Whose International Law? Sovereignty and Non-State Groups

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Juridical conceptions of sovereignty are embedded in theories of international relations and of politics. These theoretical frameworks are significant in informing the practice of international law and practical understandings of sovereignty. They may thus be of considerable consequence to non-state groups, who face the dilemmas of accepting or contesting both particular rules and understandings and theoretical frameworks themselves. I will comment on the implications for strategies pursued by non-state groups, particularly indigenous peoples, of two current, competing visions of international relations—namely, international society and liberal transnational civil society—and their accompanying approaches to sovereignty.

The contemporary enterprise of better connecting international law as a practice to the theories in which it is embedded has faced major impediments, not least the lack of work (until perhaps the past two decades) tying modern international relations theory to political theory,[1] and the paucity of developed theoretical ac-

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[1] *See* Martin Wight, *Why Is There No International Theory? in* Diplomatic Investigations 17–34 (Herbert Butterfield & Martin Wight eds., 1966). (There have, however, been several important recent contributions).

counts connecting international and domestic factors in explanations of behavior or phenomena.[2] Nevertheless, there have emerged several important approaches to the problems of describing and prescribing the practice of international law by reference to particular bodies of international relations theory and general political theory.

One prominent current approach, on which I will focus, is a composite of liberalism and the idea of transnational civil society. It involves two distinct elements. First, it seeks to metamorphose liberal theories of domestic politics into theories of international relations.[3] Secondly, it seeks to adapt and project internationally work on civil society as a basis for understanding intrastate politics and policies, with the aim of providing an account of international relations and international law as the relations and law of an emerging transnational civil society.[4] In this particular liberal vision, the transnational civil society does not yet encompass the entire globe, but it is spreading outward from the liberal heartland of the OECD countries and a few other places.[5] The combination of liberal theory and the notion of transnational civil society is offered by its proponents as a new and better analytical construct to supplant, albeit gradually, the mainstream traditional constructs of international relations on which standard accounts of international law rest.[6] It produces a view of international community in which the state may or may not retain a central place, but in which some fundamentals will undoubtedly be different. It envisages "the end/transformation of sovereignty."

In international relations writing by U.S. authors, the dominant constructs are manifestations of realism and/or liberal institutionalism.[7] Although there are examples of international law scholarship that fit well in each camp, international lawyers tend not to accept either the structural determinism of the most influential realists or the denial of the significance of normativity of the most influential neoliberal institutionalists. The vision of international relations underlying much

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[2] There are major exceptions, including the work represented by the various contributions to DOUBLE EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS, PETER B. EVANS ET AL. EDS., (1993), many of which were influenced by Robert B. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games,* 42 INT'L ORG. 427 (1988).

[3] A useful survey is Mark Zacher & Richard Matthew, *Liberal International Theory: Common Threads, Divergent Strands, in* REALISM AND THE NEOLIBERAL CHALLENGE: CONTROVERSIES IN INTERNATIONAL RELATIONS THEORY (Charles Kegley ed., forthcoming).

[4] On the notion of civil society and its relationship to political and sociological theory, see JEAN COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY (1992) and KEITH TESTER, CIVIL SOCIETY (1992). The argument that the state is gradually being displaced by the emergence of transnational or global civil society is made in spirited fashion in THE STATE AND SOCIAL POWER IN GLOBAL ENVIRONMENTAL POLITICS (Ronnie D. Lipschutz & Ken Conca eds., 1993).

[5] The argument that the world may usefully be understood as divided into zones of peace (associated with democracy and market democracy, and tending to grow) and turmoil is developed in MAX SINGER & AARON WILDAVSKY, THE REAL WORLD ORDER: ZONES OF PEACE/ZONES OF TURMOIL (1993). Arguments that international relations should be analyzed in terms of transnational civil society are by no means the exclusive preserve of adherents of liberal theories of politics and international relations.

[6] I am not aware of any fully worked account of international law based on a liberal theory of transnational civil society. I am here responding to an amalgam of suggestions (often tentative) by different writers on international law and international relations. The most sustained treatment of these issues is in the work of Anne-Marie Slaughter Burley, especially *International Law and International Relations Theory: A Dual Agenda,* 87 AJIL 205 (1993).

[7] *See, e.g.,* KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS (1979); ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); and NEO-REALISM AND NEO-LIBERALISM (David Baldwin ed., 1993).

