

## Chapter 6

### Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society

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The growing sense that there exists, or ought soon to exist, an international civil society has begun to inspire among its participants and proponents a quest for a more complete articulation of normative principles, perhaps even a kind of constitution, to guide the future development of such a society and to build a sense of coherence and solidarity among its adherents.<sup>2</sup> In this chapter I will argue first that an operational code of liberal freedom of speech and freedom of association has been the de facto guide in the construction of international civil society and, second, that this code encourages voluntaristic nongovernmental organizations (NGOs) but is not well suited to ascriptive groups (in which membership is based more on birth than volition) exercising governmental powers such as some indigenous peoples' organizations. A richer international constitutionalism will be needed to address accountability, mandate, representation, and participation in relation to these groups. In the absence of such a theorized constitutional structure for international civil society, I argue that some modest progress on these questions may be made by drawing on an incipient internationalized public law of indigenous peoples' issues.

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2 See, e.g., R. Falk, "Global Civil Society and the Democratic Prospect," in B. Holden (ed.), *Global Democracy: Key Debates* (2000) 162.

THE RELEVANCE OF LIBERAL CONSTITUTIONALISM AND INTERNATIONALIZED  
PUBLIC LAW

At present there exists neither formal agreement on express principles for the construction and regulation of international civil society, nor a strong code of unwritten quasi-constitutional principles among the leading participants. What then is the operational code guiding the developing practice of the most influential NGOs (including NGOs connected with corporations), and of the governmental and intergovernmental agencies and institutions interacting with NGOs, as they take steps directed toward the realization of an international civil society and the securing of their own roles in relation to it? Academic writers and public intellectuals have presented normative arguments for a rich form of cosmopolitan democracy,<sup>3</sup> the construction of a global public space through discursive interaction,<sup>4</sup> the development of a postmodern global citizenship,<sup>5</sup> or an emancipatory international society that repudiates the existing international society of state representatives.<sup>6</sup> The realization of any of these conceptions, if it is to occur at all, remains far in the future. The role of democratic state sovereignty as a means to organize the collective agency of members of a shared political project and public culture is a role not easily substituted by any set of global institutions,<sup>7</sup> so, for the foreseeable future, the displacement or reconstruction of state sovereignty envisaged in some of these projects may entail costs that outweigh the attainable benefits.<sup>8</sup> Whether it is practicable fully to democratize global intergovernmental institutions is also open to considerable doubt.<sup>9</sup> It is mistaken to suppose that international civil society will necessarily be more peaceful than a world dominated by states.<sup>10</sup> The functions and attributes of sovereignty are nevertheless changing, intergovernmental institutions are becoming more open, and an uneven but appreciable enlargement and democratization of the global public space can perhaps be discerned.

3 D. Archibugi and D. Held (eds.), *Cosmopolitan Democracy: An Agenda for a New World Order*, Oxford, Cambridge: Polity Press and Blackwell Publishers (1995).

4 J. Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy*, Cambridge: MIT Press (1996).

5 J. Thompson, "Community Identity and World Citizenship," in D. Archibugi, D. Held and M. Köhler (eds.), *Re-Imagining Political Community*, Palo Alto: Stanford University Press (1998) 179.

6 Ph. Allott, *Eunomia*, (revised ed.), Oxford: Oxford University Press (2001).

7 R. Post, "Democratic Constitutionalism and Cultural Heterogeneity," 25 *Australian Journal of Legal Philosophy* (2000) 185.

8 B. Kingsbury, "Sovereignty and Inequality," 9 *European Journal of International Law* (1998) 599.

9 See the modest proposals summarized in N. Woods, "Good Governance in International Organizations," 9 *Global Governance* (1999) 39.

