Transcending Aboriginality and Minority: Indigeneity in Asia as a Construct of Structural Oppression Under the Economic Globalization Regime[*]

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I. INTRODUCTION

> "To every complex problem, there is a simple solution...and it is wrong."
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> H.L. Mencken

> "Numerical minorities, cultural minorities, national minorities, religious communities, linguistic communities, impoverished minorities- are we all indigenous peoples now?"[1]
>
> Patrick Macklem

Peoples may be a debate-provoking term in international law, but more so is the term *indigenous*. *Indigenous peoples*, like *peoples*, has no definition in international law. The absence of a universal definition that expresses the heterogeneity of indigenous cultures, their histories, and realities due to the antagonisms and ties between indigenous peoples and the political majority differ from state to state.[2] The International Labour Organization ("ILO") Convention 169,[3] which trailblazed the usage of the term *indigenous peoples* consequently failed to include a definition for the term[4] because of the nescience of general consensus as to its meaning.[5]

The gains of indigenous peoples in the international arena, the recognition of their self-determination rights by various United Nations ("UN") bodies, and the overwhelming adoption of the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP") have sparked hopes for a comprehensive theory of equity creating a more inclusive and just international community. For one, by reproducing the language of the International Bill of Rights on self-determination, it affirmed the self-determination rights of indigenous peoples long denied them.

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[1] Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 30 MICH. J. INT'L L. 177, 207 (2008).

[2] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Communication 276/2003, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Feb. 4, 2010).

[3] International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, June 27 1989, C169.

[4] Article 1 of the Convention enumerates the groups to which the Convention applies but does not provide a definition.

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

But the conceptual conundrum attached to indigeneity encumbers the domestic elaboration and promotion of indigenous rights, which are left in a state of suspended animation in legal vacuums- real or artificial.

Whether indigeneity should be defined or not is in itself a controversy as much as who should define it. Divergent conceptions of indigeneity protracted debates during the drafting of the UN Declaration on the Rights of Indigenous Peoples.[6] While scholarly and political discourse grapples with definitional issues, states are left with a wide berth of discretion to affirm or reject indigenous claims under the banner of the politics of recognition. As a result, this has negated the utility of international norms developed as a prophylactic against human rights violations targeting indigenous people. Furthermore, this negates the remedies of international norms which has been regarded as a power to resist structural oppression committed by states through "an entrenched and continuing pattern. . . jeopardizing the group's pursuit of their way of life, consigning them to a situation of internal colonialism."[7]

Jose Martinez Cobo, the first United Nations Special Rapporteur on the issue of discrimination against indigenous peoples, has established most of what is known on the existing definitions of indigenous peoples:

> those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[8]

In 1996, the indigenous representatives to the UN Working Group on Indigenous Populations endorsed the Martinez Cobo's working definition[9] even if Cobo himself expressed doubts as to its applicability to Asia and

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[6] Siegfried Wiessner, *Rights and Status of Indigenous Peoples*, 12 HARV. HUM. RTS. J. 57, 99 (1999).

[7] Omar Dahbour, *The Ethics of Self-Determination*, *in* CULTURAL IDENTITY AND THE NATION-STATE 9-11 (Carol C. Goulde and Pasquale Pasquino eds., 2001).

[8] José Martínez Cobo (Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of the Problem of Discrimination Against Indigenous Populations*, ¶ 379, Subcomm. on the Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN4/Sub.2/1986/7/Add.4.

[9] Asbjorn Eide & Erika-Irene Daes (Chairperson-Rapporteur), *Working Paper on the Concept of Indigenous Peoples*, ¶ 22, Comm. on Human Rights, Subcomm. on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN4/Sub.2/AC.4/1996/21(1996).

Africa.[10] Cobo's definition highlights "having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories" as a key feature of indigenous peoples. Later, Erica-Irene Daes, as Chairperson of the UN Working Group on Indigenous Populations, recommended priority in time with the use and occupation of a specific territory as a material consideration to the understanding of *indigenous*.[11] She articulated that aboriginality is indigenous peoples' most dominant identifying feature.[12] It is propounded that the term *indigenous* suggests historical originality[13] even if there is no commonly accepted definition in contemporary international law discourse.[14] Indigenous peoples are described as descendants of the first occupants of the land to which they are strongly attached.[15] However, aboriginality is amorphous if applied in Asia and Africa, where majority and minority groups are all autochthonous.[16] The requirement of "historical continuity with pre-invasion and pre-colonial societies that developed on their territories" harkens back to the phenomena of European colonization and invasion.

Aboriginality or prior occupancy remains a lingering assumption in scholarly literatures, political and legal discourse as the main criterion to establish indigeneity. It is alleged that ethnic minorities and indigenous peoples are distinct in that the former are settler populations while the latter are autochthonous.[17] However, a number of scholars have also questioned this distinction. Waldron dismissed it as "universal valorization of territorial precedence."[18] It is argued that displacement from prior occupancy as historical injustice should not necessarily justify restitution demands of groups claiming indigeneity if it produces present injustice.[19] Justice, after all, should serve the living, not the dead whose sufferings are

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[10] Martinez Cobo, *supra* note 8, ¶ 19–20 and 366. Note that Martinez Cobo clarified that his study covered only thirty-seven countries.

[11] Eide, *supra* note 9.

[12] *Id.* ¶ 37.

[13] Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY U. L. REV. 677, 695 (1990).

[14] Hurst Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649 (1988).

[15] Wiessner, *supra* note 6, at 115.

[16] Eide, *supra* note 9, ¶ 37.

[17] Gerard Clarke, *From Ethnocide to Ethnodevelopment? Ethnic Minorities and Indigenous Peoples in Southeast Asia*, 22 (3) THIRD WORLD Q. 413, 415 (Jun., 2001).

[18] John Bowen, *Should We Have a Universal Concept of "Indigenous Peoples" Rights? Ethnicity and Essentialism in the Twenty-First Century* in 16 (4) ANTHROPOLOGY TODAY, 12 (2000).

[19] Jeremy Waldron, *Indigeneity? First Peoples and Last Occupancy*, 1 N.Z. J. PUB. & INT'L L. 55 (2003).

beyond rectification.[20] Some states conflate indigeneity with minority or even prefer the usage of the latter. For example, in the 1970s, indigenous peoples in the Philippines were legally called national minorities.[21] The term has since been legally replaced by *indigenous cultural communities*[22] and *indigenous peoples*.[23] However, some indigenous groups may prefer *national minorities* to *indigenous peoples*.[24]

Indigenous peoples may qualify as minorities.[25] In fact, it is asserted that they are the perfect prototype of ethnic, linguistic, and religious minorities.[26] Many states with indigenous peoples prefer using minorities instead of indigenous peoples. UN practice have treated indigenous peoples as minorities and their issues had been taken cognizance of by the Human Rights Council Subcommission on Prevention of Discrimination Against Minorities.[27] The jurisprudence of the Human Rights Committee on right of minorities to culture under Article 27 of the ICCPR is mostly on claims raised by indigenous peoples.[28]

Under international law, the guaranteed rights of minorities include cultural, language, and religious rights, and the right to equality and non-

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[20] *Id.*

[21] *See* CONST. (1973), art. XV, § 11 (Phil.) (providing, "The State shall consider the customs traditions, beliefs, and interests of national cultural communities in the formulation and implementation of state policies."); *see also*, Sec. 2. Presidential Decree No. 1414, Further Defining the Powers, Functions and Duties of the Office of the Presidential Assistant on National Minorities and for Other National Minorities (defining national minorities as "the non-Muslim hill tribes . . . and other non-Muslim national minorities whether referred to as National Cultural Minorities or Cultural Communities under other laws").

[22] *See* CONST. (1987), art. II, § 22 (Phil.).

[23] Republic Act No. 8371, otherwise known as The Indigenous Peoples Rights Act, uses *indigenous cultural communities* and *indigenous peoples* synonymously.

[24] Michael L. Tan, *National Minorities*, PHILIPPINE DAILY INQUIRER (Oct. 14, 2016), http://opinion.inquirer.net/98184/national-minorities.

[25] Human Rights Comm., Gen. Comment on the Rights of Minorities, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994) [hereinafter Comment on the Rights of Minorities]; *see* Gudmundur Alfredsson, *Minorities, Indigenous and Tribal Peoples: Definitions of Terms as a Matter of International Law* in MINORITIES, PEOPLES AND SELF-DETERMINATION – ESSAYS IN HONOUR OF PATRICK THORNBERRY 163 (Nazila Ghanea, et al. eds., 2005).

[26] *See* Manfred Nowak, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS CCPR COMMENTARY 493 (1993).

[27] Tom Hadden, *The United Nations Working Group on Minorities*, 14 INT'L J. MINORITY & GROUP RTS. 285, 296 (2007).

[28] Martin Scheinin, *What are Indigenous Peoples?* in MINORITIES, PEOPLES AND SELF – DETERMINATION 3, 4 (Nazila Ghanea, et al. eds., 2005); *see also* Human Rights Comm., *supra* note 25, ¶ 7.

discrimination. However, indigenous peoples' rights regime goes beyond cultural rights since they are peoples with self-determination rights.

Conceptual challenges inspired proposals to surface a characteristic of indigeneity that transcends aboriginality and minority. This paper looks at the proposals and further proposes that to definitively segregate indigenous peoples from non-indigenous, it is necessary to look at the bases for the indigenous claims. Moreover, it argues that indigeneity is a construct of structural oppression arising from grossly unjust policies imposed on distinct peoples occupying or claiming resource-rich ancestral domains. These policies ultimately seek to wrest control of such resources under the rubric of economic globalization.

A. *The Evolution of Conceptual Obfuscation: From America and Oceania to Asia and Africa*

One scholar claims that "one of the most remarkable feats in (international law's) self-construction has been its overwhelming Eurocentrism."[29] Thus is the case with *indigenous peoples*. Consequently,

> [t]he current concept or the theory of 'indigenous' has been shaped by the dialogue between academics and activists of Western Europe and North America, as well as the power structures of Western Europe which lent their support to the concept in and outside the UN. The concept, therefore, has its origins in a colonial historical perspective. When it is applied to the people of the Americas, Australia and New Zealand it creates no confusion, but when the same concept is applied to the peoples of Asia and Africa, it creates confusion.[30]

Other terms have since been used to refer to indigenous peoples such as *aborigines*, *autochthones*, *natives*, *first nations*, *first peoples*, or *original peoples*.[31] In the Northern Hemisphere and in Oceania, indigeneity simply means occupation predating European settlers and that indigenous peoples are necessarily colonized peoples.[32] In these regions, there is no issue that every people who was there prior to colonial contact was autochthonous. The story of the acceptance of indigenousness, however, took a different turn when indigenous organizations expanded its conceptual coverage to peoples in Asia and Africa.

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[29] MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS 9 (2004).

[30] RITA MANCHANDA, THE NO-NONSENSE GUIDE TO MINORITY RIGHTS IN SOUTH ASIA 9 (2009).

[31] *See* PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS 37-40 (2002); *see generally* RONALD NIEZEN, THE ORIGIN OF INDIGENISM: HUMAN RIGHTS AND THE POLITICS OF IDENTITY (2003).

[32] Waldron, *supra* note 19.

Prevailing definitions of *indigenous peoples* from a colonial perspective restricts the concept of indigeneity to peoples in the Americas and Australasia. It excludes similar groups in Africa and Asia whose oppression was at the hands of natives of neighboring territories who assumed a position of political dominance in the aftermath of nation-building. In both continents, claims of territorial precedence can be scathed by the fact that history itself cannot state with final certitude who came first in a place.[33] If indigeneity refers to aboriginality, then all peoples in Asia, after the colonials have shipped out, would be considered indigenous.[34]

Any definition or approach to segregate the indigenous from the non-indigenous in Asia or Africa requiring chronological territorial precedence overlooks the early diaspora and migration of different groups. Claims of prior occupancy are hardly fool-proof in view of recent anthropological and historical evidence, which casts a cloud of doubt on previously held truths. For instance, questions have been raised if some pastoralist groups asserting indigenous status are the aboriginals of the territories they now occupy.[35] Additionally, some groups wearing indigenous badges have never been subjected to European colonization.[36] However, there groups have suffered from structural oppression tantamount to internal colonialism either by neighboring countries or by states within which they were assimilated.[37]

Thus, while international law progressed in terms of developing norms to oversee domestic treatment of indigenous peoples, translation of these norms into actual protection became a casualty of theoretical debates. Asian and African states exploited conceptual nebulousness by dismissing indigeneity as something alien to their regions,[38] claiming they

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[33] MANJUSHA S. NAIR, DEFINING INDIGENEITY, SITUATING TRANSNATIONAL KNOWLEDGE (Jan. 31, 2006), www.uzh.ch/wsf/WSFocus_Nair.pdf.

[34] Although some groups in Botswana self-identify as indigenous, the State's official position is that everyone is indigenous. *See* Judith G. Bartlett, Lucia Madariaga-Vignudo John D. O'Neil & Harriet V. Kuhnleil, *Identifying Indigenous Peoples for a Health Research in a Global Context: A Review of Perspectives and Challenges*, 66 INT'L J. CIRCUMPOLAR HEALTH 301, 301 (2007).

[35] Jim Igoe, *Becoming Indigenous Peoples: Difference, Inequality, and the Globalization of East African Identity Politics*, 105 AFR AFF 399, 420 (2006).

[36] Such as Thailand and Nepal. *See* Frank Munger, *Globalization, Investing in Law, and the Careers of Lawyers for Social Causes: Taking on Rights in Thailand*, 53 N.Y. L. SCH. L. REV. 745, 746 (2008-2009); ARLAND THORNTON, GEORGINA BINSTOCK, & DIRGHA GHIMIRE, INTERNATIONAL NETWORKS, IDEAS, AND FAMILY CHANGE 10 (2004), http://www.psc.isr.umich.edu/pubs/pdf/rr04-566.pdf.

[37] RUSSEL BARSH, THE WORLD'S INDIGENOUS PEOPLES, http://www.sfu.ca/~palys/Barsh- TheWorldsIndigenousPeoples.pdf.

