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# First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society

Benedict Kingsbury\*

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>1</sup> In this short essay I will argue first that an operational code resembling First Amendment liberalism has been the de facto guide in the construction of international civil society, and second that this code encourages voluntaristic non-governmental organizations (“NGOs”) but is not well suited to the circumstances of ascriptive groups exercising governmental powers.<sup>2</sup> A richer international constitutionalism will be needed in order satisfactorily 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 upon an incipient internationalized public law of indigenous peoples issues.

## I. THE RELEVANCE OF FIRST AMENDMENT LIBERALISM 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

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1. See Richard Falk, *Global Civil Society and the Democratic Prospect* in Barry Holden, ed, *Global Democracy: Key Debates* 162 (Routledge 2000).

2. I use the term “ascriptive groups” loosely to mean groups in which membership is based more on birth than volition. Many indigenous peoples organizations, but not all, are ascriptive groups that exercise governmental powers.

is the operational code guiding the developing practice of the most influential NGOs (including NGOs connected with corporations), and of the governmental and inter-governmental agencies and institutions interacting with NGOs, as they take steps directed towards realizing an international civil society and securing 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 post-modern global citizenship,<sup>5</sup> or an emancipatory international society that repudiates the existing international “unsociety” 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, so the displacement or reconstruction of state sovereignty envisaged in some of these projects may for the foreseeable future entail costs that outweigh the attainable benefits. Whether it is practicable to democratize global intergovernmental institutions fully is also open to considerable doubt. It is mistaken to suppose that a world with an influential international civil society will necessarily be more peaceful than a world dominated by sovereign states.<sup>7</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.

Practice as to the roles and participation of non-state groups in international civil society is rapidly evolving. I suggest that this evolution is guided not by one of the aspirational normative 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 liberal principles akin to those associated in the United States with the First Amendment.<sup>8</sup> NGOs operating internationally are attracted by the notion in US public law that anyone should be free to form a group, to raise funds for it by any legal means, and to advocate through it virtually any

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3. Daniele Archibugi and David Held, eds, *Cosmopolitan Democracy: An Agenda for a New World Order* (Polity 1995).
  4. See Jürgen Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy* (MIT 1996).
  5. See Janna Thompson, *Community Identity and World Citizenship* in Daniele Archibugi, David Held, and Martin Köhler, eds, *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Polity 1998).
  6. See Philip Allott, *Eunomia: New Order for a New World* (Oxford 2d ed 2001).
  7. See Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Stanford 1999).
  8. The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” US Const Amend I.

nonviolent political or moral position. 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 plausible that NGOs operating in this US environment seek to transpose to international civil society, *mutatis mutandis*, the constraints on governmental regulation of the content of any group's advocacy or beliefs, and the requirement that states respect freedom of religion and maintain the public sphere as formally secular. This transposition is made easier by the transnationalism already embraced in the First Amendment protection of advocacy of positions that infringe the laws of another country or the moral code of another community.<sup>9</sup>

NGOs are subject to, and familiar with, regulation under national public law in the territories where they operate, even if they regard themselves primarily as operating in a non-territorial international civil society that 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. In so far as national public law is relevant as applicable law or as a source of principles and ideas, I suggest that there is emerging what I term an internationalized public law relating to international civil society.<sup>10</sup> The extent to which the basic principles for participation and responsibility of non-state actors in international civil society should be, or will be, embodied in law rather than in other normative structures is contested. Whether or not law should be directly involved, I suggest that the normative principles of First Amendment-type liberalism are proving in practice to be a shared starting point among a cluster of internationally influential NGOs that otherwise have diverging substantive agendas and operating methods. These NGOs are mainly, but not exclusively, based in North America and Europe, but the concerns among other groups about Western dominance have not much affected the framing of this architecture. Such a set of values may also be discerned, with variations and qualifications, in the practice of many external institutions (governmental foreign aid agencies, intergovernmental institutions such as the European Union, and major funding 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

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9. 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.
  10. Benedict Kingsbury, *People and Boundaries: An 'Internationalized Public Law' Approach*, in Allen Buchanan and Margaret Moore, eds, *Boundaries: Ethical Perspectives* (Cambridge forthcoming).

