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RECONCILING FIVE COMPETING CONCEPTUAL STRUCTURES OF INDIGENOUS PEOPLES' CLAIMS IN INTERNATIONAL AND COMPARATIVE LAW

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On what conceptual foundations do legal claims made by indigenous peoples rest? Uncertainty on this issue has had the benefit of encouraging the flowering of multiple approaches, but it also has done much to heighten national dissensus on questions involving indigenous peoples, and it has been a serious obstacle to negotiation in the United Nations¹ and the Organization of American States (OAS)² of proposed Declarations on the Rights of Indigenous Peoples. This article seeks to clarify the debate by distinguishing and exploring five fundamentally different conceptual structures employed in claims brought by indigenous peoples or members of such groups:³

* In memory of Andrew Gray (1955-99), whose death in an airplane crash in Vanuatu robbed the indigenous peoples' movement of a selfless chronicler, indefatigable activist, and great friend. The author thanks the many students with whom ideas on this subject have been explored in courses at the New York University School of Law, Harvard Law School, and the European University Institute's Academy of European Law in Fiesole, Italy. An earlier version is included, as part of the Collected Courses of the Academy, in *Peoples' Rights* (Philip Alston, ed., Oxford University Press 2001), and the present more extensively footnoted version appears by permission. The support of the New York University School of Law's Filomen D'Agostino and Max E. Greenberg Research Fund, and the comments of participants in a Seville University Conference and a Boalt Hall Law School faculty workshop at Berkeley, are acknowledged with gratitude.

1. Draft Declaration on the Rights of Indigenous Peoples, as agreed upon by members of the Working Group on Indigenous Populations at its eleventh session, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 44th Sess., Agenda Item 14, at 50, Annex I, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993) [hereinafter U.N. Draft Declaration on the Rights of Indigenous Peoples].

2. Proposed American Declaration on the Rights of Indigenous Peoples, Inter-American Commission on Human Rights, 1333d Sess., 95th Reg. Sess. (Feb. 26, 1997), available at <http://www.cidh.org/indigenas/chap.2g.htm>.

3. For doctrinal structure and background largely omitted here, see Benedict Kingsbury, *Claims by Non-State Groups in International Law*, 25 CORNELL INT'L L.J. 481 (1992).

- (1) human rights and non-discrimination claims;
- (2) minority claims;
- (3) self-determination claims;
- (4) historic sovereignty claims; and
- (5) claims as indigenous peoples, including claims based on treaties or other agreements between indigenous peoples and states.

Each of these conceptual structures has its own style of argument, historical account and canon, patterns of legitimation and delegitimation, institutional adherents, discursive community, and boundary markers. Each depends on simple premises to define its locus. These premises have been adopted and adapted in political struggles. Protagonists in these struggles purport to render the broad analytic distinctions among the categories as deeply cleaved boundaries, although most recognize that these distinctions are reconsidered and the boundaries repositioned over time. Debates as to the essence of each conceptual structure, and especially as to the boundaries between them, are often proxies for clashes of political interest. The construction of conceptual structures and of lines between them is a form of political expression, but one that utilizes, and thus is conditioned by, while itself affecting, languages of law and philosophy. Political interests are veiled scarcely in polar positions taken in arguments as to whether human rights can be held by groups or only by individuals,⁴ whether it is correct under the International Covenant on Civil and Political Rights that minorities have no right of self-determination but all peoples do,⁵ and whether the operative concept is indigenous peoples or indigenous people.⁶

4. See, e.g., Leslie A. Gerson, Deputy Assistant Secretary of State, U.S. Department of State, General Statement in the Commission on Human Rights Working Group on the Draft Declaration on the Rights of Indigenous People, (Nov. 30, 1998), available at <http://www.hookele.com/netwarriors/us-opening.html> ("Since international law, with few exceptions, promotes and protects the rights of individuals, as opposed to groups, it is confusing to state that international law accords certain rights to 'indigenous peoples' as such.").

5. On this discourse, see, for example, ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL APPRAISAL* (1995); KAREN KNOP, *DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW* (forthcoming 2002).

6. Note, for example, the careful avoidance of the term "indigenous peoples" in U.N. Economic and Social Council (ECOSOC) Resolution 2000/22, U.N. ESCOR, 1st Sess., Supp. No. 1, 45th mtg., Agenda Item 14,

For lawyer-diplomats, by contrast, a frequent objective is to bridge these political divides, making the boundaries indistinct and permeable, so that they are not necessarily determinative at all. This latter project is shared by some lawyer-activists, but they proceed from the premise that there are conceptual differences among the categories and that the political impetus behind a particular category can be marshaled astutely for some other objective by extending that category's domain. This is one purpose of arguments that self-determination is actually a human right, that minority rights to culture extend to indigenous land rights, that all indigenous peoples by virtue of that designation have the right to self-determination.

In political negotiations about normative matters, the question of which concept is applicable often is set up as the key threshold issue; its resolution is seen as a key to channeling arguments, determining which structure of analysis and legitimation will then prevail, and thus influencing outcomes. In initial negotiations on the U.N. and OAS Declarations, many state representatives tended to urge that the issues be addressed as human rights or perhaps minority rights questions, while indigenous representatives often framed the core issues in terms of self-determination or historic sovereignty.⁷ Over time some convergence has occurred on the utility of a fifth category—the notion that some legal claims raised by indigenous peoples are *sui generis* and have a distinct conceptual structure. The forensic point of this article is that different claims made by indigenous peoples may fall into any of these five categories, or into several at once, and that the totality of these claims as a genre cannot and should not be understood as belonging exclusively to any one or other category. While

U.N. Doc. E/2000/99 (2000) (providing for the Establishment of a Permanent Forum on Indigenous Issues).

7. See *Discrimination Against Indigenous Peoples: Analytical Compilation of Observations and Comments Received Pursuant to Sub-Commission Resolution 1988/18*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, U.N. ESCOR, 41st Sess., Agenda Item 13, U.N. Doc. E/CN.4/Sub.2/1989/33/Add.1 (1989) [hereinafter *Discrimination Against Indigenous Peoples*]; *Report on the First Round of Consultations Concerning the Future Inter-American Instrument on Indigenous Rights*, Inter-Am. C.H.R. 263, OEA/Ser.L/V/II.83, doc. 14 (1993), available at <http://www.cidh.org/indigenas/chap.2d.hum>.

bolic success but with limited impact on underlying problems.⁹ These cautions are important, and the mistrust grounded in historical experience is great, but strong repudiation of the international human rights program is not part of the mainstream agenda of the international indigenous peoples' movement. Many indigenous groups, antagonized by the assimilationism of the "human rights only" position and aware that such equal rights rhetoric historically has been accompanied by gross injustices, point out that the human rights program has not worked adequately in institutional practice and argue that it is normatively insufficient. This suggests that the human rights program ought to be used, and that it might be made more useful by reform, but leaves for later consideration the question whether a reformed human rights program could ever satisfactorily address all the issues, and in particular, whether a distinct category of indigenous peoples' rights ought to exist alongside the human rights program and other international legal structures.

Claims by members of indigenous peoples are often claims to respect for basic human rights, for example a claim to be free from torture or slavery. Such claims usually are made against the state, but may be directed substantively at conduct by certain non-state groups, including armed bands, mining corporations, or indigenous peoples' organizations. At issue is whether the human rights program can be adapted and renovated to take account of distinctive issues raised by indigenous peoples. In countries where the human rights program is not normatively important or where it is not operationalized, questions about incorporating indigenous peoples into it are rather abstract and futuristic, although indigenous peoples in some such countries already may receive some measure of state support or protection. In evaluating the adaptability of the human rights program, the focus must be on this program as it is enunciated and operationalized in relevant national institutions and in international institutional practice.

A fundamental question in human rights claims raised by members of indigenous groups against the state is how far the distinctive situation of the indigenous group is relevant. Issues relating to the fair treatment of groups and the inevitable

9. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987).

questions about individual identity and membership, which any operational reference to groups entails, are entangled with standard human rights claims based on the suffering of individuals in several existing normative structures. "Genocide" imports issues of harm to groups into the very definition of the crime committed against any individual. The concept of "ethnocide," although not well-developed juridically, is understood by human rights advocates to extend the ambit of genocide to the destruction of culture and other conditions essential for the continued distinctive existence of a group. In practice, the interaction between individual rights claims and group membership is established most systematically by prohibitions of wrongful discrimination. The strong international policy against racial discrimination has been an important source of leverage in indigenous claims. In the landmark decision of the High Court of Australia on aboriginal title in *Mabo*, for example, Brennan, J. indicated that the unacceptability of racial discrimination or other violations of fundamental internationally-recognized human rights was a strong reason for that Court to be willing to reverse the long-established principle of Australian property law that aboriginal people hold no rights to land at common law except those derived from the Crown.¹⁰ Conversely, the identity of a particular individual vis-à-vis a particular indigenous group may be relevant in introducing the question of discrimination to issues that otherwise would be unproblematic. In *Means v. District Court of the Navajo Nation*, for example, Russell Means, a prominent Oglala Sioux activist, was arrested by Navajo Nation police on the Navajo Reservation for the alleged assault there of Navajo victims, but he argued that the U.S. statutory provision that confers jurisdiction on the Navajo tribal court over non-members who are Indian, but not over other non-members, is contrary to the provisions for equality and non-discrimination in the U.S. Constitution.¹¹

A survey of decisions by state courts in countries formally and substantively committed to judicial enforcement of some human rights shows divergent patterns and much uncertainty in addressing the issue whether and how the distinctive situa-

10. *Mabo v. Queensland* [No. 2] (1992) 175 C.L.R. 1.

11. *Means v. Dist. Ct. of Chinle Jud. Dist.*, No. SC-CV-61-98 (Navajo May 11, 1999), available in 26 INDIAN L. REP. 6083, 6088 (1999).

tion of indigenous groups affects human rights arguments. One line of approach is to deny any distinctive character to indigenous claims on the ground that human rights are universal, not special. An illustration is *Lyng v. Northwest Indian Cemetery Protective Association*, where Indian plaintiffs challenged a proposal by the U.S. Forest Service to build a road on public land in the Chimney Rock area of Northern California on the ground that the road effectively would destroy the tranquillity essential to the continuation of Indian meditative religious practices on this land that had been pursued for many generations.¹² Writing for a majority in the U.S. Supreme Court, Justice O'Connor rejected the argument that the Indians' right to religious freedom under the First Amendment was infringed by road construction.¹³ Although federally recognized Indian tribes occupy a special place in the U.S. legal system, and U.S. law recognizes aspects of what is often called "sovereignty" of Indian tribes, Justice O'Connor did not see this as relevant to a First Amendment claim.¹⁴ Her position was that Indians have exactly the same First Amendment rights as anyone else, and that these do not extend to controlling the use of public lands.¹⁵ The historic experience of Indians, including the loss of control of lands they had long used, was not material, nor was the ancient character and spatial location of this particular religious practice.¹⁶ Her argument was that the courts must be neutral as among religions and cannot begin inquiries into the veracity, merits, or historical weight of religious claims that would privilege some religious claims over others.¹⁷ However, it might be argued to the contrary that the First Amendment jurisprudence does exactly this in privileging understandings of religion that depend not on expanses that since colonization have become "public" lands, but instead on private buildings protected by a property rights regime that itself is buttressed by First Amendment limits on state action. The process by which land historically used by Indians for religious observance became "public lands" and the weakness of the property rights Indians enjoy are integral

12. *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

13. *See id.* at 447-58.

14. *See id.*

15. *See id.* at 451-52.

16. *See id.* at 450-53.

17. *See id.* at 454-58.

to evaluating the protection of their religious freedom. Supposed neutrality in human rights protection can be, as here, a distortion where the human rights question is separated from the property rights regime and from governance regimes, such as federal trust responsibilities or frameworks for self-government.

A second approach is to start with a requirement of universality but to modify it to favor indigenous peoples where disadvantage or past injustices warrant. In *Gerhardy v. Brown*, a defendant who was not a member of the Pitjantjatjara and thus had no right to enter lands restored to Pitjantjatjara communities under the Pitjantjatjara Land Rights Act,¹⁸ a South Australian statute, challenged his prosecution for illegal entry onto the lands by arguing that the statutory provision limiting his access infringed the Racial Discrimination Act,¹⁹ a Commonwealth statute.²⁰ The Act was intended to give effect to provisions in the International Convention on the Elimination of All Forms of Racial Discrimination.²¹ A majority in the High Court of Australia took the view that the South Australian legislation was on its face racially discriminatory in that only Aboriginal people could be Pitjantjatjara and so entitled to free access to the land, whereas non-Pitjantjatjara (including non-Pitjantjatjara Aboriginal people like the defendant) were entitled to access only if other conditions were satisfied (e.g., if they had permission or were candidates for election to public office).²² A strong argument may be made that this approach to the concept of legally-prohibited discrimination is misguided, and that the Court should have asked whether the measures had an objective and reasonable justification, were proportionate to this justification, were not unnecessarily under- or over-inclusive, and reasonably accommodated the interests of others.²³ In the terms used in U.S. jurisprudence, the question is whether the classification of Pitjantjatjara by

18. Pitjantjatjara Land Rights Act, 1981 (S. Austl.).

19. Racial Discrimination Act, 1975 (Austl.).

20. *Gerhardy v. Brown* (1985) 57 A.L.R. 472, 476, 480.

21. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 12, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter ICERD].

22. *See id.* at 473, 475-76.

23. *See, e.g.,* Ian Brownlie, *The Rights of Peoples in Modern International Law*, in *THE RIGHTS OF PEOPLES* 1, 1, 9 (James Crawford ed., 1992).

reference to traditional ownership of the land when only an Aboriginal person could satisfy the requirement of being a traditional owner, and the exclusion of non-Pitjantjatjara from the land, were measures justified by compelling state interest and were tailored narrowly to meet the legitimate objectives of the statute.²⁴ In *Gerhardy*, the Court failed to make such an inquiry (although in subsequent cases it has indicated that this approach might be modified in the future).²⁵ The Court held, however, that the statutory provision was saved by the provision in the International Convention excluding from the category of racial discrimination: "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals . . . in order to ensure such groups or individuals equal enjoyment of human rights and fundamental freedoms" ²⁶ The policy of this Convention provision is widely understood to apply even where there is no specific evidence of the effects on particular groups or persons of past discrimination.²⁷ It thus diverges from, for example, current U.S. judicial approaches to affirmative action, under which racially-based affirmative action, or reverse discrimination, is subject to the same requirements as racial discrimination against discrete and insular minorities—compelling state interest and narrow tailoring to advance the interest.²⁸ Nevertheless, some members of the High Court in *Gerhardy* were strongly influenced in their finding on *prima facie* discrimination by their concern that allowing the government to evade prohibitions on racial discrimination by reference to such criteria as traditional ownership might open a loophole for what

24. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (articulating a two-pronged test for racial classifications: (1) whether there was a compelling state interest and (2) whether the means chosen to further that interest were narrowly tailored).