[38] Mauro Barelli, *The Interplay Between Global and Regional Human Rights*

have no indigenous peoples.[39] They condemned its application in their regions as neo-colonialism,[40] an imposition of universalism rooted in Western imperialism. Most Asian states abjure the term opting to adopt ethnic minorities,[41] tribal groups,[42] small nations,[43] scheduled tribes,[44] or hill tribes[45] to eschew the burden of recognizing collective rights inherent in peoplehood. Thailand dismisses its indigenous peoples as migrants.[46] As a consequence, thousands are denied registration, which in turn results in denial of access to social services.[47] Indigenous peoples in Laos, Cambodia, Vietnam, and other countries in Southeast Asia are similarly circumstanced.[48] China makes the same denial[49] and prefers to use the term *minority ethnic groups* or *minorities* with the categorical characterization that they are not indigenous.[50] India insists on equating

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Systems in the Construction of the Indigenous Rights Regime, 32 (4) HUM. RTS. Q. 951, 958 (2010).

[39] Benedict Kingsbury, *The Applicability of the International Legal Concept of "Indigenous Peoples" in Asia*, *in* THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 350-53 (Joanne R. Bauer, et al. eds., 1999).

[40] *See* Rep. of the Workshop on a Permanent Forum for Indigenous People, ¶ 10, 13, U.N. Doc. E/CN4/Sub.2/AC.4/1995/7.

[41] Such as in China, Vietnam Ethiopia, Ivory Coast, Pakistan, Nepal, Turkey, and Kazakhstan.

[42] Such as in Cambodia, Indonesia, Thailand, Ghana, Morocco, Tunisia, Ethiopia, Ivory Coast, Pakistan, Nepal, Turkey, and Kazakhstan.

[43] Such as in Russia, in reference to the indigenous peoples in the Caucasus.

[44] Such as in India. *See* Jayantha Perera, *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006: A Charter of Forest Dwellers' Rights?*, *in* LAND AND CULTURAL SURVIVAL: THE CULTURAL LAND RIGHTS OF INDIGENOUS PEOPLES IN ASIA 213-24 (Jayantha Perera ed., 2009).

[45] Such as in Thailand. *See* Larry Lohmann, *Land, Power and Forest Colonization in Thailand*, *in* THE STRUGGLE FOR LAND AND FATE OF THE FORESTS (Marcus Colchester, et al. eds., 1993).

[46] *Id*.

[47] MRG reported that "[t]here are [a]s many as twenty different 'hill tribes,' totaling 1 million people according to some estimates, live in Thailand and include, among the more numerous, the Akha, Karen, Lahu, Lisu, H'mong and Mien." *See* Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2009 – Thailand* (July 16, 2009), http://www.unhcr.org/refworld/docid/4a66d9a3c.html.

[48] Bartlett, *supra* note 34, at 301.

[49] Tan Chee-Beng, *The Concept Of Indigenous Peoples And Its Application In China*, *in* THE CONCEPT OF INDIGENOUS PEOPLES IN ASIA – A RESOURCE BOOK 357, 358 (Christian Ernie ed., 2008).

[50] Embassy of the People's Republic of China in Switzerland, *China Concerned with Protection Of Indigenous Peoples' Rights* (1997), http://www.china-

indigenous with *autochthonous*, recognizing all Indians as indigenous since it is impossible to say who settled first due to its history of epochs of migration, cultural amalgamation, and dispersion.[51] Echoing India's position, China claims that all its nationalities have lived within its borders for ages, and since all of them are aboriginal, it has no indigenous issues.[52]

Progress made by indigenous movements to advance their claims in the international arena ushered in a wave of indigenous renascence. Thus, some minority groups identify as indigenous peoples for political leverage and global attention and redress of their issues for territorial control and enforcement of liabilities for ecoterrorism.[53] Tribal Peoples in Africa, such as the San or Maasai, self identify as indigenous to participate in indigenous discourses in the UN, even though their occupation of the region they inhabit does not predate those of other groups.[54] The Kashmiri Pandits of India have also brought their issues before the UN as an indigenous people.[55] In addition, there have been claims ranging from interesting to ludicrous in the aftermath of indigenous renascence. Fairly recently, the Bedouin of Palestine claimed indigeneity and brought their exclusion from their homelands to the attention of the UN.[56] Eskaya, a group in the Philippines, continues to assert indigenousness[57] even if they

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embassy.ch/eng/ztnr/rqwt/t138829.htm.

[51] Rabindra Nath Pati and Jagannatha Dash, *The Indigenous and Tribal Peoples Today: Issues in Conceptualization*, *in* TRIBAL AND INDIGENOUS PEOPLE OF INDIA: PROBLEMS AND PROSPECTS 3, 10-11 (Jagannatha Dash, et al. eds., 2002); Rep. of the Workshop on a Permanent Forum for Indigenous People, *supra* note 40, ¶ 10, 13.

[52] Embassy of the People's Republic of China, *supra* note 51 (stating, "As in the case of other Asian countries, the Chinese people of all ethnic groups have lived on our own land for generations. We suffered from invasion and occupation of colonialists and foreign aggressors. Fortunately, after arduous struggles of all ethnic groups, we drove away those colonialists and aggressors. In China, there are no indigenous people and therefore no indigenous issues.").

[53] Chidi Oguamanam, *Indigenous Peoples and International Law: The Making of a Regime*, 30 QUEEN'S L.J. 348, 386 (2004).

[54] U.N. Secretariat of the Permanent Forum on Indigenous Issues, *The Concept of Indigenous Peoples: Background Paper*, U.N. Doc. PFII/2004/WS.1/3 (Jan. 19-21, 2004), www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc.

[55] Sumit Hakhoo, *Pandits write to UN rights council; Seek balanced approach on Kashmir*, TRIBUNE (Sept. 16, 2016), http://www.tribuneindia.com/news/jammu-kashmir/pandits-write-to-un-rights-council/297767.html.

[56] James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Report by the Special Rapporteur on the Rights of Indigenous Peoples*, U.N. Doc. A/HRC/18/35/Add.1 (Aug. 22, 2011); *see* Havatzelet Yahel, Ruth Kark & Seth J. Frantzman *Are the Negev Bedouin an Indigenous People? Fabricating Palestinian History*, MIDDLE EAST Q. 3, 14 (2012) (repudiating Bedouin indigenous claims).

[57] Teddy A. Casino, Rene L Relampagos, Arthur Yap & Erico Aumentado, House Resolution No. 246, House of Representatives, Congress of the Philippines, *Resolution Directing the Committee on National Cultural Communities to Conduct an Investigation,*

are regarded as a mere religious group by many.[58] In the wake of the abolition of apartheid, white Afrikaners from South Africa claimed indigeneity and attempted to forward their agenda to the UN Working Group on Indigenous Populations.[59] White Namibians did the same, fuelling an inked protest from indigenous groups.[60] In order to justify the massacre of Tutsis, several Rwandan Hutus portrayed themselves as the indigenous people of Rwanda who were subjugated by Tutsis.[61]

B. *Indigeneity as Minority*

Using minority status to ground rights of indigenous peoples does not fully protect indigenous peoples under international law. For one, there is no reference to minority rights in either the Charter of the United Nations or in the Universal Declaration of Human Rights.

The Council of Europe Framework Convention for the Protection of National Minorities of 1995[62] and the UN Declaration on the Rights of Persons Belonging or Ethnic, Religious and Linguistic Minorities of 1992[63] contain a systemized catalogue of minority rights, guaranteeing the right to equality and non-discrimination and the protection of the cultural, language and religious uniqueness of the minorities. The UN Declaration on Minorities provides that minorities have the right to effective participation in public affairs.[64] Similarly, the Council of Europe Framework Convention for the Protection of National Minorities guarantees the "effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them."[65] In sum, international law guarantees

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In Aid of Legislation on the Various Controversies, Including the Decline of their Linguistic and Cultural Traditions that Hound the Indigenous Eskaya Tribe, the Cultural Minority of the Island of Bohol.

[58] Piers Kelly, *A Tasaday Tale in Bohol: The Eskaya Controversy and its Implications for Minority Recognition, the Indigenous Peoples' Rights Act, and the Practice of Cultural Research in the Philippines,* 24 LUMINA 1 (2014).

[59] JENS DAH, THE INDIGENOUS SPACE AND MARGINALIZED PEOPLES IN THE UNITED NATIONS 199-200 (2012).

[60] *Id.*

[61] Bowen, *supra* note 18, at 14 (citing CHRISTOPHER TAYLOR, SACRIFICE AS TERROR: THE RWANDAN GENOCIDE OF 1994 (1999)).

[62] Framework Convention for the Protection of National Minorities, Feb. 1, 1995, E.T.S. 157.

[63] G.A. Res. 47/135, annex, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Dec. 18, 1992).

[64] *Id.* art. 2(3).

[65] Framework Convention for the Protection of National Minorities, art. 15, Feb. 1, 1995, E.T.S. 157.

minorities democratic entitlements and spaces in policy-making bodies where the will of the majority prevails. However, this does not support the peoplehood of indigenous peoples, which entails self-determination. It subjects their fate to the will of the majority, which may go against minority rights. Unfortunately, such defeat of minority rights is legitimized by the minority participation in the democratic process that generated it.

Under the ICCPR, what is recognized for minorities is the right to culture articulated in Article 27 of the Covenant. Like all other intergovernmental instruments affirming minority rights, it applies to "persons belonging to" minorities.[66] International law on minorities does *not* endorse the notion of collective rights such as the right of self-determination. Self-determination is viewed with suspicion by many states.[67] The ICCPR does not contemplate minorities as such as peoples[68] who possess, by virtue of peoplehood, a self-determining status.

Using *minorities* in reference to indigenous peoples may even deny the extension of minority rights recognized by international law to some of them. This is true in cases where they constitute the numerical majority in states[69] despite being an oppressed class in need of minority measures.[70] Legal scholarship and various UN agencies adhere to the definition of *minorities* as groups that are

> [n]umerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being

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[66] Hurst Hannum, *The Concept and Definition of Minorities*, *in* UNIVERSAL MINORITY RIGHTS 49, 69 (M. Weller, Ed., 2007).

[67] Siegfried Weissner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 116 (1999*)*.

[68] PAUL KEAL, EUROPEAN CONQUEST AND THE RIGHTS OF INDIGENOUS PEOPLES 192 (2003) (saying that when the ICCPR was being drafted, it was clarified that minorities were not included among the peoples contemplated in article 1).

[69] Human Rights Comm., Concluding Observations of the Committee on the Elimination of Racial Discrimination: Bolivia, U.N. Doc. CERD/C/63/CO/2 (Dec, 10, 2003) (stating that based on a 2001 official census, indigenous peoples make up 61.8% of the entire population)*; see* Siegfred Wiessner, *Demographic Change and the Protection of Minorities*, *in* GLOBALER DEMOGRAPHISCHER WANDEL UND MENSCHENRECHTE 155, 159 (E. Klein ed., 2005); World Bank, *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review* (Jan. 10, 2003), http://documents.worldbank.org/curated/en/570331468761746572/Implementation-of-Operational-Directive-4-20-on-Indigenous-Peoples-an-independent-desk-review.; Trygve Bendiksby, *Minority Rights and Justice in Guatemala, in* HUMAN RIGHTS IN DEVELOPMENT: YEARBOOK 1999/2000 THE MILLENNIUM EDITION 163, 179 (Hugo Stokke, et al. eds., 2001).

[70] Trygve Bendiksby, *Minority Rights and Justice in Guatemala,* in HUMAN RIGHTS IN DEVELOPMENT: YEARBOOK 1999/2000 THE MILLENNIUM EDITION 163, 179 (Hugo Stokke, et al. eds., 2001).

> nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show if only implicitly a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[71]

The HRC's General Comment No. 23 on Article 27 qualifies that the existence of a minority must be established by objective criteria. For example, the group must not exceed 50% of the *entire* population. Thus, in the case of *Ballantyne v. Canada*,[72] the complaint of English-speakers in Quebec alleging a violation by Canada of Article 27 through the implementation of a statute requiring commercial signs in Quebec to be written in French was dismissed. The HRC ruled that, although numerically inferior in Quebec, the complainants were part of Canada's English-speaking majority.[73] This interpretation can foster discrimination in the protection of land rights under Article 27 because it blocks the claims of indigenous peoples who are the dominant population in a state[74] even if their numerical superiority does not necessarily translate to political muscle necessary to win the power game in the State system.

Many states avoid the term *indigenous peoples* opting to adopt *ethnic minorities*.[75] China uses the term *minority ethnic groups* or *minorities* with the categorical characterization that they are not indigenous.[76] The preference for minorities is a strategy to eschew the burden of recognizing self-determination claims inherent in peoplehood as a *jus cogens*.[77] The right of peoples to self-determination is entrenched in

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[71] Francesco Capotorti (Special Rapporteur), *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, U.N. Doc. E/CN.4/Sub.2/384/Add.1-7 (1991).

[72] Ballantyne, Davidson, McIntyre v. Canada, Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993).

[73] *See id.*

[74] Such as in Bolivia, Guatemala, Peru, Nepal, and Fiji. *See* Minority Rights Group International, *World Directory of Minorities*, http://www.minorityrights.org/?lid=185&tmpl=printpage; Erica- Irene Daes (Chairperson-Special Rapporteur), *Working Paper on the Relationship and Distinction Between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples*, Comm'n on Human Rights, Subcomm'n on the Promotion and Protection of Human Rights, ¶ 29, U.N. Doc. E/CN.4/Sub.2/2000/10 (July 19, 2000) (stating that the "numerical superiority of indigenous peoples in countries such as Bolivia or Guatemala has . . . been no guarantee of their enjoyment of basic human rights.").

[75] Such as in China, Vietnam Ethiopia, Ivory Coast, Pakistan, Nepal, Turkey, and Kazakhstan.

[76] Embassy of the People's Republic of China in Switzerland, *supra* note 50.