(although not all) of traditional Anglo-American international law scholarship may be better expressed in the theory of "international society" articulated by Hedley Bull and his mentor, Martin Wight.[8] This theory provides a useful counterpoint for evaluation of liberal theories of transnational civil society in relation to issues concerning non-state groups, particularly indigenous peoples.

A caveat is in order concerning the meaning of "indigenous peoples," which is complex and contested.[9] For the purposes of these remarks, it is not necessary to enter into definitional questions, beyond indicating the term's usage in international practice. Features often associated with "indigenous peoples" include self-definition, common ethnicity, non-dominance in the state, existence in the territory or region prior to more recent arrivals who have become dominant, and particularly close connections with land. The core of the indigenous peoples' movement initially comprised groups identifying themselves as prior inhabitants in areas of European settlement, but groups in Asia and more recently Africa have now become actively involved.[10]

The International Society (of States) and Indigenous Peoples

Hedley Bull analyzed international relations in terms of an anarchical society—a society of states without a central government. This account has been described in postmodernist terminology as embodying an inside/outside dichotomy: state sovereignty is the centering of power/authority inside a given territory, enabling the development there of justice and law, freedom and social progress; but it is also the negation of such community outside the state.[11] Some common normative framework is a necessary evidential feature of international society as Bull defined it: "A *society of states* (or international society) exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the workings of common institutions."[12] This is a pluralist conception, based on accommodations among states with quite different systems and values, although there was tension in Bull's own work between pluralism and the solidarism of an international legal system in which rights are established and capable of some enforcement. This tension is evident in his exposition of a Grotian conception of international society, a *via media* between *Realpolitik* and cosmopolitanism.[13] States are not the only actors,

[8] *See especially* MARTIN WIGHT, INTERNATIONAL THEORY: THE THREE TRADITIONS (1991), a posthumous compilation based mainly on lectures delivered in the 1950s; and HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (1977). *See also* Barry Buzan, *From International System to International Society: Structural Realism and Regime Theory Meet the English School,* 47 INT'L ORG. 327–352 (1993).

[9] *See* Benedict Kingsbury, *"Indigenous Peoples" as an International Legal Concept, in* INDIGENOUS PEOPLES IN ASIA, (R. H. Barnes *et al.,* eds., forthcoming 1994).

[10] The boundaries of the category were again debated in the corridors of the 1993 UN Working Group on Indigenous Populations, prompted partly by the attendance for the first time of the members of the Reheboth Baster community, an Afrikaans-speaking group of whites whose forebears moved to an area near Windhoek in the 1870s, prior to proclamation of the German colony, and now describe themselves as an indigenous people threatened by policies of the Namibian Government.

[11] R. B. J. WALKER, INSIDE/OUTSIDE: INTERNATIONAL RELATIONS AS POLITICAL THEORY 159–83 (1993).

[12] HEDLEY BULL, *supra* note 8, at 13.

[13] *See, e.g.,* Hedley Bull, *The Grotian Conception of International Society, in* DIPLOMATIC INVESTIGATIONS, *supra* note 1, at 51–73; Bull, *The Importance of Grotius in the Study of International Relations, in* HUGO GROTIUS AND INTERNATIONAL RELATIONS 65–93 (Hedley Bull et al eds., 1990); and Benedict Kingbury & Adam Roberts, *Introduction: Grotian Thought in International Relations,*

but they are the primary ones; they act in their own right, not as mere agents in the manner suggested by some liberal accounts. International society is, as Terry Nardin puts it, a "practical association" rather than a "purposive association."[14] In this view, international law is largely horizontal and exists in constant tension with power. For the most part, international law operates amongst states; only in exceptional areas, such as human rights and commercial transactions, is it grudgingly accorded a transnational character. In my view, some variant of this concept of international society underlies much of the mainstream literature and jurisprudence of public international law. This is true even of a scholar such as Louis Henkin, who asserts that sovereignty "is not an axiom of the inter-state system of secular States; it is not *per se* a normative conception in international law."[15] For although Henkin would like to dispense with the term internationally, to change the language in order to debunk some myths, he continues to distinguish relations in a domestic society—where sovereignty represents the locus of ulti- mate authority for that society—from the state-dominated system of international relations.