25. See, e.g., *Western Australia v. Commonwealth* (1995) 183 C.L.R. 373, 451 (upholding the Native Title Act, 1993 against a challenge under the Racial Discrimination Act).

26. ICERD, *supra* note 21, art. 1(4); *Gerhardy*, 57 A.L.R. at 477.

27. See, e.g., Identification with a Particular Racial or Ethnic Group (Art. I, par. 1 & 4), General Recommendation VIII, Committee on the Elimination of Racial Discrimination, 38th Sess., U.N. Doc. A/45/18 (1990).

28. See *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 291 (1978) (explaining that racial distinctions of "any sort" are subject to the same level of scrutiny).

Gibbs, C.J. called "the most obnoxious discrimination."²⁹ By this he seems to have meant apartheid. His suspicions of "traditional ownership" as a sufficient criterion for excluding non-owners overcame the argument that most owners of property can exclude non-owners; he focused on "the vast area of the lands . . . more than one-tenth of the state" to distinguish the situation of the Pitjantjatjara from that of ordinary property holders, although Australian property law protects the exclusionary rights of non-aboriginal holders of very large tracts.³⁰ This logic—that claims settlements with indigenous peoples for the restoration of land to traditional owners may involve racial discrimination against non-members of these groups—is a basis for much political opposition to, and some judicial concerns about, land claims settlements or other historically-grounded arrangements. Some of the concerns are well-founded, most obviously where the language of "indigenous rights" is used to justify domination and abuse of "non-indigenous," but also where a state action purporting to favor a disadvantaged indigenous group is in fact a disguised measure to serve another sectional interest, whether a mining company or an exclusively self-serving elite. The concept of non-discrimination is thus valuable in, but also a potential obstacle to, indigenous peoples' claims. It, too, often is described with an air of neutrality that belies its real workings, especially its connections with property, self-government, history, and social justice.

A third approach is to uphold special measures by states that benefit indigenous groups precisely because of the distinctive histories and experiences of these groups. In *Morton v. Mancari*, the U.S. Supreme Court was unanimous in upholding an explicit policy of the U.S. Bureau of Indian Affairs to give preference in its hiring and promotion policies to members of federally-recognized Indian tribes.³¹ Rejecting a due process challenge by non-Indian employees, the court held that "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a

29. *Gerhardy*, 57 A.L.R. at 481.

30. *See id.* at 479.

31. *Morton v. Mancari*, 417 U.S. 535 (1974).

unique fashion."³² The Court here steps outside the structure of standard human rights and non-discrimination arguments, focusing on the distinctive history of Indian-U.S. relations and on the trust obligations of the United States toward Indians,³³ elements that were to make almost no appearance in *Lyng* when the issue involved the high political stakes of public land use rather than the arcane world of the Bureau of Indian Affairs.³⁴ Even in *Morton*, the Court's approach is not one of judicial rights activism; the opinion is very deferential toward congressional policy and reaffirms the plenary power of Congress in relation to Indians.³⁵ The judgment is thus suggestive of the ambivalence of state judicial recognition of a distinct body of law triggered by identities as indigenous peoples: The category may have significant effects, but state government institutions endeavor to reserve to themselves the power of shaping it.

This analysis of *Lyng*, *Gerhardy*, and *Morton* suggests that the cases differ significantly, representing three approaches to the use of human rights and non-discrimination arguments in indigenous peoples' claims. *Lyng* embraces a universal human rights approach in which indigenous claims receive no special consideration, *Gerhardy* allows special consideration but under careful watch as presumptive discrimination, and *Morton* permits the legislature to adopt special measures without special scrutiny for reasons of history and the historically-grounded trust relationship the United States is deemed to have assumed. Nevertheless, they have much in common. In each case the questions are framed in terms of state law: the meaning of the First Amendment, the Racial Discrimination Act, and the Due Process Clause. There is no real indigenous voice in any of the cases; the cases are about Indians and Aborigines, but they themselves do not figure greatly in the judicial opinions. The courts do not demonstrate a close grasp of indigenous experience in relation to religion, land, self-government, or state institutions such as the Bureau of Indian Affairs. This judicial pattern is changing, however, as negotiations and deci-

32. *Id.* at 554.

33. *See id.* at 541-42.

34. *See Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *see also Rice v. Cayetano*, 528 US 495 (2000) (to similar effect).

35. *See Morton*, 417 U.S. at 551-52.

sions on matters such as land, fisheries, resource management, language, education, and broadcasting evolve into general state acceptance of some degree of indigenous participation, self-government, and voice. Landmark judicial decisions in New Zealand, Canada, and to some extent Australia have pointed the way toward, without necessarily themselves accomplishing, this turn. *New Zealand Maori Council v. Attorney-General* established the principles of the Treaty of Waitangi as in some way constitutional and envisaged the Maori and the Crown proceeding as treaty partners;³⁶ this has since become a canon of New Zealand public policy. *Delgamuukw v. British Columbia* establishes that indigenous understandings of relations to land and territory, embodied often in oral history, are admissible and relevant in the construction of a concept of aboriginal title that is not simply a creation and sufferance of the state legal system, but embodies both indigenous history and indigenous aspirations.³⁷ While the Supreme Court of Canada did not address forms of self-government, the Court's approach is suggestive of such a development, and its call for governments and first nations to negotiate has been understood in that context.³⁸ In neither *New Zealand Maori Council* nor *Delgamuukw* did the court rest heavily on standard human rights concepts. Rather than stretch and adapt these, the courts focus on elaborating a body of public law in which certain types of indigenous claims are *sui generis*. *Mabo v. Queensland* is more equivocal in this respect. Human rights considerations figure as a justification for reversing earlier authority on aboriginal title, and much of the discussion is about concepts of property in common law rather than about the terms of a public political relationship of the sort that the New Zealand Court of Appeal founded on the Treaty of Waitangi.³⁹ Nevertheless, the situation of indigenous peoples' property in Australia became a substantial *sui generis* issue, with the Commonwealth government seeking at least some aboriginal input through the Australian and Torres Strait Islander Commission before adoption

36. *N.Z. Maori Council v. Attorney-General* [1987] 1 N.Z.L.R. 641.

37. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1067-68.

38. See *id.* at 1123.

39. See *Mabo v. Queensland* [No. 2] (1992) 175 C.L.R. 1.

of the Native Title Act, 1993.⁴⁰ The weakness of the public law element became manifest in the retreat from parts of the High Court's jurisprudence in the Native Title Amendment Act, 1998, government recalcitrance in dealing with and funding the Commission, and the unilateral terms of government policy on matters ranging from "national reconciliation" to the restructuring of aboriginal land councils.⁴¹

This review indicates that the adaptation of the category of "human rights" is of fundamental importance in addressing indigenous issues, and that courts and state institutions often prefer to address such issues within this frame, but practice and experience suggest that additional concepts are needed and often are deployed. Issues connected with distinct histories, cultures, and identities animate the search for alternative concepts of international law and national law related to, but going beyond, individual human rights and non-discrimination. These concepts, increasingly influential in judicial practice and political negotiations relating to indigenous peoples' claims, will be considered in subsequent sections.

II. MINORITIES

"Minorities"—or more often, a variant such as "national minorities"—has been utilized as a juridical category in international treaty law for several centuries and was promulgated actively and operationalized by post-World War I legal instruments and League of Nations institutions.⁴² After 1945, however, states looked to the lessons of Nazi Germany's irredentist use of disaffected German minorities in neighboring countries and to the imminent problems of nation-building in post-colonial states and became reluctant to establish international law standards focused specifically on minorities, preferring instead to build a general human rights program applicable to all individuals. Hence, there is a lack of minority rights clauses, be-

40. See *Id.*; Native Title Act, 1993 (Austl.). For criticism, see, for example, Paul Coe, *ATSIC: Self-Determination or Otherwise*, RACE & CLASS, Apr.-June 1994, at 35-39.

41. Native Title Amendment Act, 1998 (Austl.). For an overview of public law issues in Australian courts, see Jennifer Clarke, "Indigenous" People and Constitutional Law, in PETER HANKS & DEBORAH CASS, *AUSTRALIAN CONSTITUTIONAL LAW: MATERIALS AND COMMENTARY* 50-112 (6th ed. 1999).

42. See Kingsbury, *supra* note 3, at 489.

yond prohibitions of discrimination, in the 1948 Universal Declaration of Human Rights,⁴³ the 1950 European Convention on Human Rights,⁴⁴ and comparable regional instruments in the Americas and Africa.⁴⁵ The body of international legal instruments focused specifically on "minorities" is thus an impoverished one. In the early 1990s, recognition of a need to face this deficiency resulted in the U.N. Declaration on Minorities (1992)⁴⁶ and the Council of Europe Framework Convention for the Protection of National Minorities (1995);⁴⁷ however, neither is very expansive, as many state governments have continued to be unwilling to support general normative provisions that may encourage group demands or inhibit national integration. Germany, for example, is willing to grant significant legal entitlements to some long-established groups within Germany, including the Danish and Sorb minorities, but much less to other minority groups. France continues to assert that there are no minorities in France to whom international law instruments on minorities should apply, although its internal legal practice is more nuanced, especially in favoring a degree of autonomy for Corsica. Algeria, Burundi, Madagascar, Senegal, Turkey, and Venezuela are among other states that have at times taken positions similar to that of France.⁴⁸ Article 27 of the International Covenant on Civil and Political Rights (ICCPR), an instrument drafted in the early 1950s and

43. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt.1, at 71, U.N. Doc. A/810 (1948).

44. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

45. See, e.g., American Declaration of the Rights and Duties of Man, OAS Res. XXX, Ninth International Conference of American States (May 2, 1948), reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 17, OEA/Ser.L.V/II.82, doc.6 rev.1 (1992); American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978); African Charter on Human and People's Rights, Oct. 23, 1986, 1520 U.N.T.S. 218.

46. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, U.N. GAOR, 47th Sess., Supp. No. 49, at 210, U.N. Doc. A/47/49 (1992).

47. Framework Convention for the Protection of National Minorities, Feb. 1, 1995, Europ. T.S. 157.

48. See generally Patrick Thornberry, *The U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, and an Update*, in UNIVERSAL MINORITY RIGHTS 13-76, (Alan Phillips & Allan Rosas eds., 1995).

adopted in 1966, thus remains the principal general minority rights treaty text of global application, and it is worded as an individual rights provision phrased with an aspiration to avoid encouraging the appearance of new minorities and seeking to impose only modest duties on states.⁴⁹

If many state governments have been hesitant to see "minorities" operate as a flourishing general legal category wishing to subsume it into human rights, many indigenous leaders and advocates have insisted on distinguishing themselves from "minorities," arguing that classifying indigenous peoples as minorities is belittling, missing what is distinctive about being indigenous and being a people.⁵⁰ This political struggle about categories goes to important issues of identity and philosophy. It is misleading, however, to transpose these political misgivings about the applicability to indigenous peoples' issues of a broad category of "minorities" so as to exclude this category from the framework of forensic law as it is currently practiced. Advocates, some national courts, and above all the U.N. Human Rights Committee have seen in Article 27 a basis and justification for addressing indigenous issues, enabling these institutions to ensure that these issues are not bypassed and to take an active part in responding to the rising demand on them for action.⁵¹ In dealing with indigenous issues, the Human Rights Committee increasingly has interpreted Article 27 in a creative and expansive manner so as to elude some of

49. Article 27 provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 27, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 [hereinafter ICCPR].

50. Such a distinction is acknowledged partially in Article 30 of the Convention on the Rights of the Child, which broadly tracks the language of Article 27, but refers to minorities "or persons of indigenous origin." See Convention on the Rights of the Child, Nov. 20, 1989, art. 30, 28 I.L.M. 1448, 1468.

51. Article 27 also has been invoked even where not directly applicable as a treaty text. It was relied on, for example, by the Inter-American Commission on Human Rights as powerful evidence of the existing state of international law relevant to the interpretation of the less specific American Declaration on the Rights and Duties of Man. See Case 7615, Inter-Am. C.H.R. 24, OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1985).

the strictures states may have hoped to set upon it.⁵² This has been reinforced by national courts and by various national commissions and advisory bodies.

Perhaps the most important juridical application of Article 27 for some indigenous peoples has been a series of holdings that failure of the state to protect indigenous land and resource bases, including the continuing effects of past wrongs, in certain circumstances may amount to a violation of the right to culture protected in Article 27. The leading case outlining the views of the Human Rights Committee is *Ominayak v. Canada*, where the Committee concluded that the historical inequity of the failure to assure to the Lubicon Lake Band a reservation to which it had a strong claim and the effect on the Band of certain recent developments including oil and timber concessions "threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of Article 27 so long as they continue."⁵³ The Committee has incorporated this understanding of Article 27 into numerous discussions of state reports and has pressed states to adopt this expansive understanding of their Article 27 obligations in national policy. For example, the Committee weighed in on the controversy concerning dam projects on the Biobio river in Chile, expressing concern that these "might affect the way of life and the rights of persons belonging to the Mapuche and other indigenous communities" and casting doubt on the Chilean government policy of land acquisition and resettlement: "Relocation and compensation may not be appropriate in or-

52. For an overview, see Human Rights Committee General Comment No. 23 (50) on Article 27, U.N. GAOR, 49th Sess., Supp. No. 40, at 107, U.N. Doc. A/49/40 (1994).