[77] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 515 (1990).

international law. However, no such right is recognized by international law for minorities.

Self-determination of all peoples is recognized by international law particularly under the ICCPR and IESCR.[78] The recognition that this right extends to indigenous peoples is express in pronouncements of the Human Rights Committee[79] and the Committee and Economic, Social and Cultural Rights,[80] and the treaty bodies that monitor States' compliance with the ICCPR and ICESCR, respectively. Furthermore, the UNDRIP expressly affirms the self-determination rights of indigenous peoples.[81] Earlier, however, self-determination claims raised by indigenous peoples had been historically rebuffed or ignored by the HRC.[82] This was to avoid upsetting states vehemently opposed to the recognition of the peoplehood

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[78] Article 1 of both Covenants state:

> 1. All 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.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

[79] The earliest pronouncements were made in the HRC's Concluding Observations on Canada and Norway in 1999. *See* Human Rts. Comm., Concluding Observations on Canada, U.N. Doc. CCPR/C/79/Add.105 (1999); Human Rts. Comm., Concluding Observations on Norway, U.N. Doc. CCPR/C/79/Add.112 (1999); *see also* Human Rts. Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Brazil, U.N. Doc. CCPR/C/BRA/CO/2 (Dec. 1, 2005); Human Rts. Comm., Concluding Observations on Denmark, U.N. Doc. CCPR/CO/70/DNK (2000); Human Rts. Comm., Concluding Observations on Australia UN doc. CCPR/CO/69/AUS (2000); Human Rts. Comm. on Sweden, U.N. Doc. CCPR/CO/74/SWE (2002); Human Rts. Comm., Concluding Observations on the United States, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

[80] *See*, *e.g.*, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation, ¶ 11, U.N. Doc. E/C.12/1/Add.94 (Dec. 12, 2003).

[81] G.A. Res. 61/295 (III), United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295, art. 23 (Sept. 13, 2007).

[82] *See, e.g.,* Kitok v. Sweden, Comm. No. 197/1985, U.N. Doc. CCPR/C/33/D/197/1985 (July 27, 1988); Lubicon Lake Band v. Canada, Comm. No. 267/ 1984, Annex 9 (A), U.N. Doc. N45/40, (1990); Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000).

status of indigenous peoples due to fears of secession. It was only in the last decade and a half that the HRC acknowledged indigenous peoples as *peoples*.[83]

States fought tooth and nail to bar international law recognition of the peoplehood of indigenous peoples. During the drafting of ILO Convention 169, the pioneering instrument in the usage of the term *indigenous peoples*, states were adamant on the use of *populations* instead of *peoples* or the use of *peoples* with a categorical declaration that it did not imply self-determination rights.[84] The compromise reached was to use *peoples* with the caveat that it was not to be construed as "having any implications as regards the rights which may attach to the term under international law."[85]

The UN Working Group on Minorities and the UN Working Group on Indigenous Populations identified the differences between indigenous peoples on the one hand and national, ethnic, religious and linguistic minorities on the other, thus explaining why the former are entitled to targeted rights above those under article 27 of the ICCPR. Minorities seek integration and participation in the political set-up, recognition of their individual rights, and protection against non-discrimination in societies where they are assimilated.[86] Indigenous peoples, on the other hand, struggle for the recognition of their institutional distinctiveness and their collective rights including self-determination, self-government, and autonomy within the larger political framework.[87]

Evidently, the victory of indigenous peoples to have their peoplehood affirmed was won in a long and difficult struggle. The recognition of their label as *indigenous peoples* comes with the recognition of the rights that international and domestic laws assign to indigeneity. It is therefore saddening for some indigenous peoples to opt out of the term and embrace what states prefer to call them: minorities.

C. *What's in a Name?: The Need for Conceptual Clarity*

Indigeneity is now a normative concept to which is attached sizeable power "as a basis for group mobilization, international standard setting, transnational networks and programmatic activity of

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[83] *See supra* note 76.

[84] *See* REPORT OF THE MEETING OF EXPERTS ON THE REVISION OF THE INDIGENOUS AND TRIBAL POPULATIONS CONVENTION, 1957 (No. 107) GB 234/5/4 (Geneva, Sept. 1-10, 1986), ¶ 14.

[85] Article 1 (3), 72 ILO Official Bull. 59; 28 ILM 1382 (1989).

[86] Asbjorn Eide and Erika-Irene Daes (Special Rapporteurs for Sub-commission on Promotion and Protection of Human Rights), *Working Paper on the Relationship and Distinction Between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples*, UN Doc. E/CN.4/Sub.2/2000/10.

[87] *Id.*

intergovernmental and nongovernmental organizations."[88] International law recognizes that indigenous peoples have the right of self-determination. Since 1999, the UN Human Rights Committee has been calling on states to respect this.[89] The term *indigenous* has progressed such that it is "not only a legal category and an analytical concept but also an expression of identity, a badge worn with pride, revealing something significant and personal about its wearer's collective attachments."[90] The moment that considerable power attached to indigeneity was realized, indigeneity attracted controversies further aggravating the struggle for international theoretical consensus that transcends controversies over territorial precedence.

Similar to other essentialist identities, indigeneity confers on its claimants seats in forums in the political space.[91] A claim to indigenous status gives groups the right to wave the indigenous banner for "better visibility, increased legitimacy and improved donor support."[92] In Indonesia, indigenous identity is asserted as a strategy for the recognition of self-representation and participation in the democratic processes in order to have access to social goods.[93] In various parts of the world, indigenous status is invoked as the right of self-determination, embracing the right to give or withhold free, prior, and informed consent to outsiders' development projects.

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[88] Kingsbury, *supra* note 5, at 414.

[89] The first time the HRC acknowledged that indigenous peoples have article 1 rights was in its 1999 Concluding Observations on Canada's report under the reporting mechanism provided by the ICCPR in article 40. *See* Human Rts. Comm., Concluding Observations on Canada, UN Doc. CCPR/C/79/Add.105 (1999). For other similar Observations, *see*, *e.g.*, Human Rts. Comm., Concluding Observations on Norway, U.N. Doc. CCPR/C/79/Add.112 (1999); Human Rts. Comm., Concluding Observations on Mexico, U.N. Doc. CCPR/C/79/Add.109 (1999); Human Rts. Comm., Concluding Observations on Brazil, U.N. Doc. CCPR/C/BRA/CO/21 (Dec. 2005); Human Rts. Comm., Concluding Observations on Denmark, U.N. Doc. CCPR/CO/70/DNK (2000); Human Rts. Comm., Concluding Observations on Australia, U.N. Doc. CCPR/CO/69/AUS (2000): Human Rts. Comm., Concluding Observations on Sweden, U.N. Doc. CCPR/CO/74/SWE (2002); Human Rts. Comm., Concluding Observations on Finland, U.N. Doc. CCPR/CO/82/FIN (Dec. 2, 2004); Human Rts. Comm., Concluding Observations on the United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

[90] Niezen, *supra* note 31, at 3.

[91] Andrea Muehlebach, *"Making Place" at the United Nations: Indigenous Cultural Politics at the UN Working Group on Indigenous Populations*, 16 (3) CULTURAL ANTHROPOLOGY 415-48 (2001).

[92] Dorothy L. Hodgson, *Introduction: Comparative Perspectives on the Indigenous Rights Movement in Africa and the Americas*, 104 (4) AM. ANTHROPOLOGY 1037–49 (2002).

[93] Tania Murray Li, *Articulating Indigenous Identity in Indonesia: Resource Politics and the Tribal Slot*, in 42 COMP. STUD. SOC'Y & HIST. 149-79 (2000).

The challenge of distinguishing the indigenous from other minority groups has reduced the concept of indigenousness almost to irrelevance insofar as it is unable to serve its purposes. While indigeneity remains a casualty of definitional debates over and above the politics of state recognition, a gaping protection fissure lies between international and/or domestic human rights laws and the serious and urgent problems of the world's poorest and most marginalized peoples. Terminological debates and conceptual conundrum impede the implementation and further development of an international law regime to oversee domestic treatment of indigenous peoples. Furthermore, these debates stagnate the domestic recognition and promotion of international norms. It is crucial to segregate indigenous peoples from other minoritized groups.[94] Once a collectivity is put under a particular category, it can claim the rights attached to such category. Moreover, once a group is delineated as indigenous, its self-determination claims should be respected and recognized.

Thus, while it has no exact and comprehensive definition applicable to all states,[95] *indigeneity* must be conceptually cleaned. Clarification should not require precision or exactitude, which potentially homogenizes heterogeneous groups. What should emerge from this exercise is a unifying international concept with room for flexibility in accommodating diverse material realities to foreclose "unsustainable fragmentation and inconsistency."[96]

Even with theoretical clarity, in the final analysis, the recognition of indigenousness is a political act of states claiming sovereignty. Such clarity, however, which relies on some objective and subjective criteria, may curb arbitrariness as states will avoid being blamed and shamed from international platforms for oppressing their peoples who are plainly indigenous, ergo, entitled to international status.

II. APPROACHES TO SEGREGATING THE INDIGENOUS FROM NON-INDIGENOUS

While international law is stuck in a quagmire of protracted debates on who indigenous peoples are, the protection that international law provides for indigenous peoples will remain in the realm of theories. Thus, several scholars[97] proposed approaches to set apart the indigenous from the non-indigenous.

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[94] Miriam Aukerman, *Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context*, 22 HUM. RTS. Q. 1011, 1019 (2001).

[95] Erica-Irene Daes, *supra* note 9, ¶ 9.

[96] Benedict Kingsbury, *Claims by Non-State Groups in International Law*, 25 (3) CORNELL INT'L L.J. 420 (1992).

[97] The scholars are identified in the discussions in II *infra* on the positivist, pragmatic, and constructivists approaches to identifying the indigenous from the non-indigenous.

A. *The Positivist Approach: Indigenous peoples are those who the states say are indigenous.*

The positivist approach recognizes that states should determine who is indigenous. This dangerously confers the oppressor the power to determine who among its constituents are entitled to or should be denied the protection under international law attached to indigenous peoples. The state may or may not adopt a definition. Both the presence and absence of a definition are problematic. Absence grants states wide latitude of prerogative to affirm or repudiate assertions of indigenousness. A definition will empower states to do the same. It may also homologize diverse peoples and open floodgates to flush out legitimate claims.

The positivist approach first regards indigenous peoples as a legal category, which requires a clear-cut definition on the basis of which to determine whether or not a status, right, or responsibility attaches. It is a tribute to the politics of recognition. Thus, among players in the international arena, states are the strongest supporters of this position arguing that the cause of indigenous peoples will inch forward only with a definition which cements protection for indigenous rights.[98] Proponents argue that since indigenous realities are diverse from region to region or state to state, the determination of indigeneity should be at the discretion of regional political formations or states familiar with peculiarities of each group.[99]

There are some good arguments for the positivist approach. The avoidance of a definition for the easy identification of groups entitled to rights attached to indigeneity results in loss of focus on the human rights issues of indigenous peoples.[100]However, an explicit definition is required to delineate indigenous peoples from minorities.[101] Furthermore, states argue that "ambiguity or absence of criteria could be a convenient cover for States to deny or grant recognition of indigenous status, since there would be no international standard to go by."[102]

Ascribing traits or attributes of indigenousness essentializes identity and reduces the task of determining who is and who is not indigenous to a perfunctory box-ticking exercise. Once identity is

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[98] EYASSU GAYIM, PEOPLE, MINORITY AND INDIGENOUS: INTERPRETATION AND APPLICATION OF CONCEPTS IN THE POLITICS OF HUMAN RIGHTS 150 (2006).

[99] This was the proposal of African States. Matthew Russell Lee, *At UN, Indigenous Rights Are Threatened with Amendments, by Global Warming, and Agency Hot Air*, INNER CITY PRESS (May 22, 2007), http://www.innercitypress.com/indigenous052207.html.

[100] Erica-Irene A. Daes (Chairperson-Special Rapporteur), *Discrimination Against Indigenous Peoples*, ¶ 34, U.N. Doc. E/CN4/Sub.2/1996/21 (Aug. 16, 1996).

[101] *Id.*

[102] *Id.*

essentialized, it is susceptible of existential abrogation by the State. A definition also undermines the "fluidity and dynamism of social life to distorted and rather static formal categories."[103] The attributes of identity should be like the chameleon: adapting to pressures that can spell the difference between extinction and survival. Identity, after all, is "a socially constructed, variable definition of self or other, whose existence and meaning is continuously negotiated, revised, and revitalized."[104]

Positivism has no room for this dynamism. The Indigenous Peoples Rights Act of the Philippines illustrates this as it homologizes indigenous peoples by characterizing them as homogenous.[105] This fosters exclusion of those who do not exhibit the same traits as the recognized indigenous groups. A definition gives states a weapon to gloss over indigenous self-determination by excluding indigenous peoples who do not snugly fit within the four corners of the conceptual box. In fact, some states deliberately reduce the percentage of the indigenous among their population to deny access to resources and lands.[106]

Indigenous peoples contest states' powers to define indigenousness,[107] expressing fears that a definition in the UNDRIP could limit groups that may exercise the political powers and claim the rights recognized under the Declaration.[108] The pitfall is that "[t]he politics of recognition in its contemporary form promises to reproduce the very configurations of colonial power that indigenous peoples' demands for recognition have historically sought to transcend."[109] In the Philippines, the National Commission for Indigenous Peoples has to recognize the Council of Elders or the group in the process of obtaining the free, prior,

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[103] Kingsbury, *supra* note 5, at 414.

[104] Joane Nagel, *Constructing Ethnicity: Creating and Recreating Ethnic Identity and Culture, in* MAJORITY AND MINORITY: THE DYNAMICS OF RACE AND ETHNICITY IN AMERICAN LIFE (Norman R. Yetman ed.,1993).

[105] Sec. 3 (h), Indigenous Peoples Rights Act of 1997 (defining in part indigenous peoples as "a group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organized community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonization, nonindigenous religions and cultures, became historically differentiated from the majority of Filipinos.").

