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## ESSAY

# INDIGENOUS RECOGNITION IN INTERNATIONAL LAW: THEORETICAL OBSERVATIONS

Patrick Macklem\*

At the height of the Second World War, Hans Kelsen, one of the world's leading proponents of the view that there exists a sharp distinction between politics and law, published an essay entitled "Recognition in International Law: Theoretical Observations" in *The American Journal of International Law*.<sup>1</sup> What Kelsen meant by recognition was the recognition of a State and its government in international law. In classic Kelsenian fashion, he argued that "the term 'recognition' may be said to be comprised of two quite distinct acts: a political act and a legal act."<sup>2</sup> Political recognition, such as the establishment of diplomatic relations, means that the recognizing State is willing to enter into a political relationship with the recognized community. But this willingness, even if reciprocal, does not turn the community in question into a State in international law. In contrast, legal recognition is constitutive of statehood. It is a legal conclusion—Kelsen calls it "the establishment of a fact"<sup>3</sup>—that a community meets international legal requirements of statehood. According to Kelsen, "by the legal act of recognition the recognized community is brought into legal existence in relation to the recognizing [S]tate, and thereby international law becomes applicable to the relations between these [S]tates."<sup>4</sup>

Contemporary accounts of recognition in international law treat recognition in declaratory terms, as an act by one State that affirms the legal

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1. Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605 (1941). Kelsen's article sparked a lively debate. See Edwin Borchard, *Recognition and Non-Recognition*, 36 AM. J. INT'L L. 108 (1942); Herbert W. Briggs, *Recognition of States: Some Reflections on Doctrine and Practice*, 43 AM. J. INT'L L. 113 (1949); Philip M. Brown, *The Effects of Recognition*, 36 AM. J. INT'L L. 106 (1942).

2. Kelsen, *supra* note 1, at 605.

3. *Id.* at 607.

4. *Id.* at 609. One of Kelsen's contemporaries, Hersch Lauterpacht, argued in 1948 that the constitutive account yields recognitional rights and duties. See HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* (1948); see also TI-CHIANG CHEN, *THE INTERNATIONAL LAW OF RECOGNITION: WITH SPECIAL REFERENCE TO PRACTICE IN GREAT BRITAIN AND THE UNITED STATES* (L.C. Green ed., 1951) (giving a declaratory account of recognition in international law that includes recognitional rights and duties); Josef L. Kunz, *Critical Remarks on Lauterpacht's "Recognition in International Law"*, 44 AM. J. INT'L L. 713 (1950) (critiquing Lauterpacht's thesis).

existence of another State.<sup>5</sup> On a declaratory account, whether a State exists in international law does not turn on whether other States recognize it as a State; instead, it turns on whether it possesses the objective attributes of a State. Despite their differences, what declaratory and constitutive accounts of recognition share is the insight, eloquently articulated by Kelsen in 1941, that international law itself supplies the criteria for determining the international legal existence of a State. This insight assumes renewed relevance in light of the fact that international law increasingly structures and regulates relations between States and individuals and groups. Numerous international legal instruments assume that individuals belong to certain communities. In some circumstances, communities themselves exist in international law—not as States, but as international legal actors in their own right.<sup>6</sup> In Kelsenian terms, what criteria does international law provide to determine the legal existence of a community that is legally distinct from the State in which it is located?

This Essay addresses this question in the context of the evolving status of indigenous peoples in international law. International instruments vest rights in indigenous peoples, and establish indigenous peoples as international legal actors to whom States and other international legal actors owe legal duties and obligations. These developments began between the First and Second World Wars, when the International Labour Organization (ILO) began to supervise indigenous working conditions in colonies. They continued after the Second World War with ILO Conventions No. 107 and 169, which vested rights in indigenous populations located in States that are a party to their terms.<sup>7</sup> More recently, the U.N. General Assembly enacted the Declaration on the Rights

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5. See, e.g., Opinion No. 1 of the Arbitration Commission of the Peace Conference on Yugoslavia (Nov. 29, 1991), *reprinted in* 31 I.L.M. 1494, 1495 (1992) (“[T]he existence or disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory.”). See generally JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 1–28 (2d ed. 2006) (detailing a comprehensive overview of the debate).

6. International organizations also possess the capacity to acquire international legal personality. See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11) (“[The United Nations] is a subject of international law and capable of possessing international rights and duties, and . . . it has capacity to maintain its rights by bringing international claims.”).

7. International Labour Organization (ILO), *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169), June 27, 1989, 1650 U.N.T.S. 383, *reprinted in* 3 INT’L LABOUR ORG., *INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1977–1995* 324–36 (1996) [hereinafter *Convention No. 169*]; ILO, *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (ILO No. 107), June 26, 1957, 328 U.N.T.S. 247, *reprinted in* 2 INT’L LABOUR ORG., *INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1952–1976* 99–108 (1996) [hereinafter *Convention No. 107*].

of Indigenous Peoples,<sup>8</sup> which declares that indigenous peoples possess a wide array of rights, including the right to self-determination. It affirms the international legal existence of indigenous peoples by recognizing them as legal subjects, and it renders international law applicable to their relations with States. Some of these international instruments, such as conventions adopted by the ILO, legally bind States that are a party to their terms. Others, like the U.N. Declaration, do not, strictly speaking, legally bind international legal actors, but they nonetheless have diffuse legal consequences for the development of both international and domestic law.

If state recognition may be said to be “comprised of two quite distinct acts: a political act and a legal act,”<sup>9</sup> what legal act of recognition brings indigenous peoples into existence in international law? What criteria does international law provide to determine the international legal existence of indigenous peoples? Some international legal instruments provide guidance on what constitutes an indigenous population or people, but they are not explicit about what constitutes its international legal status.<sup>10</sup> Others, such as the U.N. Declaration on the Rights of Indigenous Peoples, specify no criteria for determining whether a community constitutes an indigenous people in international law. In this Essay, I argue that questions regarding indigenous recognition in international law ought to be approached in light of the nature and purpose of international indigenous rights. Indigenous rights in international law mitigate some of the adverse consequences of how the international legal order continues to validate what were morally suspect colonization projects by imperial powers. Indigenous peoples in international law are communities that manifest historical continuity with societies that occupied and governed territories prior to European contact and colonization. They are located in States whose claims of sovereign power possess legal validity because of an international legal refusal to recognize these peoples and their ancestors as sovereign actors. What constitutes indigenous peoples as international legal actors, in other words, is the structure and operation of international law itself.

I develop these claims by engaging with several issues raised by indigenous recognition in international law. What legal conclusions has international law drawn from the “political fact” of indigenous peoples in the past? What is the relationship between legal recognition of States and legal recognition of indigenous peoples? What are the legal forms of

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

9. Kelsen, *supra* note 1, at 605.

10. For examples, see generally sources cited *supra* note 7 and *infra* note 44.

indigenous recognition, and what ends do they serve in international law? What role does indigenous legal recognition play in the structure and operation of the international legal order? Part I heuristically locates Kelsen's description of the role of recognition in a broader account of international legal rules and principles governing the acquisition and distribution of sovereign power, and recounts how international law validated claims of sovereign power over indigenous peoples and their territories. Parts II and III describe developments in the ILO that led to the gradual emergence of indigenous populations as legal actors in international law. Part IV addresses developments in the United Nations, culminating in the recent adoption of the U.N. Declaration on the Rights of Indigenous Peoples. Part V offers some theoretical observations on the legal requirements of indigenous recognition in international law, the relation between legal recognition of States and legal recognition of indigenous peoples, and the nature and purpose of international indigenous rights.

## I.

When Kelsen wrote that, "by the legal act of recognition the recognized community is brought into legal existence," what he meant by "legal existence" was international legal recognition.<sup>11</sup> That is, the recognized community acquires international legal status as a legal entity in possession of legal rights in international law. It does so by manifesting attributes that international law requires of States as legal subjects. This is not to say that the community possesses no legal existence before or in the absence of international legal recognition. A community could possess a legal existence by virtue of its own legal system. It could also possess legal status by virtue of the domestic law of the State in which it is located. What Kelsen had in mind was legal status in international law. The legal act of recognition of a community as a State brings that community into international legal existence as a State. It possesses legal rights not simply by virtue of its own laws or the laws of the State in which it is located. It is no longer "located" within a State. It becomes a State unto its own in international law, a subject of international law, governed by international law itself, with its own juridical location in the international legal order.

