they call home.

Erica-Irene A. Daes, the esteemed former chair of the WGIP, points out in the important study she presented to the UNCHR in 2001 entitled "Indigenous Peoples and their Relationship to Land" that a number of other treaties provide indirect support for the territorial claims of indigenous peoples.[19] Chief among these are the widely ratified 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Convention on Genocide),[20] the 1966 International Covenant on Civil and Political Rights (ICCPR),[21] and the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[22] The Convention on Genocide prohibits acts that intend to destroy, in whole or in part, a group targeted on the basis of its nationality, ethnicity, race, or religion. It covers acts that kill, seriously injure body or mind, or deliberately impose conditions calculated to bring about destruction. Few would dispute that a human community that endures the physical upheaval of its environment suffers, at a minimum, serious psychological injury. Where the upheaval, in addition, is intentionally inflicted on a distinctive cultural community, there is likely a violation of the Convention on Genocide. Depending on how a court interprets the element of intent, then, whether as difficult-to-show purpose or easier-to-show foreseability, the ravages unleashed by logging, extractive, dam-construction, drug-interdicting fumigation, and other military activities now widely conducted in territories traditionally inhabited by indigenous peoples could be legally characterized as genocidal.[23] The recently activated International Criminal Court will undoubtedly be the first general international tribunal to rule on genocide, and thereby make the authoritative determination regarding the nature of intent. In the interim, the specialized International Criminal Tribunal for the former Yugoslavia seems to be setting such an unexpectedly high bar for the proof of intent in genocide, apparently requiring direct as opposed to indirect evidence of intent, that observers are predicting that Slobodan Milosevic will escape conviction on that particular charge.[24]

The ICCPR, which guarantees civil and political rights to individuals against infringement by their states, has long been thought to include the only other reference to group rights contained in a currently enforceable international human rights instrument. Its article 27 states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, <u>in community with the other members of their group</u>, to enjoy their own cultures, to profess and practice their own religion, or to use their own language (emphasis added).

The Human Rights Committee, entrusted with the authority to apply and interpret the ICCPR, considers that article 27 reaches the subject of indigenous peoples' collective rights to their territories:[25]

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes 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 (emphasis added).

Likewise, the CERD Committee set up to apply and interpret CERD has read its article 5(d)(v), which prohibits discrimination regarding the "right to own property alone as well as in association with others," to cover indigenous peoples' collective rights to their territories.[26] Finding that the CERD mandate reaches indigenous peoples, the CERD Committee then explained that indigenous peoples suffer discrimination when they lose "their land and resources to colonists, commercial companies and State enterprises."[27] It called on states to:

> Recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories (emphasis added).[28]

Note that the CERD Committee, which like the Human Rights Committee interprets treaty law, recognizes in the above passage indigenous peoples' right to control—as opposed to ILO Convention 169's more restrictive "co-control"—of their lands, territories, and resources. This same right to control, as has been shown, is also set out in the DD, but has not yet been accepted by the WGDD, which thereby shows itself to be lagging behind developments in treaty law.

Recognition of the special territorial orientation, needs, and rights of indigenous peoples is simultaneously spreading through the Organization of American States (OAS) system. In 1997, the Inter-American Commission on Human Rights, which is composed of seven independent experts appointed by states, submitted a Proposed American Declaration on the Rights of Indigenous Peoples (PAD) to the Permanent Council of the OAS. The latter then entrusted its review to a Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples (OAS WG), a body that is made up of member states. As in the WGDD, indigenous representatives from the Americas do not hold decision-making powers in the OAS WG but participate vigorously nonetheless in its meetings, under the aegis of the Indigenous Caucus or under the banners of their own communities or organizations. Indeed, many indigenous attendees are veterans of both the UN and OAS processes. Not surprisingly they insist, in both venues, on the primacy of the same two foundational rights: self-determination and territoriality.

In the summer of 2003, the OAS WG issued a revised version of the PAD, calling it the Consolidated Text.[29] However, because the latter is a working text, whose provisions are not adopted until the OAS WG adopts a full text, I will now compare the relevant and equivalent sections of the PAD and the DD to highlight their points of convergence and

divergence. To begin with, the PAD does not carry a self-determination provision comparable to that found in DD article 3, set out earlier in this paper, which reproduces, verbatim, the classic international law formulation of the right.[30] Instead, PAD article XV, which contains the document's sole reference to self-determination, grants indigenous peoples autonomy only:

> Indigenous peoples have the right to freely determine their political status and freely pursue their economic, social, spiritual and cultural development, and are therefore, [sic] entitled to autonomy or self-government with regard to inter alia … land and resource management…[31]

In addition, the PAD, compared to the DD, takes a more timid approach on the issue of whether indigenous peoples of the Americas enjoy a general right to control, i.e. veto, the uses of their territories and resources. Its article XIII, denominated "The right to environmental protection," starts off with vague general references to indigenous peoples' rights to a "safe and healthy environment," to "conserve, restore and protect… the productive capacity of … their lands, territories and resources," to "full participation" in the planning and implementation of governmental programs, to assistance from the state, and to the latter's interdiction of the entry and location of hazardous materials in indigenous territories. However, the article does end with the recognition, in one context, of what I call the territorial veto right of indigenous peoples:

> When a state declares an indigenous territory to be a protected area, and in the case of any lands, territories and resources under potential or actual claim by indigenous peoples, as well as locales used as natural biopreserves, conservation areas shall not be subject to any natural resource development <u>without the informed consent</u> and participation of the peoples concerned (emphasis added).