[106] *See*, *e.g.*, BIRGITTE FEIRING, ET. AL., INDIGENOUS PEOPLES AND POVERTY: THE CASES OF BOLIVIA, GUATEMALA, HONDURAS AND NICARAGUA (2003).

[107] Daes, *supra* note 74, at ¶ 33.

[108] *Id.*

[109] Glen S. Coulthard, *Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition,'* 6 CONTEMPORARY POL. THEORY 437, 437 (2007).

and informed consent of an indigenous community to a project in its ancestral domain.[110] This recognition has produced indigenous *dealers* from supposed indigenous *leaders* who conspired with government and its corporate partners to betray peoples' interests and created new elites from among them.[111]

Cambodia's Land Law of 2001 defines an indigenous community as "a group of people who are residents in the territory of the Kingdom of Cambodia whose members manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use."[112] This romanticizes the image of savagery and excludes indigenous groups who modified or even abandoned traditional lifestyles and economic systems as a result of structural oppression and economic pressures coming from the dominant development paradigm.

In fact, indigenous cultures evolved because modernization and integration were forced on indigenous peoples by states to bring socio-economic change.[113] Thus, as of 2012, the United States recognized only 565 tribal groups, excluding the Alaska natives,[114] leaving out several tribes. India, which has the largest indigenous population in Asia and the second largest in the world,[115] has more than a thousand indigenous groups but only 600 are recognized by the state as *scheduled tribes*.[116]

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[110] *See* NCIP Administrative Order No. 3 Series of 2012, The Revised Guidelines on Free and Prior Informed Consent (FPIC) and Related Processes of 2012.

[111] CHERYL L. DAYTEC-YANGOT AND BERNICE AQUINO-SEE, PHILIPPINE INDIGENOUS PEOPLES AND CORPORATE SOCIAL RESPONSIBILITY: CASE STUDY (Based on the national consultation with people's organizations held November 13-14 2010 in Baguio City, Philippines under the auspices of Forum-Asia and DINTEG) (on file with authors).

[112] Indira Simbolon, *Law Reforms and Recognition of Indigenous Peoples' Communal Rights*, *in* CAMBODIA IN LAND AND CULTRAL SURVIVAL: THE CULTURAL LAND RIGHTS OF INDIGENOUS PEOPLES IN ASIA 63, 74 (Jayantha Perera, ed., 2009).

[113] Rodolfo Stavenhagen (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 10(a), U.N. Doc. A/HRC/6/15 (Nov. 15, 2007).

[114] Cheryl L. Daytec, *Fraternal Twins with Different Mothers: Explaining Differences between Self– Determination and Self–Government Using the Indian Tribal Sovereignty Model as Context*, 22 MIN J. INT'L L. HUMPHREY SUPP. 25, 25 (2013) (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO–12–348, INDIAN ISSUES: FEDERAL FUNDING FOR NON–FEDERALLY RECOGNIZED TRIBES 6 (2012), http://www.gao.gov/assets/600/590102.pdf).

[115] H.C. UPRETI, INDIAN TRIBES: THEN AND NOW (2007).

[116] P. Karunakar, *Threat of Globalization to Indigenous Peoples' Culture and Identities in India*, 10 FOURTH WORLD J. 153, 154 (2011).

Indubitably, the positivist approach gives states the prerogative to recognize or invisibilize indigenous peoples. This allows them to determine the reach of the right of self-determination.

B. *The Pragmatic Approach: Politics of Recognition in Disguise*

Framing indigenous peoples within a definition is complicated and serves as a site of contestation. This is because the indigenous peoples are diverse but share distinct semblances.[117] The proposed alternative, the pragmatic approach, is the adoption of a set of criteria rather than a formal definition, with self-identification being the most important criterion. The approach celebrates heterogeneity and diversity, and rejects the homogenizing tendency of positivism. More importantly, it abandons to self-identification the construction of who is indigenous. Critics of this approach correctly argue that it fosters over-inclusion as any group may claim to be indigenous.[118] If everyone is indigenous, then no one is.

The UNDRIP provides that "[i]ndigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such."[119] The rather adamant emphasis on self-identification is a safeguard in response to apprehensions that states will either repudiate assertions of indigenous status or restrictively recognize them.[120]

The UNDRIP best demonstrates the pragmatic approach: indigeneity is based on self-ascription and ascription by others. This promotes the indigenous renascence that emerged when indigeneity pervaded the rights discourse in international law because asserting political identity meant entitlement to benefits.[121] It is opined that "the self-definition criterion has already made the space of indigeneity a battlefield for inclusion" which "resembles the representational political field of nation-states where communities that were unheard of before

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[117] Stanley F. Cunningham, et al., Indigenous by Definition Experience, or World View, 327 BRIT. MED. J. 403-04 (2003).

[118] *See, e.g.,* Chidi Oguamanam, *Indigenous Peoples and International Law: The Making of a Regime*, 30 QUEEN'S L.J. 348, 386 (2004); Macklem, *supra* note 1.

[119] United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 81, at art. 8.

[120] Jose R. Martinez Cobo (Special Rapporteur). *The Study on the Problem of Discrimination Against Indigenous Populations*, ¶ 369, U.N. Doc. E/CN4/Sub.2/1986/7/Add.4.

[121] Macklem, *supra* note 1, at 36; *see* WILL KYMLICKA, MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY 286 (2007) (stating "[T]oday it is politically advantageous for substate nationalist groups to adopt the label and rhetoric of indigenous peoples.").

suddenly appear and assume an identity that cries for representation."[122] However, self-ascription as the basis for determining indigeneity can create practical difficulties ranging from overinclusion to overinclusion resulting in exclusion. Earlier reference was made to Rwanda's Hutus invoking territorial precedence and indigeneity to give moral grounding to their massacre of Tutsis,[123] and to the post-apartheid assertion of indigenousness by formerly dominant societies in apartheid Africa.[124]

Self-identification, while important, does not automatically translate into state recognition. In the ultimate analysis, self-identification cannot trump the power of states since recognition of such status is theirs to make as sovereigns, which may be arbitrarily exercised in the absence of objective criteria. It is posited that "[i]ndigenous peoples may get moral victories from international law, but the real power remains vested in the hand of sovereign states, who can (and do) ignore international norms with impunity."[125] If all minoritized groups assert indigenousness, then states will just acknowledge everyone's indigeneity and treat everyone as if they were the same. Alternatively, states may declare that no one is indigenous which produces the same consequence. Furthermore, as the arbiter in the contest for inclusion, the state may step in and choose to include or exclude groups under a positivist approach. In reality, the pragmatic approach may be an unwitting invocation of the politics of recognition exercised as non-recognition. Just as under the positive approach, the net effect may be existential abrogation.

In some states, groups who self-identify as indigenous face further structural oppression. This can take the form of deprivation of citizenship, exclusion from electoral participation and other political processes, and lack of official recognition of existence by the denial of registration of records of their births and other civil events in their lives.[126] Thus, gains from the recognition of self-identification may be Pyrrhic because states will refute indigenous rights absent a reasonably clear-cut coverage of the legal concept of indigenous peoples.[127]

C. *The Constructivist Approach: But how do you tell indigenous peoples from substate nations?*

The pitfalls of both the positive and pragmatic approaches have led to a method that avoids the rigidity of framing indigenous peoples in a box

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[122] Nair, *supra* note 33, at 7.

[123] Bowen, *supra* note 18.

[124] Dah, *supra* note 59.

[125] Will Kymlicka, *Theorizing Indigenous Rights*, 49 U. TORONTO L.J. 293 (1999).

[126] *See* Minority Rights Group International, *supra* note 47.

[127] Scheinin, *supra* note 28, at 3.

and the laxity of giving people the freedom to ascribe indigeneity to themselves. The constructivist approach associated with Professor Benedict Kingsbury, a leading scholar in international law, rejects an international definition or the adoption of universal criteria.[128] It regards the concept as one embodying an unremitting evolution, where claims and practices in innumerable specific cases are theorized in general terms in the international community, then made specific to apply to political, legal, and social processes of actual cases or groups.[129]

Kingsbury proposes the adoption of a general concept that leaves room enough for self-identification and the accommodation of characteristics peculiar to specific groups. He submits four criteria:

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.[130]

He also identifies three more indicia:

e) position of non-dominance,
f) close cultural affinity with a land or territory; and
g) historical affinity with pre-invasion or pre-colonial societies.

The last criteria are not absolute, but their presence gives strong reasons for categorization while their absence raises doubt, which may be rebutted or overturned.[131]

The Kingsbury solution rightly eulogizes realism and potentially restricts state arbitrariness; yet it also lumps non-indigenous groups in minority positions under the same category as the indigenous.[132] In fact, it tears down the demarcating wall between indigenous peoples and substate nations, like the Scots, Catalans, Kurds, Chechens, Crimean Tatars, Kashmiris, Palestinians, and Tibetans.[133] It leads to the conclusion that substate nations[134] are no different from indigenous peoples. Thus, in reference to them, Kymlicka observes:

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[128] Kingsbury, *supra* note 5.

[129] *Id.* at 415.

[130] *Id.* at 453.

[131] *Id.* at 456.

[132] Macklem, *supra* note 1, at 207.

[133] Will Kymlicka, *Beyond the Indigenous/Minority Dichotomy?*, *in* REFLECTIONS ON THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 183, 189 (Stephen Allen, et al. eds., 2011).

[134] Kymlicka conflates "substate nations" with "national minorities." *Id.* at 184.

> Like indigenous peoples, these are culturally distinct groups living on their traditional territory, who think of themselves as a distinct people or nation, and show a deep attachment to their cultural distinctiveness and to their homeland, which they have struggled to maintain despite being incorporated (often involuntarily) into a larger state. Such ethnonational groups are not typically seen as 'indigenous peoples', but they share many of the same concerns about cultural integrity, non-discrimination, and the right to govern themselves and their territory.[135]

The Kingsbury approach raises other difficulties. How is non-dominance defined? Is it in reference to political power or number? Numerical dominance does not necessarily entail political dominance. The numerical superiority of indigenous peoples in some states like in Bolivia[136] and Guatemala has not guaranteed their enjoyment of fundamental human rights.[137] While a people may be dominant in the state, they may not be dominant in specific regions. They may also be dominant in a region, but not in the state.[138] Moreover, close affinity to the land claimed as an imperative criterion[139] discounts development-induced displacement and resettlement. Likewise, historical affinity with pre-invasion or pre-colonial society is not common to all indigenous peoples.

While the constructivist approach embraces most of the current indigenous claims and attributes, it does not succeed in surfacing a characteristic that only indigenous peoples can lay claim to. However, Professor Patrick Macklem, an expert on international law on indigenous peoples, asserts that Kingsbury's constructivist approach, if "supplemented by an explanation of the normative significance of international indigenous rights,"[140] can actually accomplish segregation.

Taking the cue from Macklem, this paper advances that Kingbury's proposal should factor in the importance of indigenousness to those who

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[135] *Id.* at 189.

[136] In its 2003 Concluding Observations on Bolivia, the CERD remarked that based on a 2001 official census, indigenous peoples make up 61.8% of the entire population. *See* Concluding Observations of the Committee on the Elimination of Racial Discrimination: Bolivia. U.N. Doc. CERD/C/63/CO/2 (Dec. 10, 2003).

[137] Erica-Irene Daes (Chairperson-Special Rapporteur for the Sub-Commission on the Promotion and Protection of Human Rights), *Working Paper on the Relationship and Distinction Between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples*, U.N. Doc. E/CN4/Sub.2/2000/10 (July 19, 2000).

[138] In the Cordillera region of North Luzon, the indigenous peoples are numerically dominant.

[139] Wiessner, *supra* note 6, at 115.

[140] Macklem, *supra* note 1, at 207.

claim it as both an identity and a status, indigenousness is invoked to fence out structural oppression that reduces indigenous peoples into internally or domestically colonized peoples. The approach must affirm the role of targeted structural oppression in producing indigenousness, which is the upshot of pressures imposed from external sources[141] to legitimize the separation of distinct peoples from resource-rich ancestral domains.

III. OUT OF THE LOOP: AN EXAMINATION OF INDIGENOUS SELF-DETERMINATION CLAIMS

A. *Normative Justifications for Self-Determination*

The positivist, pragmatic, and constructivist approaches, while providing for some general indications as to who qualifies for indigenous rights protection, do not offer a characteristic of indigenous peoples not shared by other minoritized and vulnerable groups. Nor do they resolve the issue of who is indigenous in Asia.

As proposed by Macklem, the constructivist approach may be redeemed when supplemented with the normative justifications for an indigenous international status.[142] He argues that indigenous peoples have a status in international law, and by implication, possess the right of self-determination as a consequence of the structure and operation of international law.[143] He points to the fact that indigenous peoples exist in state polities whose claims to sovereign power over them are legitimized by international law "because of an international legal refusal to recognize these peoples and their ancestors as sovereign actors" even if they existed in self-governing domains prior to colonization.[144] The refusal to recognize indigenous peoples as sovereigns while recognizing other collectivities legitimized the arbitrary assertion by states of sovereignty over them and their resources,[145] their ownership over which predates the states. By giving legitimacy to the exclusion of indigenous peoples from the distribution of sovereignty, international law obliges itself to reverse what it created by recognizing indigenous self-determination. Thus, if any group asserting indigeneity under Kingbury's approach can support its self-determination claims with Macklem's argument, it must be indigenous.

Macklem's thesis is very compelling but is not without issues. Under it, substate nations, and indigenous peoples will belong within the

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[141] Rodolfo Stavenhagen, *Indigenous Rights: Some Conceptual Problems*, *in* INDIGENOUS PEOPLES EXPERIENCE WITH SELF-GOVERNMENT 9, 14-15 (W. J. Assies and A.J. Hoekema eds., 1994).

[142] Macklem, *supra* note 1.

[143] *Id*. at 186.

[144] *Id.*

[145] *Id.*

same loop without a demarcating line between them. Like indigenous peoples, substate nations were also excluded from the distribution of sovereignty.