53. *Ominayak v. Canada*, U.N. GAOR, 45th Sess., Supp. No. 40, Annex 9, at 27, U.N. Doc. A/45/40 (1990). Other cases taking this approach include *Länsman v. Finland (No. 1)*, Comm. on Civil and Political Rights, 57th Sess., pt. 1, at 74, 84, 85, U.N. Doc. CCPR/C/57/1 (1996) (stating that "Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. . . . However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under Article 27" and finding no breach of Article 27); *Länsman v. Finland (No. 2)*, U.N. GAOR, 52d Sess., Supp. No. 40, Annex 6, at 193, 203, 204, U.N. Doc. A/52/140 (1997) (affirming decision in *Länsman (No. 1)*); and *Kitok v. Sweden*, U.N. GAOR, 43d Sess., Supp. No. 40, Annex 7, at 229, U.N. Doc. A/43/40 (1988) (finding no breach of Article 27).

der to comply with article 27 of the Covenant."⁵⁴ This view that Article 27 obligations impose constraints on government economic development policy was applied as the rule of decision by the Supreme Administrative Court of Finland in nullifying deeds for mining claims in Sami areas in a series of cases beginning in 1996.⁵⁵ In 1997, the District Court of Sapporo made similar use of Article 27 in finding that the government improperly had failed to consider Ainu culture before proceeding to build the Nibutani Dam.⁵⁶

Notwithstanding opposition by some indigenous groups to any categorization as minorities, Article 27 may be an important source of leverage for indigenous peoples in securing recognition. The need to make periodic reports under the ICCPR spurred debate within Japan about the government line that the country is homogeneous, leading eventually in the late 1980s to the official abandonment of the view of Japan as entirely homogeneous and agreement that Ainu are a distinct ethnic group for purposes of Article 27. This in turn paved the way in the Japanese political system for the government to move glacially toward recognition of Ainu as indigenous. Although such recognition was not included in the Ainu law of 1997,⁵⁷ official government statements have moved in this direction, nudged significantly by the finding of

54. Concluding observations of the Human Rights Committee: Chile, Hum. Rts. Comm., 65th Sess., ¶ 22, U.N. Doc. CCPR/C/79/Add.104 (1999).

55. See *Käsivarsi Reindeer Herders' Coop. v. Ministry of Trade and Industry*, File No. 1447, Supreme Administrative Court of Finland, May 15, 1996 (Heljä Tilli & Martin Scheinin trans., on file with Prof. Martin Scheinin, Abo Akademi University); see also Martin Scheinin, *The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land*, in *THE JURISPRUDENCE OF HUMAN RIGHTS: A COMPARATIVE INTERPRETIVE APPROACH* 159, 214 (Theodore S. Orlin et al. eds., 2000) (discussing *Kasivarsi Reindeer Herders' Cooperative* and the decisions of the Supreme Administrative Court of Finland of Mar. 31, 1999 in cases 692 and 693).

56. *Kayano v. Hokkaidō Expropriation Comm.*, 1598 HANREI JIHŌ 33, 938 HANREI TIMES 75 (Sapporo Dist. Ct., Mar. 27, 1997) (Japan), reprinted in 38 I.L.M. 394, 397 (Mark Levin trans., 1999) [hereinafter *Nibutani Dam Decision*].

57. *Ainu Bunka no Shinkō narabini Ainu no Dentō-tō ni Kan suru Chishiki no Fukyu oyobi keihatsu ni kan suru Horitsu* [Act for the Promotion of Ainu Culture and Dissemination of Knowledge Regarding Ainu Tradition], Law No. 52 of 1997 (Japan), translated in 1 ASIAN-PAC. L. & POL'Y J. 11 (Masako Yoshida Hitchingham trans., 2000), available at <http://www.hawaii.edu/aplpj/pdfs/11-masako.pdf> (last visited Jan. 23, 2002).

the Sapporo District Court that Ainu are indigenous, in a case that itself was leveraged by Japan's acceptance of Article 27.⁵⁸

Another source of misgivings by some indigenous groups about Article 27 is that its complex implications go well beyond possible claims by groups against states. *Lovelace v. Canada* represents on its face the use of Article 27 by a group member to challenge the group's own policy of excluding her.⁵⁹ Under the Indian Act, Sandra Lovelace had lost her status as an Indian by the act of marrying a non-Indian man, whereas Indian men who married non-Indian women did not lose their status.⁶⁰ Her exclusion was upheld by the political representatives of her own Maliseet band on the Tobique reservation.⁶¹ The Committee's handling of the case, however, can be appreciated also as a response to a century of the Indian Act policy of assimilation. Not only did the Indian Act transform into non-Indians women who married non-Indians and their children, but also it ended the Indian status of men who served in the Canadian army and of Indians who became "enfranchised."⁶² Marrying a white, having a white father, military service, and civic entitlement to vote were all badges of honor qualifying Indians to upgrade to non-Indian.⁶³ This established pattern of assimilation combined with gender-targeting had structured many Indian communities.⁶⁴ The Committee's views reflect sensitivity to the problems for community decisionmaking and capacity for disentrenching such a long-standing identity-shaping system. The Committee did not treat the case as one of discrimination in Indian communities

58. Nibutani Dam Decision, *supra* note 56, 38 I.L.M. at 418. On the decision generally, see Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U. J. INT'L L. & POL. 419 (2001).

59. *Lovelace v. Canada*, Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, Annex 18, at 166, U.N. Doc A/36/40 (1981).

60. *See id.*

61. *See id.* at 170-71.

62. Indian Act, R.S.C. ch. I-6 (1970) (Can.).

63. *See id.*

64. Mary Ellen Turpel, *The Women of Many Nations in Canada*, in INDIGENOUS WOMEN ON THE MOVE 93-103 (1990).

between men and women,⁶⁵ nor did it find simply that Article 27 entailed the entitlement of all ethnic Indians to move back to their band's reservation if they wished to do so. The Committee focused narrowly on Sandra Lovelace's own circumstances as a divorcee wishing again to live on her reservation after her divorce.⁶⁶ Partly because it chose not to confront the entire structure of the Indian Act, a paternalistic dimension is discernible in the Committee's language. This element apart, the prudence of the Committee's circumspection was borne out by the upheaval and long process of adjustment precipitated by the reform and partial rectification of the assimilationist provisions of the Indian Act in 1985.⁶⁷

The regime of minority rights involves intricate dynamics and balances among individual claims, state action, community autonomy, and participation by members of a minority group in its shared cultural and economic life. Is the status of a group as historically prior or indigenous relevant to the way in which these balances are struck? The U.S. Supreme Court decision in *Santa Clara Pueblo v. Martinez* confronted the question of the significance of distinct Indian history and political identity in refusing to overturn a decision of the Santa Clara tribal authorities denying membership to the children of Julia Martinez.⁶⁸ Ms. Martinez was a member of the Santa Clara Pueblo, a traditional reservation community of fewer than 1500 people in which gender was an important, explicit part of the definition of social roles.⁶⁹ Her children had grown up on the reservation and were Tewa-speaking, but were excluded from membership, and thus from inheriting property or the right of residence on the reservation after her death, because

65. The Committee's approach may be explained more austere as being crafted to avoid problems of the Covenant's application *ratione temporis*: Sandra Lovelace had married and lost her Indian status in 1970, but the Covenant entered into force for Canada only in 1976. The Committee itself developed its reasoning as an interpretation of the substantive provisions of the ICCPR rather than as a construction of residually-available provisions.

66. *Lovelace v. Canada*, Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, Annex 18, at 172-73, U.N. Doc A/36/40 (1981).

67. See Indian Act, R.S.C. ch. 32 (1st Supp.) (1985) (Can.). Long after this amendment made excluded women and their children eligible for reinstatement, the status of future generations remains unresolved.

68. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

69. *Id.* at 52-53.

Santa Clara membership rules excluded children of a female tribe-member born to a marriage with a non-member, while including children of a male tribe-member in such circumstances.⁷⁰ The argument of Justice Thurgood Marshall's opinion for the Court begins by quoting with approval from Chief Justice John Marshall in *Worcester v. Georgia*:⁷¹ "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government."⁷² The Court affirmed the power of Congress to make laws regulating Indian tribes and conferring federal court jurisdiction, but favored judicial circumspection where Congress has not given federal courts the clear power to intervene.⁷³ Finding that no such power had been granted here, the Court was able to avoid consideration of the membership issue.⁷⁴ The opinion is anchored by the Court's recognition "that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and State governments."⁷⁵ This is buttressed by policy arguments that federal judicial intervention "may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity,"⁷⁶ and that membership issues "will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts."⁷⁷ Thus, a membership rule that on its face affronts much liberal sentiment was allowed to stand as a concession to indigenous self-government, although it is possible that the Court was aware that the membership rule had been adopted in living memory with U.S. government encouragement and that currents of reform were evident in the Pueblo. Justice White in dissent implied that self-government

70. *See id.* At the time, children who could not claim membership of a recognized group were in theory denied benefits, such as those accorded by the Indian Health Service, although in practice such benefits increasingly have been made available to people who are Indian even if for such reasons not members of a federally-recognized tribe.

71. *Worcester v. Georgia*, 31 U.S. 515 (1832).

72. *Santa Clara Pueblo*, 436 U.S. at 55 (internal citations omitted).

73. *See id.* at 72.

74. *See id.*

75. *Id.* at 71.

76. *Id.* at 72.

77. *Id.* at 71.

was not the issue.⁷⁸ Where, as here, the group itself is very small, with members of the tribal government and the tribal court well-acquainted with the specific situation of each family, his reasoning suggests that the real justification for federal court intervention was that the group was transgressing the fundamental liberal principle that one must not be the judge in one's own cause. The conflicting opinions in this case highlight a clash between modern liberal conceptions of the state, with a supposedly independent judiciary constraining excesses and abuses of state power, and the realities of government by some kinds of non-state groups, especially face-to-face groups or those relying on non-judicial methods of social control.

A different balance was struck by the High Court of Tanzania in *Ephrahim v. Pastory and Kazilege*.⁷⁹ In this case, Haya customary law allowed men to sell clan land outside the clan without consent of the clan, but allowed women only the power of usufruct, not alienation.⁸⁰ In other Tanzanian cases, state court judges had abstained from intervention, stating that in the absence of statutory provisions, needed reforms in customary law could come only by evolution of views within the particular community. Mwalusanya, J., however, saw the judicial role as encompassing renovation of customary law to accord with the prohibition of sex discrimination in the Bill of Rights.⁸¹ Accordingly, sale of land by a woman was allowed on the same terms as sale by a man, which under Haya law meant that other clan members could redeem the sale by payment of the purchase price to the outside purchaser within six months.⁸² The pluralist legal system of Tanzania, in which customary law of many different communities regulates matters of property, inheritance, family, and personal law within the framework of state law for a large proportion of the population, differs materially from state legal systems in European settler societies, in which accommodation of self-governance for numerically small indigenous groups is understood as an anomalous departure from universality. It is thus consistent for judges in local state courts to favor intervention in

78. See *id.* at 72.

79. *Ephrahim v. Pastory & Kaizilege*, 87 I.L.R. 106 (Tanz. High Ct. 1990).

80. See *Ephrahim*, 87 I.L.R. at 108.

81. See *id.* at 110-16.

82. See *id.* at 119.

Tanzania but argue for abstention from the affairs of the Santa Clara Pueblo.

Comparing *Ephraim* and *Santa Clara* indicates that formulation of a non-contextual normative theory governing the striking of such balances is a challenging and probably hazardous undertaking if the theory is intended to be operational in international law. A stimulating attempt is Will Kymlicka's normative distinction, intended to be operational, between external protection that the state should help provide for minority groups to prevent domination by the wider society or other social groups and internal restrictions that a group imposes on the freedoms of its members, which, he argues, liberalism does not permit.⁸³ Thus it is consistent with liberalism to provide special political representation of minorities in legislative and recommendatory bodies, self-government, and "polyethnic" rights such as support of minority languages.⁸⁴ By contrast, the liberal state in which a minority group is located must consider intervention to prevent persistent internal restrictions by the minority group. For example, Kymlicka wants to prevent what he regards as theocratical discrimination against Protestants in some Pueblo Indian communities.⁸⁵ Non-consequentialist versions of liberalism focus on the violation of the rights of individuals whose freedom is restricted,⁸⁶ without necessarily distinguishing different impacts of comparable interventions arising from, for example, the different historical experiences and current circumstances of the Bahaya in Tanzania and the Santa Clara Pueblo. Extreme rights-orientation thus creates false similitude. Kymlicka is careful to avoid this, but his account is not explicitly contextual. He utilizes a preliminary distinction between multinational and polyethnic polities that is almost determinative of consequences but is much more clear-cut on paper than many polities are in fact. He employs an inside/outside, internal/external dichotomy that

83. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 35-36 (1995).

84. See *id.* at 36-37, 109.

85. See *id.* at 40.

86. Cf. Brian Barry, Book Review, 107 *ETHICS* 153 (1996) (reviewing WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995)) (criticizing Kymlicka as being a romantic nationalist, too well-disposed toward collectivities when there is a real tension with the rights and moral value of individuals).

is confounded by practice and is curiously ahistorical. For the purposes of internal restrictions, a minority group is evaluated as if it were a state rather than a focal point of identity and power within a much larger polity, a set of variegated, churning societies, and perhaps a complex of transnational markets and connections.⁸⁷ Culture is treated as coextensive with the group, simply something a group happens to have. Kymlicka also does not distinguish liberalism as an ideal justificatory theory from the complex of justificatory theories actually prevailing in different polities. The argument for upholding external protections while considering intervention against a category of "internal restrictions" is deceptively simple. It is stimulating as a parsimonious normative theory in one group of liberal states, but operationalizing it in these simple terms without close attention to history, context, consequences, and prevailing background norms may have unappealing or dangerous results.

Operationalizing such a normative theory involves the questions of who judges, how they judge, and what the various impacts of different rights-protecting institutions are.⁸⁸ Adjudicative approaches to minority questions have made appreciable contributions but face inevitable limits, confronted even within the relatively circumscribed scope of Article 27.⁸⁹ The case of *Kitok v. Sweden* before the Human Rights Committee typifies the problems encountered by tribunals in using Article 27 as a means to redress wrongs involving land and natural resources.⁹⁰ The diminution of areas available for reindeer pasturage due to encroachment by other users, combined with rising living standards, was interpreted by the Sami authorities, whose decisional competence was embodied in Swedish state law, as necessitating the restriction of some aspiring reindeer herders in order to maintain the viability of the reindeer-herding lifestyle.⁹¹ The decision-making system on reindeer herding among members of the Sami Village (Sameby) reportedly

87. See THOMAS M. FRANCK, *THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM* 235-41 (1999).

88. Some of these issues are noted in KYMLICKA, *supra* note 83, at 163-72.

89. See Darlene M. Johnston, *Native Rights as Collective Rights: A Question of Group Self-Preservation*, 2 CAN. J. L. & JURISPRUDENCE 19, 27-34 (1989).