The difference between the above provision and DD article 27, which broadly recognizes indigenous peoples' right to withhold consent for all occupation or use of their territory, then lies seemingly in this: The PAD specifically vests the state with the task of designating indigenous territory. Only after such designation do indigenous peoples exercise full control therein. The DD, on the other hand, specifies no such prior designation by the state, though arguably that is understood. Either way, given a state's potential for abuse of its power to designate, indigenous peoples will need a share in that power, or at least an impartial review mechanism for the designation. Finally, it should be noted that the OAS process, which began well after the UN one, is moving faster than the latter, and will likely yield a hemispheric declaration ahead of a universal one. This would then place the OAS instrument in the position of influencing the outcome of the UN instrument, rather than vice versa.

Notwithstanding the uncertain prospects of both the OAS and the UN draft declarations, OAS jurisprudence on indigenous peoples' rights to their lands is moving forward with remarkable vigor. The impetus springs from both the complaints that indigenous

plaintiffs diligently bring to the Inter-American Commission of Human Rights (the Commission) alleging violations of the 1969 American Convention on Human Rights (ACHR),[32] and to the principled behavior of the Commission itself in submitting meritorious cases to the Inter-American Court of Human Rights (the Court). On 31 August 2001, the Court issued a path-breaking decision regarding one such complaint that was pleaded before it by the Commission: *Case of the Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*.[33] The complaint was first filed in the Commission on behalf of the plaintiff by the U.S.-based Indian Law Resource Center. The Commission, finding the complaint compelling, in turn argued its merits to the Court. The latter, applying article 21 of the ACHR (guaranteeing the right of property), which it read in conjunction with the Constitution of Nicaragua (recognizing the right of indigenous peoples to maintain their communal forms of land ownership, use and enjoyment), as well as Nicaraguan domestic legislation (requiring the demarcation of indigenous territories), wrote:

> Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.[34]

With that important foundation laid, the Court went on to confirm that the community of *Awas Tingni* held rights to their lands and resources in common, and in accord with the land-tenure system of their own culture, which governed in their territory. The state of Nicaragua violated these rights by, among other things, failing to demarcate the community's territory and issuing title thereon as required by its own legislation, and by unilaterally granting a logging concession in the territory to an outside timber company. Central to the decision was the Court's recognition that the communal ownership of lands by an indigenous people is a human right protected by the ACHR; that customary land-tenure laws control in indigenous territory; and that the integrity of indigenous territory may not be breached by the state or its concessionaire at the state's sole discretion.

Awas Tingni is the last in a trio of remarkably innovative and far-reaching judicial opinions on the territorial rights of indigenous and tribal peoples that have been handed down over the last three decades by international, regional, and national tribunals. The first was the 1975 International Court of Justice (ICJ) *Western Sahara* Advisory Opinion,[35] and the second was the 1992 Australian High Court's *Mabo v. Queensland* judgment.[36] Together with *Awas Tingni*, these cases profoundly re-orient normative thinking in the area; far more so, alas, than they do conditions on the ground. ICJ Advisory Opinions are only that—advisory. Thus even though the ICJ ruled—on the basis, *inter alia*, of anthropological information attesting to the historical depth and eco-

logical logic of the cultures of the nomadic tribes of the concerned space—that the inhabitants of the Western Sahara were a people entitled to the exercise of self-determination under international law, the Court lacked the authority, let alone the power, to interdict or reverse Morocco's physical assertion of hegemony over the territory. Likewise, while the *Mabo* decision—holding null and void the notorious *terra nullius* doctrine that underlay the settler society's property regime[37]—certainly binds Australia, the High Court there gave the federal and state governments so much leeway to adjust their property laws in response to its ruling that the Aboriginal peoples of the continent have yet to reap real benefit from the decision.[38] Of the three cases, then, perhaps only *Awas Tingni* will be implemented in good faith.[39]

From a normative perspective, however, the three cases represent a sea change in international law. First, local ethnographic data, as much as universal political formula, were privileged by the ICJ as a basis for validating the self-determination claim of the nomadic tribes of the Western Sahara. In fact, the tribes, under the evidence presented, rarely controlled their territory with the degree of cohesion, specificity, permanence, and exclusivity that international law, long accustomed to folding the concept of territoriality into that of the state, hitherto looked for in assessing potential and effective independent statehood—something the population of Western Sahara apparently pursued. Second, the *terra nullius* doctrine was laid to rest, indirectly in *Western Sahara*, definitively in *Mabo*. The legal doctrine's conceit that inhabited spaces later settled by westerners either did not shelter human beings before, and/or that these human beings possessed no social order, was exposed for the blatant racism and pitiful ignorance that it embodied. *Awas Tingni* contributed a further piece in this rectificatory legal evolution: A prior indigenous social order does not yield automatically to a later statist order, particularly when, as is the case today, modern international law has repudiated the doctrine that territory may be lawfully acquired from another through conquest or other forms of coercion.