Dahbour also has an explanation why indigenous peoples as a class deserve a self-determining status.[146] He refers to an entrenched and continuing pattern adopted by the sovereign that rules over them jeopardizing the group's pursuit of their way of life, consigning them to a situation of internal colonialism.[147] This pattern favors other groups over them resulting in patently unjust redistribution of goods and resources. Darbour cites two manifestations of discriminatory redistribution: 1) the mistreatment and extreme disenfranchisement of a people from their material and spiritual culture; 2) the economic exploitation in such manner that material wealth and opportunities are unfairly reallocated paralyzing a people's capability to live independent and self-sustaining lives within their regional environments.[148] When these disrupt a people's capacity to pursue a way of life distinct from the rest of the politically dominant population, self-determination for them is legitimate. This is, however, an argument not exclusive to indigenous peoples.

Furthermore, it is argued that indigenous peoples are generally ignored, and thus, had no participation in state-building as well as in designing the modern constitution of states.[149] Nor were they ever made meaningful participants in national decision-making[150] under the priesthood of international law. Having been deprived of full participation in the political process, they have never surrendered their right to self-determination.[151] This is because the "most obvious justification of self-determination follows from the prima facie impermissibility of governing people without their consent."[152] No state may impose its sovereignty over a people that did not consent to be part of it.[153] It is propounded that the forcible assimilation of certain peoples within states grounds self-determination claims.[154] It is even maintained that

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[146] *See* Dahbour, *supra* note 7.

[147] *See id.*

[148] *Id.* at 11.

[149] Erica-Irene A Daes, *An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations*, 21 CAMB. REV. INT'L AFF. 24 (2008).

[150] *Id*.

[151] *Id.*

[152] CHARLES BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 94 (1979).

[153] John Howard Clinebell & Jim Thomson, *Sovereignty and Self-Determination*, 27 BUFFALO L. REV. 709 (1978).

[154] JURGEN HABERMAS, THE POST NATIONAL CONSTELLATIONS 72 (2001).

> [w]here indigenous nations never voluntarily transferred their political rights to surrounding States, they retain an unrelinquished and foundational authority over their own members and historical domains and are thereby entitled to a quasi-independent or even fully independent political existence if they choose this.[155]

However, why should these arguments not apply to substate nations who, similar to indigenous peoples, are entrapped as nations within assimilating states?[156] Substate nations were also excluded from the distribution of sovereignty by international law and denied participation in state building. Additionally, substate nations "contest the authority of the state to govern them and their territories, seek acknowledgement of historic injustices, and seek to pluralize state structures through recognition of rights of self-determination or autonomy."[157] Since these grounds for indigenous self-determination equally apply to substate nations erecting a firewall between them produces moral inconsistencies.[158]

Kymlicka's argument would not hold water if Macklem's thesis is supplemented with the material infrastructure that configure the respective self-determination demands of indigenous peoples and substate nations. As identity, indigeneity is contextual, produced by historical and material realities.[159] It is, therefore, socially constructed, "the product of a range of shifting and diverse social and cultural categories and identifications that are rarely stable."[160] Exploring the natures and contexts of self-determination assertions of indigenous peoples and substate nations, one can tell the two categories apart. The presence of the firewall Kymlicka says is needless is in turn vindicated.

B. *Beyond Intrinsic Attributes: Indigeneity as Structural Oppression*

Indigenousness is not an immutable construct derived solely from intrinsic attributes of peoples or biological or cultural continuity.[161] It is the consequence of oppressive policies from above or the outside.[162] Thus,

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[155] BURKE A. HENDRIX, OWNERSHIP, AUTHORITY, AND SELF-DETERMINATION 3 (2008).

[156] Wiessner, *supra* note 6, at 115.

[157] Kymlicka, *supra* note 133, at 192.

[158] *Id.* at 199.

[159] Michelle Harris, Bronwyn Carlson & Evan S. Poata-Smith, *Indigenous Identities and the Politics of Authenticity*, *in* THE POLITICS OF IDENTITY: EMERGING INDIGENEITY 3 (Michelle Harris, et al. eds., 2013).

[160] *Id.*

[161] Stavenhagen, *supra* note 141, at 17.

[162] *Id.*

Stavenhagen says that it was the invasion and colonization of Americans in the 16th century that divided people into indigenous and Europeans.[163]

In Asia, it is not a distinct pre-colonization culture or informal government system that definitively makes indigeneity. In fact, it is equivocated that the preservation of pre-contact or low-technology indigenous cultures is neither practical nor desired by most groups[164] since cultures are dynamic and evolve with the material conditions of society. Neither is ethnic distinctiveness a unique claim of indigenous peoples.

More than painting the image of the noble savage, indigenousness embraces the marginalization, dehumanization, and powerlessness generated by the imposition of exploitative outside dictates. These dictates are expressed and legitimized as laws or policies that reconfigure indigenous peoples' economic, political and socio-cultural existence under the umbrella of structural oppression. In the Asian context, aboriginality, having commonly owned ancestral territories, strong attachment to the homeland, the desire to maintain a separate identity, and perpetuate ancient economic, political and socio-cultural systems each of these or a combination of them will not make a people indigenous without structural oppression. Indigenousness is not something a people is born with. Indigenous peoples are defined as much by their relations with the state as by any intrinsic characteristics that they may possess.[165]

Indigenous peoples, who have limited access to power and resources and lack political influence. This does not, however, necessarily buttress a right to a separate status.[166] Other groups, whose identities are derived from race, ethnicity, sexual orientation, or religion, may also be subjected to structural oppression barring their access to power and resources. But subjection to structural oppression does not automatically ground a claim to indigeneity. Every oppression is a tribute to social inequality and injustice, but not all oppression produces indigenousness. To determine whether the oppression produces indigeneity, context is very important as will be shown in the succeeding discussion.

C. *The Self-Determination Demands of Substate Nations*

Ethnic, linguistic, and cultural minority groups to whom Article 27 specifically refers are said to aspire for integration and assimilation into the mainstream without being discriminated against.[167] Indigenous peoples

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[163] *Id.* at 15.

[164] Alison Brysk, *Turning Weakness into Strength: The Internationalization of Indian Rights*, 23:2 LATIN AMERICAN PERSPECTIVES 38, 41 (Spring 1996).

[165] DAVID MAYBURY-LEWIS, INDIGENOUS PEOPLES, ETHNIC GROUPS, AND THE STATE 54 (1997).

[166] HENDRIX, *supra* note 155, at 24.

[167] Asbjorn Eide (Special Rapporteur for Sub-Commission on the Promotion and Protection of Human Rights), *Categories of Rights: Some Initial Observations in Working*

and substate nations, unlike other oppressed or minoritized groups, aspire for self-determination and are similar in that sense. As peoples, international law affirms they have the right of self-determination, by virtue of which "they freely determine their political status and freely pursue their economic, social and cultural development."[168] However, the radices of structural oppression within these two categories of peoples are different. The articulation of their self-determination claims are also equally different. Thus, the goals of the dominant forces in structurally oppressing them are not identical.

Both substate nations and indigenous peoples have territorial claims. This is what distinguishes them from other minority groups who may be similarly distinct. Other minority groups may possess an unequivocal or coherent sense of identity distinguishing them from the rest of society. Nevertheless, without territorial claims, they cannot reasonably articulate a right to self-determine or make demands for statehood. The Roma, a minority group aggrieved the worst in Europe, for example, are non-territorial as they are dispersed across that continent.[169] Without a territorial claim,[170] uniting them to fight against the collective persecution suffer at the hands of governments is an insurmountable challenge.[171]

Land galvanizes the solidarity of a people. Hence, to destroy the American Indian tribal peoples and accomplish their assimilation in the 1800s, the United States government parceled their tribal lands into individual allotments to limit the natives to their individual spaces.[172] The allotment policy was cognizant that "[w]hen land is held in common the possibility of dissolving the group is difficult"[173] but fragmentation of the

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Paper on the Relationship and Distinction Between the Rights of Persons Belonging to Minorities and Those of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/2000/10 (July 19, 2000).

[168] Article 1, International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171; article 1, International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3 / [1976] ATS 5 / 6 ILM 360 (1967).

[169] ZOLTAN BARANY, THE EAST EUROPEAN GYPSIES: REGIME CHANGE, MARGINALITY, AND ETHNOPOLITICS (2002).

[170] *Id.*; Erin Kristin Jenne, *The Roma of Central and Eastern Europe: Constructing a Stateless Nation, in* THE POLITICS OF NATIONAL MINORITY PARTICIPATION IN POST-COMMUNIST EUROPE: STATE-BUILDING, DEMOCRACY, AND ETHNIC MOBILIZATION 189 (Jonathan Stein ed., 2000).

[171] ZOLTAN BARANY, *supra* note 169; Ian Hancock, *The Consequences of Anti-Gypsism in Europe*, 2 OTHER VOICES (Feb. 2000).

[172] MONROE E. PRICE, LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES 541 (1973).

[173] *Id.* For a detailed discussion on the extent of dispossession American Indians suffered under the Allotment law, *see* Susan Campbell, *On 'Modest Proposals' to Further Reduce the Aboriginal Landbase by Privatizing Reserve Land*, 27 (2) CAN. J. NATIVE

communal land would dismantle collective cohesion[174] and force the indigenous peoples to integrate into the mainstream.[175] This is why states conjure the specter of secession when collectivities with territories articulate self-determination demands.

The originalist interpretation of self-determination equated it with secession and limited it to colonial situations.[176] This has evolved over time to acquire a contemporary flavor.[177] Canada's Supreme Court proclaimed that a plurality of peoples may exist in an existing state and a *people* does not have to refer to its entire population, and that internal self-determination short of statehood is a remedy for grave human rights violations committed on groups within states.[178] This was a globally groundbreaking decision[179] and is now the prevailing international legal thought. Specifically, that Court said that

> a right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or

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STUD. 219-46 (2007).

[174] *Id.*

[175] JAMES ANAYA, INDIGENOUS PEOPLES AND INTERNATIONAL LAW 318 (2004).

[176] KRISTINA ROEPSTORFF, THE POLITICS OF SELF-DETERMINATION: BEYOND THE DECOLONISATION PROCESS (2013).

[177] Hurst Hannum, *The Specter of Secession: Responding to Claims for Ethnic Self-Determination*, 77 (2) FOREIGN AFFAIRS 13, 13 (1998).

[178] Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

[179] Prior to the 1998 *Reference re Secession of Quebec*, the HRC had been way too cautious to make a statement that would effectively recognize the peoplehood of indigenous peoples. But in 1999, it acknowledged indigenous self-determination which is in effect a recognition of self-determination claims. The HRC stressed, in reference to Canada's aboriginal peoples that "the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence." This was an indirect affirmation of indigenous peoplehood which the HRC had long been reluctant to acknowledge. This Observation came within the year that Canada ruled on the Reference, Quebec Secession case that self-determination is possible in the non-colonial context. *See* Concluding Observations of the Human Rights Committee: Canada, ¶ 8, U.N. Doc. CCPR/C/79/Add.105 (July 4, 1999). Also, in 2000, the HRC made a turn-around in *Apirana Mahuika v New Zealand* when it conceded in an individual complaint that "the provisions of Article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27" which affirmed that indigenous peoples are entitled to the rights in article 1. However, it repudiated claims of Article 1 violations stressing "that the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated." *See* Human Rts. Comm., Apirana Mahuika v. New Zealand, Communication No 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (Nov. 15, 2000).

> exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the State of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing State.[180]

Historically, however, substate nations and indigenous peoples do not necessarily have the same self-determination claims. Substate nations organize their self-determination claims around both irredentist and the secessionist goals,[181] which necessarily call for the redrawing of territorial metes and bounds.

Secessionist or separatist movements are attributed to ethnic conflicts or capitalize on ethnic differentiation although the underpinning force may derive from a different source. When one ethnic group dominates power relations, it oppresses others through the state apparatus. When the space for ethnic pluralism becomes too constricted, the oppressed then demand secession. As a result, civil war erupts with the state supporting the dominant ethnic group.

There is also a view that ethnic entrepreneurs and competing elites fan ethnic conflict and manipulate ethnic identities to gain power.[182] This happens when elites from territorial non-dominant ethnic groups mobilize ethnic identities of their people against the centralizing state to install themselves to power.[183] In those cases where the oppressed peoples wear the same ethnic badge as those in an adjacent state with an agenda of territorial expansion, their self-determination may be organized around irredentism to be annexed to the second state.[184] While civil wars between ethnic groups occur within states, the cause, fuel, or trigger may be located externally or in another state interested in expanding its territory or driven by its own strategic self-interest[185] which may not complement that of the group it incites to or supports for secession. Serbia, Russia, Macedonia, and Albania as well as the United States had roles to play in the secession of Kosovo.[186] The ethnic conflict in Kashmir between Muslims and

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[180] Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

[181] *See, e.g.*, Palestinian National Council Declaration of Independence (Nov. 14, 1988), http://www.multaqa.org/pdfs/PNC%20INDEPENDANCE%20DECLERATIONpdf.

[182] PAUL R. BRASS, ETHNICITY AND NATIONALISM: THEORY AND COMPARISON (1997).

[183] DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT (1985).

[184] *Id.*

[185] Gauvav Ghose & Patrick James, *Third-Party Intervention in Ethno-Religious Conflict: Role Theory, Pakistan, and War in Kashmir, 1965*, 17 (3) TERRORISM AND POLITICAL VIOLENCE 427 (2005).

[186] *See* Marcus Papadopoulos, *The US Plan for Macedonia: Keep Serbia Down*

Pandits is propelled by a proxy war between Pakistan and India. Pakistan supports the Muslim insurgents seeking accession to Pakistan, while India pushes for Pandit settlements in the region to maintain its sovereignty.[187] Whatever drives an ethnic conflict, a party player will always end up being violently repressed and oppressed. Eventually, it will demand independence.