10 M. Kaldor, *New and Old Wars: Organized Violence in a Global Era*, Palo Alto: Stanford University Press (1999).

Practice as to the roles and participation of nonstate groups in international civil society is rapidly evolving. I suggest that this evolution is guided not by one of the emancipatory theories just mentioned, but by a seldom articulated sense that the architectural scheme for the further construction of such roles and participation is provided by the global application of voluntaristic liberal principles of freedom of speech and freedom of association.<sup>11</sup> NGOs operating internationally are attracted by the notion in US public law that anyone is free to form a group, to raise funds for it by any legal means, and to advocate through it virtually any political position or moral opinion, short of violence. Apart from some obligations with regard to the use of funds, taxation, employment law, and occasional tort liability, US law imposes little responsibility or accountability on participants in such groups beyond whatever they undertake through the terms of their own agreements. It is not implausible that NGOs operating in this environment seek to transpose to international civil society, *mutatis mutandis*, constraints on governmental regulation of the content of any group's advocacy or beliefs, the requirement that states respect freedom of religion, and (with more debate) the view that governmental institutions should not be used to establish any particular religion so that the international public sphere should be formally secular. This transposition is made all the easier by the transnationalism already embraced in the US Constitution's First Amendment protection for advocacy within the US that infringes upon the laws or moral code of another community.<sup>12</sup>

NGOs are subject to, and familiar with, regulation under national public law in the territories where they operate, even if they regard themselves as primarily operating in a nonterritorial international civil society, which, to some extent, has its own rules and practices. The construction of the rules and practices of international civil society involves the simultaneous application of national public law and a set of international or transnational rules, practices, and understandings. Insofar as national public law is relevant as applicable law or as a source of principles and ideas, there exists what I term an internationalized public law.<sup>13</sup> The extent to

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11 M. Sandel has argued that an extreme voluntarism has in recent decades characterized US Supreme Court jurisprudence and public law beliefs with regard to the First Amendment and that this is manifest in legal doctrine favoring voluntaristic associations over ascriptive groups. See, e.g., M. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy*, Cambridge: Belknap Press (1996). Other First Amendment scholars contest this interpretation of US law. The resolution of that debate about US law is not directly material to the argument made in this paper about voluntarism in international civil society.

12 Attempts by foreigners to influence US politics and political opinion are much more subject to regulation, including restrictions on donations by foreigners to candidates for US political office, requirements for certain recipients of foreign funds to register as foreign agents, and Cold War era requirements that makers of certain foreign motion pictures inform viewers in the US that the work is foreign propaganda.

13 B. Kingsbury, "People and Boundaries: An 'Internationalized Public Law' Approach," in A. Buchanan and M. Moore (eds.), *States, Nations, and Borders: The Ethics of Making Boundaries*, Cambridge: Cambridge University Press (2003) 298.

which the basic principles for participation and responsibility of nonstate actors in international civil society should be embodied in law rather than in other normative structures is contested. Whether or not law is directly involved, I suggest that the normative principles of liberal freedom of speech and freedom of association are proving in practice to be a shared starting point among a cluster of internationally influential NGOs, mainly but not exclusively based in North America and Europe, which otherwise have diverging substantive agendas and operating methods. Such a set of values may be discerned also, with variations and qualifications, in the practice of many external institutions (governmental foreign aid agencies, intergovernmental institutions such as the European Union, and NGOs such as the Ford Foundation and the Open Society Institute) involved in fostering local civil society organizations with transnational connections. I do not suggest that extrapolation from liberal first amendment ideas is necessarily a conscious process, although for actors socialized in the US it may well be. Nor do I assume that such ideas are drawn especially from the US – they are found in many political traditions although with different emphases. I take the ideas advocated by influential US NGOs as denominating the kind of principles that many participants shaping the construction of international civil society accept and espouse.