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 United States— with different emphases they are found in many political traditions. I take the First Amendment as an influential marker in denominating the kind of principles many participants shaping the construction of international civil society accept and espouse.

## II. CONSEQUENCES OF FIRST AMENDMENT LIBERALISM IN INTERNATIONAL CIVIL SOCIETY

The assertion that First Amendment liberalism is informing practice in the construction of international civil society is only a hypothesis, not a proposition that can be robustly demonstrated here. As a hypothesis to explain the self-understanding of actors engaged in the construction of international civil society, it appears, at a minimum, to be consistent with, and perhaps explanatory of, several observable features of that practice. First, the struggle to articulate any useful approaches to establishing rigorous accountability of non-state actors suggests that international civil society has at present minimal conceptual resources other than First Amendment liberalism for structuring thought about problems of accountability. First Amendment liberalism offers few means of NGO accountability except via markets, and it tends 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, apparently seeing no conflict between such restrictions and First Amendment liberalism.) The lack of other ideas about accountability suggests not only that First Amendment liberalism has been tacitly imported as the prevailing blueprint for NGO participation in international civil society, but also that it almost exhausts the field, so that few other principles of international constitutionalism bearing on accountability have been developed or 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>11</sup> With

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11. See *Mikmaq Tribal Society v Canada*, UN Doc CCPR/C/43/D/205/1986 at paras 5.4, 5.5, and 6 (Dec 3, 1991). The Human Rights Committee concluded in *Mikmaq* that the right to participation in Article 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. While advocates for indigenous peoples have strongly criticized the Committee's view that the Mikmaq nation was not entitled to direct participation in the Canadian First Ministers constitutional conferences (representation of aboriginal peoples in these conferences having being confined to certain umbrella groups), any general theory of participation must also take account of the need for limits on

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 First Amendment liberalism say little about which non-state 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 (perhaps along with the corporation) is the model 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 is consistent with the observable difficulties some of the internationally influential NGOs have with regard to the roles of groups like indigenous peoples that are ascriptive rather than voluntaristic.<sup>12</sup> Whereas people join and leave 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. Further, 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 non-voluntaristic ascriptive groups do not find a well defined place. It is not First Amendment principles themselves that produce this result. Rather, the liberalism that has led to First Amendment principles being applied to international civil society has also generated a model of a voluntaristic international civil society in which no distinctive accommodation for ascriptive groups seems justified or necessary. Adherents of First Amendment 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>13</sup> While liberal political theory has embraced

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participation. See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 *Nw U L Rev* 173 (1997).

12. See generally Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 *Notre Dame L Rev* 615 (1992); and Iris Marion Young, *Justice and the Politics of Difference* (Princeton 1990).
13. Jeremy Waldron, *Liberal Rights* 36–37 (Cambridge 1993). As Waldron acknowledges, any such generalization about a wide-ranging and complex set of positions is contestable and must admit of exceptions.

certain forms of NGOs (including civic associations and, with palpable misgivings, corporations and industry associations) in which entry and exit are voluntary,<sup>14</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 (for example, excluding children of mixed marriages from membership) 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, so that their participation and decisionmaking 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 First Amendment principles.

### III. 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 First Amendment principles 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.

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 who 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 *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,

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14. 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, for example, Robert A. Dahl, *A Preface to Democratic Theory* (Chicago 1956). On the history of pluralist thought in England, see generally, Paul Q. Hirst, ed., *The Pluralist Theory of the State* (Routledge 1989).

the Pueblo Council.”<sup>15</sup> He seemed implicitly to doubt that in small face-to-face communities, such as Santa Clara pueblo, it would be possible for a tribal court system to achieve the kind of liberal progress lauded by Edmund Burke, who asserted, “[o]ne 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>16</sup> Justice White envisaged the US federal courts as providing a means for this liberal ideal to be achieved in tribal communities, 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 few effective mechanisms to pursue such accountability outside their own limited zones of jurisdiction. The campaign against fur sealing is a reminder that the attractive freedom NGOs enjoy under First Amendment liberalism can carry costs that may fall unfairly. Greenpeace helped lead that campaign, but belatedly dropped it when the adverse effects on the traditional cultures and livelihoods of indigenous hunting communities in the Arctic region became evident. 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>17</sup> The contest 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, and between subsistence economy and the values of global markets. These are much discussed elsewhere,<sup>18</sup> and I will pass over them here in order to focus attention on a less appreciated paradox relating to indigenous peoples’ participation.