The assumption is that secession resulting in the birth of a new state with a homogeneous ethnicity as opposed to a rump state will abate internal conflict[188] because group objectives are mobilized along shared ethnic lines. Thus, secession is defined as "an attempt by an ethnic group claiming a homeland to withdraw with its territory from the authority of a larger state of which it is a part,"[189] and makes ethnicity a crucial political issue.

Secession does not necessarily eradicate ethnic conflicts or improve the lives of the seceding group. It can reorder conflicts when there are more than one ethnic groups in the emergent state.[190] This may be true in the case of irredentists whose external supporters exploit the ethnic kinship to mask realpolitik objectives such as territorial expansion. Political scholarship, thus, does not support secession. Additionally, the international community proscribes it as a remedy for human rights violations because of the resulting territorial fragmentation[191] and the world seems to be united against it.[192]

Perhaps, this has driven other substate nations to couch their self-determination demands utilizing the language of self-rule or autonomy.[193]

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and Russia Out, RUSSIA TODAY (Mar 7, 2017), https://www.rt.com/op-edge/379727-us-macedonia-nato-russia/; *see also* Doug Bandow, *The U.S. Role in Kosovo*, Testimony before the International Relations Committee United States House of Representatives, Mar. 10, 1999, https://www.cato.org/publications/congressional-testimony/us-role-kosovo.

[187] *See* Nasreen Akhtar, *A Response to "The Kashmir Conflict,"* 27: 1 INT'L J. WORLD PEACE 45-53 (2010); *see also*, Rathnam Indurthy, *Rejoinder to Akhtar's Comments on Kashmir*, 27:1 INT'L J. WORLD PEACE 55-59 (2010).

[188] *See* DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 589 (1985).

[189] Donald L. Horowitz, *Irredentas and Secessions: Adjacent Phenomena, Neglected Connections*, *in* IRREDENTISM AND INTERNATIONAL POLITICS 11 (N. Chazan ed., 1991).

[190] HOROWITZ, *supra* note 188; *see also* Jaroslav Tir, *Keeping the Peace after Secession: Territorial Conflicts Between Rump and Secessionist States*, 49(5) J. CONFLICT RESOLUT. 713-41 (2005).

[191] Darlene M. Johnston, *The Quest of the Six Nations Confederacy for Self-Determination*, 44 U. TORONTO FAC. L. REV. 1, 28 (1986).

[192] Wiessner, *supra* note 6, at 116.

[193] *See*, *e.g.*, Ruslan Kermach, *The Separatism of Chechnya in 1991: Prerequisites for the Republic's Secession from Russia*, 2 KYIV-MOHYLA L. & POL. J. 203, 203 (2016); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION:

Tibetan self-determination movements, for example, first emerged as demands for independence but have since been downgraded to genuine autonomy, which China said it is willing to discuss.[194] Whether it is secession or self-rule, the goal of substate nations is always expressed in political language. This is not the case for indigenous peoples.

D. *The Radix of Internal Colonialism of Indigenous Peoples: Resource-Rich Domains as Magnets of Structural Oppression*

Self-determination claims of indigenous peoples, at least in Asia, are framed by their experiences under the economic globalization regime and not fuelled primarily by ethnic conflict. The normative force underpinning their self-determination claims is drawn from their subjection to development aggression.[195] Development aggression defined as "the imposition of so-called development projects and policies without the free, prior and informed consent of those affected, under the rubric of modernization or nation-building"[196] is made possible through the combination of capital, technology, and sometimes, armed security forces provided by states[197] and lax regulatory climates.[198] It facilitates resource exploitation within their domains by a behemoth resulting from the merger of corporate and government actors.

Indigeneity in Asia is the result of sustained and systematic imposition of the dominant forces' orders, which are legitimized as laws and policies targeting peoples who inhabit ancestral lands rich with natural resources. The purpose of such laws and policies is two-fold. First, it is to exploit ancestral domains for an expanding global economy under the tenets of global capitalism supported by international law. Second, it alienates such peoples from their domains for the purpose of promoting the dominant forces' interest couched as national interest or global commons. In both cases, indigenous peoples receive little or no benefit and are thereby further dehumanized.

THE ACCOMMODATION OF CONFLICTING RIGHTS (1996).

[194] *See*, *e.g.*, Michael C. Davis, *Establishing a Workable Autonomy in Tibet*, 30 HUM. RTS. Q. 227, 229 (2008).

[195] EMILY CARUSO ET AL., EXTRACTING PROMISES: INDIGENOUS PEOPLES, EXTRACTIVE INDUSTRIES AND THE WORLD BANK 9 (2003).

[196] Permanent Forum on Indigenous Issues, *Indigenous peoples and the Millennium Development Goals*, U.N. Doc. E/C.19/2005/4/Add.13 (May 16-27, 2005).

[197] Cheryl L. Daytec-Yañgot, *Free, Prior and Informed Consent: A Shield for or Threat to Indigenous Peoples Rights?*, *in* INDIGENOUS PEOPLES EXPERIENCES ON FREE, PRIOR AND INFORMED CONSENT: A COLLECTION OF CASE STUDIES 39, 53 (2010).

[198] Gbenga Bamodu, *Managing Globalization: UK Initiatives and Nigerian Perspective*, *in* HUMAN RIGHTS AND CAPITALISM: A MULTIDISCIPLINARY PERSPECTIVE ON GLOBALISATION 147 (Janet Dine and Andrew Fagan eds., 2006).

As discussed in Part I, *supra*, it is not aboriginality or territorial precedence or some other attribute believed to be inherent in indigeneity, which produced the indigenous peoples in Asia, said to make up 75% of indigenous peoples in the world.[199] As a result, the indigenous peoples in Asia become the casualties of development aggression either by the states or multinational business actors operating under economic globalization. They are precariously positioned in an economic regime dominated by World Trade Organization ("WTO") agreements that have given birth to the corporatized states, the behemoths that emerged from the union of states and business, especially multinational enterprises. They are internally oppressed through the denial of access to their lands and resources, just like their counterparts in other parts of the world.[200] The self-determination of peoples recognized by the ICCPR had long been vaguely interpreted by the HRC in relation to indigenous peoples considering that the right "involves a substantial transfer of political and economic power from the centralized State to the indigenous communities."[201] In rejecting the UNDRIP, the New Zealand representative, speaking for New Zealand, the United States and Australia said that indigenous peoples could use the UNDRIP to assert self-determination to gain exclusive control of their territorial resources.[202]

While indigeneity is a victimhood, it is also a status under international law to which is attached power. Paradoxically, it is indigeneity as victimhood, which grounded the recognition under international law of indigeneity as power. This victimhood is produced and reproduced by international law, which created the global economic order that uses states to exploit indigenous peoples. This justifies the recognition by international law of indigeneity as a status, as a response or a counter-discourse to indigeneity as victimhood. An understanding of this will answer the indigenous question in the Asian context when the application of prevailing conceptual approaches still generate uncertainties. Is the assertion of indigenous status the appropriate response to the oppression?

Owing to their traditional land tenurial systems, indigenous peoples managed to preserve the resources within their domains. These systems without the unbridled pressure of economic globalization, view

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[199] Barsh, *supra* note 37, at 2.

[200] FEIRING, *supra* note 106.

[201] ALEXANDRA XANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF- DETERMINATION, CULTURE AND LAND 113 (2007).

[202] *The Declaration on the Rights of Indigenous Peoples: Hearing on Draft Resolution A/C.3/61/L.18/Rev.1 Before the General Assembly* 61st Session, Item 64(a) (Oct. 16, 2006) (Statement by H.E. Ms. Rosemary Banks, Ambassador and Permanent Representative of New Zealand, on behalf of Australia, New Zealand, and the United States), http://www.australiaun.org/unny/Soc%5f161006.html.

the Earth and everything natural in it as something borrowed from the generations yet unborn[203] and not as articles or commodities for commerce.[204] However, indigenous peoples' cultures are evolving as a consequence of their introduction into the trajectory of modernization and as outsiders try to corrupt their traditional ways of life. For example, Welltanschauung and their spiritual relationship with their domains may be slowly being reshaped. Despite this, there is still an abundance of resources in the indigenous domains, which are now subject to the pressures of economic globalization. While indigenous peoples are a numerical minority in the globe making up 5% of the world population,[205] they inhabit 20% of the Earth's land surface, and stand for and are caretakers of 80% of the world's cultural and biological diversity.[206] The resource-rich vestigial frontiers of the planet are mostly located in their domains. In the Philippines, for example, they are estimated to make up 17% of the population but they host most of the country's remaining biodiversity and the large-scale mining companies operate in their ancestral domains.[207] These resources have become magnets of state oppression in the face of economic globalization.

Indigenous issues were insinuated into the UN system in 1949 with the creation of a group to study the material and cultural development of indigenous Americans to map out how the world could profitably utilize their rich resources.[208] ILO Convention 169 was adopted to provide for a

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[203] For an analysis of indigenous stewardship over lands, *see* S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 J. INT'L COMP. L. COMPARATIVE LAW (2004).

[204] Simon Handelsman, *Mining in Conflict Zones*, *in* BUSINESS AND HUMAN RIGHTS 126, 126 (Rory Sullivan ed., 2003).

[205] Secretariat of UN Permanent Forum on Indigenous Issues, *Indigenous Peoples and the MDGs: We Must Find Inclusive and Culturally Sensitive Solutions* in 4 UN CHRONICLE 1-3, 1 (2007) (citing IFAD, *Statistics and Key Facts about Indigenous Peoples*, 2007, http://www.uNorg/esa/socdev/unpfii/documents/MDGs%20article%20in%20UN%20Chronicle.pdf.)

[206] *Study Guide: The Rights of Indigenous Materials*, UNIVERSITY OF MINNESOTA (2003), http://www1.umn.edu/humanrts/edumat/studyguides/indigenous.html.

[207] Cheryl Daytec-Yañgot, *A Bipolar Philippine Constitution: Reinforcing the Oppression of Philippine Indigenous Peoples under a Double-Edged Legal Framework*, paper presented during the Regional Training on International and National Mechanisms to Promote Indigenous Peoples Rights sponsored by the Asian Indigenous and Tribal Peoples Network, Kathmandu, Nepal, Aug. 2-6, 2008 (citing the speech of Atty. Eugenio A. Insigne, Chairman, National Commission on Indigenous Peoples (NCIP) on *The Important Role of Free and Prior Informed Consent (FPIC) in Responsible Mining* before the Chamber of Mines on November 19, 2007).

[208] Russel Lawrence Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L 369, 370 (1986).

protection regime for indigenous peoples in acknowledgment of the unfettered exploitation of resources in ancestral domains.[209] Additionally, the Indigenous Peoples Rights Act in the Philippines passed to protect the rights of the indigenous peoples. However, as it has been implemented, it has been used to legitimize the plunder of resources in ancestral domains through the free, prior, and informed consent process, which is often railroaded by the government in favor of big business. Prior to the passage of IPRA, any corporate expansion in indigenous domains without the consent of the domain holders was unequivocally oppressive. Apparently, the Philippines learned its lesson from indigenous opposition in the 1970s to World Bank-funded projects in ancestral domains.[210] Indigenous peoples permeated the discourse on self-determination via the "backdoor of international developmental policy"[211] in the face of state-sponsored development aggression in their domains. As the international community was increasingly becoming economically globalized, transnational corporate actors whose powers have overwhelmed those of states assumed a more aggressive stance in exploiting Earth's remaining natural resources within indigenous territories. In the face of community resistance, such expansion would always constitute development aggression. Since the passage of IPRA, the entry of extractive industries in ancestral territories became legal with the National Commission on Indigenous Peoples certifying that indigenous peoples have given their free, prior, and informed consent.[212]

International law designed the "deeper integration and more rapid interaction of economies through production, trade, and financial transactions by banks and multinational corporations."[213] Under this system, the World Bank, the International Monetary Fund, and WTO,[214] are the so-called "handmaidens to the destructive and inequitable forces of

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[209] *See* ILO CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES, 1989 (NO. 169): A MANUAL (2003), http://pro169.org/res/materials/en/general_resources/Manual%20on%20ILO%20 Convention %20No.%20169.pdf.

[210] Cordillera Peoples Alliance, *A History of Resistance: The Cordillera Mass Movement Against the Chico Dam and Cellophil Resources Corporation*, http://www.cpaphils.org/campaigns/A%20History%20of%20Resistance.rtf.

[211] LUIS RODRIGUEZ-PINERO, INDIGENOUS PEOPLES, POSTCOLONIALISM AND INTERNATIONAL LAW: THE ILO REGIME (1919–1989) 332 (2005).

[212] Cheryl L. Daytec-Yañgot & Mary Ann M. Bayang, *IP Imprimaturs to Mining: Symptoms of Internalized Oppression*, NORTHERN DISPATCH (Aug. 2008); Daytec-Yañgot, *supra* note 193, at 40.

[213] Valentine M. Moghadam, *Gender and Globalization: Female Labor and Women's Mobilization*, 5:2 J. WORLD SYST. RES. 367 (1999).

[214] *Id*.

global capitalism"[215] performing significant roles.[216] International law legitimized the economic globalization regime through the WTO, which was purportedly erected to facilitate international trade and economic relations. [217] Instead, it put the domestic economies under the control of a few global elite, effectively shrinking the powers of states. Although their powers have been reshaped, states are indispensable to serve as the infrastructure for a globalized economy[218] dominated by transnational and multinational corporate actors that benefit from their status as "leviathans"[219] under international law.

Developing countries have become economically dependent on the direct investments of global corporate actors whose license to operate is hinged on the economic benefits generated by their technology and capital these countries lack.[220] This dependence is spawned by the reality of dire economic situations,[221] such as heavily indebted central banks, lack of technology to turn their resources to cash, and bourgeoning pressures coming from the major actors such as the World Bank to allow foreign investments.[222] The Bank measures a state's wealth based on its capacity to convert its natural wealth into commercial commodities circulating in free trade regimes. [223] Thus, a state's natural resources becomes its secure comparative advantage over others.[224] The affluent states supply the sophisticated technology and capital to convert these resources into commercial commodities.[225] Desirous of attracting capital and succumbing

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[215] Andrew Hurrel, *Global Inequality and International Institutions*, *in* GLOBAL JUSTICE 32 (Thomas Pogge ed., 2007).