90. *Kitok v. Sweden*, U.N. GAOR, 43d Sess., Supp. No. 40, at 221, U.N. Doc. A/43/40 (1988).

91. See *id.* at 223-24, 229.

was weighted toward those who already had large herds.⁹² If it had been clear to the Committee on the complex facts that Ivan Kitok's formal exclusion from entitlement to herd reindeer was an arbitrary exercise of local power, Article 27 might have provided a basis for intervention, the infringing conduct of the Swedish state being its failure to intervene. In so far as the Sameby policy depriving those who spent more than three years away was a response to the crisis in the long-term viability of reindeer-herding lifestyle and culture, however, the Swedish state was implicated much more fundamentally in not securing sufficient land, pasturage, and support for the Sami culture, yet the Committee became more hesitant to intervene. This paradox structures the result in the case, a very uneasy compromise in which no violation of the ICCPR is found because Kitok was in fact being permitted, although not as of right, to herd reindeer, and nothing is said about the systemic assimilationist effects of the diminishing resource base or other aspects of historic Swedish state policy.⁹³

Many of the most difficult systemic issues involving minorities are addressed more effectively through negotiations and policy processes, especially in deeply-divided societies. In highly-charged cases, international oversight and conciliation may play important roles, as some of the work of the High Commissioner for National Minorities of the Organization for Security and Cooperation in Europe (OSCE) attests.⁹⁴ In cases involving indigenous peoples, international and national regimes of minority rights may set useful minimum standards. Adjudicative or quasi-adjudicative proceedings are significant in upholding fundamental rights and in some cases may overcome a political impasse or provide impetus to needed policy reforms.

Indigenous claims often have much in common with minority claims. Before the surge of contemporary legal activity concerning indigenous peoples, tribunals frequently conflated the categories. Dealing with (and finding inadmissible) a Sami challenge to a Norwegian government hydroelectric dam

92. See *id.* at 224.

93. See *id.* at 225, 230.

94. See, e.g., Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT'L L. & POL. 591, 617-47 (2000) (discussing features of the work of the High Commissioner).

project flooding reindeer-herding areas in 1983, for example, the legal basis on which the then European Commission on Human Rights proceeded was simply that "a minority group is, in principle, entitled to claim the right to respect for the particular life style it may lead" as private life, family life, or home under Article 8 of the European Convention.⁹⁵ That the distinction is not always applicable or easily drawn is attested by the hesitation of the Supreme Court of Canada in the Quebec Secession reference. It recognized that the protection of aboriginal and treaty rights is "an important underlying constitutional value," but skirted the issue of whether these rights should be "looked at in their own right or as part of the larger concern with minorities."⁹⁶

In practice, however, tribunals facing indigenous issues increasingly have found themselves identifying or constructing distinct analytical approaches that go beyond standard minority provisions. This is especially prevalent where claims arise from the distinct historical circumstances of indigenous groups, as such claims are often *sui generis* in the national society. This applies, for example, to the kinds of issues addressed in the *Delgamuukw*,⁹⁷ *Mabo*,⁹⁸ and *New Zealand Maori Council* cases.⁹⁹ Where claims are based on maintenance and development of a distinct culture, religion, or language, there may be substantial analogy between indigenous claims and claims of minority groups generally, and the legal techniques used often will overlap. Very often the distinct indigenous element will be integral to such claims as well. However, there is no universal bright line. Where the substantive differences are contestable, distinctions between indigenous claims and similar claims by other minorities may or may not be legitimate, depending in part on compliance with fundamental human rights standards and in part on the complex dynamics of different societies.

The dynamics are well-illustrated by questions relating to reindeer herding and Sami identity in Finland. Reindeer

95. *G. and E. v. Norway*, Apps. No. 9278/81 and 9415/81, 35 Eur. Comm'n H.R. Dec. & Rep. 30, 35 (1984).

96. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 262-63.

97. See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1088.

98. *Mabo v. Queensland* [No. 2] (1992) 175 C.L.R. 1.

99. *N.Z. Maori Council v. Att'y-Gen.* [1987] 1 N.Z.L.R. 641.

herding has a fundamental place in Sami culture, a place recognized in Protocol 3 to the accession agreements governing the entry of Sweden and Finland into the European Community.¹⁰⁰ This provides:

THE HIGH CONTRACTING PARTIES, RECOGNIZING the obligations and commitments of Sweden and Finland with regard to the Sami people under national and international law, NOTING, in particular, that Sweden and Finland are committed to preserving and developing the means of livelihood, language, culture and way of life of the Sami people, CONSIDERING the dependence of traditional Sami culture and livelihood on primary economic activities, such as reindeer husbandry in the traditional areas of Sami settlement, HAVE AGREED on the following provisions, Article 1 Notwithstanding the provisions of the EC Treaty, exclusive rights to reindeer husbandry within traditional Sami areas may be granted to the Sami people. Article 2 This Protocol may be extended to take account of any further development of exclusive Sami rights linked to their traditional means of livelihood"¹⁰¹

In Finland, however, exclusive rights of this sort have not been accorded to the Sami. Reindeer herding is practiced by assorted individuals, most of whom are Sami, some of whom do not regard themselves as Sami, and some of whom claim to be Sami but are not regarded as Sami by recognized Sami organizations. A single reindeer-herding cooperative may include people in each category.¹⁰² Many of the special government regulations relevant to reindeer herding are applied not on the basis of ethnicity, but to geographic localities.¹⁰³ Difficult questions thus arise as to whether reindeer herding is an activity in which preference and decisionmaking roles should be allocated on the basis of being Sami, or a traditional rein-

100. See Council Decision 95/1 Adjusting the Instruments Concerning the Accession of New Member States to the European Union, 1995 O.J. (L 38) 1, 10-11.

101. *Id.*

102. See Kristian Myntti, *The Nordic Sami Parliaments*, in *OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION* 203, at 205-11 (Pekka Aikio & Martin Scheinin eds., 2000).

103. See *id.* at 205.

deer herder, or a resident of the relevant locality, or some combination of these. Some may argue, for example, that everyone who participates in the traditional reindeer-herding culture is a member of a minority whose rights to culture ought to be protected under Article 27, whereas others have argued that the Sami are the relevant minority, or that the operative category is membership in the Sami indigenous people and participation in its community or political organizations. As the indigenous (Sami) category becomes more significant in public discourse in Finland, efforts have been made by "non-Sami" to broaden the category of "Sami" to include them on grounds such as cultural affinity, kinship connection, or fairness in representation. At one level, the debate takes place in terms of legal categories and texts such as Article 27; at another, it is a political struggle that is part of a continuous process of construction and reconstruction of these categories and of the lines between them. Any normatively appealing solution will not be simply categorical; it must involve some balance of competing interests and rights. How the power of decision is allocated is nevertheless of great importance. Typically, this power, in practice, has rested preponderantly with state institutions, but this simple allocation is increasingly contested by reference to a competing conceptual structure, that of self-determination.

III. SELF-DETERMINATION

Negotiations on international normative instruments relating to indigenous peoples repeatedly have become ensnarled in the question of whether the international law of self-determination applies to indigenous peoples. As in other areas, political debate has revolved around the binary issue of the complete applicability or inapplicability of an existing conceptual structure. Representatives of indigenous peoples in international negotiations have insisted, as a large group of them put it in a 1993 *démarche* to the U.N. Working Group on Indigenous Populations, that "the right of self-determination is the heart and soul of the declaration. We will not consent to any language which limits or curtails the right of self-

determination."¹⁰⁴ They proposed incorporation of a version of Article 1(1) of the 1966 Covenants in the U.N. Draft Declaration, modified to state expressly that the right of self-determination belonged to indigenous peoples. The five members of the Working Group adopted this proposal verbatim in Article 3 of the Draft: "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." A number of states met this with categorical opposition, asserting that these groups are not peoples and have no international law right of self-determination. These binary views are accompanied by deceptively simple appraisals of what is involved. For many indigenous advocates, the core idea of self-determination is self-evident and spelled out in the Draft; complaints about lack of clarity are political diversions or academic excesses. For some state governments, self-determination is a principle upholding independent states, and any application of it to groups within states would undermine the state.

Self-determination has long been a conceptual morass in international law, partly because its application and meaning have not been formulated fully in agreed texts, partly because it reinforces and conflicts with other important principles and specific rules, and partly because the specific international law practice of self-determination does not measure up very well to some of the established textual formulations.¹⁰⁵ The standard international law of self-determination accords to the people of certain territorially-defined units the right to determine the political future of the territory. The categories of units to which this right applies have not been delineated precisely,¹⁰⁶ but, in addition to states, at least five such categories are supported in the practice of states and inter-state institutions:

- (1) mandated territories, trust territories, and territories treated as non-self-governing under Chapter XI of the U.N. Charter;

104. Sarah Pritchard, *Working Group on Indigenous Populations: Mandate, Standard-Setting Activities and Future Perspectives*, in *INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS* 46 (Sarah Pritchard ed., 1998).

105. For a survey of some of these problems, see *THE MODERN LAW OF SELF-DETERMINATION* (Christian Tomuschat ed., 1993).

106. A number of such units are discussed in *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

- (2) distinct political-geographical entities subject to *carence de souveraineté* (gross failure of the duties of the state);
- (3) other territories in which the principle of self-determination is applied by the parties;
- (4) highest-level constituent units of a federal state where that state has dissolved; and
- (5) formerly independent entities reasserting their independence with at least the tacit consent of the established state, where their incorporation into that state was illegal or of dubious legality.

A somewhat distinct body of practice confers upon such units, especially upon peoples of independent states as represented by their governments, certain economic rights relating especially to natural resources and certain protections in relation to title to territory and the use of force.¹⁰⁷ While claims by indigenous peoples may in some cases fall within these categories, for the most part their acceptance would involve some rethinking of existing practice as represented in this summary. Elements of existing interpretations of self-determination, together with increasingly coherent bodies of emerging national and international practice and the growing support among state governments for initiatives in relation to internal self-determination generally and to indigenous peoples specifically, suggest that the case of indigenous peoples may be one upon which innovative normative formulations can be agreed. These almost certainly will not be exhaustive of the issues, probably will not be highly precise, will not be universally respected, and may be somewhat incoherent. At a minimum, they must not be disastrously dangerous and, within the limits of existing imprecision and incoherence, they should be consistent with existing formulations relating to self-determination, human rights, and other fundamental principles. If this is to happen, it is suggested that a fundamental reorientation is called for that leaves aside the binary conceptual debate and moves closer to emerging practice. This reorientation involves shifting—not for the purpose of exhaustive statement, but merely for the purpose of reaching agreement on partial for-

107. See IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 167, 599-602 (5th ed. 1966).

mulations—from an end-state approach to a relational approach to self-determination.

The legal instantiation of self-determination upon which the claims of indigenous peoples have drawn most in the formative period of the international indigenous movement is the law established for decolonization of extra-European colonies of European states¹⁰⁸ and to a lesser extent the international law applied to special situations such as minority rule under apartheid in South Africa.¹⁰⁹ The practice of decolonization did much to transform what had been in effect a political principle of self-determination into a legal right, with correlative duties for states exercising control over such units of self-determination and more attenuated duties arising for other states as the *erga omnes* character of the right came to be recognized.¹¹⁰ Arguments for the extension of the decolonization justification of the right of self-determination to indigenous peoples presuppose and recognize their colonized status. These arguments appeal to the logic of decolonization and urge that its unfinished business be addressed. Some of the early rhetoric of the international indigenous peoples' movement referred to the "Fourth World" and sought support from newly decolonized states of the "Third World." This approach has been reinforced by appeal to the principle of equality, which is associated explicitly with self-determination in the U.N. Charter principle of "equal rights and self-determination of peoples."¹¹¹ If "all peoples" have the legal right to self-determination, it is argued strongly that it is unjustifiable discrimination to treat indigenous peoples differently from other "peoples."¹¹² This logic leads to the view that independence should be one of the options for an indigenous people exercis-

108. See generally UMOZURIKE O. UMOZURIKE, *SELF-DETERMINATION IN INTERNATIONAL LAW* (1972).

109. See JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 98-108 (1987) (discussing self-determination in the context of the establishment of homeland-states in South Africa). See generally MICHLA POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS* (1982).

110. See *Concerning East Timor (Port. v. Austl.)*, 1995 I.C.J. 14, para. 29 (June 30).

111. U.N. CHARTER art. 1, para. 2.

112. See Erica-Irene A. Daes, *Equality of Peoples Under the United Nations Draft Declaration on the Rights of Indigenous Peoples*, 7 ST. THOMAS L. REV. 493 (1995).

ing self-determination, even if it is an option rarely chosen in practice.

This argument from decolonization has been reinforced by practice suggesting that self-determination in the strong form as a right to establish a separate state may be an extraordinary remedy in distinct territories suffering massive human rights violations orchestrated by governing authorities based elsewhere in the state; such an argument may explain acceptance of the secession of Bangladesh from Pakistan. Internationally-backed autonomy within the state may be an alternative remedy in such situations, much discussed in the case of Kosovo. But the far-reaching argument that self-determination in this strong form of statehood or almost complete autonomy is essential as a general precondition for human rights does not establish which groups or territories are the units of self-determination for purposes of human rights enhancement, nor does it overcome legitimate concerns about the threats to human rights and to human security posed by repeated fragmentation and irredentism.¹¹³ The remedial human rights justification for self-determination, while persuasive in some cases, is most unlikely to become normal rather than exceptional unless the sovereignty and legitimacy of states declines precipitously.¹¹⁴

The right to self-determination in the context of European decolonization was conceived primarily as an instrument for ending the colonial relationship by conferring freedom. The future relations between colonizer and colonized were then to be determined by free agreement; the right to self-determination was concerned with the preconditions for such choice, not with the relationship itself. Many problems were accentuated by the rapidity and artificiality of the transformation of legal relations from colonial hierarchy to the supposed equality and freedom of relations among sovereign states. Often the theory of these legal relations was disconnected grossly from economic, political, and social relations as they existed in practice. The duties of the colonial state correlative to the right of the people of the colonized unit to self-determi-

113. Donald Horowitz, *Self-Determination: Politics, Philosophy, and Law*, in *ETHNICITY AND GROUP RIGHTS* 421 (Ian Shapiro & Will Kymlicka eds., 1997).