#### CONSEQUENCES OF FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION AS VALUES IN INTERNATIONAL CIVIL SOCIETY

The assertion that liberal freedom of speech and freedom of association is informing practice in the construction of international civil society is only a hypothesis. It is not a proposition that can be robustly demonstrated here. As a hypothesis to explain the self-understanding of actors engaged in constructing international civil society, it appears – at a minimum – to be consistent with, and perhaps explanatory of, several observable features of that practice. First, at present, international civil society has minimal conceptual resources other than liberal freedom of speech and freedom of association for structuring thought about problems of nonstate actors' accountability. These liberal principles offer few means of NGO accountability except via markets and tend to view demands for other forms of accountability with suspicion, as devices used to muzzle free expression or to introduce content regulation. (However, some large NGOs are enthusiastic about the protection of intellectual property, particularly in their own merchandising or their joint operations with corporate partners, seeming to see no conflict between such restrictions and free-speech liberalism.) The lack of ideas about accountability suggests not only that these liberal principles have been tacitly imported as the prevailing blueprint for NGO participation in international civil society, but that they almost exhaust the field, so that few other principles of international constitutionalism bearing on accountability can yet be invoked.

Second, international civil society has no agreed principles for rationing entitlements to participate in institutions where the total possibilities of participation

are inescapably constrained by the need to accomplish the institution's tasks.<sup>14</sup> With thousands of groups clamoring to participate in decisions on a given issue and finite resources of meeting time and space, participation in international institutions must be controlled and allocated. The implicit principles of liberal freedom of speech and association say little about which nonstate groups should be allowed a place at the table, on what terms, and with what preconditions. In privileging speech, these principles favor voice and advocacy, so that the NGO (and perhaps the corporation) is the model type of actor in international civil society. Others with more distinctive claims, such as indigenous peoples' organizations exercising governmental power rather than simply advocating or volunteering, are not thereby excluded, but their distinctive claims receive no special status in a structure dominated by the NGO model.

Third, the hypothesis that influential NGOs embrace the voluntaristic principles of first amendment liberalism as the architecture for international civil society is consistent with the observable difficulties some of these NGOs have with regard to the roles of groups, such as indigenous peoples, that are ascriptive rather than voluntaristic.<sup>15</sup> Whereas people join and unjoin NGOs (or corporations), the membership of ascriptive groups for the most part depends on birth, and members of the group who wish to detach themselves from it may pay a steep price in terms of identity and access to resources and governance structures. Whereas NGOs (or corporations) form and dissolve as occasion demands, indigenous peoples claim an enduring identity and a responsibility to ancestors and future generations to maintain this. A liberal commitment to voluntarism and individual choice underpins a model of international civil society in which voluntary NGOs (or corporations) are the paradigmatic actors, and nonvoluntaristic ascriptive groups do not find a clear place. It is not principles of freedom of speech and association in themselves that produce this result. Rather, the liberalism that has led to these principles being applied to international civil society has also generated a model of a voluntaristic

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14 The Human Rights Committee concluded in *Marshall* that the right to participation in Art. 25 of the International Covenant on Civil and Political Rights does not entitle even directly affected groups to choose the modalities of their participation in deliberations affecting them, although such participation could not be subject to unreasonable restriction. *Mikmaq Tribal Society (Marshall et al.) v. Canada*, UN doc CCPR/C/43/D/205/1986 (Dec. 3, 1991), esp. paras. 5.4, 5.5, and 6. While advocates for indigenous peoples have strongly criticized the Committee's view that the Miqmaq nation were not entitled to direct participation in the Canadian First Ministers constitutional conferences (representation of aboriginal peoples in these conferences having been confined to certain umbrella groups), any general theory of participation must also take account of the kinds of argument adumbrated in J. Rossi, "Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking," 92 *Northwestern University Law Review* (1997) 173.

15 On some of the problems see, e.g., A. Addis, "Individualism, Communitarianism and the Rights of Ethnic Minorities," 67 *Notre Dame Law Review* (1992) 615; and I. M. Young, *Justice and the Politics of Difference*, Princeton: Princeton University Press (1990).

international civil society in which no distinctive accommodation for ascriptive groups seems justified or necessary. Adherents of this kind of liberalism tend to take positions of the sort encapsulated by Jeremy Waldron in arguing that "liberals are committed to a conception of freedom and of respect for the capacities and the agency of individual men and women, and ... these commitments generate a requirement that all aspects of the social world should either be made acceptable or be capable of being made acceptable to every last individual."<sup>16</sup> While liberal political theory has embraced certain forms of nonstate organization, including civic associations, in which entry and exit are voluntary and (albeit with palpable misgivings) corporations and industry associations,<sup>17</sup> it has hesitated to embrace ascriptive intermediate groups.