Claims made by indigenous peoples often depend, for their persuasiveness to the dominant non-indigenous community, on the indigenous group being a traditional one, the inheritor of a people previously wronged and which continues to be recognizably distinct in culture and institutions. But the process of pursuing a claim to land, compensation, or special status, and the structures that must be put in place to manage assets and representation once such a claim succeeds, can result in the transformation of the group’s organization. The group becomes less recognizably the traditional one whose “authenticity” in the estimation of decisionmakers and the wider

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15. *Santa Clara Pueblo v Martinez*, 436 US 49, 82 (1978).

16. Edmund Burke, *Reflections on the Revolution in France* 150 (Penguin 1968) (Conor Cruise O’Brien, ed) (emphasis in original).

17. See, for example, Marcus Colchester and Andrew Gray, *Foreword* in Proceedings from the Pocallpa Conference, *From Principles to Practice: Indigenous Peoples and Biodiversity Conservation in Latin America* (International Work Group for Indigenous Affairs 1998).

18. See, for example, Alison Brysk, *From Tribal Village to Global Village: Indian Rights and International Relations in Latin America* 188–245 (Stanford 2000).



public had been a predicate of the vitality of the claim.<sup>19</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.<sup>20</sup> These same organizational forms are also favored in the construction of international civil society and fostered by its practices, including its First Amendment liberal 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>21</sup> ANCSA required the organization of Alaskan 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. Though some of the corporations have operated successfully, others have struggled. For many people the legislation has come at great cost to cultural continuity, collective resources, and the strength of community.<sup>22</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, as in the separation envisaged in the Indian Reorganization Act of 1934 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 but structuring the corporate governance in ways that maintain control by the traditional leadership, as 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 management methods of the corporation may incorporate elements of the community's traditional culture, but often this may raise tensions with marketplace views of best management practices. The indigenous group has strong incentives to

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19. Comparable processes of transformation may also occur in other situations where the group has substantial assets to manage and develop.
  20. It is worth noting that 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.
  21. On the politics of the drafting and passage of the statute, see John R. Boyce and Mats A.N. Nilsson, *Interest Group Competition and The Alaska Native Claims Settlement Act*, 39 *Nat Resources J* 755 (1999).
  22. For reviews see Thomas R. Berger, *Village Journey: The Report of the Alaska Native Review Commission* (Hill and Wang 1985); and Marilyn 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 *J Envir L & Litig* 305 (1997).

train more young people in corporate management, and even to try to adapt culture and decisionmaking 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, each of which received about \$100 million (NZ\$170m) 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 strictly on market principles, with tremendous commercial success, while Tainui, with a much larger population and more complicated and decentralized governance structure, initially followed a hybrid approach which led to some notable losses.<sup>23</sup> This has sparked a spirited debate about the compatibility of market-based corporatism with Maori custom. Some Maori argue that corporatization and the formation of other non-traditional organizations provides an external buffer to protect traditional Maori ways of living and leadership inside, while generating the material assets and self-confidence needed to revitalize dissipating traditional culture and bring together communities that had 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, and may extend to the wider public, but would not be the same as the stringent accountability for financial dealings imposed on state officials under national non-indigenous 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. The strong demand of indigenous peoples 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 resources from agencies such as the World Bank and Oxfam in developing countries, have been made available to encourage the formation of indigenous organizations and to build the capabilities of such organizations, often while exercising 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>24</sup> Thousands of indigenous

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23. Reports based on the 2000 financial year suggested that Tainui's assets were then worth NZ\$170m, while Ngai Tahu's had risen to NZ\$366m. Kevin Taylor, *Back to Square One for Tainui*, *New Zealand Herald* (Jan 8, 2001).