Beyond treaty law and the judicial opinions that interpret it lie other matrices of international norms and rules. The practices of states, intergovernmental bodies and, increasingly, agents of international civil society such as NGOs potentially generate, in existentially driven increments, norms and rules of customary international law that evolve in response to aspects of life in the global village that tend to be relational and fluid (such as indigenous-state relations), in contrast to those that present themselves as largely repetitive or technical (such as trade or civil aviation, respectively). As Justice C. G. Weeramantry of the ICJ has written, customary international law plays a key role in fashioning a community, as opposed to a mere collection, of states.[40] Indeed, it is outside the formal treaty-making sites that states control, and in the practice-accumulating and norm-developing spaces of international society where indigenous peoples and independent or semi-independent "experts" increasingly interface, that the territorial prerogative of indigenous peoples is now being most actively and creatively negotiated. While examples abound of these interfaces, I will illustrate my point with reference to the World Bank, that *ne plus que* bastion of global capitalism.

From the outset it must be said that the World Bank, more than any other intergovernmental organization (IGO) in the last half-century, bears the responsibility for financially enabling the mega-projects, particularly dams, that have delivered the unkindest cuts of all to settled communities and fragile ecologies. Left to its own devices, the World Bank without doubt would accumulate an uninterrupted history of what the political scientist and social historian James C. Scott calls "Seeing Like a State" in the book bearing this title.[41] The statist vision that Scott meticulously exposes in his work is one that is habitually abstract, rationalist, universalist, high modernist, and presumes to see long into the future exactly what it is that human societies need, even when (one is tempted to say particularly when) the affected themselves fail to share the vision. Hence the nature of these mega-projects: messianic, alien, irreversible. Fortunately, ordinary voices sometimes reach the divine ear, or at least those of the experts that the Bank recruits into its less-monolithic-than-appears bureaucracy, and cause the divine will to waver.

During the 1980s, as awareness grew of the special vulnerabilities of indigenous peoples importuned by states and transnational corporations, the World Bank briefly subscribed to the principle that its projects should not entail coercion and injury for indigenous communities. It later abandoned the principle, drawing loud censure from indigenous peoples and their supporters.[42] This once again prompted the World Bank to adopt a relatively protective stance in its 1991 Operational Directive (OD) 4.20. The new document recognizes the disadvantage that accrues to indigenous peoples in development projects, and requires not only that these not harm indigenous peoples, but indeed offer them socially and culturally appropriate benefits.[43] Recently, a team of experts commissioned by the Bank advised that OD 4.20 be revised before the end of 2004 with the participation of indigenous peoples so as to enlarge its regard for their interests in a manner consistent with their expanding rights under international law.

The team, in its *Extractive Industries Review* (EIR) report,[44] forwarded to the Bank a number of other startling findings and recommendations that show that norms of international behavior are being thoughtfully generated at what might be termed the interface of need with expertise. Headed by Dr. Emil Salim, former Minister of the Environment in Indonesia's government, the EIR team urged the Bank to 1) immediately cease funding for coal projects worldwide, 2) phase out support for oil production by 2008, 3) terminate support for destructive mining activities, and 4) obtain the prior informed consent of indigenous peoples and others potentially affected by proposed projects.[45] Whether or not the Bank will heed these environment-friendly and indigenous peoples-supportive recommendations remains to be seen. What is clear is that the Bank has bent to such pressure before. And pressure, it appears, is alchemized in the intersectoral workshops of the global village where new knowledge and fresh resolve sometimes take root, without which the predatory form of capitalism now prowling the world requisitioning laissez-faire welcome mats might already have left behind only a desert.

In this regard, the inauguration of the UN Permanent Forum on Indigenous Issues in New York in May 2002 represents an ambitious effort by the UN to institutionalize a maximally productive interface between representatives of indigenous communities, states, UN agencies, other IGOs, and NGOs. The Permanent Forum is composed of 16 mainly indigenous commissioners nominated in equal number by states and indigenous organizations but appointed by the president of the UN Economic and Social Council (ECOSOC). It is charged with advocating for the interests of indigenous peoples throughout the UN system as well as in cooperating bodies like the World Bank. Notwithstanding the real promise inherent in its creation, the Permanent Forum will need far more resources than it currently receives from the UN if it is to realize its mandate. Given the parsimony powerful member states have imposed of late on the world body, the fate of its highly innovative Permanent Forum likely depends on how much assistance it will receive from outside donors, NGOs, and the "expert" community.

Issues and Paradigms

As indicated earlier, two issues, more than all others, preoccupy indigenous participants in the UN and OAS draft declaration processes: the right of self-determination; and the right to territoriality or territorial control, encapsulated in the relevant documents as the right to give or withhold "prior free and informed consent" to activities affecting indigenous homelands.[46] No doubt because these rights are worded more favorably for indigenous peoples in the DD than in the PAD, the debate around them has also been more engaged, vehement, and thorough in the older UN process than the younger OAS one. This section will therefore discuss the debate on the two rights as it crystallized in the WGDD after Norway submitted in 2002 a proposal calling for changes to DD provisions that address the right of self-determination.[47]

First, the Norway proposal added a qualifier (underlined below) to the previously unqualified reference to the right of self-determination contained in paragraph 15 of the Preamble to the DD:[48]

> Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination, <u>yet nothing in this Declaration shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples</u>.