Some indigenous organizations behave as NGOs and operate on the same voluntaristic premises, in which case few issues arise. But other indigenous peoples' organizations may undertake governmental or governance activities that most NGOs do not. In doing so they may privilege ascriptive characteristics (excluding children of mixed marriages from membership, for example) and apply their own cultural and political values (for instance, denying speaking rights to women) in ways that many NGOs do not accept. They may argue that their representation of their members is much more fundamental to the identity and welfare of the members and of the group than is the representation claimed by NGOs. As a result, they may argue, their participation and decision-making roles should exceed those of NGOs. These positions are inimical to the NGO model of international civil society and the voluntaristic precepts generally used to structure participation under its prevailing liberal principles.

#### INDIGENOUS PEOPLES IN INTERNATIONAL CIVIL SOCIETY

An adequate theory of international civil society must make space for indigenous peoples and other ascriptive groups. For the reasons already noted, this is not possible if liberal principles of freedom of speech and freedom of association remain the only widely accepted guide to future practice in international civil society, and if NGOs and corporations remain the archetypes of the available social roles within which other kinds of actors must struggle to fit. Reflection on the case of indigenous peoples confirms that a richer international constitutionalism is needed.

16 J. Waldron, *Liberal Rights*, Cambridge: Cambridge University Press (1993) 36-7. As Waldron acknowledges, any such generalization about a wide-ranging and complex set of positions is contestable and must admit of exceptions.

17 Pluralist conceptions of democracy as institutionalized competition to secure or influence the use of governmental authority have emphasized the role of secondary non-governmental associations in the democratic political system. See, e.g., R. A. Dahl, *A Preface to Democratic Theory*, Chicago: University of Chicago Press (1956). On the history of pluralist thought in England, see P. Q. Hirst (ed.), *The Pluralist Theory of the State*, London: Routledge Press (1989).

But a romanticized image of indigenous peoples as timeless actors is misplaced. Indigenous organizations are proliferating, and many draw deliberately on the organizational forms, strategies, and values of NGOs or corporations. This abundance of organizational forms and characters raise challenging questions about the nature of the actors and the constitutional principles that should apply to them in international civil society. I will suggest that one potential – if limited – source of guidance is the incipient internationalized public law of indigenous peoples.

Practices of indigenous groups as organs of government or governance – for example, their decisions to hunt whales or to apply gender-discriminatory membership rules – attract opposition from environmental or human rights NGOs, which see the control of governmental abuse as a core mission. Such NGOs may demand accountability of indigenous groups for their conduct, perhaps through external intervention under rule-of-law principles. Illustrative of such liberal apprehensions about indigenous governance is Justice White's dissent in the US Supreme Court in *Santa Clara Pueblo v. Martinez*, in which he buttressed his argument for federal court review of the tribal court's denial of a challenge to a gender-discriminatory tribal membership rule by pointing out that "both legislative and judicial powers are vested in the same body, the Pueblo Council."<sup>18</sup> He seemed implicitly to doubt that in small face-to-face communities, such as the Santa Clara pueblo, it will be possible to achieve the kind of liberal progress lauded by Edmund Burke: "One of the first motives to civil society, and which becomes one of its fundamental rules, is, *that no man shall be judge in his own cause.*"<sup>19</sup> He envisaged the US federal courts as providing means for tribal communities to achieve this liberal ideal and quoted congressional testimony from a disgruntled member of another pueblo demanding essentially this.