Kelsen was aware of the objection that, given that it is States themselves that are in the business of recognizing the existence of other States, recognition in international law looks suspiciously more political

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11. Kelsen, *supra* note 1, at 609.

than legal. His response was that international law provides the criteria by which a State can be said to exist, and empowers States to decide whether these criteria have been met. It does not empower States to determine the criteria themselves. For Kelsen, “a community which is to be regarded as a State in an international law sense” must be “constituted by a coercive, relatively centralized legal order”; manifest “a power or authority capable of enforcing the enduring obedience of the individuals living within a certain territory”; and “be independent, *i.e.*, it must not be under the legal control of another community, equally qualified as a [S]tate.”<sup>12</sup> When States establish that “a certain community fulfills these required conditions” of statehood, they perform “the legal act of recognition.”<sup>13</sup>

Kelsen enlisted States as legal authorities empowered to ascertain whether a community possesses the attributes of statehood because, for Kelsen, facts become law when they are held as such by a competent legal authority in a legally prescribed procedure.<sup>14</sup> The value of Kelsen’s contribution lies not in which authority he regarded as performing legal recognition—a view rightly discounted by contemporary accounts of recognition that emphasize that the existence of a State as a subject of international law is not dependent on recognition by other States.<sup>15</sup> It lies instead in the insight that the legal existence of a State is a conclusion that the community in question possesses the attributes that international law requires of States as legal subjects.<sup>16</sup>

Although Kelsen did not use the term, what a community acquires when it is “brought into” international legal existence as a State is international legal authority to exercise sovereign power over persons and territory. International law distinguishes between legal and illegal claims of sovereign power made by communities seeking international legal status as States. Kelsen’s characterization of how a political community becomes a State in the eyes of international law sheds light on the nature of the field itself. By legally validating some claims of sovereign power and refusing to validate others, international law organizes international political reality into a legal order in which certain collectivities possess legal authority to rule people and territory. It conceptualizes certain

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12. *Id.* at 607–08.

13. *Id.* at 609.

14. See HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., Univ. of Cal. Press 2d ed. 1967) (1960).

15. See *supra* note 1 and accompanying text.

16. This insight is also present in Kelsen’s earlier writings, which display more of a declaratory flavor on the topic. See, e.g., HANS KELSEN, *DAS PROBLEM DER SOUVERÄNITÄT* [THE PROBLEM OF SOVEREIGNTY] (1921).

claims of political power as legally valid claims of sovereign authority, legally entitling those entities—States—to govern people and territory.

In 1941, whether a community constituted a State in international law turned on whether it manifested the attributes of a State as stipulated by international law. But, after World War II, international law vested in “all peoples” a right of self-determination.<sup>17</sup> In exceptional circumstances, the right of self-determination vests sovereignty in a political community that is not co-extensive with the population of an existing State. By the right of self-determination, international law extended international legal validity to myriad political projects that resulted in the decolonization of more than seventy colonies and dependent territories.<sup>18</sup> Other States typically recognized the claims of sovereign statehood made by populations that had severed their colonial ties with imperial powers, and they did so in terms of the legal criteria that Kelsen identified as the terms by which a State can be said to exist in international law. But, contemporary international law vests in a colonized people a right to acquire sovereign statehood as an incident of a more general right of self-determination, and it conceptualizes decolonization projects aimed at acquiring sovereign independence as legally valid acts by virtue of this right.<sup>19</sup>

International law thus brings legal order to international political reality by processing the countless claims of sovereign power that have punctuated global politics for centuries by sorting them by a binary opposition between legal and illegal claims of sovereignty. This has the effect of legally including certain political communities, and legally excluding others, in a systemic and dynamic international distribution of sovereign authority. Its systemic nature is a function of the fact that its distributional reach envelops all States in its structure and operation, treating all as formal equals in terms of the legal nature and scope of their sovereign power. Its dynamic nature arises from the presence of rules and principles that authorize reallocations of sovereignty occasioned by the demise of existing States and the creation of new States by right or recognition. These rules and principles render the distribution of sovereignty capable of recalibration and realignment in light of new political developments deemed to possess international legal significance.

The systemic and dynamic dimensions of the distribution of sovereign authority in international law enable us to ask questions about the ways in which it organizes international political reality into a legal order, how and under what conditions it vests certain political projects with

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17. See CRAWFORD, *supra* note 5, at 112–14.

18. *Id.* at 107–31 (providing an overview of these developments).

19. *Id.*

international legal significance, and the distributive outcomes that it produces. What values are promoted, and what values are compromised, by an international legal order that conceptualizes the power to rule people and territory as a legal entitlement that vests in certain geographically concentrated communities in the various regions of the world? To what extent can we speak of a just or unjust distribution of sovereign power? What varieties of inequalities are produced—and what varieties of inequalities are addressed—by an international legal architecture built on the foundation of sovereign equality? What are the rules and principles that determine which communities are entitled to participate in the distribution of sovereignty that international law performs?

This last question is especially relevant to indigenous recognition in international law. Three rules or principles structure the ability of communities to participate as States in the international legal order. First, international law provides that existing States, generally speaking, are entitled to have their territorial integrity respected by other States.<sup>20</sup> Second, as Kelsen so formally reminds us, it also confers legal validity on a claim of sovereignty by a community if it meets the criteria that it supplies to determine whether it constitutes a State. Third, as noted, international law vests the right of self-determination in peoples, which, in certain contexts, entitles a people to sovereign statehood. The first of these three legal stances validates the status quo distribution of sovereignty. The second and third permitted and continue to permit its recalibration in exceptional circumstances.

But, the legality of the existing distribution of sovereign power was not produced simply by its operation. International law began to validate claims of sovereign power, and thereby began to constitute international political reality into a legal order, when European States launched ambitious plans of imperial expansion and began to establish overseas colonies. Each colonizing power viewed itself and others as entitled to claim sovereignty to territory if it could establish a valid claim according to doctrines that governed European imperial practice at the time.<sup>21</sup> Some of these doctrines, such as cession, were antecedents of contemporary international legal principles that regulate the acquisition of sovereignty,

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20. See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), ¶ 6, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (Dec. 14, 1960) (“Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”); see also Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), pmbl., U.N. GAOR, 25th Sess., Supp. No. 28, Annex, U.N. Doc. A/8028 (Oct. 24, 1970) [hereinafter Declaration on Principles of International Law].

21. See generally CRAWFORD, *supra* note 5.



but others, such as the doctrines of discovery and conquest, no longer form part of contemporary international law.<sup>22</sup>

According to the doctrine of discovery, sovereignty could be acquired over unoccupied territory by discovery.<sup>23</sup> If the territory in question was occupied, then conquest or cession was necessary to transfer sovereign power from its inhabitants to an imperial power. However, European claims of sovereign authority over indigenous peoples and territory came to be understood as grounded in a legal fiction that indigenous territory was unoccupied, or *terra nullius*, for the purposes of acquiring sovereign power. In Kelsenian terms, the political fact of indigenous peoples possessed no international legal consequences. The doctrine of *terra nullius* represented the legal conclusion that indigenous peoples possessed no international legal existence. International law, therefore, deemed their lands to be vacant, and neither conquest nor cession was necessary to acquire the sovereign power to rule indigenous people and territory.

International law deemed indigenous territory to be *terra nullius* because European powers viewed indigenous peoples as insufficiently similar to themselves. Again in Kelsenian terms, indigenous peoples did not meet the criteria by which a State can be said to exist—criteria which at the time emphasized civilization and religion. European powers viewed indigenous peoples to be insufficiently Christian or civilized to merit recognizing them as sovereign powers.<sup>24</sup> In the words of Chief Justice John Marshall of the U.S. Supreme Court,

[T]he character and religion of [North America's] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.<sup>25</sup>

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22. This is not to suggest that international law, or at least the principles governing the acquisition of territory, predated the colonial encounter. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 7 (2004) (arguing that international rules deciding which entities are sovereign, and the powers and limits of sovereignty, were “generated by problems relating to colonial order”).

23. See CRAWFORD, *supra* note 5, at 258.

24. See, e.g., WILLIAM C. HALL, *A TREATISE ON INTERNATIONAL LAW* 47 (A. Pearce Higgins ed., 8th ed. 1924) (stating that international law only governs States that are “inheritors of that civilization”); LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 126 (Ronald F. Roxburg ed., 3d ed. 1912) (arguing that the law of nations does not apply to “organized wandering tribes”); JOHN WESTLAKE, *CHAPTERS ON PRINCIPLES OF INTERNATIONAL LAW* 136–38, 141–43 (1894) (drawing a distinction between “civilization and want of it”).

25. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823).

Imperial powers did not always treat indigenous peoples and territory in this way. Early colonial encounters yielded treaties between indigenous peoples and imperial powers in many parts of the world, which continue to structure legal relations between indigenous peoples and States in which they are located. Throughout most of the period of imperial expansion and colonization, however, these treaties did not possess international legal force. International law stipulates that only an agreement between “two independent powers” constitutes a treaty binding on the parties to its terms.<sup>26</sup> The possibility that treaties between imperial powers and indigenous peoples might nonetheless affect the international legal validity of imperial claims of sovereign authority over indigenous peoples and territory was eclipsed, in any event, by the emergence of the international legal fiction that indigenous territory constituted *terra nullius*. Regardless of whether imperial powers had entered into treaties with indigenous populations, international law began to validate imperial claims of sovereign power over indigenous peoples and territories on the basis that indigenous peoples were insufficiently civilized to merit legal recognition as sovereign legal actors.