Second, the proposal moved article 31, which states that "Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy," from its unremarkable location toward the end of the DD to a prominent position immediately following article 3 which, standing alone, extends the classic, unqualified right of self-determination contained in international law instruments to indigenous peoples.

Juxtaposed, the two articles instead potentially support an argument that article 31 reduces the scope of article 3 to that of autonomy, or what some confusingly call internal self-determination. Interestingly, the U.S. offered a proposal at the same session of the WGDD that explicitly merged the right of self-determination with that of autonomy by simply absorbing article 31 into an emasculated article 3:

> Indigenous peoples have the right to internal self-government. By virtue of that right, they may negotiate their political status within the framework of the existing nation-state to pursue their economic, social and cultural development. Indigenous peoples, in exercising their internal right of self-determination, have the internal right to autonomy or self-government …[49]

Note that the U.S. text quoted above employs the terms "internal self-government" and "internal right to autonomy" interchangeably. Neither term, at the moment, figures as a term of art in international law for the simple reason that the latter does not, in principle, concern itself with internal political subdivisions. Furthermore, the international law right of self-determination is a unitary one that has not been subdivided into internal and external components in either conventional or customary international law except, arguably, in the case of apartheid South Africa when the General Assembly called apartheid a violation of self-determination that, the jurist Antonio Cassese notes, could only have meant internal self-determination under the circumstances.[50] On the other hand, another jurist close to the subject, Gudmundur Alfredsson, asks that the term self-determination not be used cosmetically: "…political participation and autonomy … fall short of granting the right of self-determination … we should call the rights offered by their correct names and not try to advance their image by doubtful labeling."[51]

As set out in treaty law, the right of self-determination simply enunciates a people's right to choose, among other things, its political status, the form of which international law neither prescribes nor proscribes. The General Assembly made this quite clear in 1960 when it adopted Resolution 1541, which states that the political status a people chooses in its exercise of self-determination may range from incorporation with an existing state, through free association with it, to total independence.[52] Furthermore, as indigenous peoples never tire of pointing out, the five WGIP independent experts who crafted the DD, and the much larger group of independent experts who endorsed it in the Sub-Commission, could not have crafted a lesser degree of self-determination for indigenous peoples than for other peoples without violating the UN Charter mandate "requiring respect for the principle of equal rights and self-determination of peoples."[53]

At the same time, having unambiguously established in article 3 the formal equality of indigenous peoples with all other peoples with respect to self-determination, the WGIP experts understood that virtually all indigenous peoples seek a freely negotiated partnership with states rather than independence. They thus ingeniously constructed a paradigm for just such a partnership in the rest of the DD. The Norwegian and U.S. proposals, if adopted, would thus jettison this fundamental nexus, or inspired balance, that the DD

established for indigenous peoples, between their right to self-determination on the one hand, and the high likelihood that they will exercise it to negotiate a partnership with states on the other hand. In other words, the WGIP experts anticipated that, to the extent that international law guarantees indigenous peoples' right to self-determination, it will also 1) motivate states to do what few have done in the course of past bilateral relationships, i.e. negotiate in good faith,[54] and 2) motivate indigenous peoples, who are rightfully wary of states, to enter newly negotiated arrangements with them, the minimal standards of which are reassuringly guaranteed by international law, and the coercive potential of which is mitigated by the right of indigenous peoples to seek alternative arrangements as set out in UN General Assembly Resolution 1541.

The U.S. and western Anglophone countries,[55] followed lately by Norway and other Nordic countries that have signed on to its 2002 proposal, rationalize their opposition in the WGDD to an unencumbered right of self-determination for indigenous peoples on two closely related grounds: 1) that international law does not permit secession, and 2) that it affirmatively protects the territorial integrity of states, which article 3 in the DD threatens. While literally accurate, the first proposition misleads—international law has nothing whatsoever to say about secession, for or against. However, international law does say that "peoples," which it does not define, may exercise their right of self-determination to claim independence, an action that certainly entails separation from an existing state. So a people's separation from an existing state, whether or not called "secession"—and indigenous representatives suggest that the term be reserved to describe the repudiation of a state by an entity that previously agreed to join it, which does not embody their case—is not as such forbidden in international law.