Indigenous groups, in turn, have plausible grounds to call NGOs to account, but, despite having some governance powers, they may have fewer mechanisms to pursue such accountability outside their own limited zones of jurisdiction. The campaign against fur sealing, which Greenpeace helped lead but then belatedly dropped when the adverse effects on the traditional cultures and livelihoods of indigenous hunting communities in the Arctic region became evident, is a reminder that the attractive freedom NGOs enjoy under a regime of liberal freedom of speech and association can carry costs that may fall unfairly. Large NGOs have increasingly adopted policies or internal codes of practice relating to their dealings with indigenous groups but these seldom envisage any formal mechanisms of accountability or compensation.<sup>20</sup>

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18 436 U.S. 49, 82 (1978).

19 E. Burke, *Reflections on the Revolution in France*, London: Penguin Classics (1968) [first publ. 1790] 150.

20 See, e.g., M. Colchester and A. Gray, "Foreword," in A. Gray and A. Parellada (eds.), *From Principles to Practice: Indigenous Peoples and Biodiversity Conservation in Latin America*, Copenhagen: IWGIA (1998) 10-15.

Contestation with regard to indigenous peoples' roles in international civil society involves familiar tensions between traditional community and modern liberal individualism, between particular cultural understandings and the assertion of universalizable values, between subsistence economy and the values of global markets. These are much discussed elsewhere,<sup>21</sup> and I will pass over them here in order to focus attention on a less appreciated paradox relating to indigenous peoples' participation.

The paradox is the following. Claims made by indigenous peoples are often more persuasive to dominant groups if the indigenous group is a traditional one, the inheritors of people previously wronged and who continue to be recognizably distinct in culture and institutions. But the process of pursuing a claim to land, compensation, or special status, and even more so the structures that must be put in place to manage assets and representation once such a claim succeeds, can transform the group's organization so that it becomes less recognizably the traditional one whose "authenticity," in the estimation of decision makers and the wider public, had been a predicate of the claim's vitality.<sup>22</sup> This transformation is usually toward the most successful organizational forms fostered in the law and practice of modern secular liberal societies, principally NGOs or corporations. (Indigenous peoples have adopted other organizational models in different contexts, including religious structures, military organization, and political parties, but these are less germane to the issues considered here.) These same organizational forms are also favored in the construction of international civil society and fostered by its practices, including its liberal voluntarist principles.

In parts of the US, Canada, New Zealand, and elsewhere, this process has involved the adoption by indigenous groups of corporate structures, the management styles and techniques of large businesses, and investment priorities focused on maximizing rates of return. The corporatization of indigenous peoples has been a primary objective of some state policy, as in the Alaska Native Claims Settlement Act of 1971 (ANCSA), a statute shaped more by concerns of the oil industry and environmental groups than by those of native peoples.<sup>23</sup> ANCSA required the organization of Alaska native peoples into village and regional corporations that deliberately did not correspond to traditional governance structures. This has created a new cadre of corporate-minded native leaders, and some of the corporations have operated successfully, while others have struggled. For many people,

21 See, e.g., A. Brysk, *From Tribal Village to Global Village: Indian Rights and International Relations in Latin America*, Palo Alto: Stanford University Press (2000) 188-245, an extended discussion under the title "Identities Across Borders: The Politics of Global Civil Society."

22 Comparable processes of transformation may also occur in other situations where the group has substantial assets to manage and develop.

23 On the politics of the drafting and passage of the statute, see J. R. Boyce and M. A. N. Nilsson, "Interest Group Competition and The Alaska Native Claims Settlement Act," 39 *Natural Resources Journal* (1999) 755.