This mode of validating imperial claims of sovereign power achieved greatest prominence in international legal circles at the turn of the twentieth century,<sup>27</sup> and its acceptance operated to legitimate the distribution of sovereign power retrospectively. It has since been repudiated as a justifiable basis for the assertion of sovereign power over indigenous peoples and their lands.<sup>28</sup> But, its effect was to exclude indigenous peoples from the international distribution of sovereignty and include them under imperial sovereign power. This process of indigenous exclusion and inclusion vested States with international legal authority for the colonizing projects that they began centuries earlier. The adverse consequences of these projects, which included genocide, forced relocation, and territorial dispossession, are well known and need not be catalogued here. Nor is it necessary to turn a blind eye to the many potential benefits

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26. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 58–70 (5th ed. 1998); see also CRAWFORD, *supra* note 5, at 268–70; OPPENHEIM, *supra* note 24, at 285–86 (providing a similar, more contemporaneous formulation that declares that a treaty between a native tribe and a State is not binding in international law).

27. See HALL, *supra* note 24; CHARLES C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* (1922); OPPENHEIM, *supra* note 24; WESTLAKE, *supra* note 24; see also ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990) (analyzing earlier manifestations).

28. See, e.g., *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12, 39, para. 80 (Oct. 16) (“Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*.”). See generally CRAWFORD, *supra* note 5, at 257–74.

of an international legal order that treats sovereignty as a legal entitlement that it distributes among collectivities that it recognizes as States. The important point is that this process of sovereign exclusion and inclusion was not a one-shot affair, occurring some time in the distant past when international law accepted the proposition that indigenous territory constituted *terra nullius*. It is an ongoing process of exclusion and inclusion to the extent that it continues to subsume indigenous populations under the sovereign power of States not of their making.

That the international legal order continues to exclude indigenous peoples from its distribution of sovereign power is underscored by the role and function of the right of self-determination in international law. Although the right of self-determination extended legal validity to claims of sovereign independence by colonized populations, it only validated such claims made in relation to territories geographically separate from a colonizing power.<sup>29</sup> Claims made in relation to part of the territory of a sovereign State violated international legal commitments to the "territorial integrity" of that State.<sup>30</sup> In 1970, the U.N. General Assembly eliminated any doubt that decolonization threatened the territorial integrity of a State by declaring that the territory of a colony has "a status separate and distinct from the territory of the State administering it."<sup>31</sup> Known as the "blue water doctrine" because of its implication that the right to sovereign independence vests only in colonized populations separated by water from their parent colonial State, this geographical condition prevented indigenous peoples located in sovereign States from acquiring sovereign independence. International law not only excluded indigenous peoples from the international distribution of sovereignty and included them under the sovereign power of States not of their making; it restricted the legal capacity to acquire sovereign independence by right to populations not located in sovereign States.

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29. See, e.g., G.A. Res. 1514 (XV), *supra* note 20.

30. See, e.g., *id.*; see also Declaration on Principles of International Law, *supra* note 20.

31. See Declaration on Principles of International Law, *supra* note 20, at 124. The Declaration indicates that

[t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination . . . .

## II.

Although international law excludes indigenous peoples from its distribution of sovereign authority and renders them subject to the sovereign power of the States in which they live, international law also purports to protect indigenous peoples from the exercise of sovereign power. Contemporary international legal protection of indigenous populations formally emerged at the first Berlin Conference on Africa, initiated in 1884 by France and Germany in an effort to stem mounting tensions over competing imperial claims of sovereignty to various regions of Africa. At the Berlin Conference, imperial powers divided up Africa for the purposes of establishing and maintaining colonial territories and mutually recognized their claims of sovereign power to large swathes of the continent. Conference participants also undertook to “watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being . . . .”<sup>32</sup> As a result of the Berlin Conference, what was a justification for excluding indigenous peoples from the distribution of sovereign power—their perceived lack of civilization—began also to form the basis of an international legal duty borne by imperial powers to exercise their sovereign authority in ways that improve moral and material conditions in colonies under their control.<sup>33</sup>

This duty of protection was subsequently embodied in the Covenant of the League of Nations. Members of the League undertook “to secure just treatment of the native inhabitants of territories under their control.”<sup>34</sup> It also received limited institutional form in the League’s mandates system, which applied to territories that had been annexed or colonized by Germany and the Ottoman Empire before World War I.<sup>35</sup> The League’s Covenant declared that these territories, “inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world,” were to be administered by “mandatories”—sovereign States—whose administration in turn was to be supervised by the League Council and the Permanent Mandates Commission.<sup>36</sup> Mandates were grouped into three categories depending on the degree of their “development,” which determined the extent to which they enjoyed

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32. General Act of the Conference of Berlin Concerning the Congo art. 6, Feb. 26, 1885, *reprinted in* E. HERTSLET, 2 *THE MAP OF AFRICA BY TREATY* 468, 473 (3d ed. 1908).

33. See SYBIL E. CROWE, *THE BERLIN WEST AFRICAN CONFERENCE, 1884–85* (1970) (1942) (describing the diplomatic history of the Berlin Conference).

34. League of Nations Covenant art. 23, para. b.

35. See generally QUINCY WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* (1930) (providing a contemporaneous analysis of the mandates system).

36. League of Nations Covenant art. 22.

political autonomy from their mandatory powers.<sup>37</sup> Mandatories were responsible for the “tutelage” of peoples inhabiting mandates in accordance with “the principle that the well-being and development of such peoples form a sacred trust of civilisation . . . .”<sup>38</sup>

International indigenous protection during this period, however, received the most attention from the ILO. Soon after its inception in 1919, the ILO sought to extend its supervisory authority to working conditions in colonies. This initiative was met with wide-spread opposition from colonial powers,<sup>39</sup> despite their pledge to “secure just treatment of the native inhabitants of territories under their control.”<sup>40</sup> The Constitution of the ILO specified that Member States undertake to apply ILO conventions to which they are party “to the non-metropolitan territories for whose international relations they are responsible, including any trust territories for which they are the administering authority . . . .”<sup>41</sup> The Constitution, however, went on to relieve Member States of this obligation “where the subject-matter of the Convention is within the self-governing powers of the territory or the Convention is inapplicable owing to the local conditions or subject to such modifications as may be necessary to adapt the Convention to local conditions.”<sup>42</sup> Colonial powers quickly relied on these exceptions to avoid ILO scrutiny of working conditions in their colonies and territories under their trusteeship. The ILO responded by undertaking studies in 1921 on the working conditions in colonies and dependent territories, establishing a Committee of Experts on Native Labour in 1926 to formulate labor standards for workers in these regions, and enshrining these standards in seven conventions that came into force between 1930 and 1955.<sup>43</sup>

Unlike other ILO conventions during this period that called for robust domestic protection of international labor rights, the seven inter-war conventions aimed at indigenous workers set out relatively weak labor standards for the protection of workers in colonies and dependent territories. They included obligations to phase out the use of forced labor;

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37. Group A was comprised of territories in the Middle East, Group B was comprised of territories in Central Africa, and Group C was comprised of territories in South-West Africa and the Pacific. *See id.* Article 22 explicitly refers to peoples in Group C as “indigenous” populations. *See id.*

38. *Id.*; *see* WRIGHT, *supra* note 35; *see also* ANGHIE, *supra* note 22, at 115–95.

39. LUIS RODRÍGUEZ-PIÑERO, *INDIGENOUS PEOPLES, POSTCOLONIALISM, AND INTERNATIONAL LAW: THE ILO REGIME (1919–1989)* 24–25 (2005).

40. League of Nations Covenant art. 23, para. b.

41. International Labour Organization Constitution art. 35, para. 1, *available at* <http://www.ilo.org/public/english/about/iloconst.htm#>.

42. *Id.*

43. *See infra* note 44. *See generally* RODRÍGUEZ-PIÑERO, *supra* note 39 (examining a detailed account of the history of the ILO’s studies and conventions concerning indigenous workers).

regulations governing the recruitment of workers that sought to minimize the impact of the demand for labor on the political and social organization of the population; requirements that employers enter into written contracts with employees and bear certain costs associated with relocation and transportation of workers; obligations to phase out, "progressively and as soon as possible," penal sanctions for breach of contract; provisions specifying the maximum length or term of employment contracts; and regulations governing the use of migrant workers.<sup>44</sup> Meagre as they were, the actual impact of these conventions on colonial working conditions was negligible. Only one colonial power, Great Britain, ratified all of the ILO conventions before World War II, and other colonial powers either failed to ratify any or ratified only a few after significant delay.<sup>45</sup>

Who constituted indigenous workers for the purposes of these inter-war conventions had little to do with the fact that their ancestors inhabited territory prior to colonization and imperial expansion. Each convention defined an indigenous worker as "a worker belonging to or assimilated to the indigenous population of a non-metropolitan territory" or "dependent territory."<sup>46</sup> Indigenous status was conditional on the legal nature of the jurisdiction in which the population in question was located. International indigenous protection between the two World Wars extended to "populations living under a legal status of dependency in

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44. See Convention Concerning Migration for Employment (revised) (ILO No. 97), July 1, 1949, 120 U.N.T.S. 71, *reprinted in* INT'L LABOUR ORG., INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1919-1981 [hereinafter ILO CONVENTIONS AND RECOMMENDATIONS] 785 (1982); Convention Concerning the Maximum Length of Contracts of Employment of Indigenous Workers (ILO No. 86), July 11, 1947, 161 U.N.T.S. 113, *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra*, at 854 [hereinafter Convention No. 86]; Convention Concerning the Regulation of Written Contracts of Employment of Indigenous Workers (ILO No. 64), June 27, 1939, 40 U.N.T.S. 281, *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra*, at 845 [hereinafter Convention No. 64]; Convention Concerning Penal Sanctions for Breaches of Contracts of Employment by Indigenous Workers (ILO No. 65), June 27, 1939, 40 U.N.T.S. 311, *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra*, at 853; Convention Concerning the Regulation of Certain Special Systems of Recruiting Workers (ILO No. 50), June 20, 1936, 40 U.N.T.S. 109, *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra*, at 837; Convention Concerning Forced or Compulsory Labour (ILO No. 29), June 28, 1930, 39 U.N.T.S. 55, *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra*, at 29. Penal sanctions for breach of contract were finally abolished in 1955. See Convention Concerning the Abolition of Penal Sanctions for Breaches of Contract of Employment by Indigenous Workers (ILO No. 104), June 21, 1955, 305 U.N.T.S. 265, *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra*, at 856. Forced labor was abolished in 1957. See Convention Concerning the Abolition of Forced Labour (ILO No. 105), June 25, 1957, 320 U.N.T.S. 291, *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra*, at 39.