Under the international law traditionally associated with this theory of interna- tional relations, many benefits are seen to flow from personality and status, and indigenous peoples aspiring to full participation have in effect to seek membership in the society of states. If independence was established, an older test for member- ship was the "standard of civilization," although this was never applied in the simplified way the phrase suggests. Nowadays the test is probably independence and sustained effective control of territory, combined with a degree of recognition, although there have been attempts to set higher standards for entry, as with EC policy on recognition of highest-level republics of the former Yugoslavia. Over the past two decades, the membership test came to mark a de facto boundary of the indigenous peoples' movement; those non-state groups with a significant prospect of having their demands for membership accepted, such as the PLO, have tended not to involve themselves in the UN Working Group on Indigenous Populations and similar fora. Other norms for relations between states, non-state groups, and individuals have of course developed, but with a focus on preserving order and the legitimacy of the existing system. Thus, the CSCE High Commis- sioner on National Minorities operates within the organization's security frame- work rather than its human rights arrangements, and the 1992 UN Declaration on the Rights of Minorities stresses maintenance of the integrity of states. Similarly, in the merits phase of *Nicaragua v. United States,* the ICJ held that while interna- tional law protected Nicaragua's sovereignty through norms against intervention and the use of force, Nicaragua had assumed no binding (or at least opposable) international law commitment to conduct free and fair elections, despite its adher- ence to such human rights treaties as the International Covenant on Civil and Political Rights (ICCPR).[16] This is paralleled by the circumspection shown by the

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id. at 1–64. This material, along with the lines of thought sketched in HEDLEY BULL, JUSTICE IN INTERNATIONAL RELATIONS (1984), indicates that it is erroneous to regard Bull's account as simply a standard realist theory of power politics.

[14] TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES 1–24 (1983).

[15] "The Mythology of Sovereignty" *in State Sovereignty: The Challenge of a Changing World,* 21 PROC. CANADIAN COUNCIL OF INTERNATIONAL LAW 15, 17 (1992). Also *in* ESSAYS IN HONOUR OF WANG TIEYA 351, 353 (Ronald St. John Macdonald ed., 1994).

[16] *Military and Paramilitary Activities* (Nicaragua v. United States), 1986 ICJ REP. 131–32. *See also* James Crawford, *Democracy and International Law,* 64 BRITISH YEAR BOOK OF INTERNATIONAL LAW 113 (1993).

Human Rights Committee in dealing with questions concerning representation or participation of indigenous peoples under Article 25 of the ICCPR.[17]

Another interesting illustration is the 1992 report to a committee of the Quebec National Assembly on the territorial integrity of Quebec, should it accede to sovereignty, by five eminent international lawyers.[18] They concluded that Quebec did not have a right to secede because this would conflict with Canada's right to territorial integrity; but that if Quebec did become sovereign without resistance by Canada, its rights under the principle *uti possidetis juris* would apply to all territory within the boundaries of the province, regardless of when or how portions of this territory were added. The report opined that indigenous peoples within that territory have no international legal right to sovereignty, and that such other (unspecified) international legal rights as the indigenous peoples may have are not a bar to the assumption of sovereignty by Quebec in place of Canada. The approach taken in the report was that sovereignty is a matter of fact, to be established on the ground, albeit with a certain role for recognition. In one sense, sovereignty is treated by the authors as pre-legal. The report seems implicitly to reject the view that international law may be constitutive of sovereignty and statehood.

This vision of international society, of statehood, of sovereignty and of international law has provoked bitter condemnation among representatives of many indigenous peoples, who see it as exclusionary, as a legitimation of colonialism, and as leaving their voices and interests grossly underrepresented.

More general criticisms of this vision of an international society of states as the basis of the international legal system have also been numerous. It is attacked for the sin of homogenization and the sin of pluralism. Insofar as the system upholds the equal sovereignty of very unequal and unlike actors, the result is, as Anne-Marie Slaughter Burley puts it: "International lawyers . . . are hamstrung by their disciplinary insistence on what Hoffman has described as the 'formal homogeneity of a legal system whose members are supposedly equal.' "[19] The state is taken as a given, so that the culture, ideas and internal structures that constitute it are not investigated. In failing to articulate and apply standards for judging deviation from morality (or homogeneity!) with respect to structures and values of existing states, this view is liable to attract empassioned charges comparable to those leveled by the distinguished American historian of the Cold War, John Lewis Gaddes: that theorizing about the nature and structure of international relations during the Cold War period disengaged American scholars from moral evaluation and even from study of Stalinist brutalities.[20]

Transnational Civil Society and Indigenous Peoples

Protagonists of the liberal theory of transnational civil society offer answers to many of these criticisms. Differences between actors can be more easily accommodated, as in domestic society; and in a few accounts (although not Rawls's own) Rawlsian "maximin" principles are available to combat inequality.[21] The internal

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[17] *Mikmaq Tribal Society v. Canada,* UN Doc. CCPR/C/43/D/205/1986 (1991).