114. See Benedict Kingsbury, *Sovereignty and Inequality*, 9 *EUR. J. INT'L L.* 599 (1998).

nation were mainly procedural, encompassing rather modest preparations of the territory for possible independence, the negotiated establishment of an environment and framework for a legitimate act of self-determination, the proper conduct of a referendum, and the orderly transfer of power. The focus was on realization of an end-state—usually independence, but occasionally some other political arrangement. Most of the groups participating in the international indigenous peoples' movement, however, expect to continue in an enduring relationship with the state(s) in which they presently live. This is the expectation of leaders of the states involved. The claims of the Cree in Quebec illustrate this dynamic. They have not sought independence from Canada, concentrating instead on their evolving relations with the federal and provincial governments, to which Canadian courts increasingly have contributed.¹¹⁵ If Quebec secedes based on its existing boundaries, thus changing the nature of these relations, however, the Cree insist on exercising their right of self-determination to determine their future, which might well involve their continuing in Canada.¹¹⁶ Thus the claim to self-determination in the sense of a choice among internationally-sovereign entities is considered in practice by Cree leaders as relational and remedial, triggered by outside action disrupting existing relationships. In practice, assertion by the international indigenous movement of a strong form of the right of "all peoples" to self-determination may prove double-edged for the Cree in Quebec who oppose Quebec independence, as such an argument is equally well-adapted to assertions of self-determination in the name of some "people" defined by a separatist movement able to secure a majority in Quebec.

The international indigenous movement has been reluctant in international negotiations to move away from the end-state model including possible independence in order to

115. See GRAND COUNCIL OF THE CREES, *SOVEREIGN INJUSTICE: FORCIBLE INCLUSION OF THE JAMES BAY CREES AND CREE TERRITORY INTO A SOVEREIGN QUEBEC* 56, 58, 61-67 (1995).

116. See *id.* at 62-67. The Supreme Court of Canada paid disconcertingly little specific attention to issues raised by aboriginal peoples. See *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, 287-88. The Supreme Court may well imply, but does not make absolutely explicit, that aboriginal peoples should have a distinct place in negotiations were Quebec to seek independence.

maintain solidarity with groups unwilling to accept any relationship with an existing state. A representative statement of such a position is that of Mick Dodson, then a central figure in the Australian Aboriginal and Torres Strait Islander Commission and Chair of the U.N. Voluntary Fund for Indigenous Populations: "Finally, even where a state meets the obligations required under the Declaration,¹¹⁷ there will be some indigenous peoples whose right to self-determination will never be satisfied until they have a free and independent state of their own. And it would be a violation of those peoples' right of self-determination for anyone else to say that this is not an acceptable way for them to exercise that right."¹¹⁸ Similarly, a conference of "representatives of indigenous peoples of Asia" at Baguio declared in 1999

that although autonomy and self-government may be a way through which many indigenous peoples wish to exercise their right of self-determination . . . these

117. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (1970), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971).

118. Mick Dodson, *Towards the Exercise of Indigenous Rights: Policy, Power and Self-Determination*, RACE & CLASS, Apr.-June 1994, at 74. Elsewhere, he notes that when indigenous peoples started trying to persuade the WGIP to recognize the right to self-determination,

[t]he members of the Working Group thought that we were crazy. The Chairperson made it clear that there was no way that the Working Group could support recognition of such a politically contentious right. An examination of the drafts from one year to the next reveals that our perspectives were gradually accepted.

Mick Dodson, *Comment*, in INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 104, at 64. A significant group of state governments have moved in the same direction over the years, suggesting that unswerving adherence to the basic position was initially a successful strategy for indigenous negotiators. On the conduct of the negotiations in the first four annual sessions of the Inter-Sessional Working Group of the Human Rights Commission, see the thoughtful accounts by Andrew Gray in the *IWGIA Yearbook (The Indigenous World)*. Andrew Gray, *Indigenous Peoples at the United Nations: The Declaration Reaches the Commission on Human Rights*, INDIGENOUS WORLD, 1995-96, at 247-68; Jens Dahl & Andrew Gray, *Indigenous Peoples Keep the U.N. Declaration Intact for a Second Year*, THE INDIGENOUS WORLD, 1996-97, at 287-313; Jens Dahl & Andrew Gray, *U.N. Declaration Enters a Third Year at the U.N. Commission on Human Rights*, INDIGENOUS WORLD, 1997-98, at 347-63; Andrew Gray, *The U.N. Declaration on the Rights of Indigenous Peoples is Still Intact*, INDIGENOUS WORLD, 1998-99, at 355-72.

are not the only ways by which indigenous peoples may exercise this right. . . . [T]hey have the right to establish their own government and determine its relations to other political communities.¹¹⁹

While the international indigenous movement may adhere to this theoretical position, it is not viable as an express formulation for a U.N. Declaration on the Rights of Indigenous Peoples to be adopted by states, nor does it embody the current preoccupations of most internationally active indigenous peoples. By contrast, a relational approach to self-determination captures many of the aspirations embodied in the U.N. Draft Declaration produced by the U.N. Working Group on Indigenous Populations (WGIP).¹²⁰ Such an approach might be pursued in a U.N. declaration without foreclosing remedial questions that may arise in extraordinary cases.

Self-determination is about the relation between state and community. As an international program, it has complex modern origins: in efforts by nationalists to establish states for their nations, in efforts by state elites to establish a mass sense of belonging to overcome the artificiality of the modern rationalist-legal industrialized state, and in hybrid efforts to end foreign domination and create state and nation all at once.¹²¹ It can be state-threatening or state-reinforcing, liberating or chauvinist, democratic or demagogic. In its legal operation since 1920, it generally has buttressed the states system, even when potentially a threat, as with the lift it provided to the minorities program in the 1920s and 1930s¹²² and its expression in the law of mandates, trusts, and decolonization. In many states in which groups active in the international indigenous peoples' movement live, maintenance of the state at present involves efforts by the state to enhance its legitimacy, engagement with forms of community that run deeper than ra-

119. The Baguio Declaration, Apr. 21, 1999, The Conference on Indigenous Peoples' Self-determination and the Nation State in Asia, Baguio City, Philippines, available at <http://www.iwgia.org>.

120. See U.N. Draft Declaration on the Rights of Indigenous Peoples, *supra* note 1.

121. For a review, see, for example, Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT'L & COMP. L.Q. 241 (1994).

122. See Nathaniel Berman, "But the Alternative Is Despair": *Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993).

tional-legal associations, and in some cases accommodation of pluralism and multiple identities. There is thus, for the time being, a convergence between indigenous peoples and state decisionmakers with sufficient overlap to make conceivable the adoption of some set of international principles, at least in the form of a U.N. declaration. Reconstruction of the concept of self-determination is necessary in order to take advantage of this convergence. The end-state, independence-oriented focus, established during European decolonization and still relevant in some situations, has diverted attention from the development of legal principles concerning enduring relations between indigenous peoples and states.¹²³

The 1993 U.N. Draft Declaration proposed by the WGIP incorporates numerous ideas relevant to such reconstruction, but the only element explicitly connected with self-determination is the strong preference for autonomy expressed in 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.¹²⁴

The meanings of "autonomy" and "self-government" are not specified further, but the political connotation is one of freedom, subject to restrictions as to matters not specifically included in the powers of the autonomous entity. In practice, the most conspicuous exclusions from autonomy relate to foreign affairs and military security, but Article 31 is more hesitant even than this, not providing specifically for autonomy in matters such as policing, taxation, or judicial proceedings. Article 31 does not connect autonomy expressly with a land base, leaving open the possibility of autonomy that is defined by personal affinity rather than territorial area. The kinds of auton-

123. See Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304 (1994).

124. U.N. Draft Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 31.

omy regimes which indigenous peoples operate or to which they aspire vary enormously, influenced in part by geographical and demographic settings.¹²⁵ Almost all such regimes presuppose extensive relations between the autonomous institutions and other government institutions of the state and between indigenous people and other people within or outside the autonomous area. Relations between autonomous entities (and their institutions) and the state (and its institutions) require a complex governance framework, often embodied in a formal agreement or in constitutional or legislative provisions, which, although formally unilateral, over time may be understood as requiring the consent of all affected groups before amendment.¹²⁶ Establishing the terms of such relationships and the legal elements structuring the dynamics of their continued evolution has become a specialized field of practice in crafting solutions in many strife-torn polities. More systematic analysis of rapidly evolving autonomy arrangements involving indigenous peoples and other groups may provide part of a structure of norms to give substance to an emerging legal understanding of autonomy.¹²⁷ It is clear, however, that in the overwhelming majority of cases autonomy is not simply freedom, it is a relationship. Indeed, most of the aspirations of most groups in the indigenous peoples' movement involve definition of relationships with states. The relational dimension of self-determination embodies these aspirations. Giving meaning to this element of self-determination thus requires that a central focus be on the terms and dynamics of these relational aspects.

The U.N. Draft Declaration identifies and includes provisions addressing many further crucial issues in such relationships, but does not connect these expressly to self-determina-

125. For one study of the practicalities of self-determination, far from, although connected with, the politics pursued in negotiations in Geneva, see ANDREW GRAY, *INDIGENOUS RIGHTS AND DEVELOPMENT: SELF-DETERMINATION IN AN AMAZONIAN COMMUNITY* (1997).

126. See Constitution Act, 1982, § 35.1, as set out in Canada Act, 1982, c.11, sched. B (U.K.). Even provisions such as the allocation of power on Indian issues to the federal government in section 91(24) of the British North America Act of 1867 could not be amended easily without support from First Nations in Canada. See British North America Act, 1867, 30 & 31 Vict., c.3 (U.K.).

127. See, e.g., HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION* (rev. ed. 1996).

tion in the way advocated here. The dynamic of the U.N. process has been rather the opposite, treating self-determination as an end-state issue and separating the debate on self-determination from the structuring of relationships. The Draft Declaration provides much of the material from which the concept of self-determination may be reconstructed in relational terms, but does not always develop the relational aspects sufficiently. The Draft envisages that indigenous groups may determine their own memberships and the structures of their own institutions;¹²⁸ meanwhile, indigenous individuals have rights to obtain citizenship of the states in which they live.¹²⁹ Recourse for an individual aggrieved by a membership decision of the group is not specified—decisions are required as to the enduring responsibilities and powers of states of the sort invoked by Ms. Lovelace and Ms. Martinez. Indigenous institutions and juridical practices may be maintained and promoted, subject to internationally recognized human rights standards,¹³⁰ but the relation of these institutions and practices to state institutions, particularly the judicial system, is not addressed explicitly. The Draft would require states to include the rights recognized in the Declaration in national legislation “in such a manner that indigenous peoples can avail themselves of such rights in practice,”¹³¹ but the role of state institutions, especially courts and administrative agencies, is not addressed systematically. The Draft alludes to the capacities and powers of states throughout. States are required, for instance, to “take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples,” a formulation that deliberately did not provide for indigenous consent to receipt of such materials.¹³² Indigenous peoples have the right to effective measures by states to prevent any interference with, alienation of, or encroachment upon their rights to “own, develop, control and use the lands and territories . . . which they have traditionally owned or otherwise occupied or used.”¹³³ This may entail

128. See U.N. Draft Declaration on the Rights of Indigenous Peoples, *supra* note 1, arts. 32, 33.

129. See *id.* art. 32.

130. See *id.* art. 33.

131. *Id.* art. 37.

132. *Id.* art. 28.

133. *Id.* art. 26.

some state responsibility to prevent alienation of land even where an indigenous person wishes to sell, albeit perhaps only in exceptional circumstances where the group's own political and legal structures are in disarray or where the conduct of the state (for example in wrongly individualizing communal title) has precipitated the situation. Even with qualifications, such state involvement raises complex problems, often restricting the ability of indigenous groups to raise capital by mortgage or to make their own development decisions. Further engagement between the state and indigenous people is indicated in provisions that indigenous peoples are entitled to benefit where they wish from state education¹³⁴ and health care,¹³⁵ from the full rights accorded by international labor law and national labor legislation,¹³⁶ and from financial and technical assistance,¹³⁷ and that they have the right to special measures to improve their economic and social conditions¹³⁸ and the right to reflection of indigenous cultural diversity in state-owned media.¹³⁹ The broad philosophy of the Draft is that indigenous peoples have the right to maintain and strengthen their distinct characteristics and legal systems while retaining the right to participate fully in the life of the state.¹⁴⁰ The provisions concerning indigenous spiritual and material relationships to and ownership, control, and restitution of land, territories, and waters, together with provisions on environment, sustainable development, and indigenous responsibilities to future generations, provide a foundation for a land and territorial base within the state.¹⁴¹ The Draft would constrain state military activities and development projects in indigenous areas except with the consent of the people concerned.¹⁴² Although specific formulations such as these will be debated, negotiation on such issues is part of relational autonomy as already widely practiced. The Draft is lacking in provisions on duties of indigenous peoples and in provisions

134. *See id.* art. 15.

135. *See id.* art. 24.

136. *See id.* art. 18.

137. *See id.* art. 38.

138. *See id.* art. 22.

139. *See id.* art. 17.

140. *See id.* art. 4; *see also id.* arts. 8, 12-14, 19-21, 23 et seq.

141. *See id.* arts. 25-28.

142. *See id.* arts. 28-30.

on reconciling the conflicting rights and interests of others, including non-members and dissenting members; these and other relational questions are of immense practical importance, but do not appear to be excluded or prejudged by the Draft as written.

After long hesitation about the application of the provisions on self-determination in Article 1 of the ICCPR¹⁴³ to indigenous groups within independent states, the U.N. Human Rights Committee has begun, in dialogues with states parties under the reporting procedure, to express views under the self-determination rubric on the substantive terms of relationships between states and indigenous peoples. It has emphasized in particular the provisions of Article 1(2), which stipulate that all peoples may dispose freely of their natural wealth and resources and must not be deprived of their own means of subsistence.¹⁴⁴ It has criticized the Canadian government's practice of insisting on the inclusion in contemporary claims settlement agreements of a provision extinguishing inherent aboriginal rights, confining aboriginal rights instead to those specified in the agreement.¹⁴⁵ The Committee recommended that this practice "be abandoned as incompatible with article 1 of the Covenant,"¹⁴⁶ an important indication that the Committee believes the Article 1 provisions on self-determination are applicable to indigenous peoples in Canada.¹⁴⁷ The Commit-

143. ICCPR, *supra* note 49, art. 1.

144. *Id.* art. 1(2).