Likewise, the related proposition that international law protects the territorial integrity of states is true, but the question must be asked: From whom? The answer, given international law's simultaneous support for the self-determination of peoples, can only be: From other states. The Norway proposal which directly appends a territorial integrity qualifier to the right of self-determination mentioned in the Preamble to the DD is thus a wholly novel move in international law. No previous instrument of this system has suggested that the principle of territorial integrity bars a state's own constituents, as opposed to another state, from challenging its borders. Indeed, the qualifier language, which the Norway proposal lifts from the 1970 *Declaration on Friendly Relations Between States* (DFR), is taken out of context.[56] The DFR, as its name intimates, is a treaty concluded by states in which they mutually engage not to disturb one another's borders. Nowhere does the instrument allude to secession. Indeed, Western states, more than others, should be embarrassed to suggest otherwise, for when they last formally and collectively pronounced on the right of self-determination in Helsinki in 1975, in the context of the restiveness then spreading through the U.S.S.R. and Eastern Europe, they in fact extended the reach of the right beyond its more understated expression in UN documents:

> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development (emphasis added).[57]

Raising the bar of state territorial integrity against self-determination for indigenous peoples is jurisprudentially faulty for two other reasons. The right of self-determination is generally considered to be *jus cogens*, i.e. of the highest order and non-derogable, in international law.[58] Territorial integrity, on the other hand, while fundamental as a principle that shields states from other states, does not enjoy this status. In addition, the invocation of territorial integrity in the indigenous context reflects an across-the-board, context-blind jurisprudence similar to that which the U.S. Supreme Court uses in its interpretation of the Equal Protection clause of the 14th Amendment of the U.S. Constitution—where the Court makes both remedial race-conscious affirmative action programs and repressive racist discrimination practices equally subject to its strictest scrutiny. This approach, as civil-rights scholars critical of the Court point out, all but guarantees the legal demise of the remedy along with, or long before, the demise of the injury.

The invocation by some states of the principle of territorial integrity as a limitation on the right of self-determination of indigenous peoples created great concern in the Indigenous Caucus, where it was interpreted as a move not so much to keep international borders inviolate, since these were not being appreciably threatened by indigenous peoples, but to maintain the state's traditionally exclusive and increasingly intrusive jurisdiction, i.e. its "internal" territorial integrity, over all lands, territories, and resources within its borders. Now, state and global market intrusion and control in indigenous homelands are precisely what drove indigenous activists to seek out international fora in the first place, in the hopes that international law could and would help their communities retain or regain control of the homelands that long ago shaped their distinctive identities, and that could still guard them against the shock of physical and cultural dissipation in the present globalizing moment.

States regularly urge indigenous peoples to accept the autonomy offered in the UN and OAS draft declarations as an alternative to the full right of self-determination that they seek. Indigenous peoples just as consistently reject the offer, for a number of reasons. First, as explained above, "autonomy," like "secession," carries no technical meaning in international law. It is a concept whose content is filled in by enclosing states according to their domestic laws, good or bad will, and whim. Thus, whether called autonomous, self-governing, internally self-determining, or nation-within-a-nation, tribes in the U.S. remain, under its domestic law, subject to the ever-elastic "plenary power of Congress" so long as no superceding international law lifts them beyond its reach. Of course, as Benedict Kingsbury proposes in a recent work, international law could develop a norm of autonomy that is accepted and honored by states.[59] Indeed, the DD's description of what

an indigenous-state relationship should look like at a minimum may generate just such a development. However, unless the balance that the DD strikes for indigenous peoples between the right of self-determination and the practice of autonomy or partnership is simultaneously retained, and unless international oversight is additionally mandated, states could easily turn floor into ceiling, putting indigenous peoples right back where they started in the 1960s. That should not be allowed to happen.

International civil society, born in spaces that break open as the Westphalian interstate system dives tectonically under the UN Charter-based international community system, has a continuing role to play here, in clarifying issues and proposing better paradigms. Indeed, most of the protection developed for indigenous peoples in recent decades has been pioneered in fora where indigenous peoples conversed with independent experts, rather than state representatives. As a result of that contact, interpretations of various UN and OAS human-rights conventions that were responsive to indigenous peoples' needs were in fact formulated by independent experts and/or judges entrusted with applying the ICCPR, the CERD, and the ACHR respectively. Independent experts also crafted the highly progressive 1994 DD, as well as the stunning EIR proposals submitted to the World Bank in January 2004. The last were followed just one month later by another landmark report of experts commissioned by the ILO to review globalization. Entitled *A Fair Globalization: Creating Opportunities for All*, the report strongly recommends that globalization be judged and directed not by economic figures but by its social consequences. In contrast, once the DD and the PAD left the nursing beds where independent experts had incubated them, and were subject to the harsh glare of state representatives, these either tried to pare down their protection for indigenous peoples or held up the drafts. Interestingly, the persons who staff expert committees and interstate bodies quite often commute between these two spaces, yet manage for reasons inviting further study to adopt quite different perspectives, depending on whether they represent a government or their own judgment.

Looking back on the decades-long exchange between indigenous peoples, independent experts, and state representatives on the rights of the first group, an exchange in which the author sporadically participated, it is possible to decipher a principled approach that could resolve the major contest now pitting indigenous peoples' demand for the right to self-determination and territoriality against states' insistence on their own territorial integrity. The approach involves a limited textual change to the DD (and by analogy to the PAD), and a more ambitious paradigm shift in prevailing assumptions regarding the nature of peoples, states, international society, and international law, as set out below.

1. Territorial integrity. International law recognizes, in the principle of the territorial integrity of states, that these have a legitimate interest in protecting their borders from infringement by other states, including infringements that may be irredentist in nature, i.e. collusive between the infringing state and a related constituent of the target state. To protect this interest, and this alone, preambular paragraph 15 of the DD might be amended to read:

> Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination exercised in conformity with applicable principles of international law; and re-affirming that every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country… (proposed addition underlined).