[216] Moghadam, *supra* note 213.

[217] Erica-Irene Daes, *Article 3 of the Draft UN Declaration on the Rights of Indigenous Peoples: Obstacles and Consensus*, *in* SEMINAR: RIGHT TO SELF-DETERMINATION OF INDIGENOUS PEOPLES 12 (2002), http://www.ddrd.ca/site/_PDF/publications/indigenous/proceedingsExpertSeminarMay2002PRINT.pdf.

[218] GAVIN ANDERSON, CONSTITUTIONAL RIGHTS AFTER GLOBALIZATION 21 (2005).

[219] Sarah Joseph, *Taming the Leviathans: Multinational Enterprises and Human Rights*, 46 NETH. INT'L L. REV. 171 (1999).

[220] Frans-Paul van der Putten, Gemma Crijns & Harry Hummels, *The Ability of Corporations to Protect Human Rights*, *in* BUSINESS AND HUMAN RIGHTS 89 (Rory Sullivan ed., 2003).

[221] Bamodu, *supra* note 198.

[222] *Id*.

[223] Fernando Coronil, *Towards a Critique of Globalcentrism: Speculations on Capitalism's Nature*, 12 PUB. CULTURE 363-64 (2000).

[224] *Id*.

[225] Ramon Grosfoguel, *Developmentalism, Modernity and Dependency Theory*

to pressures from international finance institutions and the WTO, developing countries abandoned protectionism and created investment climates with enervated regulatory mechanisms favorable to transnational corporate participation in domestic economies.[226] This confirms that "[a] government that for lack of resources is unable to follow through on a popular mandate does not simply wither away, however; rather, it becomes more vulnerable to being pressed into the service of domestic or foreign elites."[227] Weissbrodt laments that governments, afraid of the prospect of losing the economic benefits brought in by businesses, look the other way when these businesses perpetrate human rights violation on their soils.[228]

International law succeeded in transforming sovereignty,[229] catapulting corporate powers to the international power throne.[230] Thus, the combined force of the international trade and financial institutions, and transnational corporations has erected a global economic order apathetic to the rights of people.[231] Furthermore, this economic order has created human rights problems in the weaker economies and political systems[232] where the imperatives of social justice for the promotion and protection of the rights of the weak are clearly in jeopardy.[233]

Indigenous peoples are concentrated in these developing countries. Due to the vastness of the resources in their domains, they stand particularly vulnerable. Forces of the economic globalization regime are expanding to even the remotest indigenous territories in a frenetic battle to

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in Latin America, *in* NEPANTLA: VIEWS FROM SOUTH (Walter Mignolo ed,, 2000).

[226] Bamodu, *supra* note 198.

[227] JAN KNIPPERS BLACK, THE POLITICS OF HUMAN RIGHTS: MOVING INTERVENTION UPSTREAM WITH IMPACT ASSESSMENT 79 (2009).

[228] David Weissbrodt & Muria Kruger, *Human Rights Responsibilities of Businesses as Non-State Actors*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 315, 345 (2005).

[229] SASKIA SASSEN, LOSING CONTROL?: SOVEREIGNTY IN AN AGE OF GLOBALIZATION 14 (1996).

[230] *See* David Kinley & Adam McBeth, *Human Rights, Trade and Multinational Corporations*, *in* BUSINESS AND HUMAN RIGHTS 54 (Rory Sullivan ed., 2003) (stating "while the rules of international trade law regulate the conduct of States for the direct benefit of multinational corporations engaged in trade . . ., the conduct of entities actually engaged in international trade . . . not regulated.").

[231] Asborjn Eide, *Globalization and the Human Rights Agenda: The Petroleum Industry at Cross-roads*, *in* HUMAN RIGHTS AND THE OIL INDUSTRY 22-45 (A. Eide, et al. eds., 2000).

[232] Van der Putten, et al., *supra* note 220, at 82.

[233] Theo C. van Boven, *A Universal Declaration of Human Responsibilities?*, *in* REFLECTION ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 76 (B. van der Heijden et al., eds., 1998).

accumulate more wealth.[234] This will result in the most ruthless expression of oppression of indigenous peoples since the post- colonial era. Land use policies are crafted to seduce development projects with a nexus to attempts at assimilating the indigenous groups into the mainstream.[235] Indigenous peoples suffer from relocation as "practical expression of [States'] agendas... often justified as a solution for overpopulation, need for resettlement, transmigration, resources exploitation and security."[236] It is painfully unjust that indigenous peoples benefited the least from the natural resources they preserved[237] and that they are the world's most marginalized.[238] In the name of the global common good and the outsider's drive for more profits, they have been deprived of access to their own resources.[239]

Thus, indigenous peoples around the world are the "disenfranchised victims of globalized development"[240] as a result of the consortium between states and multinational corporations.[241] This disenfranchisement from development is part of what constructs indigeneity since indigenous peoples are determined by their power relations with states as much as the inherent features they have.[242]

The same UN system that created the economic globalization regime now acknowledges that abuses indigenous peoples suffer are directly traceable to the forces of this regime. Massive corporate expansion projects targeting indigenous lands are ringing the alarm bells even among UN bodies and other human rights mechanisms. This in turn will help lift the veils that camouflage indigenous issues. The several

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[234] S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 4 (2004).

[235] *See* U.N. Centre on Transnational Corporations, Rep. on Transnational Investments, U.N. Doc. E/CN4/Sub.2/1994/40 (1994).

[236] Jeremie Gilbert, *The Treatment of Territory of Indigenous Peoples in International Law*, *in* TITLE TO TERRITORY IN INTERNATIONAL LAW 199, 205 (J. Castellino et al., eds., 2000).

[237] Rodolfo Stavenhagen (Special Rapporteur), *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, ¶ 56, U.N. Doc. E/CN4/2002/97. In this report, Mr. Stavenhagen said that "resources are being extracted and/or developed by other interests (oil, mining, logging, fisheries, etc.) with little or no benefits for the indigenous communities that occupy the land. . . . [I]n numerous instances the rights and needs of indigenous peoples are disregarded, making this one of the major human rights problems faced by them in recent decades."

[238] BLACK, *supra* note 227, at 117-18.

[239] *See* Permanent Forum on Indigenous Issues, *Indigenous Peoples and the Millennium Development Goals*, U.N. Doc. E/C.19/2005/4/Add.13 (May 16-27, 2005).

[240] LAURA WESTRA, ENVIRONMENTAL JUSTICE AND THE RIGHTS OF INDIGENOUS PEOPLES 14 (2008).

[241] *Id.*

[242] MAYBURY-LEWIS, *supra* note 165, at 54.

observations of the UN bodies on the abusive practices by both corporations and States are proof of this.[243] In recent years, the UN monitoring bodies such as the CERD,[244] HRC,[245] and CESCR[246] articulated their concern about activities ranging from mining, gas pipeline construction, oil exploration, hydro-electric power generation, radio-active, timber extraction, infectious waste disposal, and various extractive industries in indigenous territories. These activities result in displacement, militarization, and other human rights abuses committed against indigenous peoples in different parts of the world.[247]

The CERD for instance expressed alarm that colonists, commercial companies, and state enterprises displaced them.[248] Other international human rights bodies have made the same articulations.[249] Stavenhagen, as

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[243] Xanthaki, *supra* note 201, at 196-97.

[244] *See, e.g.*, Comm. on the Elimination of all Forms of Racial Discrimination, General Recommendation XXIII Concerning Indigenous Peoples, U.N. Doc. CERD/C/51/Misc.13/Rev.4 (Aug. 18, 1997); Comm. on the Elimination of all Forms of Racial Discrimination, Concluding Observations/Comments on Nigeria, U.N. Doc. CERD/C/NGA/CO/18 (Jan. 11, 2005); Comm. on the Elimination of all Forms of Racial Discrimination, Concluding Observations/Comments on Guatemala, U.N. Doc. CERD/C/GTM/CO/11 (May 15, 2006); Comm. on the Elimination of all Forms of Racial Discrimination, Decision 1(68), United States of America, U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006); Comm. on the Elimination of all Forms of Racial Discrimination, Concluding Observations/Comments on Guyana, U.N. Doc. CERD/C/GUY/CO/14 (Apr. 4, 2006).

[245] *See*, *e.g.*, Human Rts. Comm., Concluding Observations on Sweden, U.N. Doc. CCPR/CO/74/SWE (2002); Human Rts. Comm., Concluding Observations on the Philippines, U.N. Doc. CCPR/CO/79/PHL (Dec. 1, 2003); Human Rts .Comm., Concluding Observations on Colombia, U.N. Doc. CCPR/CO/80/COL (May 26, 2004); Human Rts. Comm., Concluding Observations on Thailand, U.N. Doc. CCPR/CO/84/THA (July 8, 2005); Human Rts. Comm., Concluding Observations on Brazil, U.N. Doc. CCPR/C/BRA/CO/2 (Dec. 1, 2005).

[246] Comm. on Econ., Soc. and Cultural Rts., Concluding Observations on Venezuela, U.N. Doc. E/C.12/1/Add.56 (May 21, 2001); Comm. on Econ., Soc. and Cultural Rts., Concluding Observations on Panama, U.N. Doc. E/C.12/1/Add.64 (Sept. 24, 2001); Comm. on Econ., Soc. and Cultural Rts. Concluding Observations on Colombia, U.N. Doc. E/C.12/Add.1/74 (Nov. 30, 2001); Comm. on Econ., Soc. and Cultural Rts., Concluding Observations on Brazil, U.N. Doc. E/C.12/1/Add.87 (June 26, 2003); Comm. on Econ., Soc. and Cultural Rts., Concluding Observations on Ecuador, U.N. Doc. E/C.12/1/Add.100 (June 7, 2004); Comm. on Econ., Soc. and Cultural Rts. Concluding Observations the Russian Federation, ¶¶ 29-30, U.N. Doc. E/C.12/1/Add.13 (May 20, 1997).

[247] See *supra* notes 245-246.

[248] Comm. on the Elimination of all Forms of Racial Discrimination, General Recommendation XXIII (51) Concerning Indigenous Peoples, U.N. Doc. CERD/C/51/Misc.13/Rev.4 (Aug. 18, 1997).

[249] *See*, *e.g.*, Maya Indigenous Community of the Toledo District v. Belize, Merits, nter-Am. Ct. H.R. (ser. C) No. 12.053, ¶ 727 (Oct. 12, 2004); Twelve Saramaka v Suriname, Case No. 12.338, Inter-Am Comm'n H.R., ¶ 214, June 23, 2006,

UN Special Rapporteur on the fundamental rights and freedoms of indigenous peoples, reported acute threats to indigenous peoples' rights as a result of resource extraction operations by states and transnational corporations from which they receive little or no benefit.[250] Furthermore, these resource extractions gravely restrict their capacity to sustain themselves physically and culturally.[251] Stavenhagen also reported that it is ultimately indigenous peoples who pay "the costs of resource-intensive and resource-extractive industries, large dams, other infrastructure projects, logging and plantations, bio-prospecting, industrial fishing and farming, and also eco-tourism and imposed conservation projects."[252] Tauli-Corpuz noted that "for many indigenous peoples throughout the world, oil, gas and coal industries conjure images of displaced peoples, despoiled lands, and depleted resources" which, she says "explains the unwavering resistance of most indigenous communities with (sic)any project related to extractive industries."[253]

Even regional human rights bodies acknowledge that states are oppressing indigenous peoples through development aggression committed in most cases with corporate actors[254] that disrupt indigenous

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http://www.cidh.org; Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 121 (Nov. 28, 2007); The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (2001); Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Communication 276/2003, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Feb. 4, 2010), Awas Tingni v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) (2001); The Kichwa Peoples of the Sarayaku Community and tts Members Ecuador, No. 167/03, Inter-Am. Ct H.R. (2004).

[250] Rodolfo Stavenhagen (Special Rapporteur), *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Doc. E/CN4/2002/97.

[251] *Id*.

[252] Rodolfo Stavenhagen (Special Rapporteur), *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Doc. 2001/65 E/CN4/2003/90 (Jan. 21, 2003).

[253] CARUSO, *supra* note 195.

[254] *See*, *e.g.*, Maya Indigenous Community of the Toledo District v. Belize, Merits, nter-Am. Ct. H.R. (ser. C) No. 12.053, ¶ 727 (Oct. 12, 2004); Twelve Saramaka v Suriname, Case No. 12.338, Inter-Am Comm'n H.R., ¶ 214, June 23, 2006, http://www.cidh.org; Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 121 (Nov. 28, 2007); The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (2001); Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Communication 276/2003, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Feb. 4, 2010), Awas Tingni v. Nicaragua, Inter-Am. Ct. H.R. (ser. C)

life and spiritually, physically, and/or economically displace them from their indigenous territories. The African Commission on Human and People's Rights declared that "many [marginalized vulnerable] groups have not been accommodated by dominating development paradigms and in many cases they are being victimised by mainstream development policies and thinking and their basic human rights violated." [255] It further declared "that indigenous peoples have, due to past and ongoing processes, become marginalised in their own country. . . ."[256]

The opposition of states to the recognition of indigenous peoples is that recognition would amount to affirmation of their self-determination rights under Article 1 of the ICCPR which "involves a substantial transfer of political and economic power from the centralized State to the indigenous communities."[257] In rejecting the UNDRIP, the New Zealand representative, speaking for New Zealand, the United States and Australia said that indigenous peoples could use the UNDRIP to assert self-determination to gain exclusive control of their territorial resources.[258] The United States specifically pointed out self-determination, lands and resources, and redress of rights violation as central but awry provisions in the Declaration.[259] States' refusal to recognize indigeneity and self-determination is due in large part to fear of erosion of power over natural resource control than loss of political power.[260]

(2001); The Kichwa Peoples of the Sarayaku Community and tts Members Ecuador, No. 167/03, Inter-Am. Ct H.R. (2004).

[255] African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Communication 276/2003, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Feb. 4, 2010).