145. The Royal Commission on Aboriginal Peoples criticized this policy in its final report. See 2 ROYAL COMMISSION ON ABORIGINAL PEOPLES, FINAL REPORT, ch. 2, § 3.8 (1996), available at <http://www.indigenous.bc.ca/rcap.htm>. The Royal Commission earlier drew upon a study by Mary Ellen Turpel and Paul Joffe. See Royal Commission on Aboriginal Peoples, Treaty Making in the Spirit of Co-Existence: An Alternative to Extinguishment (1995), available at http://www.ubcic.bc.ca/docs/Treaty_Making.doc.

146. *Concluding Observations on the Fourth Periodic Report of Canada*, U.N. Hum. Rts. Comm., 65th Sess., 1747th mtg., ¶ 8, U.N. Doc. CCPR/C/79/Add. 105 (1999).

147. For an argument that harsher elements of the policy of extinguishment pursued by the Australian government infringe international law, see Sarah Pritchard, *Native Title from the Perspective of International Standards*, 18 AUSTL. Y.B. INT'L L. 127, 167-69 (1997). The Native Title Amendment Act also has been considered critically by the U.N. Committee on the Elimination of Racial Discrimination. See Decision 2 (54) on Australia, Committee on the Elimination of Racial Discrimination, 54th Sess., ¶ 21(2), U.N. Doc. A/54/18 (1999). The New Zealand government's policy of seeking to make

tee further recommended on the basis of Article 1 that the Canadian government implement the Royal Commission report on the need for greater allocation of land and resources to ensure institutions of aboriginal self-government do not fail.¹⁴⁸ Earlier the Committee on Economic, Social and Cultural Rights had made similar substantive recommendations to the government of Canada without basing them explicitly on self-determination and the terms of Article 1 of the International Covenant on Economic, Social and Cultural Rights.¹⁴⁹ As Article 1 is common to both Covenants, the logic of gradual convergence in interpretation is compelling and is likely to prevail over differences in institutional dynamics. The intervention of such bodies in the dynamics of state-indigenous relations under Article 1 may be judged in relation to Canada, where the government accepts the general principle of indigenous self-determination and where the political and policy system already has developed and calibrated possible initiatives. The international bodies, which have scant ability to formulate such detailed policies themselves, are able in such a case to boost one part of a national process. The challenge for these bodies is whether to try to apply such interpretations of self-determination for indigenous peoples to states where the government and the political system are not prepared to accept any such notion or in situations where there is no carefully crafted and politically legitimate policy document upon which the international body may seize.

The number of state governments accepting principles for relationships with indigenous peoples that incorporate elements of self-determination gradually has increased. Reasonably representative of current positions of Canada, New Zealand, Denmark, and other governments is a 1995 statement by the then-Australian (Labour) government, that self-determination is "an evolving right which includes equal rights, the continuing right of peoples to decide how they should be gov-

contemporary settlements of Maori claims "full and final" has been criticized by Maori leaders and several scholars. See, e.g., Annie Mikaere, *Settlement of Treaty Claims: Full and Final, or Fatally Flawed?*, 17 N.Z.U. L. Rev. 425, 450-55 (1997).

148. *Concluding Observations on the Fourth Periodic Report of Canada*, supra note 146, ¶ 8.

149. *Concluding Observations on the Third Periodic Report of Canada*, U.N. ESCOR, 57th mtg, ¶ 18, U.N. Doc. E/C.12/1/Add.31 (1998).

erned, the right of people as individuals to participate in the political process (particularly by way of periodic free and fair elections) and the right of distinct peoples within a state to make decisions on and administer their own affairs."¹⁵⁰ The government of Guatemala, formally committed to implementing provisions on land rights, local self-government, and national participation in the 1995 Mexico City Peace Agreement on Identity and Rights of Indigenous Peoples,¹⁵¹ has taken the position internationally that self-determination of indigenous peoples is possible without threatening national unity.¹⁵² A basis for comparable international positions is provided by the 1991 Colombian Constitution, which, in tandem with a series of Constitutional Court decisions, envisages significant indigenous autonomy as well as rights in relation to land, resources, consultation, representation, language, and education¹⁵³ and by the Philippines Indigenous Peoples Rights Act of 1997, which expressly endorses indigenous self-governance and self-determination within the state.¹⁵⁴ These legal policies often conflict with other government policies and may fall far short in implementation and in their real effects, but their normative stance has some genuine support and reflects a broader, if uneven, trend. This trend may be necessary to the future success of the state¹⁵⁵ as well as to the vitality of indigenous peoples.

A relational approach to self-determination entails some crossing of the boundaries drawn in political debate between

150. Information Received from the Government of Australia, U.N. Commission on Human Rights, 52d Sess., ¶ 8, U.N. Doc. E/CN.4/1995/WG.15/2/Add.2 (1995).

151. Agreement on Identity and Rights of Indigenous Peoples, U.N. GAOR, 49th Sess., Agenda Item 42, Annex, U.N. Doc. A/49/882, S/1995/256 (1995).

152. *Report of the Working Group on Indigenous Populations on Its Sixteenth Session*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 50th Sess., Agenda Item 7, ¶ 30, U.N. Doc. E/CN.4/Sub.2/1998/16 (1998).

153. For a short summary, see Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 79-81 (1999).

154. The Indigenous Peoples Rights Act, Republic Act No. 8371 (1997) (Phil.), available at http://www.bknet.org/laws/RA_8371.html.

155. Cf. ALAN S. MILWARD, *THE EUROPEAN RESCUE OF THE NATION-STATE* (1992); ANDREW MORAVCSIK, *THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT* (1998).

the self-determination program and the human rights program. This characteristic legal strategy has many adherents, and is reinforced juridically by the inclusion of self-determination as the first right in the 1966 Covenants (ICCPR and ICESCR).¹⁵⁶ Thus, some justify self-determination on human rights grounds as a necessary precondition and means to the realization of other human rights.¹⁵⁷ In this view, self-determination in finely nuanced forms is an embodiment of the underlying objectives of human rights—general rights to political participation, for example, or specific rights for the members of religious and linguistic communities collectively to make decisions concerning religious and language matters. This view, while plausible, is far removed from the most common ways in which the idea of “self-determination” presently is used in international practice, although the tide may be moving in this direction. Others look behind the formal rules of self-determination and human rights to find a justification that unites both programs, such as the realization of freedom and equality through rights accorded to human individuals or collectivities.¹⁵⁸ In this analysis, like the law of human rights, the law of self-determination is the law of remedies for serious deficiencies of freedom and equality. Comparable arguments also can be made for unifying these categories with minority claims.¹⁵⁹

Internationalist writing in western countries increasingly assumes conditions of unquestionable peace, participation, and respect constructed through dialogue—what some have

156. ICCPR, *supra* note 49, art. 1; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 1, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR].

157. See, e.g., *The Right to Self-Determination: Implementation of United Nations Resolutions*, Study Prepared by Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, ¶ 59, U.N. Doc. E/CN.4/Sub.2/405/Rev.1 (1980); Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 INT'L & COMP. L.Q. 857 (1994).

158. See, e.g., S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1995); S. James Anaya, *Self-Determination as a Collective Right Under Contemporary International Law*, in *OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION*, *supra* note 102, at 19.

159. Some such arguments are evaluated and carefully sidestepped, in ATHANASIA SPILIOPOULOU-ÅKERMARK, *JUSTIFICATIONS OF MINORITY PROTECTION IN INTERNATIONAL LAW* (International Studies in Human Rights, vol. 50, 1997).

described as the advent of the post-modern state.¹⁶⁰ In some such writing, the distinctions among the categories discussed here virtually disappear, along with sovereignty. The right to self-determination, human rights, minority rights, and indigenous rights all become one. This view of the world, however, is dangerously optimistic as a basis for global legal norms intended for serious application. It does not confront the hard cases where the human rights, minority rights, and self-determination programs lead in different directions. The logic of self-determination is not simply the orderly negotiation of constitutional issues in a peaceful and affluent society. To illustrate from extreme cases, it widely is thought that the "free elections" held to vindicate post-communist democratic self-determination in unified Yugoslavia in 1990 encouraged ethno-nationalist campaigning and helped catalyze the ethnicization of politics that precipitated war and fragmentation.¹⁶¹ If these elections represented the self-determination program, they did not represent the program of human rights. Conversely, U.N.-authorized intervention in Somalia might be defended as protecting basic human rights, but the insertion of external force into complex militarized local politics is scarcely congruent with the standard discourse of self-determination. Less extreme cases involving indigenous peoples arise often. One of the unresolved dilemmas of basing indigenous claims on self-determination is that in encouraging groups to mobilize as "nations," some may take what appears to outsiders (and to some insiders) as the path of nationalist excess: oppressing dissenters, mistreating and even creating minorities in order to create a clear majority and reinforce the dominant identity,¹⁶² and confronting neighbors. Some persons who are indigenous but have multiple connections may not wish to be forced to opt decisively into one group and out of others; other persons who identify as indigenous, especially in urban

160. THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS 535 (Peter J. Katzenstein ed., 1996).

161. See Misha Glenny, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR* (3rd ed. 1996); see also Adam Roberts, *Communal Conflict as a Challenge to International Organization: The Case of Former Yugoslavia*, 21 REV. INT'L STUD. 389, 396 (1995) (discussing the ethnicization of politics).

162. See, e.g., *MAKING MAJORITIES: CONSTITUTING THE NATION IN JAPAN, KOREA, CHINA, MALAYSIA, FIJI, TURKEY AND THE UNITED STATES* (Dru C. Gladney ed., 1998).

areas, may be living outside traditional communities and may be left with no group to join. The self-determination program can have such costs. They can be ameliorated, but not wished away; they must be evaluated in defining and determining the limits of the self-determination program. On the other side of such evaluation, as many members of indigenous groups point out, the price of not having self-determination has been extremely high—state policy, pursued with bureaucratic rationality but little accountability, often has been very expensive for the state and dismal for indigenous people. The logic of self-determination is that “the people” themselves, not state governments, should make these evaluations; this is not the logic of the human rights program.

As to the relationship of self-determination to the minorities and indigenous peoples' programs, it already has been noted that the overlap between these latter categories is considerable, and a relational approach is relevant to both. For example, in advocating a view of self-determination as encompassing “the right of distinct peoples within a state to make decisions on and administer their own affairs,” the Australian government added that this is “relevant both to indigenous peoples and to national minorities.”¹⁶³ However, the terms of the relationships that evolve will often differ, for reasons that are practical, normative, and, in some cases, strategic. In some societies, indigenous claims to relational self-determination are legitimate and actionable in a way that comparably extensive claims of minorities might not be, whereas in other societies introducing such a distinction between certain specified groups may be irrelevant or even pernicious. The remarkable evolution of international norm-making to the point where numerous state governments accept some concept of self-determination as a principle broadly applicable to indigenous peoples has not been paralleled even remotely in relation to minorities in general. For many states this is because the category of “indigenous peoples” is close-ended, politically accepted, and historically justified, whereas the category of “minorities” is much wider and free-ranging. This body of practice is strong evidence of the current political vitality of the

163. Information Received from the Government of Australia, U.N. Commission on Human Rights, 52d Sess., ¶ 8, U.N. Doc. E/CN.4/1995/WG.15/2/Add.2 (1995).

distinction between these two categories and suggests that the category of "indigenous peoples" is operative and necessary to understanding the evolving law of self-determination.

IV. HISTORIC SOVEREIGNTY

Accounts and memories of an earlier era of political independence are widespread among indigenous peoples. In many cases, this independence initially was recognized by the aspiring colonial power. Treaties between indigenous peoples and colonizing or trading states made over several centuries commonly were premised on the capacity of both parties to act. In some cases, this implied recognition of the capacity of the leaders of the indigenous people to act directly in international law. The Treaty of Waitangi, for instance, was one of many such agreements included in standard nineteenth century European treaty series.¹⁶⁴ The legal basis under which this independence was lost often was not accepted by the indigenous group involved, and even under the legal principles of contemporaneous international law espoused by the colonizers it may have been tainted by illegality. The international law concerning colonialism contained inconsistencies observed by many international lawyers in the nineteenth century and earlier. It is not surprising that leaders of some indigenous groups aspire to rectify wrongs by reviving their previous independence.

Claims by the three Baltic republics of the U.S.S.R. to revive their prior sovereignty received some support during the rapid transition of these entities to independence in 1991.¹⁶⁵

164. Treaty of Cession, Feb. 5-6, 1840, Gr. Brit.-N.Z., 89 Consol. T.S. 473; VI A COMPLETE COLLECTION OF THE TREATIES AND CONVENTIONS, AND RECIPROCAL REGULATIONS, AT PRESENT SUBSISTING BETWEEN GREAT BRITAIN AND FOREIGN POWERS, AND OF THE LAWS, DECREES, AND ORDERS IN COUNCIL, CONCERNING THE SAME; SO FAR AS THEY RELATE TO COMMERCE AND NAVIGATION, TO THE REPRESSION AND ABOLITION OF THE SLAVE TRADE; AND TO THE PRIVILEGES AND INTERESTS OF THE SUBJECTS OF THE HIGH CONTRACTING PARTIES 579 (Lewis Hertslet ed., 1845). Many such treaties are collected and printed in a separate section in Clive Parry's *Consolidated Treaty Series* (published in the latter part of the twentieth century), but often the original sources intimated no qualitative distinction of this sort. See MICHAEL A. MEYER, INDEX-GUIDE: SPECIAL CHRONOLOGICAL LIST 1648-1920 (1984) (indexing treaties as found in the *Consolidated Treaty Series*).

165. For discussion, see Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 EUR. J. INT'L L. 36 (1993); Colin Warbrick,

It is arguable that the coercion involved in their incorporation into the Soviet Union was of doubtful international legality in 1940-41, and that the incorporation was void or voidable. If Lithuanian sovereignty was never extinguished lawfully and could revive, why should not the same apply to Mohawk sovereignty as some Mohawk have argued for centuries?¹⁶⁶ The orthodox view has been that if any rule of international law existed prohibiting and potentially negating the forcible incorporation perpetrated by the Soviet Union, it was then very new, so that there are not necessarily legal implications for groups forcibly incorporated into existing states in earlier periods. Many states are aware of the vast implications of such retrospective invalidation, and in the cases of the Baltic republics, states sought to avoid establishing such a precedent by insisting that the independent statehood of these entities should be recognized only once the agreement of the authorities in Moscow had been obtained.¹⁶⁷ Because this program is not well-developed in practice, little attention has been given to fundamental questions. More generally, whereas self-determination is mainly a forward-looking program, the historic sovereignty program is organized to be concerned with restoration of the *status quo ante*. This may suggest legal responsibility for wrongful interference with sovereign rights, a class of claim raised in exceptional legal proceedings such as those brought by Nauru¹⁶⁸ and by the U.N. Council for Namibia¹⁶⁹ and in war rep-

Recognition of States, 41 INT'L & COMP. L.Q. 473 (1992). Some advocates of Eritrean independence espoused a variant of this argument, although the legal situation was different, not least because of U.N. General Assembly endorsement of the 1952 inclusion of Eritrea as a component part of the Ethiopian Federation. Cf. EYASSU GAYIM, *THE ERITREAN QUESTION: THE CONFLICT BETWEEN THE RIGHT OF SELF-DETERMINATION AND THE INTERESTS OF STATES* (1993).