[18] Thomas M. Franck, Rosalyn Higgins, Alain Pellet, Malcolm N. Shaw, & Christian Tomuschat, *L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté* (Appendix, DRAFT REPORT OF THE COMMITTEE TO EXAMINE MATTERS RELATING TO THE ACCESSION OF QUEBEC TO SOVEREIGNTY, NATIONAL ASSEMBLY OF QUEBEC, 1992).

[19] *Supra* note 6, at 226.

[20] *The Tragedy of Cold War History,* 17 DIPLOMATIC HISTORY 1, at 8, 9 (1993). A slightly adapted version of this article appeared in 73 FOREIGN AFF. 142 (1994).

[21] *See, e.g.,* CHARLES BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979).

structure of the state is salient. Liberal ethics may be deployed to make moral evaluations, and the legal and political systems can turn these into enforceable judgments. There is also scope to investigate ways in which the state is constituted by its embeddedness in international structures, including the global economic order.[22]

The vision of international law as the law of a transnational civil society is superficially very promising for indigenous peoples. The globalization of communications, information, and economic and ecological interactions, the high political cost of certain kinds of conflicts, and the connections that led an episode in Mogadishu, for example, to inspire Haitian military policy days later, place representatives of many indigenous peoples in a kind of global society with some shared language and referents.[23] Indeed, the coordinated activities of non-state groups, including social movements of indigenous peoples and others, are cited as cases *par excellence* by those who argue that we must understand "transnational civil society" in order to understand the present and future of international law and of state sovereignty.

This perception of the nature of the international community and of the transmutation of sovereignty adds weight to arguments by globally oriented representatives of indigenous peoples for a strategy of participating in the international legal system. If law is an emanation of the transnational society in which they are participants, there is scope to use the political process to make that law more favorable. The state thus loses its place as an autonomous lawgiving institution and one of a tiny cadre of subjects of international law, and becomes both a field of contestation and a participant in the wider process in which it must sit in the same UN meeting room (with the same speaking rights) as indigenous peoples. The indigenous peoples' movement internationally becomes important and has a tangible impact: indeed, groups begin to shape their self-definition, their claims, and even their origin myths in order to fit into the patterns necessary for membership in this movement.[24] The discourse of the indigenous peoples' movement becomes an empowering one that is self-initiated and, it is hoped, not appropriated by anyone else. Concepts such as sovereignty and independence become overtly relative in important ways. These aspects are preponderant for individuals whose primary focus is transnational; but for many indigenous peoples, the feedback into intrastate political processes, and in a few cases the interactions among national and international bodies, may be at least as important. These two further aspects need much more systematic research than has yet been done; today I will simply give brief illustrative examples.

Impacts of Transnational Civil Society on Intrastate Politics. Much of the evidence on interactions between international/transnational activities and intrastate politics and policy in this area is anecdotal; it is difficult to develop methodologies for researching causation that go beyond descriptive inference. A potentially interesting case is the use made of proceedings in the UN Working Group on Indigenous Populations as a source of legitimacy for particular positions in intrastate politics.

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[22] *See* Fred Halliday, *International Society as Homogeneity: Burke, Marx, Fukuyama in* 21 MILLENNIUM 435 (1992); *see generally* CHRIS BROWN, INTERNATIONAL RELATIONS THEORY: NEW NORMATIVE APPROACHES (1992).

[23] Mark W. Zacher, *The Decaying Pillars of the Westphalian Temple: Implications for International Order and Governance, in* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 58 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

[24] *Supra* note 9, *esp.* chapters by Gray and Barnes.

Indigenous peoples frequently have used statements in or by the Working Group in this way, and several have invited the Chair-Rapporteur of the Working Group or the Special Rapporteur on Treaties to visit their communities, receive accounts and evidence and engage with news media.