Indeed, in the fall of 2003, in the course of opposing the Nordic countries' proposal that preambular paragraph 15 be qualified, the Indigenous Caucus counter-proposed to the WGDD that the paragraph's original wording (not underlined above) simply carry the additional phrase "exercised in conformity with applicable principles of international law." The rationale was that the WGDD was not a judicial body entitled to decide what, if anything, limited a people's right to self-determination. With the concurrence of the Indigenous Caucus, however, the WGDD could reaffirm that indigenous peoples' exercise of self-determination, as any such exercise, must remain within the confines of international law as a future tribunal might determine them to be.

2. UN oversight. To further guard against unlawful or merely undesirable consequences of indigenous-state conflicts, the DD, which already calls for UN oversight of such conflicts, could add the following to preambular paragraph 17:

> Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples, and a duty to facilitate the peaceful resolution of conflicts and disputes between indigenous peoples and states… (proposed addition underlined).

The point here is to impose a duty on the UN to keep abreast of indigenous-state conflicts so as to minimize their potential for harm. The provision also suggests that, sooner rather than later, the UN, like the OAS, may need to set up some sort of commission to investigate and resolve indigenous-state disputes.

3. Indigenous-state partnership. Given the above modifications, article 3 guaranteeing the right of self-determination of indigenous peoples, and article 30 recognizing their territoriality—understood as their right to control their territories and give or withhold their prior free and informed consent for projects affecting these—should then be kept as originally drafted by their independent expert authors. Consent entails a move beyond coercion on the part of the state, and past rigidity on the part of indigenous peoples. It anticipates agreements arrived at between formally equal partners, as is in fact ordained in the legal theory of partnership, as well as in the theory of international law-making.

4. Paradigmatic chasms. Representatives of states and indigenous peoples are also conditioned by divergent experiences and the different paradigms they engender regarding the nature of identity, the state, international society, and international law. To this observer, the divergences that need reconciliation appear as follows:

a) Representatives of governments, accustomed to seeing the state as the exclusive subject of international law as well as the exclusive holder of domestic jurisdiction, have

difficulty accommodating non-state actors in substance, even when they do so in form, whether in national or international fora.

b) Indigenous peoples, on the other hand, know the state more as an enemy than a friend. Global capitalism has worsened this perception, because while states continue to invoke sovereignty to shield their own human rights violations from international scrutiny, they concurrently plead loss of sovereignty vis-à-vis global capital's depredations in indigenous territories.

c) Indigenous peoples' assertion of self-determination, then, is primarily driven by their need to gain an international legal personality, albeit as a *sui generis* category, so as to influence decisions that affect them, whether these emanate from international or from national fora, or, more likely, from both.

d) Yet states insist still on casting indigenous claims in old Westphalian molds, rather than the new UN Charter paradigm, which itself grew both to accommodate and to ameliorate the global economy. States thus depict indigenous peoples' demand for self-determination and territoriality as a challenge to the former's external as well as internal territorial integrity, when the demand is in fact a challenge to the predatory aspects of global capitalism that states are unwilling or unable to interdict.

e) A more complex paradigmatic problem concerns the relationship between citizenship and cultural affiliation. Since the French Revolution, modern states have tried, with differential success, to solidify their hold over their citizens by representing the two identities—one thick (cultural affiliation), one thin (citizenship)—as one and the same. The attempt has borne least fruit in indigenous territories because, by definition, indigenous peoples are the last to be assimilated into the mythologized nation-state, which has figured more as predator than matrix in their collective memory.[60]

f) Under global capitalism, in any event, political refuge for indigenous peoples is now found more and more regionally and internationally, rather than at the level of the state. As for cultural or affective refuge, indigenous peoples, in this age of global ultra-fungibility, seek it more and more in the original homeland, the one portion of land that is not the same as the next, the place that remains, from mixed portions of memory and experience, sufficient, animate, meaningful, and validating of their worth. This cultural attachment to the homeland, perhaps more than any other trait, has become unfathomable, unrealistic, and irrational to the persons who represent states, whose very utility to the state may depend on their own suppression of memory and attachment.

g) Finally, a brief note on the paradigmatic gulf that separates lawyers who represent states from indigenous activists who represent their communities in the UN and OAS draft declaration processes. In some respects, the interstate system resembles a small village of some 200 inhabitants who know one another's idiosyncrasies well, can afford to accommodate them, and thus have less need for a leader and rules than for wise elders and flexible norms. Indeed, UN declarations do nothing more than announce norms that states are urged to live by for a number years at the end of which experience will tell

whether they should be converted into binding rules or not. Many indigenous activists, from their own experience in small communities, are adept at this form of order-building that is long on norms and short on operational rules. Opposed to them in the drafting process, often, are young lawyers, who are short on norms and experience but still chock-full of positivist legal training who insist on clear definitions and "operational" rules. This is another reason why the interface between indigenous peoples and the older, might one say wiser, multidisciplinary members of expert committees tend to be more productive.