45. RODRÍGUEZ-PIÑERO, *supra* note 39, at 36 n.104.

46. See, e.g., Convention No. 86, *supra* note 44, art. 1(a); Convention No. 64, *supra* note 44, art. 1(a).

conditions of formal colonialism.”<sup>47</sup> It did not extend to indigenous populations living in independent States. In the words of Luis Rodríguez-Piñero, “the category of ‘indigenous’ served as a device for the regulation of the relations between the colonizer and the colonized . . . .”<sup>48</sup>

The distinctly colonial conception of indigenous rights that informed international legal protection under the auspices of the ILO in the inter-war period shifted dramatically after World War II. In 1957, the ILO adopted the Indigenous and Tribal Populations Convention (Convention No. 107).<sup>49</sup> Convention No. 107 was the culmination of a series of initiatives within the ILO that was begun shortly after the end of the war and that sought to expand and deepen its policies with respect to indigenous populations.<sup>50</sup> Convention No. 107 defines two “tribal and semi-tribal” populations that benefit from its protection. The first is comprised of people “whose social and economic conditions are at a less advanced stage” than those enjoyed by “the other sections of the national community and whose status is regulated wholly or partially by their own customs and traditions or by special laws.”<sup>51</sup> By including this category, Convention No. 107 extended its protection to socially and economically disadvantaged “tribal” populations that were “segregated culturally or legally from national society, whether or not this had arisen from the historical circumstances of colonization.”<sup>52</sup> The second category of tribal populations is comprised of people “which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation . . . .”<sup>53</sup> Such people must “live more in conformity with the social, economic, and cultural institutions of that time than with the institutions of the nation to which they belong.”<sup>54</sup> This second category conceptualized an indigenous population as a particular type of tribal population, distinguished by its ancestral connection to conquest or colonization. In other words, all indigenous populations are tribal populations, but not all tribal populations are indigenous popula-

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47. RODRÍGUEZ-PIÑERO, *supra* note 39, at 47.

48. *Id.*

49. Convention No. 107, *supra* note 7.

50. See generally RODRÍGUEZ-PIÑERO, *supra* note 39 (exploring in detail the ILO’s adoption of conventions concerning indigenous rights).

51. Convention No. 107, *supra* note 7, art. 1(1)(a).

52. Russel Lawrence Barsh, *Revision of ILO Convention No. 107*, 81 AM. J. INT’L L. 756, 757 (1987).

53. Convention No. 107, *supra* note 7, art. 1(1)(b).

54. *Id.*

tions.<sup>55</sup> What makes a tribal population indigenous, according to Convention No. 107, is a history of conquest or colonization.

Not only did Convention No. 107 conceptualize an indigenous population as a tribal population with a history of conquest or colonization, it dramatically reconceived indigenous populations as populations located in "independent countries."<sup>56</sup> Before Convention No. 107, only members of indigenous populations in colonies possessed international indigenous rights. The ILO inter-war conventions provided protection to colonial populations because the jurisdictions in which they were located did not constitute sovereign States and instead fell under the sovereign authority of foreign colonizing powers. After Convention No. 107, indigenous populations were no longer co-extensive with colonial populations. Only people who live in independent States, who "live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong,"<sup>57</sup> and whose ancestors experienced colonization or conquest, possess international indigenous rights. Convention No. 107 reoriented the focus of international legal scrutiny of the conditions confronting indigenous peoples from the formal colonial context to those confronting indigenous peoples in independent States.

Convention No. 107's dramatic reconceptualization of an indigenous population in international law occurred against the backdrop of fundamental changes in international legal relations between colonies and colonizing powers. After World War II, the League of Nations' mandate system was replaced by the U.N. Trusteeship Council, which was empowered to oversee the eventual decolonization of dependent territories that were under mandatory supervision prior to the war.<sup>58</sup> The Trusteeship Council did not possess supervisory authority over colonial territories outside of the trusteeship system, but the U.N. Charter did establish the principle that Member States were to administer such territories in conformity with the best interests of their inhabitants.<sup>59</sup>

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55. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Working Group on Indigenous Populations, *Working Paper: Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*, para. 22, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (June 10, 1996) (prepared by Erica-Irene A. Daes). Daes notes that Convention No. 107 "guarantees both categories of people exactly the same rights" and, therefore, the distinction "is of no practical consequence . . ." *Id.* But, the legal consequences are significant. Convention No. 107 defines an indigenous population in part as a tribal or semi-tribal population that has been subject to past conquest or colonization. See Convention No. 107, *supra* note 7, art. 1(1)(b).

56. See Convention No. 107, *supra* note 7, art. 1(1)(a)-(b).

57. *Id.* art. 1(1)(b).

58. U.N. Charter arts. 75-91.

59. *Id.* art. 73.



Colonial populations both inside and outside of the trusteeship system became entitled to exercise their right of self-determination to achieve sovereign independence. Reframing indigenous populations in international law as collectivities in independent States as opposed to collectivities in colonies thus resulted in two regimes of international legal protection. The first, governing colonized populations, entitled such populations to acquire sovereign independence as of right. The second, governing indigenous populations, only entitled such populations to protection internal to and compatible with the sovereign authority of the State in which they were located.<sup>60</sup>

Within this framework, Convention No. 107 significantly expanded the scope of international legal protection of indigenous populations beyond what existed in the inter-war period. While inter-war protection represented efforts by the ILO to assert its jurisdiction to working conditions in colonies and dependent territories, Convention No. 107 had a very different orientation. Although it expressed concern about conditions of employment, and required States to prevent various forms of discrimination in the context of work,<sup>61</sup> its scope was much more ambitious than labor market regulation. Affirming that “all human beings have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity,”<sup>62</sup> Convention No. 107 reached much deeper into the social, economic, and political life of indigenous peoples. It enshrined a right of indigenous “ownership” of traditional territories,<sup>63</sup> it called for the recognition of indigenous legal and cultural traditions,<sup>64</sup> and it required governments to provide indigenous populations with access to existing social security regimes, adequate health services, and educational opportunities,<sup>65</sup> and to respect indigenous customs, institutions, languages, and cultural differences.<sup>66</sup>

Four features of Convention No. 107, however, constrained these provisions. First, the rights and obligations enshrined in Convention No. 107 allowed for exceptions, limitations, and qualifications. As a result, Member States had extensive flexibility in meeting its terms. For exam-

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60. See RODRÍGUEZ-PIÑERO, *supra* note 39, at 142 (“Convention No. 107 contributed to sanction the breach between the international legal regime applying to peoples in conditions of classic colonialism and that applying to indigenous groups living within independent states, as promoted by the Blue Water Doctrine.”).

61. See Convention No. 107, *supra* note 7, art. 15 (Recruitment and Conditions of Employment); see also *id.* arts. 16–18 (Vocational Training, Handicrafts, and Rural Industries).

62. *Id.* pmb1.

63. *Id.* art. 11.