[256] *Id.*

[257] Xanthaki, *supra* note 201.

[258] The Declaration on the Rights of Indigenous Peoples: Hearing on Draft Resolution A/C.3/61/L.18/Rev.1 Before the General Assembly 61st Session, Item 64(a) (Oct. 16, 2006) (statement by H.E. Ms. Rosemary Banks, Ambassador and Permanent Representative of New Zealand, on behalf of Australia, New Zealand, and the United States), available at http://www.australiauNorg/unny/Soc%5f161006.html.

[259] John R. Crook, *Contemporary Practice of the United States Relating to International Law: United States Votes Against Adoption of UN Declaration on Indigenous Peoples*, 101 AM. J. INT'L L. 866, 885 (2007).

[260] John B. Henriksen, *Implementation of the Right of Self-Determination of Indigenous Peoples*, 3 (1) INDIGENOUS AFF. 6, 10 (2000) (noting that all the States except the United States that voted against the UNDRIP cited its provisions on the recognition of rights over ancestral lands and resources as the reason for their votes); *see* Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; "Major Step Forward" Towards Human Rights For All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007), http://www.uNorg/News/Press/docs/2007/ga10612.doc.htm.

E. *Indigenous Self-Determination: Form and Substance*

Kingsbury notes that "[t]he self-determination claims made by indigenous peoples do not presently constitute an immediate crisis of political legitimacy for either the institution of the State or the governments exercising authority within States that have indigenous populations."[261] While self-determination dominates their rights agenda, it is forwarded not as a claim to statehood but rather as the power to chart their economic and cultural destinies within existing state polities[262] Moreover, this power can end development aggression and unbridled expansion into their collectively-owned ancestral domains.[263] These demands, brought about by global capitalism, partly construct indigeneity as status to which is attached power. This is a major distinction between substate nations whose self-determination demands are forwarded as secession, statehood or a degree of political independence.

The form and substance of indigenous demands for self-determination are rooted in the state oppression that provoked them. Similarly, the shape and substance of international and domestic responses to assertions of indigeneity cannot be estranged from the struggle of the movement that used it as a banner to resist development aggression.

The adoption of the UNDRIP and the eventual attribution by international law of self-determination to indigenous peoples was the result of decades of struggle. The emergence of the global indigenous movements in the 70s and 80s[264] was a response to the expansion of development projects in their domains.[265] Indigenous peoples actively contributed to the conceptualization of self-determination as enshrined in the UNDRIP as their response to globalization.[266] No document, other than the UNDRIP, best expresses the form of self-determination that indigenous peoples desire. It is regarded as a "declaration [of] . . . the mainstream agenda of indigenous peoples."[267] The language of UNDRIP is even more specific stating, "indigenous peoples shall not be forcibly

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[261] Kingsbury, *supra* note 5; *see also* Dahbour, *supra* note 7.

[262] Paul Keal, *Indigenous Self-Determination and the Legitimacy of Sovereign States*, 44 INT'L. POL. 287, 288 (2007).

[263] Dahbour, *supra* note 7.

[264] NIEZEN, *supra* note 31.

[265] Sabihah Osman, *Globalization and Democratization: The Response of the Indigenous Peoples of Sarawak*, 21 THIRD WORLD Q. 977, 987 (2008).

[266] Cherie Metcalf, *Indigenous Rights and the Environment: Evolving International Law*, OTTAWA L. REV. 101 (2003); *see also,* Russell Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?,* 7 HARV. HUM. RTS. J. 33, 33-34 (1994).

[267] MAYBURY-LEWIS, *supra* note 165, at 56-57.

removed from their lands or domains,"[268] and that "no relocation shall take place without [their] free, prior and informed consent,"[269] Moreover, the UNDRIP asserts that they "have the right to the lands, domains and resources which they have traditionally owned, occupied or otherwise used or acquired,"[270] and "the right to own, use, develop and control the lands, domains and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired,"[271] Furthermore, the UNDRIP provides "the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources."[272] It also provides that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[273]

In their submission to UN bodies, indigenous peoples phrased their right to self- determination as the right to control their ancestral domains. They complained of massive forced economic globalization projects such oil, gas, timber, mining, logging, and other extractions, are physically, economically, and spiritually displacing them.[274]

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[268] G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 10, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

[269] *Id.*

[270] *Id.* art. 26.

[271] *Id.*

[272] *Id.* art. 32.

[273] *Id.*

[274] *See*, *e.g.*, Human Rts. Comm., Diergaardt et al. v. Namibia, Communication No 760/1997, U.N. Doc. CCPR/C/69/D/760/199 (July 2000); Human Rts. Comm., Lubicon Lake Band v Canada, Communication. No. 167/1984, U.N Doc. Supp. No. 40 (A/45/40), at 1 (Mar. 26, 1990); Human Rts. Comm., Mikmaq v Canada, Communication No. 78/1980 (30 Sept. 1980), U.N. Doc. Supp. No. 40 (A/39/40), at 200 (1984); Human Rts. Comm., Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, (Oct. 27, 2000). For corporate encroachment into indigenous lands in Asia, *see* MARCUS COLCHESTER & SOPHIE CHAO (EDS.), OIL PALM EXPANSION IN SOUTH EAST ASIA TRENDS AND IMPLICATIONS FOR LOCAL COMMUNITIES AND INDIGENOUS PEOPLES (2011); *see also* RUSSEL BARSH, THE WORLD'S INDIGENOUS PEOPLES, http://www.sfu.ca/~palys/Barsh-TheWorldsIndigenousPeoples.pdf.

Indubitably, indigenous peoples embrace self-determination as a prophylactic against development aggression. Any interpretation of indigenous self-determination cannot detract from their conception. After all, indigenous self-determination was conceived not for the benefit of states or corporations but for indigenous peoples. If the definition of self-determination is left to the states, then the right will only serve to maintain the *status quo* as the danger of its assuming a concept farfetched from indigenous realities is very real.

Indigenous movements played a crucial role in the evolution of the meaning and legal implications of self-determination and peoplehood in international law by articulating demands not using the language of political independence. Clearly, gleaning from the UNDRIP, indigenous peoples are not organized around irredentist or secessionist goals,[275] or political aspirations which sets them apart from substate nations. In fact, the Declaration qualifies that:

> [n]othing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.[276]

However, this paper is quick to clarify that secession is not beyond the options of indigenous peoples. It is widely held that secession does not exist as a right in international law, however, international law does not prohibit it either. The international community made up of states is solid in opposition to secession because of the resulting territorial disintegration. But secession should "not be barred by the shibboleth of territorial integrity"[277] when it is the only option[278] because a state "that gravely violates its obligations towards a distinct people or community within its boundaries loses the legitimacy to rule over that people."[279] This is supported by the decision of the Supreme Court of Canada in the case *Reference re Secession of Quebec*,[280] which affirmed the right of secession where a people is deprived of its self- determination right within the state

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[275] Keal, *supra* note 68, at 4.

[276] G.A. Res. 61/295, *supra* note 268, at art. 46(1), annex.

[277] *Id.*

[278] *Id.*

[279] Henriksen, *supra* note 260, at 6.

[280] Supreme Court of Canada, Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

to which it was politically assimilated.[281] When a state oppresses its citizens in a manner tantamount to colonialism, or "in cases of serious injustice where there is no other remedy available, there should at least be a moral if not a legal right to secede."[282]

IV. PARTING WORDS

For as long as the international status of indigenous peoples wanders in a charivari of scholarly opinions conflicting cryptic interpretations of international law, indigenous peoples will continue to be victims of unfettered plunder of their lush resources through economic globalization projects. Clarifying indigeneity is imperative not only for theoretical precision but also for practical reasons[283] such as the prevention of development aggression in their domains. The norms of international and domestic law on indigenous peoples promote and safeguard a human-rights based approach to development in indigenous territories. They require that such development must have the free and prior informed consent of indigenous peoples, among other rights. But who are these peoples? Who are bearers of those rights?

While providing some general indications as to who qualifies for indigenous rights protection, the existing definitions or identification criteria to determine who is indigenous failed to arrive at a characteristic of indigenous peoples not shared by other minoritized or vulnerable groups. All existing definitions are Eurocentric as they require aboriginality or territorial precedence. Applied to the indigenous peoples in the Americas and Oceania, this is unquestionable.[284] However, in Asia, most if not all their peoples can claim priority in time of occupation. As in existing definitions of indigeneity, challenges likewise pervade the approaches in separating the indigenous from the non-indigenous.

The positivist approach, which lionizes the politics of state recognition only serves to preserve the status quo. Where indigenous peoples are subject to the arbitrary exercise of state power particularly the power to say they are indigenous or not. Furthermore, they are deprived of

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[281] *Id.*

[282] Wiessner, *supra* note 6, at 119-20.

[283] *See, e.g.,* Bartlett, *supra* note 34, at 301 (stating that [t]he specific context and use of locally relevant and clear definitions or characterizations of Indigenous Peoples is important for recognizing unique health risks Indigenous Peoples face, for understanding local Indigenous health aspirations and for reflecting on the need for culturally disaggregated data to plan meaningful research and health improvement programs.").

[284] In *Saramaka People v. Suriname*, the Inter-American Court of Human Rights regarded the Saramaka people who are not autochthonous in Suriname as indigenous peoples. The Court ruled that a tribal group which shares the distinctive characteristics of indigenous peoples are entitled to the same land rights of such peoples. *See* Case of the Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

the protection international and domestic laws provide for them simply because the state may just deny their indigeneity. States always act in their own self-interest. Such interest may be couched in the language of the common good or national development, which may be deleterious to indigenous rights.

The pragmatic approach respects self-identification as the main criterion in determining who is indigenous resulting in over-inclusion. But over-inclusion is not the only problem spawned by the pragmatic approach.[285] Over-inclusivity operates to exclude. The drawback, if all minoritized groups can claim to be indigenous, is it waters down the value and undermines the legitimacy of the protection international law accords to indigenous peoples. To say that everyone is indigenous is in effect to say that no one is. Self-ascription as the main criterion reduces the indigenous struggle for state recognition of their status, to a state of stagnation. In terms of legal efficacy, pragmatism is no different from the positivist approach. If everyone may invoke indigenousness to avail themselves of the inherent protections, then the situation goes back to the politics of recognition. Obviously, if every oppressed group claims to be indigenous, the state steps in as the arbiter to resolve the conflict among groups asserting indigeneity. While debates on who are indigenous wax over, the status of the legitimate claimants will be trapped between the state's power to recognize and everyone's right to self-identify.

The constructivist approach proposed by Kingsbury is not without challenges. It fails to surface a characteristic that is unique to indigenous peoples. Under its criteria, national minorities and even some ethnic minorities may also fall within the loop of the *indigenous*. In other words, it does not effectively eliminate the issue of over-inclusion, which may push the legitimate groups to a state of exclusion. However, this approach may be salvaged if it takes into account the normative justification for assertions of indigeneity and the self-determination claims that come with it. The criteria set by Kingsbury are very important insofar as they help shape a group's distinctive self-identity.[286] But they alone do not define indigeneity.

There is a need to factor in the root cause of oppression of the group invoking indigeneity. Indigenous peoples are subjected to internal oppression through projects that physically, economically, and/or spiritually dislocate them from their ancestral domains which host the remaining reservoir of biodiversity. They are internationally oppressed not because of states' fears of secession but because their oppression is necessary to acquire control of their resources convertible to cash under the directives development paradigms of the economic globalization

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[285] Xanthaki, *supra* note 201, at 154.

[286] WALKER CONNOR, ETHNONATIONALISM. THE QUEST FOR UNDERSTANDING 104 (1994).

regime. The root cause of their oppression is evident from the evolution of international law on indigenous rights. While professing to protect these rights, international law also legitimized the state-directed exploitation of resources in indigenous domains. This fact is also evident from domestic legislations on indigenous rights. No other minority group entitled to self-determination is similarly situated as indigenous peoples.

In the case of indigenous peoples, their self-determination claims are forwarded as demands to control their communal ancestral lands, which various international tribunals have helped to articulate. In the UNDRIP, which indigenous peoples helped draft, they categorically expressed that secession as a right was not smuggled into the Declaration. It goes without saying, however, that secession is available to them as an option under international law.

Indigenousness is therefore not limited to characteristics inherent in a people. It also embraces the suffering of peoples. By themselves or their ancestors, they managed to preserve the natural resources in their communally owned domains that their traditional world view did not conceive as commodities. Sadly, these resources became the snare that invited all forms of human rights violations and abuses suffered at the hands of the corporatized states collectively known as development aggression.

In the ultimate analysis, targeted structural oppression akin to internal colonialism in the form of oppressive laws and policies in the name of economic globalization have configured indigeneity as victimhood. The demands that the victims asserted, which international law acknowledged, constructed indigeneity as a status that carries the right of self-determination. Both of these dimensions are the elements which make indigeneity an identity.

Back to the nagging question: Who are the indigenous peoples in Asia? Apply Kingsbury's constructivist approach and then look into the normative hinge of the claim to being indigenous, and the nature of the structural oppression to which the claimants are subordinated. Therefore, it is essential to evaluate assertions of indigenousness in Asia taking into consideration the normative bases for its recognition. Otherwise, the constructive ambiguity surrounding the term *indigenous peoples* will inspire protracted disagreements that can hold hostage the fate of indigenous peoples and detain their issues and grievances in the discussion rooms of UN bodies and academic circles. Meantime, while international law, and legal and political discourses grapple with the full import of indigenousness, indigenous peoples are left with inadequate legal prophylactic to shield them from the tentacles of economic globalization in their territories which result in the same historical injustices they and their ancestors suffered.

No doubt, indigeneity in Asia is a consequence of structural oppression in the form of development aggression, seeking to remove its

victims from their resource rich ancestral lands to serve the ends of economic globalization. Both state and corporate actors combined their powers to commit the aggression. I argue that if the structural oppression that marks the existence of identified indigenous peoples in Asia ceases, they will cease to be indigenous, thereby producing merely distinct ethnic groups.