International scrutiny seems to have made some difference to the delegitimation of the doctrine of *terra nullius* as a basis for colonial sovereignty in Australia, for example. After the 1992 High Court decision in *Mabo,* there was some evidence that the Commonwealth (federal) Government, which favored significant implementation of the spirit of the decision through recognition of aboriginal land rights, found material from the Working Group and the ILO (in which bodies the Commonwealth Government participated) helpful in debates with recalcitrant state governments. The Commonwealth Government thus had an incentive to encourage the Working Group to take strong positions on relevant normative issues. The assumption of international legal obligations by the Commonwealth Government can also strengthen its constitutional competence and political bargaining power vis-à-vis the states.[25]

Role of National Tribunals and International Bodies. The account of liberal transnational civil society suggests that state courts will become involved in dialogue with other national courts and with international institutions.[26] In relation to issues of concern to indigenous peoples, this is of particular interest where state courts are considering moving away from specific state-legitimating doctrines to which they have historically been attached, and where these courts may be seen—albeit to a limited extent—as agents of change. Dialogue is already evident among the highest courts of Canada, New Zealand and Australia, in cases such as *Calder, Guerin, Sparrow, New Zealand Maori Council v. Attorney-General Muriwhenua,* and *Mabo.*[27] (U.S. cases have been influential, as with the impact of the Boldt decision in the Waitangi Tribunal's thinking about Maori fishing rights in New Zealand,[28] but there is as yet not much evidence of the reciprocal process of U.S. courts drawing on the experience of foreign tribunals in this area.) Through judgments and personal interactions among judges, these Commonwealth courts seem to have signaled to each other shifts in approaches to such matters as aboriginal title and interpretation of treaties to which indigenous peoples are parties and, more fundamentally, to rethinking relations between indigenous peoples and states. In each case international developments—including the output of the UN Working Group on Indigenous Populations, organizations of indigenous peoples, and the ILO—played some part both in reassuring courts that they were marching in the spirit of the times and in reminding them that they were speaking also to international audiences.

For proponents of transnational civil society, the next step is to use courts in one state in order to advance claims by an indigenous people living in another

[25] *Cf.* Koowarta v. Bjelke-Petersen, 153 COMMONWEALTH L. REP. 168 (1982).

[26] *Cf.* Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine,* 92 COLUM. L. REV. 1907 (1992).

[27] Calder v. Attorney-General of British Columbia, Canadian Supreme Court Reports 313 (1973); Guerin v. R, 2 Canadian Supreme Court Reports 335 (1984); R. v. Sparrow, 1 Canadian Supreme Court Reports 1075 (1990); New Zealand Maori Council v. Attorney-General, 1 NEW ZEALAND L. REP. 641; Te Runanga o Muriwhenua Inc. v. Attorney-General, 2 NEW ZEALAND L. REP. 641 (1990); Mabo v. Queensland, 175 COMMONWEALTH L. REP. 1 (1992).

[28] United States v. Washington, 384 F.Supp 312 (1974). *See also* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); WAITANGI TRIBUNAL, MURIWHENUA FISHING REPORT 22 (1988).

state. The attempt to use a Dutch court to trace the proceeds of uranium mined in Namibia while South Africa continued to rule after termination of the mandate illustrates the strategy, although the lack of success is a pointer to the potential complexities. Courts in the United States frequently host transnational public law litigation on human rights issues,[29] and matters in which indigenous peoples are specifically involved have been pursued in this way, as with challenges to Conoco's operations in Ecuador; the increasing incidence of such cases raises issues ranging from problems of representativity to the desirability of such litigation and such expansive judicial roles. International tribunals may also be used: The 1987 *Rainbow Warrior* arbitration between Greenpeace and France is an interesting precedent in this respect.

Some Problematic Aspects for Indigenous Peoples of Liberal Theories of Transnational Civil Society

In all the areas I have discussed, a theory of international law as an emanation of an advancing liberal transnational civil society seems promising in terms of the objectives of some indigenous peoples. As a crusading or prescriptive theory it is attracting adherents, and its attractions may be even greater for peoples outside the zone of "liberal states," in which its fullest embodiments are predicted to be found. In the limited format of these remarks, I must leave aside the fundamental questions whether this theory actually explains international law as it is, or whether it is more useful than others in advancing the study of international relations and international law. Instead, I will briefly note a few complications of particular relevance to indigenous peoples and other non-state groups. For simplicity (although with some artificiality), I shall discuss these complications under three headings: ethics, power and perception.