64. See *id.* art. 7.

65. See *id.* arts. 19–20 (Social Security and Health); *id.* arts. 21–22 (Education and Means of Communication).

66. See *id.* arts. 7–8, 23, 26.

ple, indigenous populations are allowed to retain their own customs and institutions, but only to the extent that they “are not incompatible with the national legal system . . . .”<sup>67</sup> Indigenous rights of ownership of land are to be respected “within the framework of national laws and regulations.”<sup>68</sup> Special measures are to be enacted to ensure the effective protection of conditions of employment—again “within the framework of national laws and regulations.”<sup>69</sup> Social security and educational opportunities are to be extended “where practicable.”<sup>70</sup> The Convention stipulated more generally that the nature and scope of the measures to be taken to effect its terms “shall be determined in a flexible manner, having regard to the conditions characteristic of each country.”<sup>71</sup>

Second, Convention No. 107 cast indigenous protection primarily in terms of non-discrimination. Although some of its measures required States to provide indigenous populations with a measure of territorial and political autonomy from the broader population, its primary thrust was the elimination of discrimination against members of indigenous populations. It referred to the social, economic, and cultural circumstances of indigenous populations as hindering them “from benefiting fully from the rights and advantages enjoyed by other elements of the population” and “from sharing fully in the progress of the national community of which they are a part.”<sup>72</sup> It called for “national agrarian programmes” to secure “treatment equivalent to that accorded to other sections of the national community” with respect to the provision of land and means required to promote development.<sup>73</sup> It required all Member States to “do everything possible to prevent all discrimination between workers belonging to the populations concerned and other workers.”<sup>74</sup> It proscribed forced labor “except in cases prescribed by law for all citizens.”<sup>75</sup> It required measures to ensure that indigenous people “have the same opportunity to acquire education at all levels on an equal footing with the rest of the national community.”<sup>76</sup> These and other provisions suggest that international indigenous protection is needed more to address discrimination between indigenous and non-indigenous people within independent States than to secure a modicum of indigenous autonomy from independent States.

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67. *Id.* art. 7(2).

68. *Id.* art. 13(1).

69. *Id.* art. 15(1).

70. *Id.* arts. 19, 23.

71. *Id.* art. 28.

72. *Id.* pmb1.

73. *Id.* art. 14.

74. *Id.* art. 15.

75. *Id.* art. 9.

76. *Id.* art. 21.

Third, Convention No. 107 housed both forms of indigenous protection—anti-discrimination and autonomy—in an overarching objective of “integration.” The measures it demands of government were to protect indigenous people in “their progressive integration into the life of their respective countries.”<sup>77</sup> Integration is to occur based on respect for “the cultural and religious values” of indigenous people, in recognition of “the danger of disrupting the value and institutions” of indigenous populations without replacing them with “appropriate” and acceptable “substitutes.”<sup>78</sup> In this respect, the Convention distinguishes between integration and assimilation, stipulating that integration is not to occur by “force or coercion” or by means of “measures tending towards the artificial assimilation” of indigenous people.<sup>79</sup> Beyond these provisions, the text offers little insight into the meaning of integration. But the concept of integration during this period possessed broader currency in anthropology and the social sciences, as well as in the ILO itself. The terms of Convention No. 107 were consistent with a conception of integration as an enlightened process of cultural adjustment designed to foster economic and social development in ways that reinforce the legitimacy and effectiveness of the national institutions of a State.<sup>80</sup>

Fourth, Convention No. 107 comprehends international indigenous protection in temporal and transitional terms. It conceives of tribal, semi-tribal, and indigenous populations as communities that, because of social and economic conditions, cultural differences, distinctive legal identities, and historical circumstances, have yet to become integrated into the life of their respective countries. International indigenous protection, on this view, enables or facilitates a transition from a State of non-integration to one of integration. For example, the Convention defines the term “semi-tribal” as including “groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community.”<sup>81</sup> Measures that provide indigenous protection are not to be “used as a means of creating or prolonging a state of segregation,” and “will be continued only so long as there is need for special protection and only to the extent that such protection is necessary.”<sup>82</sup> Such measures should also include “policies aimed at mitigating the difficulties experienced by these populations in adjusting themselves to

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

78. *Id.* art. 4.

79. *Id.* arts. 2(2)(c), 2(4).

80. See RODRÍGUEZ-PINERO, *supra* note 39 (providing an extensive analysis of the meaning of integration in Convention No. 107).

81. Convention No. 107, *supra* note 7, art. 1(2).

82. *Id.* art. 3(2)(a)–(b).

new conditions of life and work.”<sup>83</sup> They should protect indigenous institutions, persons, property, and labor “so long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong.”<sup>84</sup>

### III.

In 1989, the ILO adopted a revision of Convention No. 107, entitled the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169).<sup>85</sup> Convention No. 169, in the words of James Anaya, “is a central feature of international law’s contemporary treatment of indigenous peoples’ demands.”<sup>86</sup> Much of its prominence is due to the degree to which it departs from the orientation and commitments of Convention No. 107. Absent from Convention No. 169 is any reference to “integration” as an objective of international indigenous protection. Also absent is any intimation that the rights and obligations it enshrines are temporary measures whose significance wanes as the social, economic, and political conditions of indigenous people improve over time. Some of the rights and obligations contained in Convention No. 107 are reiterated in Convention No. 169, but they are worded more strongly and contain fewer and narrower exceptions, limitations, and qualifications. For example, whereas Convention No. 107 “allowed” indigenous populations to “retain their own customs and institutions where these are not incompatible with the national legal system,”<sup>87</sup> Convention No. 169 declares that indigenous peoples “shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights.”<sup>88</sup> It also recharacterizes indigenous rights as vesting in “indigenous peoples” in contrast to Convention No. 107’s emphasis on “members of indigenous populations.”<sup>89</sup> It reiterates Convention No. 107’s affirmation of indigenous

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83. *Id.* art. 4(c).

84. *Id.* art. 3(1).

85. Convention No. 169, *supra* note 7; see Lee Swepston, *Indigenous and Tribal Peoples and International Law: Recent Developments*, in 30 *CURRENT ANTHROPOLOGY* 259, 259–64 (1989) (offering a contemporaneous account of the revision of Convention No. 107).

86. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 58 (2d ed. 2004).

87. Convention No. 107, *supra* note 7, art. 7(2).

88. Convention No. 169, *supra* note 7, art. 8(2).

89. See KAREN KNOP, *DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW* 237–42 (2002) (analyzing the debates during the drafting process on the issue of the vesting of indigenous rights).

ownership and possession of traditional lands,<sup>90</sup> but it does so in collective terms, as vesting in "peoples." It also specifies that such lands "shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use."<sup>91</sup>

In addition, whereas Convention No. 107 conceived of indigenous protection primarily in terms of non-discrimination, Convention No. 169 strikes a very different balance between non-discrimination and autonomy. It does so by placing additional indigenous rights and state obligations on the international legal register. It provides that indigenous peoples "shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use."<sup>92</sup> It states that "the rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded," including the "right of these peoples to participate in the use, management and conservation of these resources."<sup>93</sup> It requires governments to consult with indigenous peoples "through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly."<sup>94</sup> It also requires governments to "establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose."<sup>95</sup>

Convention No. 169 also introduces the concept of "self-recognition" to the field of international indigenous protection. It states that "self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply."<sup>96</sup> Self-recognition as a criterion of application prevents States from claiming that the Convention does not apply to indigenous peoples within their midst because they have not been identified as such by state law or policy. If self-recognition were the sole criterion of application, then the Convention would vest indigenous rights in all peoples claiming indigenous status that are located in States party to its terms. But, self-identification is specified as "a fundamental criterion," not the sole criterion, which suggests that there are additional international legal requirements of indigenous recognition in international law.

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90. Convention No. 107, *supra* note 7, art. 11.

91. Convention No. 169, *supra* note 7, art. 13(2).

92. *Id.* art. 7(1).

93. *Id.* art. 15(1).

94. *Id.* art. 61(a).

95. *Id.* art. 6(c).

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

Convention No. 169's provisions addressing this question are similar, but not identical, to those contained in Convention No. 107. When specifying to whom it applies, Convention No. 169 refers to "peoples" and not to "populations." It refers to "tribal peoples" but not to "semi-tribal" peoples. It no longer identifies such peoples in terms of "social and economic conditions" that are at "a less advanced stage" than other sections of the national community but instead in terms of social and economic conditions that "distinguish them" from other sections of the national community. Despite these differences, Convention No. 169 affirms what Convention No. 107 declared so strikingly thirty-two years earlier. International indigenous rights attach to peoples located in "independent countries." Like Convention No. 107, it states that it applies to "tribal" and "indigenous" communities. The first are "tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations."<sup>97</sup> The second are "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries."<sup>98</sup> In relation to this second category, Convention No. 169 replaces Convention No. 107's requirement that they must "live more in conformity with the social, economic, and cultural institutions of that time"<sup>99</sup> with a less time-bound requirement that requires them to "retain some or all of their own social, economic, cultural, and political institutions."<sup>100</sup> But, for both conventions, according to either definition, an indigenous community possesses international indigenous rights because of its historic connection to territory that now falls under the sovereign authority of an independent State. Like Convention No. 107, Convention No. 169 conditions international recognition of an indigenous community on

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97. *Id.* art. 1(1)(a).

98. *Id.* art. 1(b). Unlike Convention No. 109, Convention No. 169 provides that indigenous peoples include those whose ancestors inhabited the territory "at the time of . . . the establishment of present state boundaries" as well as "at the time of conquest or colonisation . . ." *Id.* art. 1(1)(b). This addition broadens the ancestral links required of an indigenous community and blurs the distinction, otherwise maintained by the Convention, between indigenous and tribal peoples. See KNOP, *supra* note 89, at 244–45 ("Whereas conquest and colonization encode the wrong central to a historical argument for the rights of indigenous peoples, the phrase 'establishment of present state boundaries' is more neutral and could be seen as diminishing the normative power of the other two").