24. 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 at 5 (2001).

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 is it ‘civil society’ (though the organisations are mostly private concerns in their legal status). Rather, the Indigenous Sector is a third thing created out of the interaction—sometimes, but not always, frictional—of government and the Indigenous domain.<sup>25</sup>

In New Zealand, organizations based on traditional Maori descent-based (*whakapapa*) groups are being augmented by large numbers of organizations catering to non-descent based urban communities of interest, such as the Waipereira Trust 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 intra-group, inter-group, and extra-group issues.<sup>26</sup>

This body of indigenous public law is generally incomplete, although it is developing quickly in many societies. It may include principles of abstention under which state institutions do not intervene in certain intra-indigenous 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

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25. Tim Rowse, *Do Indigenous Australians Have a Choice?* 6, paper presented at *The Power of Knowledge, the Resonance of Tradition—Indigenous Studies: Conference 2001*, The Australian National University, Canberra, Manning Clark Centre (Sep 18–20, 2001), available online 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)> (visited Mar 24, 2002).

26. Kirsey Gover and Natalie Baird, *Identifying the Maori Treaty Partner*, 52 U Toronto L J 39 (2002).

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 of a self-identified indigenous group to be exercised as the 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 many, but 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>27</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 is an indication of the need for an approach to international civil society that extends beyond First Amendment liberalism. Internationalized public law may be one useful, if limited, element in crafting such an approach.

#### IV. CONCLUSION

International civil society in its widest sense is bound to be a largely unregulated free-for-all, with markets in prestige, influence, membership, fundraising capability, and other markers of organizational success. 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 purport 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. Some indigenous groups 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 NGOs. Such claims may be outside of, or even disruptive of, evolving principles for allocation of the scarce opportunities for participation and influence that are constructed in dialogue between NGOs and inter-state 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

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27. See Brysk, *From Tribal Village to Global Village* at 274 (cited in note 18).

Issues,<sup>28</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 allowing for extensive participation by indigenous peoples organizations not accredited under the United Nations Economic and Social Council system for NGOs,<sup>29</sup> and in the special status in the Arctic Council of certain umbrella indigenous groups as "Permanent Participants" distinct from the category of NGOs. At present, these arrangements remain more or less ad hoc, without general criteria for identifying or 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, and accountability.

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 prevailing understandings of the roles and agency of states. 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 to international civil society of a unified body of democratic theory to supplant the existing implicit pattern of dependence on a limited analogue to First Amendment liberalism. 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>30</sup> This may eventually spill over into the democratic theory

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28. United Nations Economic and Social Council Resolution, *Establishment of a Permanent Forum on Indigenous Issues*, UN Doc E/RES/2000/22 (2000).
  29. See United Nations Economic and Social Council, *Commission on Human Rights Resolution 1995/32*, UN Doc E/CN.4/RES/1995/32 at 15, 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 representatives of the relevant peoples, but in practice such state action is unlikely except in contentious political circumstances.
  30. A sample of relevant work includes Duncan Ivison, Paul Patton, and Will Sanders, eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge 2000); James Tully, *Strange Multiplicity* (Cambridge 1995); Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims Since the 1970s* (Oxford 1997); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon 1995); Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto 2001); John Borrows, "Landed" *Citizenship: Narratives of Aboriginal Political Participation*, in Will Kymlicka and Wayne Normans, eds, *Citizenship in Diverse Societies* (Oxford 2000); Margaret Moore, *The Ethics of Nationalism* (Oxford 2001); Jacob Levy, *The Multiculturalism of Fear* (Oxford 2000).

animating proponents of international civil society, although the process has a long way to go.

In sum, a fully satisfactory theory of the roles and responsibilities of international civil society actors is dependent 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 First Amendment liberalism that currently prevails is insufficient to meet these challenges.