Conclusion

Should the draft declaration processes now in the control of states fall short of the gains made for indigenous peoples are gaining in fora controlled by independent experts, the Indigenous Caucuses may well choose to repudiate the processes rather than lend legitimacy to documents that undermine practices which, increasingly, confirm their peoples as subjects of international law, with a stake in the activities affecting their traditional homelands, and hence with a territorial prerogative to control and regulate those activities. I use the term "prerogative," not "imperative," advisedly for even states have lost the prior absolutism of their sovereignty over peoples and territory. A loss that represents a challenge to our times no doubt, but perhaps also a harbinger that other absolutisms—of capitalism, religion, hegemony—will follow suit as we discover the necessity and also fertility of perpetual conversation and mediation in the global village. ♔

---

[1] Chief Seattle, "Speech," reproduced in *The Indigenous Voice, Vol.2*, ed. Roger Moody (London: Zed Books, 1988), 41-43. While some have questioned whether Chief Seattle actually pronounced these words, the pre-eminent Native American historian Vine DeLoria assured me that the genre and tone of the quoted text reflect the discursive style of his forebears of the period.

[2] The 45 states were the U.S., Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela, China, Philippines, Liberia, UK, Australia, Canada, Egypt, Ethiopia, India, Iraq, Iran, Ireland, New Zealand, Republic of South Africa, Belgium, Czechoslovakia, Denmark, France, Greece, Netherlands, Luxembourg, Norway, Poland, Yugoslavia, USSR. See *Encyclopedia of the United Nations* (New York: Routledge, 2003), 227.

[3] For a brief discussion of the structural legacy of both colonialism and Bretton Woods, and what international institutional changes are needed to mitigate the inequity they have engendered, see Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2001), 394-418.

[4] See David Harvey, *The New Imperialism* (Oxford: Oxford University Press, 2003). As this article goes to press, the *New York Times* reported, on 24 February 2004, that the ILO was releasing that day in London two-year study entitled "A Fair Globalization" that it had commissioned from a group of government officials and experts, including the Nobel laureate Joseph Stiglitz, on the global economy's effect on the distribution of wealth. Reportedly the study found, among other things, that globalization has widened the gap between rich and poor, in and between countries.

[5] *Study of the Problem of Discrimination Against Indigenous Populations*, vol. V (New York: United Nations, 1987) para. 379. UN Doc. E/CN.4/Sub.2/1986/7/Add.4.

[6] The Copenhagen-based International Work Group for Indigenous Affairs (IWGIA), which groups together social scientists who have studied indigenous communities and are concerned about their ability to survive and prosper in the contemporary world, has for decades systematically and most helpfully documented their circumstances and struggles in three sets of publications: an annual report entitled *The Indigenous World*, a journal called *Indigenous Affairs*, and a monographic series that today exceeds 100 titles. For a recent theoretical conceptualization of the political contest between multinational corporations and indigenous communities unfolding in the Amazon region, see Pamela L. Martin, *The Globalization of Contentious Politics: The Amazonian Indigenous Rights Movement* (New York: Routledge, 2003).

[7] See the 1933 *Convention on the Rights and Duties of States Adopted by the Seventh International Conference of American States* ("Montevideo Convention"), U.S.T.S. 881, 49 Stat. 3097. Serious movements for independence exist in Kanaky/New Caledonia, Ka Pae'aina/Hawai'i, Tahiti/French Polynesia, and West Papua/Irian Jaya.

[8] Meeting of Experts on Ethno-Development and Ethnocide in Latin America, *Final Report*, San José, Costa Rica (7-11 December 1981).

[9] I have described these developments through 1999 in some detail in *At the Edge of the State: Indigenous Peoples and Self-Determination* (Ardsley, New York: Transnational Publishers, Inc., 2000).

[10] See Douglas Sanders, "The Re-Emergence of Indigenous Questions in International Law," *Canadian Human Rights Yearbook* 3 (1983).

[11] Ibid., 14.

[12] 328 U.N.T.S. 247.

[13] UN Doc. E/CN.4/Sub.2/1994/2/Add.1.

[14] See the 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples* G.A. Res. 1514; the 1966 *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3; and the 1966 *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171.

[15] UN Doc. E/CN.4/1995/2/Add.1.

[16] The tripartite rubric—which appears in the relevant UN, ILO, and OAS documents—is not defined but clearly aims at maximal inclusion of land formations, internal and coastal waters, and any and all resources found in territories traditionally occupied by indigenous peoples.

[17] ILO Convention 169, LXX11 I.L.O Official Bull, Ser.A. no. 2, at 63 (1989).

[18] Articles 14-16.

[19] E/CN.4/Sub.2/2001/21. See also Daes's related 2003 submission to the UNCHR entitled *Indigenous Peoples' Permanent Sovereignty over Natural Resources*, E/CN.4/Sub.2/2003/20.

[20] 78 U.N.T.S. 277.

[21] 999 U.N.T.S. 3.

[22] 660 U.N.T.S. 195.

[23] For a study that illustrates in considerable detail how an oil company's drilling in indigenous territory in Ecuador radically disrupted the Huaorani's culture and livelihood , and argues for laws to protect the tribe's environment, see William Andrew Shutkin, "International Human Rights Law and the Earth: the Protection of Indigenous Peoples and the Environment," *Virginia Journal of International Law* 31 (1991): 479-500. Reports of drilling, logging, and dam-building activities in the Amazon and how they impact the region's indigenous communities are regularly presented at www.amazonalliance.org.