99. Convention No. 107, *supra* note 7, art. 1(1)(b).

100. Convention No. 169, *supra* note 7, art. 1(1)(b).

international recognition of the sovereign status of the jurisdiction in which that community is located.

Convention No. 169 accordingly comprehends international indigenous protection as measures internal to and compatible with the sovereign authority of the State in which they are located. These internal measures are no longer to be designed to promote integration; they entitle indigenous peoples to differential treatment to protect their languages, cultures, and institutions. But, they do assume that indigenous people belong to a broader political community and that they share common citizenship with its other members. Despite the frequent reference to indigenous peoples, Convention No. 169 makes no reference to a right of self-determination, which, according to the International Covenant on Civil and Political Rights<sup>101</sup> and the International Court of Justice,<sup>102</sup> vests in all peoples. To foreclose the argument that its reference to "peoples" links an indigenous population to the right of self-determination, the Convention stipulates that "the use of the term 'peoples' . . . shall not be construed as having any implications as regards the rights which may attach to the term under international law."<sup>103</sup> Thus, Convention No. 169 continues the trend, begun thirty-two years earlier by Convention No. 107, of enhancing international indigenous protection within existing States, while shielding the international distribution of sovereign power among States from the redistributive potential of the right of self-determination.

#### IV.

In contrast to the ILO, the United Nations turned its attention to international indigenous rights relatively recently. In 1971, the U.N. Sub-Commission on the Prevention and Protection of Minorities commissioned a study on "discrimination against indigenous populations."<sup>104</sup> The resolution commissioning the study, Resolution 1589, echoed the philosophy of integration at the heart of Convention No. 107. It noted that "indigenous populations often encounter racial prejudice and discrimina-

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101. International Covenant on Civil and Political Rights art. 1, Dec. 19, 1966, 999 U.N.T.S. 171; *see also* International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 19, 1966, 993 U.N.T.S. 3 (containing identical language).

102. *See* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 31, paras. 54-55 (Oct. 16); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31, para. 52 (June 21).

103. Convention No. 169, *supra* note 7, art. 1(3).

104. ECOSOC, Res. 1589(L), para. 7, 50th Sess., Supp. No. 1, U.N. Doc. E/5044 (May 21, 1971).

tion,” but it also noted that policies designed to protect indigenous cultures and identities “may, with the passage of time, become unnecessary or excessive and therefore may also become discriminatory in character.”<sup>105</sup> It recommended that States review existing legislation providing indigenous protection to determine whether protective measures are discriminatory, and called on all States to take appropriate measures to eliminate discrimination against indigenous populations.<sup>106</sup> Such measures should not promote either “segregation” or “assimilation”; instead, they should promote the “integration of indigenous populations in the national community.”<sup>107</sup> “Integration,” according to Resolution 1589, is “the most appropriate means of eliminating discrimination against those populations.”<sup>108</sup>

The study authorized by Resolution 1589 took twelve years to complete. Known as the Martínez Cobo Report, it provided a comprehensive analysis of the economic, social, cultural, political, and legal circumstances of indigenous peoples, reviewed the merits and demerits of past and existing measures that States have introduced to protect indigenous populations in their midst, and made extensive recommendations in relation to health, housing, education, languages, culture, land, and political, religious, and equality rights of indigenous peoples. Three features of the Martínez Cobo Report stand out. First, it proposed distinguishing between indigenous and non-indigenous communities on the basis of historical continuity with pre-invasion and pre-colonial times. It offered a “working definition” of “indigenous communities, peoples and nations” as “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.”<sup>109</sup> Second, notwithstanding Resolution 1589’s commitment to integration, the Martínez Cobo Report rejected integration as an overarching objective of international indigenous protection. It noted “the widespread and open rejection by indigenous

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105. *Id.* pmb1.

106. *Id.* para. 4.

107. *Id.* pmb1.

108. *Id.*

109. ECOSOC, U.N. Permanent Forum on Indigenous Issues [UNPII], *Study of the Problem of Discrimination Against Indigenous Populations*, ch. V, paras. 364, 379–80, U.N. Doc. E/CN.4/Sub.2/1982/2/Add.6 (June 20, 1982) (prepared by José Martínez Cobo). The definition also described indigenous communities, peoples, and nations as “non-dominant sectors of society” determined to maintain and reproduce their cultures, institutions, and legal systems. *Id.* para. 379. It also listed criteria for determining historical continuity, including occupation of ancestral lands, common ancestry, culture, language, and residence. *Id.* para. 380.



peoples of the concept of integration,”<sup>110</sup> and argued that “[s]elf-determination, in its many forms, must be recognized as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future.”<sup>111</sup> Third, it recommended the adoption of a U.N. Declaration on indigenous rights as an interim step to the adoption of an international convention on the topic.<sup>112</sup>

The Sub-Commission responded to the Martínez Cobo Report by establishing a Working Group on Indigenous Populations, which began work on the Declaration on the Rights of Indigenous Peoples in 1985. After extensive consultation and discussion in annual public meetings, the Working Group submitted a draft to the Sub-Commission eight years later.<sup>113</sup> Another Working Group eventually produced a subsequent draft Declaration that met with the approval of the Human Rights Council in 2006.<sup>114</sup> After some skirmishes, the Declaration on the Rights of Indigenous Peoples was finally adopted by the U.N. General Assembly in September of 2007.<sup>115</sup>

True to the report that recommended its adoption some twenty-four years earlier, the Declaration on the Rights of Indigenous Peoples enshrines the right of self-determination as its overarching normative commitment. In distinct contrast with Conventions No. 107 and 169, which were conspicuously silent on the subject, the Declaration declares that “indigenous peoples have the right to self-determination,” and states that “[b]y virtue of that right they freely determine their political status

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110. ECOSOC, UNPFI, *Study of the Problem of Discrimination Against Indigenous Populations*, ch. IX, para. 67, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.1 (June 10, 1983) (prepared by José Martínez Cobo).

111. ECOSOC, UNPFI, *Study of the Problem of Discrimination Against Indigenous Populations*, ch. XXII, para. 580, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8 (Sept. 30, 1983) (prepared by José Martínez Cobo).

112. *Id.* para. 312.

113. ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Working Group on Minorities, *Discrimination Against Indigenous People: Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (Apr. 20, 1994).

114. U.N. Hum. Rts. Council Res. 2006/2, Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214 of 23 December 1994 (June 29, 2006), available at <http://www.gcc.ca/pdf/INT000000021.pdf>.

115. One-hundred-and-forty-three countries voted in favor of the Declaration, four voted against, eleven abstained, and thirty-four States were absent from the vote. 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. Doc. GA/10612 (Sept. 13, 2007), available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>. The four States that voted against were Australia, Canada, New Zealand, and the United States. *Id.* Abstaining countries were Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, the Russian Federation, Samoa, and Ukraine. *Id.*

and freely pursue their economic, social and cultural development.”<sup>116</sup> It also guarantees numerous, more concrete rights that effectively elaborate the content of indigenous self-determination.<sup>117</sup> It enshrines rights of autonomy or self-government in matters relating to their internal and local affairs,<sup>118</sup> including “the right to maintain and develop their political, economic and social systems or institutions,”<sup>119</sup> and the right to maintain and develop their distinct political, economic, social, and cultural identities and characteristics, as well as their legal systems and “to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”<sup>120</sup> It calls on States to recognize, observe, and enforce treaties that they have entered into with indigenous peoples.<sup>121</sup>

In addition, the Declaration enshrines the right of indigenous peoples to own, develop, control, and use the lands and territories that they have traditionally owned or otherwise occupied and used, including the right to restitution of lands confiscated, occupied, or otherwise taken without their free and informed consent, with the option of providing just and fair compensation wherever such return is not possible.<sup>122</sup> It also guarantees indigenous peoples the right not to be subjected to genocide and the right not to be subjected to forced assimilation or destruction of their culture, which it suggests includes any action that deprives them of their integrity as distinct peoples or their cultural values and identities, or dispossesses them of their lands, territories, or resources.<sup>123</sup> Also enshrined in the Declaration are the rights to observe, teach, and practice tribal spiritual and religious traditions;<sup>124</sup> the right to maintain and protect historical sites, artifacts, and other manifestations of their cultures;<sup>125</sup> the right to restitution of spiritual property taken without their free and informed consent, including the right to repatriate Indian human remains;<sup>126</sup> and the right to protection of sacred places and burial sites.<sup>127</sup>

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116. UNDRIP, *supra* note 8, art. 3; *see also* KNOP, *supra* note 89, at 255–61, 263–71 (analyzing the debates on this issue during the drafting process).

117. For a similar formulation not restricted to the U.N. Declaration, *see* ANAYA, *supra* note 86, at 129 (“[T]he principle of self-determination and related human rights precepts undergird more particularized norms concerning indigenous peoples.”); *see also* ALEXANDRA XANTHAKI, *INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND* 109 (2007) (“Central to the draft Declaration is the right of self-determination.”).

118. UNDRIP, *supra* note 8, art. 4.

119. *Id.* art. 20(1).

120. *Id.* art. 5.

121. *Id.* art. 37.