Ethics. The ethics of liberalism are typically individualist and universalist. In most accounts, groups are valued only for their instrumental contributions to individual well-being and other goods. Whether or not they are regarded as "artificial rule formations," entities such as states may have ethical value under a universalist conception of ethics as what Robert Goodin terms "mutual benefit societies"—everyone owes ethical duties because everyone may be expected to benefit from such a system. Or they may have ethical value as components of a system for coordinating the discharge of general duties: Each state helps the disadvantaged within its territory, thereby ensuring that the universal duty to help the disadvantaged is discharged.[30] But liberals have been thoroughly skeptical of the ethical value of groups such as peoples. (The liberal suspicion of the tribe as a unit of analysis may be a manifestation of this.[31]) The attempt to treat the socially embedded individual rather than the abstract individual as the proper ethical subject has begun to wean some liberals away from the skeptical position with respect to the intrinsic moral value of families or even larger face-to-face communities. Some accept particularist as well as universalist ethical cases for families and certain other face-to-face groups.[32] But this is still far short of the ethical case many indigenous peoples make for themselves; and it is quite wrong to assume that the indigenous peoples' movement consists mainly of small, face-to-face com-

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[29] Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2347 (1991).

[30] Robert E. Goodin, *What Is So Special About Our Fellow Countrymen?*, 98 ETHICS 663 (July 1988).

[31] Peter P. Ekeh, *Social Anthropology and Two Contrasting Uses of Tribalism in Africa*, in 32 COMP. STUD. SOC'Y & HIST. 660 (1990).

[32] David Miller, *The Ethical Significance of Nationality*, 98 ETHICS 647 (1988).

munities. The result is that some varieties of liberalism are resistant to according intrinsic ethical value to indigenous peoples as groups.

A related problem concerns the extent to which committed liberals in the transnational civil society tolerate divergences from liberalism. The practical answer in some cases is "not very much." Liberal transnational civil society describes and promises the opening of spaces, but it also closes distances, and in so doing presses for sameness. The liberal agenda presses indigenous peoples to adopt structures based on the ethics of individualism: fundamental human rights, representative government based on something resembling participatory democracy, and perhaps even a system of private property and liberal market economics.

Behind this lies the tension that has been perennial in liberalism between universal ethics and the reality of boundaries marking vast discrepancies. Strident cosmopolitanism, in which states and most other divisions between people are disregarded, is undermined as an ethical principle of actual living by its divergence from human intuitions and human practice. Moreover, in an international system of societies and states, the problems of ethics arise not only from the limited nature of international ethical practice, but also from the controversies as to whether the ethics of individuals also apply between units, and whether ethics have a free-floating independent existence beyond politics and the practice of international relations and simply sit waiting to be applied.[33]

Power. Constructivist accounts of norms and social institutions are increasingly influential. It is frequently argued, for example, that sovereignty is constructed by the terms of dialogues among participants in international and domestic life, and that these dialogues are part of the process of identity formation and maintenance for individuals and collectivities as well as the process of norm generation and regulation. The practical implications of "sovereignty" will be continuously contested, but the upshot is, according to one such account, that "sovereignty and statehood should no longer be viewed as coterminous, and that sovereignty should be accepted as something to be spread around and as something that simultaneously bears a multitude of meanings.[34] In this theory of intersubjectivity, meanings may never become fixed in the operational way they are presumed to in, for example, the "shared subjectivities" of writers in the New Haven School of international law. But even in the context of intersubjectivity, the power of the embedded concepts, the institutions, the existing language and the sheer power of numbers all make a vast difference to norms and identity. The effects of such dialogues on the actual processes of regulation, adjudication, implementation and enforcement are likely to be highly diffuse at best. More generally, the post-modernist urge toward complexity is often indulged only at the cost of ignoring some rather basic realist insights. International institutions and other transnational actors do not exist in isolation from power and interests, and to varying degrees they are likely to reflect and reinforce both. Even the Working Group on Indigenous Populations, an insulated forum with some attractive features for indigenous peoples, may have significant shaping and conditioning effects on the international indigenous peoples' movement. The literature on transnational civil society at present says too little about the structures of power and the nature of authority within that society.