the legislation has come at great cost to cultural continuity, collective resources, and community strength.<sup>24</sup> Even where corporatization is not dictated, the adoption of corporate forms is often facilitated by state attempts to channel indigenous organization into a set of structures legible to the modernized bureaucratic state. This was the case in the Indian Reorganization Act of 1934, which envisaged separation between the governmental activities of Indian groups through tribal councils, and their commercial activities conducted through Indian-controlled corporations. Some groups have responded by using the corporate form for tribal economic activities while structuring the corporate governance in ways that maintain control by the traditional leadership. This is evident, for example, with some New Mexico pueblos in which the board of the pueblo's economic development corporation is virtually identical to the tribal council. But, in other cases, the corporate management becomes a new source of power within the indigenous community. The corporation's management methods may incorporate elements of the community's traditional culture, but this may raise tensions with marketplace views of best management practices. The indigenous group has strong incentives to train more young people in corporate management and even to try to adapt culture and decision-making techniques to align better with the markets and regulatory environment in which the group operates. This dynamic is well illustrated by the experiences of the Ngai Tahu and Tainui tribes in New Zealand, both of which received about \$NZ 170 million in settlement assets after the completion of claims negotiations with the New Zealand government in the mid-1990s. Both formed corporations, but Ngai Tahu has managed its assets on strictly market principles, with tremendous commercial success. Tainui, with a much larger population and more complicated and decentralized governance structure, initially followed a hybrid approach, which resulted in some notable losses.<sup>25</sup> This has led to a spirited debate about the compatibility of market-based corporatism with Maori custom (*tikanga Maori*). Some Maori argue that corporatization and the formation of other nontraditional organizations provides an external buffer to protect traditional ways of living and leadership and generates the material assets and self-confidence to revitalize dissipating traditional culture and bring together communities that have become dispersed and disrupted. Corporatization has intensified arguments for the construction of a Maori public law under which the accountability of the managers of Maori corporations to the indigenous communities may be greater than their standard accountability to shareholders under corporate law

24 For reviews see Th. R. Berger, *Village Journey: The Report of the Alaska Native Review Commission*, New York: Hill and Wang (1985); and M. J. Ward Ford, "Twenty-five Years of the Alaska Native Claims Settlement Act: Self Determination or Destruction of the Heritage, Culture, and Way of Life of Alaska's Native Americans," 12 *Journal of Environmental Law and Litigation*, (1997) 305.

25 Reports based on the 2000 financial year suggested that Tainui's assets were then worth \$170 million, while N. Tahu's had risen to \$366 million. K. Taylor, "Back to Square One for Tainui," *New Zealand Herald*, January 8, 2001. Available at: <[www.nzherald.co.nz](http://www.nzherald.co.nz)>.

and may extend to the wider public. But this accountability would not be the same as the accountability for financial dealings imposed on state officials under national nonindigenous public law.

The paradox described above has many other iterations in the adaptations indigenous groups are continuously making to the requirements of interactions with states, corporations, NGOs, and international agencies. Indigenous peoples' strong demand for self-determination, usually meaning more management of their own affairs within the existing state, has prompted many states to devolve power to indigenous organizations in specific fields, ranging from delivery of social services and education to resource management and local government authority. State resources, and in developing countries, resources from agencies such as the World Bank and Oxfam, have been made available to encourage the formation of indigenous organizations and to build their capabilities. This often exercises a shaping effect on the kinds of organizations that are formed and supported. Spurred in recent years by a local autonomy policy, over 15,000 indigenous organizations now exist in Bolivia.<sup>26</sup> Thousands of indigenous organizations have come into existence in the self-determination era in Australia, prompting one commentator to identify an "Indigenous Sector," that is "neither the 'state' (although it is almost entirely publicly funded) nor 'civil society' (though the organizations are mostly private concerns in their legal status). Rather, the Indigenous Sector is a third field created out of interaction – sometimes, but not always, frictional – between the government and the Indigenous domain."<sup>27</sup> In New Zealand, organizations built on traditional Maori descent-based (*wakapapa*) groups are being augmented by large numbers of organizations catering to nondescent based urban communities of interest, such as the Waipereira Trust (*Te Whanau o Waipereira*) in Auckland, and Maori associations created for a particular purpose (*kaupapa*) such as adult education or fisheries management. Distinctive bodies of public law are emerging, with varying levels of indigenous input and control, regulating issues such as the constitution of such groups, the mandate and powers of their leaders, ability to commit the organization or to alienate group assets, responsibility to a voluntary membership and to wider constituencies including the general public, financial accounting requirements, structures of internal and external supervision, and dispute settlement arrangements for intragroup, intergroup, and extragroup issues.<sup>28</sup>

26 World Bank, "Project Appraisal Document on a Proposed Learning and Innovation Credit in the Amount of SDR 4.0 Million (US\$ 5 Million Equivalent) to the Republic of Bolivia for an Indigenous Peoples Development Project," *World Bank Report* No. 21345-BO (January 25, 2001) 5.