122. *Id.* arts. 26, 28.

123. *Id.* arts. 7(2), 8.

124. *Id.* art. 12(1).

125. *Id.* art. 11(1).

126. *Id.* art. 12(2).

127. *Id.* arts. 11(1), 12(1).

In addition, it lists rights of an indigenous people to belong to an indigenous nation,<sup>128</sup> to maintain and use tribal languages and transmit their oral histories and traditions,<sup>129</sup> to education in their language, and to control their own educational systems.<sup>130</sup> It also vests extensive rights to human and genetic resources, seeds, medicines, and intellectual property.<sup>131</sup>

With its extensive catalogue of indigenous rights and overarching commitment to indigenous self-determination, the Declaration reorients international indigenous protection from the relatively even balance between the principles of non-discrimination and autonomy struck by Convention No. 169 to one weighted decidedly in favor of autonomy. It does contain provisions that require States to eliminate discriminatory measures that disadvantage indigenous people. It declares, for example, that “[i]ndigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions . . . .”<sup>132</sup> It also calls for interpretation of its terms in accordance with several principles, including equality and non-discrimination.<sup>133</sup> But the real counterweight to indigenous autonomy in the Declaration is not the principle of non-discrimination; it is the territorial integrity of States. Reiterating the principle that validates the status quo distribution of sovereign power, the Declaration precludes an interpretation of its terms that would authorize or encourage “any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”<sup>134</sup>

The Declaration thus holds fast to the existing distribution of sovereignty and vests indigenous rights in indigenous peoples in light of its effects. It declares the existence of international indigenous rights, including the right of indigenous peoples to self-determination and, in so doing, comprehends indigenous peoples as international legal actors. But, indigenous peoples as international legal actors do not occupy the same international legal plane as sovereign States. When a community is brought into international legal existence as a State, Kelsen reminds us, it becomes formally equal to all other States in terms of the legal nature and scope of its sovereign power. When indigenous communities are brought into international legal existence as indigenous peoples, they hold rights that ground obligations which attach primarily to the States

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128. *Id.* art. 9.  
129. *Id.* art. 13(1).  
130. *Id.* art. 14(1).  
131. *Id.* art. 31(1).  
132. *Id.* art. 21.  
133. *Id.* art. 46(3).  
134. *Id.* art. 46(1).

in which they live. The indigenous rights enshrined in the Declaration, like those in Conventions No. 107 and 169, presuppose complex and extensive relations between indigenous peoples and the States in which they are located.<sup>135</sup> They do not entitle indigenous peoples to acquire sovereign power as of right. They do not vest sovereignty in indigenous peoples, as sovereignty is understood in international law. Instead, international indigenous rights vest in indigenous peoples because international law vests sovereignty in States.

## V.

Unlike Conventions No. 107 and 169, the U.N. Declaration on the Rights of Indigenous Peoples does not provide an explicit definition of “indigenous peoples.” Its silence on criteria for determining in whom it vests rights is to be contrasted with the proliferation of communities that, since the United Nations turned its attention to the subject in the 1970s, have politically constituted themselves as indigenous peoples and that participate in an increasingly influential international indigenous political movement.<sup>136</sup> The deep cultural, geographic, and historical diversities of communities that identify themselves as indigenous peoples and that structure the transnational politics of indigenous identity partly explain why drafters of the U.N. Declaration on the Rights of Indigenous Peoples opted not to provide a definition.<sup>137</sup> A definition, it was feared, would also result in the “dilution of the issue, thus harming the true beneficiaries of the rights of the declaration.”<sup>138</sup> But, the absence of a definition in the Declaration, combined with its extensive set of rights, creates strong incentives for communities to adopt indigenous political identities in order to benefit from its terms.<sup>139</sup>

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135. See Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. INT'L L. & POL. 189, 225 (2001) (“Almost all such regimes [like the 1993 U.N. Draft Declaration] presuppose extensive relations between the autonomous [indigenous] institutions and other government institutions of the [S]tate and between indigenous people and other people within or outside the autonomous area.”).

136. See generally COURTNEY JUNG, *THE MORAL FORCE OF INDIGENOUS POLITICS* (2008) (arguing that in contemporary formation of indigenous political identities, indigenous identity is a political achievement).

137. See generally Benedict Kingsbury, “*Indigenous Peoples*” in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414 (1998).

138. ECOSOC, Comm'n on Hum. Rts., *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995*, para. 28, U.N. Doc. E/CN.4/1996/84 (Jan. 4, 1996).

139. See WILL KYMLICKA, *MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY* 286 (2007) (“[T]oday it is politically advantageous for substate nationalist groups to adopt the label and rhetoric of indigenous peoples.”).

Which communities should be recognized as indigenous peoples for the purposes of the Declaration? There are two common, not mutually exclusive, approaches to this question. The first is to rely on self-identification. A community that identifies itself as an indigenous people brings itself into legal existence as such in international law. Recall Convention No. 169, which provides that “self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”<sup>140</sup> An earlier draft of the Declaration specified that indigenous peoples have “the right to identify themselves as indigenous and to be recognized as such.”<sup>141</sup> But, some States proposed a strict definition of indigenous peoples, and, in the end, all that remains of self-identification in the text of the Declaration is the right of indigenous peoples “to determine their own identity or membership in accordance with their customs and traditions.”<sup>142</sup>

Another approach is to rely on recognition by States that populations within their midst constitute indigenous peoples in international law. On this approach, States are responsible for determining the international legal existence of indigenous communities. During the drafting of the Declaration, for example, China called not only for the Declaration to contain a definition of indigenous peoples but also a requirement that indigenous peoples be recognized as such by the States in which they reside.<sup>143</sup> Recall the distinction between constitutive and declaratory theories of recognition in international law.<sup>144</sup> A constitutive theory holds that a State exists in international law when other States recognize it as such, whereas a declaratory theory stipulates that a State’s international legal existence is conditional on its possession of the objective attributes of a State. Treating States as responsible for the international legal existence of indigenous peoples transposes a constitutive account of state recognition to the context of indigenous recognition in international law. It calls on States to both define and apply criteria to determine the international legal existence of indigenous peoples. A community is not an

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140. Convention No. 169, *supra* note 7, art. 1(2); *see supra* text accompanying note 97.

141. ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Draft U.N. Declaration on the Rights of Indigenous Peoples*, art. 8, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (Aug. 26, 1994), in *Report of the Sub-Comm. on Prevention of Discrimination and Prot. of Minorities on its Forty-Sixth Session*, at 108, U.N. Doc. E/CN.4/Sub.2/1994/56 (Oct. 28, 1994).

142. UNDRIP, *supra* note 8, art. 33.

143. ECOSOC, Comm’n on Hum. Rts., *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, para. 37, U.N. Doc. E/CN.4/1998/106 (Dec. 15, 1997).

144. *See supra* text accompanying notes 3–5.

indigenous people in international law until a State or group of States recognizes it as such.

Both of these approaches rely on sources other than international law to determine whether politically constituted indigenous peoples possess international legal existence. The first approach relies on indigenous peoples themselves; the second relies on States. Both fail to contemplate the possibility that international recognition of indigenous peoples, in Kelsen's words, is "comprised of two quite distinct acts: a political act and a legal act."<sup>145</sup> While Kelsen remained influenced by a constitutive understanding of state recognition, he insisted that legal recognition requires international law itself to supply the criteria for determining the legal status of a collectivity. By surrendering the task of defining the criteria of international indigenous recognition to a domain beyond international law, these approaches—like those under Kelsen's critical gaze—confuse international law with the political projects that it mediates. It is one thing for international law to empower States or indigenous peoples to decide whether international legal requirements are met in any given case. This suggests that international law supplies the criteria of indigenous legal recognition and empowers specific legal actors to determine whether these criteria are met. It is another to hold that they possess the power to determine the nature of these requirements. This suggests that international law does not regulate international legal recognition at all—either because States determine the criteria by which indigenous peoples assume international legal existence or because indigenous peoples themselves determine their own international legal status. If there is a difference between international legal and political recognition, it lies in the capacity of international law itself to supply the criteria by which to determine the international legal existence of both States and indigenous peoples.<sup>146</sup>

Benedict Kingsbury offers a third approach, which is to resolve conceptual problems surrounding international legal recognition of indigenous peoples "in accordance with processes and criteria that vary among different societies and institutions."<sup>147</sup> To strive for a precise definition of "indigenous peoples" that will determine which collectivities

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145. Kelsen, *supra* note 1, at 605.

146. *See id.* at 610–11. Kelsen noted,

If it were correct that general international law does not itself directly determine the concept of "[S]tate" but rather leaves the determination to those [S]tates competent to recognize a community as [S]tate in a given case, then the recognition of [S]tates would not be regulated by any norm of international law and hence would not be a possible subject for codification.