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[33] *Cf., supra* note 11, at 79.

[34] *See, e.g.,* Craig Scott, *Dialogical Sovereignty: Preliminary Metaphorical Musings, in* 21 PROC. CANADIAN COUNCIL OF INTERNATIONAL LAW 267, 275 (1992). A revised and much extended version of this paper is forthcoming.

Perceptions. The liberal conception of a division of the world into a liberal zone of law and a nonliberal outer zone is a familiar although strikingly explicit constitution of the "other." There are remarkable parallels with the sixteenth-century European divisions between Christians and infidels, modeled (albeit too simply) by Martin Wight as two concentric circles.[35]

One practical outcome of perceptions of the other has often been that indigenous peoples are treated as "traditional" (until quite recently, "primitive") in opposition to "modern." This is made operational in many ways, from, for example, Australian rules concerning sea closures and traditional aboriginal fishing, and comparable traditional fishing rights under the Torres Strait Treaty between Australia and Papua New Guinea, to Brazilian laws allowing Indians to use land but not own it. A different response to otherness is a modern version of the "civilizing mission"—bringing indigenous peoples into market liberalism. Of course this may overlap, and often does, with the aspirations of indigenous peoples to self-development, but major differences of perception and understanding continue to have serious practical repercussions.

The liberal theory of "zones" tends to produce overly simple views of complex interactions. With regard to indigenous peoples, the hazards of simplistic views of complex issues are well illustrated by some of the recent controversy about "green capitalism" and products such as Rainforest Crunch® ice cream. These issues involve, inter alia, perceptions on each side of the "other," the mutual interpenetration of these perceptions, multiple elements of identity and culture, and the porosity of social and economic boundaries.

John Rawls's Approach

Coming from one of the most influential contemporary theorists of liberalism, the recent reflections on some of these issues in Rawls's paper *The Law of Peoples* are of considerable interest.[36] Professor Tesón discusses this paper in depth, later in this panel, and I shall therefore not discuss Rawls further, except to make three summary points relating to my theme. First, Rawls's method for developing a law of peoples applicable to relations among "well-ordered" societies, including certain nonliberal ("hierarchical") societies, is to begin with the construction of political liberalism in the domestic society, and then to generate rules for relations among societies. Existing states and societies are presupposed. Secondly, Rawls joins the contemporary liberal enthusiasm for what he regards as the persuasive evidence that liberal societies tend not to make war on each other. He goes further, however, in starkly asserting as an empirical matter that "democratic peoples are not expansionist."[37] This observation will interest many indigenous peoples, who have experienced the "democratic peace" rather differently.

Third, Rawls takes a firm liberal position on the intolerability for liberals of societies that fall outside his category of "well-ordered," proposing to treat their rulers and elites as outlaw régimes.

Whose International Law? The Dilemmas of Participation

In a world in which virtually all the inhabitable territory is already subject to juridical sovereignty, non-state groups, including many indigenous peoples, by definition live in territories that traditional international law recognizes as subject

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[35] *See* HUGO GROTIUS AND INTERNATIONAL RELATIONS, *supra* note 13, at 14.

[36] John Rawls, *The Law of Peoples, in* ON HUMAN RIGHTS 41 (Stephen Shute & Susan Hurley eds., 1993).

[37] *Supra* note 36, at 59.

to state sovereignty. There are cases of juridical occupation or legally contested sovereignty, or otherwise complex situations; but these are exceptional in the traditional doctrine. Non-state groups wishing to make political claims thus face a dilemma. They can use international doctrines that may be helpful to them, such as self-determination, autonomy or equality,[38] but this entails acceptance of the international legal system, which cements the sovereignty of the established states and which in its doctrines and institutions is dominated by the interests of those states.

An alternative approach for non-state groups is to deny the validity of the international law under which the sovereignty of the state is established, and under which colonization may have taken place; in so doing, however, they forgo whatever leverage the international legal system might provide. Such forbearance may be plausible for a group whose only interest is to be left alone, but complete isolation is a rare objective in the contemporary world. Similarly, it might be a strategy for a group that does not see the international legal system providing it any useful leverage: the relatively limited participation of Kurdish groups in international forums may manifest a view that these forums are unlikely to be of help. Otherwise, repudiation of existing international law must be accompanied by a massive effort to establish and legitimize a normative discourse to rival that of traditional international law: this was attempted most notably by the USSR after the Bolshevik revolution, but the experience of revolutionary entities has been that after a transitional period the advantages of participating in the international legal system on negotiated terms outweigh the autochthonous alternatives.