27 T. Rowse, "Do Indigenous Australians Have a Choice?" Paper presented at "The Power of Knowledge, the Resonance of Tradition-Indigenous Studies: Conference 2001," The Australian National University, Canberra, Manning Clark Centre, September 18-20, 2001. Available at: <[http://www.aiatsis.gov.au/rsrch/conf2001/PAPERS/B3\\_Tim\\_ROWSE.pdf](http://www.aiatsis.gov.au/rsrch/conf2001/PAPERS/B3_Tim_ROWSE.pdf)>.

28 K. Gover and N. Baird, "Identifying the Maori Treaty Partner," 52 *University of Toronto Law Journal* (2002) 39.

This body of indigenous public law is generally very incomplete, although it is developing quickly in many societies. It may include principles of abstention under which state institutions do not intervene in certain intraindigenous disputes, without including affirmative principles for the settlement of such conflicts. In some contexts, relations between indigenous groups and the state are so bad, and the indigenous communities so fragmented or operating in such difficult conditions, that neither state nor indigenous sources generate an acceptable and applicable public law. Patchy and fragmentary as it is, however, the internationalization of this body of indigenous public law may provide some guidance on difficult questions facing international institutions and for actors in international civil society. Which of several groups represents a particular indigenous people with common genetic issues for the purpose of giving consent to the activities of an international genetic research program? Who is qualified to make or to waive a particular group's possible claim to the use of a traditional design or an Internet domain name? Who is authorized to instruct a human rights law NGO to bring transnational litigation on behalf of a particular group? How should outsiders respond to external consequences of disputes within or between indigenous communities, such as the Hopi-Navajo question in the US? What does it mean to say the indigenous people have been adequately consulted about a new World Bank policy? What kinds of groups, if any, should be able to infringe international environmental policies, such as the general moratorium on whaling, without attracting protest from concerned NGOs? Should it be only people engaged in "traditional" practices, for "subsistence" purposes, where whaling is of continuing "cultural" importance? Or is it a right to be exercised as the indigenous group sees fit? In what circumstances would an indigenous group have to explain what it has done or assume liability for having done wrong? Should international civil society institutions concerned with promoting representative participation accept the pattern of the international indigenous movement, in which almost inevitably many (by no means all) of the individuals and groups most active in the international movement are often not leaders of local communities or significant actors in local indigenous group politics?<sup>29</sup> Or should they encourage a pyramid representative structure through peak groups or one directly connected to grassroots organizations? Many of these questions pose problems of policy and politics, but the difficulty international institutions and international civil society organizations have in answering them indicates the need for an approach to international civil society that extends beyond liberal voluntarism. Internationalized public law may be one useful – if limited – element in crafting such an approach.

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<sup>29</sup> Brysk, *op. cit.*, note 21, 274.