*Id.*

147. Kingsbury, *supra* note 137, at 415.

possess international indigenous rights will do violence to “the fluidity and dynamism of social life.”<sup>148</sup> The fact that indigenous peoples possess international legal status holds “great normative power” for many communities around the world.<sup>149</sup> Determining whether particular communities possess such status and specifying the nature and scope of their rights, however, “can be resolved only through specific contextual decisions, often referring to detailed functional definitions, that are influenced by, and influence, the more abstract global concept.”<sup>150</sup> Kingsbury points out that the indigenous populations in east, southeastern, and south Asian countries, and to a lesser extent African countries, have become active in international indigenous politics.<sup>151</sup> States in which such populations are located challenge their status as indigenous peoples in international law on the basis that their historical experiences of colonization and conquest were radically different than those of indigenous populations in the Americas and elsewhere in the world.<sup>152</sup>

Kingsbury is right to point out the risks of requiring a precise definition of indigenous peoples to sort the legal validity of the political claims of international indigenous status made by diverse communities around the world. It would be impossible to generate a definition “that is workable and not grossly under- or overinclusive” or which “is likely to incorporate justifications and referents that make sense in some societies but not in others.”<sup>153</sup> In place of an overarching definition, Kingsbury offers four factors as criteria for international legal recognition of indigenous peoples: “self-identification as a distinct ethnic group; a historical experience of . . . severe disruption, dislocation or exploitation; long connection with the region; and the wish to retain a distinct identity.”<sup>154</sup> This approach enables “dynamic processes of negotiation, politics, legal analysis, institutional decision making and social interaction” to render the “concept” of indigenous peoples “germane to the enormous variety of local self-conceptions and political contexts to which its relevance is asserted.”<sup>155</sup>

It is difficult to contest that a community merits international legal attention when it has an abiding connection to the territory in which it

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148. See *id.* at 414 (arguing that the fluidity and dynamism of social life cannot be adequately captured by a universal definition for indigenous people).

149. *Id.* at 415.

150. *Id.* at 416. But see PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 33–60 (2002) (examining the suggested differences between indigenous peoples and other groups).

151. Kingsbury, *supra* note 137, at 428–36.

152. *Id.*

153. *Id.* at 414.

154. *Id.* at 453.

155. *Id.* at 457.

resides, it wishes to maintain its distinctive identity, and it is experiencing severe disruption, dislocation, or exploitation. What is needed is an explanation of why international legal attention to these attributes and conditions should assume the legal form of indigenous rights as opposed to more generic human rights, such as minority rights and rights to cultural protection as well as those that protect civil, political, social, and economic interests. That the community identifies itself as an indigenous population does not provide a sufficient explanation of why international law should recognize it in these terms. Kingsbury's approach, unless supplemented by an explanation of the normative significance of international indigenous rights, risks conflating different forms of international legal protection into an undifferentiated concern about the disruption or exploitation of diverse communities of value. Numerical minorities, cultural minorities, national minorities, religious communities, linguistic communities, impoverished majorities—are we all indigenous peoples now?

Determining the criteria for legal recognition of indigenous peoples requires taking an interpretive stand on the nature and purpose of international indigenous rights themselves. Indigenous rights in international legal instruments are sometimes interpreted as concrete expressions of universal rights that inhere in all individuals. Indigenous rights enable indigenous peoples to effectively enjoy human rights that protect features that all of us share. Some of these rights are civil and political in nature. Others are social, economic, and cultural in nature. Debates within the ILO during the drafting of Convention No. 107 and its text, for example, manifest an understanding of indigenous rights as integrative instruments that would enable indigenous people to benefit “fully from the rights and advantages enjoyed by other elements of the population . . . .”<sup>156</sup> As the U.N. Declaration suggests, international indigenous rights can also be construed as concrete expressions of a more general right of self-determination that inheres in all people.<sup>157</sup> From this universal perspective, the legal significance of the political fact of indigenous peoples lies in their experience of discriminatory practices that structure their relations with the broader political communities in which they are located. Understanding the nature and purpose of international indigenous rights in universal terms yields criteria for international indigenous recognition that focus primarily on the barriers that indigenous peoples

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156. Convention No. 107, *supra* note 7, pmb. For a review of these debates, see RODRÍGUEZ-PIÑERO, *supra* note 39, at 173–211.

157. See ANAYA, *supra* note 86, at 99 (“[T]he principle of self-determination arises within international law’s human rights frame and hence benefits human beings as *human beings* and . . . is presumptively universal in scope and thus must be assumed to benefit all segments of humanity.”) (emphasis in original).



face in the effective enjoyment of universal human rights, including the right of self-determination.<sup>158</sup>

But this universal approach risks losing sight of the international legal instruments that it seeks to vest with normative significance. What the legal history of international indigenous protection reveals is that indigenous rights in international law are differentiated rights that recognize differences, partly denied and partly produced by the international distribution of territorial sovereignty initiated by colonization, that exist between indigenous and non-indigenous peoples. International indigenous rights speak to the consequences of organizing international political reality, including indigenous political reality, into a legal system that vests sovereign power in certain collectivities and not others. Not only does this mode of legal organization exclude indigenous peoples from participating in the distribution of sovereign power that it performs, it authorizes legal actors to whom it distributes sovereign power—States—to exercise such power over indigenous peoples and territory to their detriment. The morally suspect foundations of these baseline legal entitlements are why indigenous rights merit recognition on the international legal register. A failure to respect international indigenous rights, in the words of Michael Reisman, “reenacts the tragedy of colonialism.”<sup>159</sup>

International indigenous rights possess normative significance not because they transcend the contingencies of history and protect universal features of humanity. Their significance lies in the contingencies of history itself, namely, in the ways in which international law has organized international political reality into a legal order. Their international legal existence is conditional on the formal legal status of the jurisdiction in which an indigenous population is located—a legal fact underscored by Convention No. 107. Before Convention No. 107, only colonial populations were recognized as indigenous populations. The colonial legal status of the jurisdiction in which a population was located determined its international legal existence as an indigenous population. After Convention No. 107, only members of indigenous populations of independent States possess international indigenous rights—entitlements subsequently extended to indigenous peoples by Convention No. 169 and the U.N. Declaration. The sovereign legal status of the jurisdiction in which indigenous peoples are located now determines their entitlement

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158. *But see* Kingsbury, *supra* note 135, at 190 (“Each of these conceptual structures[—human rights and nondiscrimination claims and self-determination claims—]has its own style of argument, historical account and canon, patterns of legitimation and delegitimation, institutional adherents, discursive community, and boundary markers.”).

159. W. Michael Reisman, *Protecting Indigenous Rights in International Arbitration*, 89 *AM. J. INT’L L.* 350, 359 (1995).

to international protection. On either formulation, indigenous recognition in international law is predicated on the legal nature of the broader political community in which indigenous peoples are located. Indigenous peoples in international law are a function of the structure and operation of the international legal order.

International law, absent exceptional circumstances, does not stipulate that the right of self-determination authorizes an indigenous people to assert sovereign independence from a State in which it is located. Nor does it authorize indigenous people to challenge the international legal validity of the sovereign power to which they are subject on the basis of its morally suspect origins.<sup>160</sup> But, international indigenous rights mitigate some of the adverse consequences of how international law validates morally suspect colonization projects that participated in the production of the existing distribution of sovereign power. Indigenous rights in international law speak to injustices produced by the way in which the international legal order conceives of sovereignty as a legal entitlement that it distributes among collectivities that it recognizes as States. Indigenous peoples in international law are collectivities for which States must adopt appropriate domestic measures to vest contemporary claims of sovereign authority with a modicum of normative legitimacy.

Interpreting the nature and purpose of international indigenous rights in these terms sheds light on questions surrounding the criteria for legal recognition of indigenous peoples. The criteria by which indigenous peoples can be said to exist in international law relate to their historic exclusion from the distribution of sovereignty initiated by colonization that lies at the heart of the international legal order. This does not exclude additional criteria that condition recognition on distinctive collective identities, experiences of exclusion, dislocation or exploitation, and self-identification. Nor does it preclude international law from recognizing indigenous peoples in Africa or Asia. It stipulates that the international legal status of indigenous peoples turns in part on the normative grounds of the sovereign power of the States in which they are located. It requires of indigenous peoples claiming international legal recognition that the sovereign power of the States in which they are located is grounded in international law's refusal to recognize their ancestors as sovereign legal actors.

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160. *Island of Palmas Case (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards 829, 845 (Perm. Ct. Arb. 1928) ("[A] juridical fact must be appreciated in the light of the law contemporary with it . . .").

## CONCLUSION

The purpose of this Essay has been to illuminate the criteria for indigenous recognition in international law. Drawing on Kelsen's classic essay on recognition of States in international law, it distinguishes between legal and political recognition based on the extent to which international law itself provides the criteria for determining the international legal status of indigenous peoples. These criteria should be a function of the nature and purpose of international indigenous rights. The twentieth-century legal history of international indigenous rights, from their origins in international protection of indigenous workers in colonies to their contemporary expression in the U.N. Declaration on the Rights of Indigenous Peoples, demonstrates that their purpose is to mitigate injustices produced by the way in which the international legal order conceives of sovereignty as a legal entitlement that it distributes among collectivities that it recognizes as States. The criteria by which indigenous peoples can be said to exist in international law relate to their historic exclusion from the distribution of sovereignty initiated by colonization that lies at the heart of the international legal order.