166. See generally DAVID BLANCHARD, *Sovereignty*, in 7 GENERATIONS: A MOHAWK HISTORY TEXT (Kahnawake Survival School, 1980), available at <http://www.schoolnet.ca/aboriginal/7gen/index-e.html>; see also *Mitchell v. Minister of National Revenue*, No. 27066, 2001 SCC 33 (Sup. Ct. Can. May 24, 2001) (Westlaw, Can. All Cases).

167. See Warbrick, *supra* note 165, at 473-75.

168. See *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, 1992 I.C.J. 240 (June 26) (Judgment on Preliminary Objections).

169. On the litigation brought by the United Nations Council for Namibia against Urenco, see Nico Schrijver, *The UN Council for Namibia vs. Urenco, UCN and the State of the Netherlands*, 1 LEIDEN J. INT'L L. 25 (1988). See gener-

arations arrangements,¹⁷⁰ but otherwise generally sidestepped by former colonial powers and by other military intervenors. Serious problems also may arise in relation to title to territory—little analysis has been undertaken, for example, of the relationship between historic sovereignty claims and the ordering principle of *uti possidetis juris*. Internal administrative boundaries utilized by the larger contemporary state may differ greatly from the boundaries ascribed to the historic entity, yet such internal boundaries generally have governed in the legal practice relating to decolonization and to disintegrating federations. The traditional or ethnic group associated with the historic entity now may be only a minority in the aspiring entity, a complexity illustrated by the relationship between Yakut people and the self-proclaimed Sakha Republic in Siberia.

A different kind of concern is that the re-expression of indigenous aspirations in the language of national and international legal structures can involve serious distortion of intention. Haudenosaunee leader Oren Lyons, for example, has pointed to the chimerical element of the modern quest for "sovereignty" among Indian nations in the United States:

[S]omebody else has it and tells you you may have it, and so you try to find it; but every time you try to find it it is not there. . . . [I]f something serves the purpose of the state it is sovereign[;] . . . it serves the government's purpose to recognize Indian sovereignty, because it then does not have to abide by the rules and regulations that govern nuclear wastes elsewhere in the United States.¹⁷¹

The recurrent affirmations of Indian sovereignty in U.S. legal materials survive as a mixture of general principle, article of faith, aspiration, morality play, and illusion, so that there is a

ally NICO SCHRIJVER, *SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES*, ch. 5 (1997).

170. See Cesare P.R. Romano, *Woe to the Vanquished? A Comparative Analysis of the Reparations Process after World War I (1914-1918) and the Gulf War (1990-1991)*, 2 *AUS. REV. INT'L & EUR. L.* 361 (1998). For a somewhat different view of the U.N. Compensation Commission, see *THE UNITED NATIONS COMPENSATION COMMISSION: THIRTEENTH SOKOL COLLOQUIUM* (Richard B. Lillich, ed., 1995).

171. Oren Lyons, *Indigenous Peoples and the Right to Self-Determination*, 87 *PROC. AM. SOC'Y INT'L L.* 190, 196 (1993).

widespread interest in their maintenance, but much resistance to their full vindication.

Reviving historic sovereignty carries the hope of reversing the consequences of wrongs. In focusing on past dispossession it incorporates a type of moral claim that resonates with liberal principles. However, a general argument for independence for indigenous groups based on historic sovereignty goes much further than most groups wish. It takes little account of how things have changed, and its radical implications provoke damaging resistance from states. In practice, most indigenous peoples seeking to revive autonomous power utilize more nuanced structures that incorporate some of the same justifications: self-determination or the emerging conceptual structure of indigenous peoples' claims.

V. INDIGENOUS PEOPLES

The construction and affirmation of a distinct program of "rights of indigenous peoples," going beyond universal human rights and existing regimes of minority rights, has been one of the objectives of the international indigenous peoples' movement. It has received support from some states prepared to recognize the validity of many claims made by indigenous peoples but anxious not simply to endorse the extension of the existing self-determination and historic sovereignty programs to indigenous peoples without modification. The Draft Declaration on the Rights of Indigenous Peoples completed by the U.N. Working Group on Indigenous Populations in 1993 embodies such an approach.¹⁷² While many of the provisions of this Draft apply or restate existing human rights norms or other principles of international law to reflect particular concerns and experiences of indigenous communities,¹⁷³ other

172. See U.N. Draft Declaration on the Rights of Indigenous Peoples, *supra* note 1.

173. See, e.g. *id.* art. 2 (declaring "the right to be free from any kind of adverse discrimination"), art. 3 ("Indigenous peoples have the right of self-determination."), art. 5 ("Every indigenous individual has the right to a nationality."), art. 6 (declaring "the individual rights to life, physical and mental integrity, liberty and security of person"), art. 18 ("Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation."), art. 43 ("All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals."). Article 1 also provides: "Indigenous peoples have the

provisions depart from this pattern to express specific aspirations and self-understandings of indigenous groups, often couched as "rights."¹⁷⁴ This combination of components is characteristic of projects to constitute "indigenous peoples" as a distinct legal category. It suggests, as has been argued here, that many of the claims indigenous peoples make and much of the law relevant to dealing with them do not depend on a group being an "indigenous people." It implies also that some elements of legal practice buttress the strong arguments of the indigenous peoples' movement, supported by large numbers of states, for distinctive recognition.

Crafting substantive legal rules on the basis of their applicability in cases involving a distinct category of indigenous peoples can be a subtle and perilous task if high priority is given to reconciling them with the four existing frameworks already discussed. International Labour Organization (ILO) Conventions 107 (1957) and 169 (1989)¹⁷⁵ are attempts to establish such a concept systematically, although with virtually no involvement of indigenous peoples in the drafting process of Convention 107 in the 1950s, and with appreciable but nonetheless limited involvement in the process of Convention 169 in the 1980s. Although the assimilationism of Convention

right to full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law." *Id.*, art. 1.

174. See, e.g., *id.* art. 7 ("Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide . . ."), art. 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."), art. 31 (declaring that "[i]ndigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government" in certain matters).

175. Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO Convention 107), *adopted* June 26, 1957, *compiled in* CONVENTIONS AND RECOMMENDATIONS ADOPTED BY THE INTERNATIONAL LABOUR CONFERENCE 1919-1966, at 901 (1966) (entered into force June 2, 1959); Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), *adopted* June 27, 1989, 28 I.L.M. 1384 (entered into force Sept. 5, 1991) [hereinafter Indigenous and Tribal Peoples Convention].

107 and the circumspection of Convention 169 have caused the international indigenous movement to focus energies on the U.N. and OAS Drafts and other evolving processes, these instruments provide significant minimum benchmarks on some issues for states and, in certain circumstances, international organizations. For example, Convention 107 has been invoked by national courts and international bodies to call attention to violations relating to indigenous land rights, displacement, and resettlement.¹⁷⁶ Similarly, Convention 169 has been invoked by the Colombian Constitutional Court in determining that consultation with and participation of indigenous people in an oil exploration licensing decision had been inadequate.¹⁷⁷ International development institutions also have begun to use "indigenous peoples" as an operational concept, one that triggers procedural requirements and substantive standards. The logic of the indigenous peoples' program gradually has led these institutions to regard consultation with indigenous peoples as essential in formulating these standards and in certain institutional practices.¹⁷⁸

The U.N. and OAS Draft Declarations, negotiated in processes in which indigenous peoples have had significant if not wholly satisfying roles, also reflect agreement on the existence of such a category, although not on its bounds and definition.¹⁷⁹ These normative texts and the growing body of legal practice are beginning to establish some common understand-

176. See *Lal Chand Mahto v. Coal India Ltd.*, CMP No. 16331 (Sup. Ct. India, Dec 13, 1985) (slip opinion, on file with author); BRADFORD MORSE & THOMAS BERGER, SARDAR SAROVAR: REPORT OF THE INDEPENDENT REVIEW (1992); see also Report on the Situation of Human Rights in Ecuador, Inter-Am. C.H.R., OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997).

177. See Petition of Jaime Cordoba Trivino, Defensor del Pueblo, en Representacion de Varias Personas Integrantes del Grupo Etnico Indigena U'Wa, Sentencia No. SU-039/97 (Corte Constitucional Colom., Feb. 3, 1997) (slip opinion, on file with author).

178. See Benedict Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples*, in THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 323 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999).

179. See U.N. Draft Declaration on the Rights of Indigenous Peoples, *supra* note 1; Proposed American Declaration on the Rights of Indigenous Peoples, *supra* note 2; *Discrimination Against Indigenous Peoples*, *supra* note 7; *Report of the Chair on the Special Meeting of the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples*, OEA/Ser.K/XVI GT/DADIN/doc.23/01 rev. 1 (2001), available at <http://www.oas.org>.

ings on legal issues that are not reached fully through adaptation of established categories and must be addressed through a normative and institutional program based on "indigenous peoples" as a legal category. Particular normative features include the legal regime for restitution of traditional lands and territories; historically-grounded and culturally-grounded entitlements and responsibilities with regard to natural resources, religious sites, and spiritual or guardianship relationships with particular land, water, mountains, etc.; entitlements and responsibilities based on treaties or other agreements to which the indigenous people is party; certain constitutional arrangements for participation and political structures for membership and self-government; duties in relation to ancestors and future generations; continuance of certain kinds of economic practices; and perhaps entitlements and responsibilities in relation to traditional knowledge.

After a long period of relative neglect, the Inter-American Commission on Human Rights (IACHR) has been galvanized by the impetus of the OAS Draft Declaration and increasing involvement of legally-oriented indigenous peoples and interested NGOs and has begun to take preliminary steps toward juridical operationalization of an indigenous peoples' program. It has begun referring some such cases to the Inter-American Court of Human Rights¹⁸⁰ and has taken an active role itself in brokering friendly settlements in several cases, especially a 1998 settlement in which the government of Paraguay agreed to purchase a substantial and quite precisely stipulated land base for two Enxet communities, in effect conceding legal responsibility to uphold indigenous rights to ancestral lands.¹⁸¹ In a settlement involving atrocities in 1993 by Guatemalan self-defense patrols against an indigenous community at Colotenango, it pushed successfully for a settlement, which included not only compensation for victims and their

180. *Mayagna Indian Cmty. of Awas Tingni v. Nicaragua*, a case against government-approved logging operations that resulted in an important decision by the Court on indigenous peoples' land rights and the right to a remedy in national law, exemplifies the Commission's more active approach. See Case 79, *La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua*, Inter-Am. Ct. H.R. (Aug. 31, 2001), available at http://www.corteidh.or.cr/serie_c/Sentencia.html.

181. See Case 11.713, Inter-Am. C.H.R. 350, OEA/Ser.L/V/11.106, doc. 3 (1999) (describing the friendly settlement of March 25, 1998).

families, but also reparation for the community as a whole in the form of schools and other development projects.¹⁸² Such settlements often involve large, U.S.-based NGOs as well as pressure from foreign governments and availability of financing by international development institutions or aid agencies. Problems may arise as to how they are carried out in practice and how far the local community (whose members themselves have diverse interests and priorities) really is able to shape the settlement and its implementation. The compatibility of such large, structured settlements with human rights, the protection of minorities within communities, self-determination, and historic sovereignty may involve problems in particular cases that have not been explored fully yet.¹⁸³ The indigenous peoples' program also has begun to animate IACHR dialogues with states, although the IACHR's approach continues to vary somewhat across different country reports, reflecting some continued hesitancy in dealing with governments of states that have long resisted intrusion in this area.¹⁸⁴

The views of the Human Rights Committee in *Hopu and Bessert v. France*¹⁸⁵ suggest, especially when read in conjunction with *Ominayak*¹⁸⁶ and other cases,¹⁸⁷ that a majority of the Committee is willing to adopt very broad interpretations of established rights in cases where some particular types of groups

182. See Case 11.212, Inter-Am. C.H.R. 447, OEA/Ser.L/V/11.95, doc. 7 (1997).

183. For a useful overview by a lawyer active in several of these cases, see Ariel Dulitzky, *Los Pueblos Indígenas: Jurisprudencia del Sistema Interamericano de Protección de los Derechos Humanos*, 26 REVISTA DEL INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS [IIDH] 137 (1998).

184. Note the extensive discussion in the Report on the Situation of Human Rights in Ecuador, *supra* note 176, at 103-28.

185. *Hopu and Bessert v. France*, U.N. GAOR, 52d Sess., Supp. No. 40, at 70, U.N. Doc. A/52/40 (1997).

186. *Ominayak v. Canada*, U.N. GAOR, 45th Sess., Supp. No. 40, vol. II at 1, U.N. Doc. A/45/40 vol. II (1990).