[24] *Tribunal Update*, 18 February 2004, at www.iwpr.net/index.pl?archive/tri/tri_344_1_eng.txt

[25] General comment 23, on article 27 of the ICCPR (50th session of the UNCHR, 1994), as reported in E/CN.4/Sub.2/2001/21, 55.

[26] CERD General Recommendation XXIII (51) on the rights of indigenous peoples, adopted at the Committee's 1235th meeting, on 18 August 1997, reported in E/CN.4/Sub.2/2001/21, 54.

[27] Ibid.

[28] Ibid.

[29] Its full title is *Consolidated Text of the Draft Declaration Prepared by the Chair of the Working Group*; OEA/Ser.K/XVI; GT/DADIN/doc.139/03. 17 June 2003.

[30] See the 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 at 66, UN Doc. A/4684 (1961); the 1966 *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3; and the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171.

[31] *Proposed American Declaration on the Rights of Indigenous Populations*. GT/DADIN/doc.1/99rev.2

[32] 1144 U.N.T.S. 123. Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1

[33] Inter-American Court of Human Rights, judgment of 31 August 2001 (Series C, No. 79).

[34] Ibid. See note 24, para. 149.

[35] 1975 *I.C.J. Reports* 12.

[36] (1992) 175 CLR 1; (1992) 107 ALR 1.

[37] The *terra nullius* doctrine ("land belonging to no one") was used by settler societies to declare a legal vacuum in pre-contact indigenous territories so as to justify their appropriation of them.

[38] See Daes's 2001 submission to the UNCHR quoted in note 19, paras. 32, 47, 65, 90.

[39] As of 26 March 2003, Nicaragua had not complied with the Inter-American Court of Human Rights' demarcation order. On that date, legal advisers for the Awas Tingni community, having filed suit charging non-compliance, met with President Enrique Bolaños of Nicaragua, who "reiterated the strong political will of his government to fully comply," and appointed a presidential adviser to oversee the implementation of the IACHR decision. See "Meeting with President Bolaños About the Awas Tingni case," at www.indianlaw.org.

[40] See "The Contemporary Role of Customary International Law," in the unpublished *Imagining Tomorrow: Rethinking the Global Challenge* (collected and compiled on the occasion of the United Nations Millennium Assembly and printed by Merrill Corporation, 2000), 351-71.

[41] James C. Scott, *Seeing Like a State* (Oxford: Oxford University Press, 2003).

[42] Rodolfo Stavenhagen, *The Ethnic Question: Conflicts, Developments and Human Rights* (Tokyo: United Nations University Press, 1990), 106.

[43] Reproduced in *Newsletter* 1991, no. 3.

[44] Joji Carino, Tebtebba Foundation, *Report on World Bank's Extractive Industries Review*, 14 January 2004 e-mail to aila@ailanyc.org.

[45] Steve Kretzman, Institute for Policy Studies, Sustainable Energy & Economy Network, 17 February 2004 e-mail to aila@ailanyc.org.

[46] Free and informed consent, to be meaningful, must clearly also be "prior" to the activity requiring consent, whether this third criterion is explicitly stated, as in DD article 30, or not, as in DD articles 10 and 27.

[47] It was quite a blow to indigenous representatives that Norway, which had hitherto declared itself able to live with the original DD text, took this position which Norway explained to the Indigenous Caucus, without particular success, as a way of bringing oppositional states like the U.S. on board the DD.

[48] Document distributed by the Norwegian delegation at the 2001 WGDD session.

[49] Document distributed by the U.S. delegation at the 2001 WGDDsession.

[50] Harvey, 286.

[51] "The Right of Self-Determination and Indigenous Peoples," in *Modern Law of Self-Determination*, ed. Christian Tomuschat (Dordrecht: Martinus Nijhoff Publishers, 1993), 53. James Anaya takes a contrary view. See his *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 1996).

[52] UNDoc. A/Res/1541 (XV).

[53] 1U.N.T.S. XVI, Art. 1 (2).

[54] A glaring example of the vacuity of bilateral negotiations conducted beyond the reach of a supranational normative order is found in the U.S., where the Supreme Court describes the state-indigenous relationship as one of "the plenary power of Congress" over Indian tribes.

[55] In a perhaps intriguing testimony to the influence of cultural kinship in international relations, the U.S, U.K., Canada, Australia, and Aotearoa/New Zealand (the last two depending on whether their Labor or Conservative parties governs) generally take mutually supportive stands on the DD.

[56] G.A. Res. 2625. The full name of the DFR is *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*.

[57] "Final Act of the Conference on Security and Cooperation in Europe" ("Helsinki Final Act"), *International Legal Materials* 1292 (1975).

[58] Cassese, 138-48.

[59] Benedict Kingsbury, "Reconstructing Self-determination: A Relational Approach," in *Operationalizing the Right of Indigenous Peoples to Self-Determination*, eds. Pekka Aikio and Martin Schienin (Turku/Abo: Institute for Human Rights, Abo Akademi University, 2000).

[60] See Benedict R. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1991).