## CONCLUSION

In its widest sense, international civil society is bound to be a largely unregulated free-for-all, with markets in prestige, influence, membership, fundraising capability, and so on. Where some regulation is required, as with the allocation of space and speaking time in international institutions, NGOs press their claims to participate on various grounds. Some NGOs claim to offer expertise not otherwise available to the institution. Others claim to represent people affected by the institution's activities or people who have some other legitimate stake in the proceedings. Indigenous groups may make comparable claims to participate as experts or as representatives of individual stakeholders, but some make the quite different claim that their participation is a matter of right because they are a government of a people, not subsumable into a category of nongovernmental organizations. Such claims may be outside, even disruptive, of evolving principles for the allocation of the scarce opportunities for participation and influence that are constructed in dialogue between NGOs and interstate institutions. A distinctive pattern of participation rules for indigenous groups has not been generally established, but glimmerings are evident in the unique arrangements for representatives of such groups to serve on the UN Permanent Forum on Indigenous Issues,<sup>30</sup> in the arrangements in the UN Working Group on Indigenous Populations and the Commission on Human Rights Inter-Sessional Working Group on the Draft Declaration for extensive participation by indigenous peoples organizations not accredited under the United Nations Economic and Social Council system for NGOs,<sup>31</sup> and in the special status in the Arctic Council of certain umbrella indigenous groups as "Permanent Participants" distinct from the category of NGOs. These arrangements remain more or less ad hoc, without general criteria for identifying and distinguishing different types of indigenous groups, or for systematically structuring any material distinctions between indigenous peoples and NGOs. They offer no more than fragments of a general theory of indigenous participation, representation, mandate, accountability, and so on.

Problems of accountability are tied to wider issues of representation, roles, legitimacy, sanctions, organic mechanisms for determining membership in an organization and in international society institutions, and means to proceed in the face of fundamental disagreement. Many of these issues take definite form only in relation to particular international institutional structures and to prevail-

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<sup>30</sup> UN ECOSOC Resolution 2000/22, UN doc E/RES/2000/22, July 28, 2000.

<sup>31</sup> See UN Commission on Human Rights Resolution 1995/32, UN doc E/CN.4/RES/1995/32, March 3, 1995, setting forth in an annex procedures for "Participation of Organizations of Indigenous People in the Open-Ended Inter-Sessional Working Group." Some scope exists for states to oppose participation by indigenous groups based in their territories. This power could conceivably be used in cases where the individuals or groups seeking to participate are not in fact representatives of the relevant peoples, but in practice such state action is unlikely except in contentious political circumstances.

ing understandings of states' roles and agency. An internationalized public law approach provides useful guidance in the growing number of concrete cases that go beyond ad hoc questions of participation. But real purchase on these issues is only attainable through the application of a unified body of democratic theory to international civil society to supplant the existing implicit pattern of dependence on a limited set of liberal principles. A body of practice within states suggests an increasingly rich set of possibilities for reconciling democratic theory with the claims and needs of indigenous peoples.<sup>32</sup> This may eventually spill over into the democratic theory animating proponents of international civil society, although the process has a long way to go.

In sum, a fully satisfactory theory of accountability for transnational civil society actors depends on the development of broadly accepted and operational principles of international constitutionalism. Such an international constitutionalism must be pursued and promoted as a substitute for the ad hoc approaches that presently prevail. One important criterion in assessing such theories must be their ability cogently and robustly to meet the dynamic challenges posed by ascriptive groups. The liberal voluntarism that currently prevails is insufficient to meet these challenges.

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32 A sample of relevant work includes D. Ivison, P. Patton and W. Sanders (eds.), *Political Theory and the Rights of Indigenous Peoples*, Cambridge: Cambridge University Press (2000); D. Ivison, *Postcolonial Liberalism*, Cambridge: Cambridge University Press (2002); J. Tully, *Strange Multiplicity*, Cambridge: Cambridge University Press (1995); A. Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims Since the 1970s*, Oxford: Oxford University Press (1997); W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford: Oxford University Press (1995); P. Mackdem, *Indigenous Difference and the Constitution of Canada*, Toronto: University of Toronto Press (2001); J. Borrows, "'Landed' Citizenship: Narratives of Aboriginal Political Participation," in W. Kymlicka and W. Norman (eds.), *Citizenship in Diverse Societies*, Oxford: Oxford University Press (2000); M. Moore, *The Ethics of Nationalism*, Oxford: Oxford University Press (2001); J. Levy, *The Multiculturalism of Fear*, Oxford: Oxford University Press (2000).