187. See *Länsman et al. v. Finland*, Communication No. 511/1992, Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Human Rights Committee, 52nd Sess., Annex, U.N. Doc. CCPR/C/52/D/511/1992 (1994); *Apirana Mahuika v. New Zealand*, Communication No. 547/1993, Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Human Rights Committee, 70th Sess., Annex, U.N. Doc. CCPR/C/70/D/547/1993 (2000).

are involved.¹⁸⁸ The claim brought by native Tahitians against a French government decision to allow construction of a hotel complex in an area impinging on an ancient Polynesian grave site was not considered under Article 27 because a majority of the Committee had decided to treat France's declaration on the non-applicability of Article 27 as a comprehensive and effective reservation.¹⁸⁹ This removed the most obvious basis for the claim. But the Committee found that the rights to family and to privacy of the Tahitian complainants were violated, notwithstanding that the graves were reportedly of people who had died several generations earlier and that no direct kinship relationship between the complainants and the forebears in the grave site had been established.¹⁹⁰ The Committee decided that "family" must be interpreted by reference to the social practices and cultural traditions of the particular society and accepted the contention of the applicants that their relationship to their ancestors was an essential element of their identities and was significant in their family lives.¹⁹¹ Specifically, the burial grounds "play an important role in the authors' history, culture and life."¹⁹² Like *Lyng*, this case was precipitated by lack of control by indigenous peoples of land. Unlike the U.S. Supreme Court in *Lyng*,¹⁹³ however, the Human Rights Committee was prepared to read general human rights provisions in a special way so as to accommodate the non-standard situation of an indigenous group. The Committee's broad interpretation would have been strengthened by more systematic recourse to standard international law methodology of treaty interpretation, particularly the means set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.¹⁹⁴ In the absence of textual or drafting evidence, it certainly would have been perverse to interpret "family" in Arti-

188. See *Hopu and Bessert*, U.N. Doc. A/52/40.

189. See *id.* at 81. Whether this decision is consistent with the Committee's General Comment 24 on Reservations was not discussed. A strong dissenting opinion on the French declaration, however, suggests that the declaration in its own terms does not apply to the French overseas possessions.

190. *Id.* at 79.

191. *Id.*

192. *Id.*

193. See *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

194. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980).

cles 17 and 23 as bounded by a single social pattern all over the world. As a strong dissent pointed out, the Committee's views treated "family" as almost boundless and scarcely analyzed the meaning and limits of the concept of "privacy" in applying it.¹⁹⁵ The Committee thus did not specify the analytical structure and limits of the concepts on which it relies, so that these terms potentially could cover an almost infinite variety of cases in many kinds of societies. It might be inferred, however, that the Committee here was according special respect to indigenous societies whose traditions, culture, lands, and beliefs had been ignored and impaired by, in this case, a state established and still dominated by colonizers. If this speculative explanation of the Committee's unarticulated premises is correct, the Committee was drawing sustenance from the developing international commitment to rights of indigenous peoples. Whether the Committee's mandate under the Optional Protocol includes carrying forward such an agenda outside Article 27, or even under Article 27, remains contentious within the Committee. One member has argued strongly for interdependence among different provisions of the Covenant—so that even a provision that is procedurally unavailable is relevant in interpreting a procedurally available provision—and more generally for interdependence between express ICCPR rights and other fundamental human rights including rights pertaining particularly to indigenous peoples.¹⁹⁶ Strong forms of such a position clearly were rejected by the dissenters in *Hopu and Bessert*,¹⁹⁷ and it is to be expected that some states will take similar views. This debate is overlain by the wider problem for the Committee of whether to enunciate only standards capable of global application or to try to nudge some governments in a positive direction where the local political and legal climate is receptive. The Committee pursued the latter strategy in this case with some success, as France changed its legal practices applicable in this and comparable situations to be consistent with its interpretation of the Committee's views.¹⁹⁸

195. *Hopu and Bessert*, U.N. Doc. A/52/40 at 82-83.

196. See Scheinin, *supra* note 55, at 172 (Theodore S. Orlin et al. eds., 2000).

197. *Hopu and Bessert*, U.N. Doc. A/52/40 at 81.

198. Submissions by France of January 29, 1998, under the Human Rights Committee's Follow-Up procedure, summarized in *Report of the Human Rights*

The evidence is that a category of claims made by indigenous peoples is emerging as a distinct conceptual structure, although it certainly is not the case that every claim by an indigenous group or person therefore falls into this category. Is such a category justified, and how does it relate to the structures of other established international law categories? For some, more than enough justification lies in the existence and common experiences of the indigenous peoples' movement, for whom it is an essential form of self-expression, mutual recognition, and leverage for legal and political change. Among the ambient population and many persons who may count themselves as members of indigenous groups, the most powerful argument for a distinctive legal category based on special features of indigenous peoples is wrongful deprivation, above all, of land, territory, self-government, means of livelihood, language, and identity. The appeal is thus to history and culture.¹⁹⁹ This justification works well in specific contexts where it is reasonably clear in broad terms who is indigenous and who is not, what wrongs were done in the past, and why it now seems morally obligatory to respond. Formulating this justification as a rule for hard cases or as a global abstraction capable of working across different types of societies with intricate identity politics and rapid cultural and economic change, however, is immensely difficult. Efforts to express culture and history as legal tests have tended to produce feeble and ultimately unconvincing searches to find or not find essentialized culture and searches to find or not find modern majorities and minorities and peoples and owners as artifacts on the surface of history. Other justifications appeal to special historic and cultural relations with land, to enduring disadvantage, or to systematic discrimination. These provide strong arguments, but are not exclusively justifications for an indigenous peoples' category.

The construction and justification of a conceptual structure of indigenous peoples' claims is political as well as legal and threatens to exclude or make difficult other political and legal projects. The indigenous peoples' movement is part of a

Committee, Vol. I, U.N. GAOR, 53rd Sess., Supp. No. 40, ¶ 495, U.N. Doc. A/53/40, (1998).

199. See, e.g., Lawrence Rosen, *The Right to Be Different: Indigenous Peoples and the Quest for a Unified Theory*, 107 *YALE L. J.* 227 (1997).

wider identity politics that may clash with other politics, such as women's movements. As tribal identity becomes more important and a tribe seems more beleaguered, women may feel forced to choose tribal identity and step back from pan-tribal women's movements that were more effective at reforming unequal traditions.²⁰⁰ Designation of some set of people as "indigenous" may be a simplistic social construction that creates an antonymic identity of "non-indigenous," setting up a structure in which some are privileged and others disadvantaged for unappealing reasons. The justification of history and culture may trigger a search for authenticity that helps some who seem to meet, and may in effect set, such criteria, while taking from others who do not. Resources may go to parts of groups able to maintain a strong political leadership appealing to tribal tradition rather than to people whose grandparents or parents drifted to urban areas. Resources may go to new kinds of elites who are able to claim to represent regeneration and revitalization as opposed to more traditional but less glamorous members of the same descent group. More generally, the indigenous peoples' program implies the insufficiency of other programs for certain purposes, but its justifications also imply more than simply supplementing the other programs in special cases. The boundaries between this and other programs are highly permeable in law as in present politics, but hard cases where the programs clash will continue to arise, perhaps with increasing frequency.

If a distinct conceptual structure of claims as "indigenous peoples" is emerging, how is "indigenous peoples" defined? No general agreement has been reached in the United Nations, although bodies such as the ILO and the World Bank have adopted definitional criteria that function for specific purposes.²⁰¹ Because this program has a substantial practical

200. Sunila Abeysekera has made this point in relation to the North-East Network of North-East Women, an inter-tribal women's network in north-east India. See Sunila Abeysekera, *Women and Peace in Sri Lanka: Some Observations*, WOMEN IN ACTION, 3:1999, <http://www.isiswomen.org/wia/wia399/pea00002.html>; Sunila Abeysekera, *Are You Proud of Being You?: A Discussion on Racism, Prejudice, Discrimination and Women*, WOMEN IN ACTION, 1-2:2000, <http://www.isiswomen.org/wia/wia100/hum00012.html>.

201. See Indigenous and Tribal Peoples Convention, *supra* note 175, art. 1; Operational Directive 4.20: *Indigenous Peoples*, WORLD BANK OPERATIONAL MANUAL ¶¶ 3-5 (Sept. 1991), available at <http://www.worldbank.org>.

existence, but does not have consensus on a simple global justification, a constructivist approach to the concept is urged. This has been developed and defended at length in a separate paper, which concludes by proposing that a possible way forward for the United Nations on the specific problem of definition might be to establish a combined list of requirements and indicia.²⁰² In addition to the suggested requisites, some of the indicia ordinarily would be expected but not required in special circumstances, while other indicia would be simply relevant factors to be evaluated and weighed in cases of doubt or disagreement. As suggested in that paper, the list might be:

- (1) essential requirements:
 - (a) self-identification as a distinct ethnic group;
 - (b) historical experience of, or contingent vulnerability to, severe disruption, dislocation, or exploitation;
 - (c) long connection with the region;
 - (d) the wish to retain a distinct identity;
- (2) relevant indicia:
 - (a) strong indicia:
 - (i) nondominance in the national (or regional) society (ordinarily required);
 - (ii) close cultural affinity with a particular area of land or territories (ordinarily required);
 - (iii) historic continuity (especially by descent) with prior occupants of land in the region;
 - (b) other relevant indicia:
 - (i) socioeconomic and sociocultural differences from the ambient population;
 - (ii) distinct objective characteristics: language, race, material or spiritual culture, etc.;
 - (iii) regarded as indigenous by the ambient population or treated as such in legal and administrative arrangements.

202. Benedict Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414, 455 (1998).

VI. CONCLUSION

The increasingly rich body of practice in the presentation and negotiation of claims raised by indigenous peoples or members of such groups and the burgeoning jurisprudence of some national and international courts and tribunals has not established agreed-upon conceptual foundations for legal analysis and political understanding of indigenous peoples' issues. It has been argued that at least five distinct conceptual structures operate. They make a difference to legal outcomes. Ms. Martinez probably would have won had her claim been treated as one of human rights, but lost because the U.S. Supreme Court treated the issue in effect as one of the Santa Clara Pueblo's self-determination with regard to membership.²⁰³ Ms. Lovelace's claim succeeded as one for her rights as a member of a minority, although not as a human rights challenge to sex discrimination, and the Human Rights Committee was not willing to see the Lubicon Lake Band's resistance as a claim to self-determination, despite Article 1.²⁰⁴ The Lubicon Lake Band attempted to raise its claim as one for self-determination, but was rebuffed under the Optional Protocol and under Canadian law as it then was, ending up with a minority rights holding by the Human Rights Committee that was nevertheless buttressed by the Band's position as an indigenous people.²⁰⁵ By contrast, the successful Indian claimants in *Delgamuukw* obtained a Supreme Court of Canada ruling on property rights as indigenous peoples that has implications for self-determination.²⁰⁶ The Haudenosaunee in upstate New York might be able to employ a somewhat comparable strategy, but based on past experience and observation of others, they are very skeptical of such compromise solutions; many instead believe that the only satisfactory solution is recognition of the continuation of their historic sovereignty.

203. See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

204. *Lovelace v. Canada*, Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, Annex 18, at 173-74, U.N. Doc A/36/40 (1981).

205. See *Lubicon Lake Band v. Canada*, Report of the Human Rights Committee, U.N. GAOR, 45th Sess. Supp. No. 40, Annex IX, U.N. Doc. A/45/40 (1990).

206. See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1111-13; see also *supra* text accompanying notes 37-38.

The absence of a single unifying structure opens many strategic possibilities in the law of the claims of indigenous peoples, but not just for indigenous peoples. Claimants may choose structures based on the competence and likely receptivity of the forum, looking in some cases for a structure that does not overreach, in others for one that may open paths for future lines of argument in the same or other fora. Respondents must decide whether to counter a claim within the same structure of argument as it has been made, to recharacterize it, or to raise a competing claim based on another conceptual structure. Bodies with powers of recommendation or decision may calibrate their approaches in one of several different systems of measure, jump between two or more structures to avoid unpalatable implications, or integrate two or more conceptual structures in seeking to craft far-sighted and workable approaches. Within liberal societies, the multiplicity of concepts offers a way beyond the limits that liberalism repeatedly confronts in coping with issues raised by indigenous peoples.²⁰⁷ Such multiplicity thus may be a basis of legitimacy.

Globally, the range of concepts and the host of ways in which they can be connected and reconciled render unconvincing any insistence on a single homogenizing structure that is alien to the political discourse and social patterns in some societies, or simply is unpopular with the regime. Even though in China the concept of indigenous peoples is not accepted and human rights discourse has clear limits, the concept of national minorities is well-established in the constitutional structure and provides a structure for possible innovation and reform. Even though in Finland official law and policy does not recognize extensive Sami land rights, state land-use actions incompatible with Sami culture may be controlled under the minority rights program. Even though in the United States strong minority rights and multiculturalism are viewed with suspicion, attenuated forms of historic sovereignty and self-determination have legal endorsement and political legitimacy, albeit fragile. Even though in New Zealand there is hesitation to move far toward official multiculturalism, biculturalism has been established on the basis of the indigenous peoples' program and the Treaty of Waitangi. This flexi-

207. Cf. JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (1995).

bility is far from the absolutism of rights and allows for evasion and abuse. The risks of delegitimation of indigenous claims jurisprudence through incoherence and polarization between political forces rallying around competing and utterly unrecconciled concepts are real. The global system of international law, however, probably does not have the capacity to resolve precisely by agreement difficult questions about the connections among and limits of these conceptual structures.

Strengthened international institutions, such as the Permanent Forum on Indigenous Issues in the United Nations and the increasing role of the IACHR and ILO oversight systems, can play an important role in monitoring and consciousness-raising. Specialist bodies, such as the Conference of the Parties of the Biodiversity Convention, can enunciate norms and action programs in difficult areas that provide valuable guidance to states, indigenous peoples, and epistemic communities of professionals. Functional international institutions, the United Nations Development Programme for example, may be in awkward positions in formulating clear justifications for policies on the issues of indigenous peoples because of the lack of clarity among member states, as well as limited familiarity and experience of staff.²⁰⁸ The international indigenous peoples' movement has played an important role in many institutions in raising issues and formulating proposals and has influenced texts ranging from Agenda 21 to the World Conservation Strategy. The number of institutions involved, however, far exceeds the present capacities of this movement, and each institution has its own dynamic and its own pressures toward other priorities. This is especially evident in institutions associated with international economic agreements, such as the WTO, NAFTA, and the proposed Free Trade Agreement of the Americas, which have major impacts on indigenous peoples but so far have been influenced very little by indigenous peoples' organizations.²⁰⁹ General normative instruments

208. A long process of United Nations Development Programme (UNDP) consideration resulted in a complex Policy Note adopted in October 2001. See UNDP, *Policy Note: UNDP and Indigenous Peoples: A Policy of Engagement*, at http://www.undp.org/policy/docs/FINAL_IP_POLICY_Oct_11.doc (last visited Mar. 7, 2002).

209. Materials from a conference on Indigenous Peoples and International Trade Agreements, to be held at New York University School of Law in May 2002, are forthcoming at www.law.nyu.edu.

such as the U.N. and OAS Draft Declarations thus have played, and if momentum is sustained may continue to play, a fundamental role in articulating norms and justifications that provide a shared reference and source of validation, even while leaving unresolved the more recondite problems of concepts and categories that have been the subject of this article.