In general, non-state groups have opted to make their cases as participants in the international legal system, striving to adapt existing doctrines to their purposes, to delegitimize and eclipse unsatisfactory doctrines, and to create spaces in the architecture of international institutions. While this may appear as the general strategy of indigenous peoples, there is a sampling bias: voices heard in the United Nations are amplified through the international legal institutions and literature, whereas those remaining outside and preferring repudiation tend not to be heard. Even amongst the audible sample, there is a degree of tension in the discourse of indigenous peoples between the strategies of accepting and contesting particular principles of international law. Only one of many possible examples may be given here.

A frequent starting point is that a particular indigenous people was an organized entity, exercising effective sovereignty in accordance with the law of the place, long before European expansion and its legal projection sought to superimpose a different system of sovereignties. The path of the argument then forks. In one approach, the indigenous people dealt with the incomers on the basis of the law of the indigenous people or of the wider system of local peoples of which they were part; whatever was given up was given up only in accordance with that law, and that law subsists quite apart from international law, so that many rights were retained or may be resumed for breach of a condition attached to the original dealing. The other approach sees the indigenous people dealing as a full subject of the European-influenced international legal system, making treaties under international law and entitled to the protections of the law in interpreting such instruments and in refusing to recognize fraud and dishonesty. In such a case, it may be argued that sovereignty was never properly given up under international law,

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[38] *See, e.g.,* Benedict Kingsbury, *Claims by Non-State Groups in International Law,* 25 CORNELL INT'L L. J. 481 (1992).

or that it was merely suspended, or that new circumstances now entail its re-invocation; in any event, what is now required under international law is the restoration as far as may be practical of the status quo ante. The treatment of precolonial history and the experience of colonization is important in framing the relations of "indigenous" and "non-indigenous." The most common contemporary strategy of reconciliation internationally is to use arguments drawing on both approaches. Differences remain, however, as to the essential relevance or irrelevance in historical argument of reasoning based on positive international law.

There are many strong reasons leading indigenous peoples to participate in the international legal system. These are likely in most cases to outweigh any doubts or objections. It is nevertheless worth observing that acceptance of, and participation in, the international legal system may in some cases come at a price. For participants in international bodies, "success" may come to be defined in highly institutional terms, for example improved status at meetings or a change in the wording of a hortatory resolution, with only a very distant relation to what happens on the ground.[39] The objectives of participants can be shaped and channeled in such ways. Issues of co-option of elites, and of representativeness, inevitably arise. Beyond this, participants may have to forge and maintain problematic alliances, as with the episodic but uneasy alliances between indigenous peoples and environmental NGOs.

Specific international norms may have significant shaping, constraining and even delegitimizing effects for indigenous peoples. The challenges posed by universality and individualism in international human rights standards and discourse have appreciable implications for some indigenous peoples, and these challenges have not yet been fully addressed. Indigenous peoples may also encounter normative blocks that affect political dynamics. Thus, just as some indigenous peoples may see themselves securing a foothold on the self-determination ladder, they are finding that international lawyers are busy trying to move the top of the ladder away from the place where it was traditionally thought by many to rest—that is, at independence.

Conclusion

Where the dominant understanding of international relations, informing international law, is that of an international society of the sort described by Hedley Bull, the difficulties and frustrations of participation for indigenous peoples may often seem acute. Although membership in the society is attractive, results falling short of full membership in the society may be disappointing. The choices facing many indigenous peoples may thus seem different from those that faced "saltwater" European colonies as the law of decolonization was rapidly being established.

The liberal conception of transnational civil society may seem to offer much more to non-state groups, including its description of political space, its apparent inclusiveness, and its apparent responsiveness to contemporary realities. If international law is understood as an emanation of such a liberal transnational civil society, the dilemma of participation or repudiation is likely to be seen in a different light. To some extent, such a view is already evident in the discourse and strategies of internationally active non-state groups.

In some versions, however, the liberal commitment can be individualistic, universalizing and judgmental. In modeling transnational civil society, with the me-

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[39] Chris Tennant, *Indigenous Peoples, International Institutions, and the International Legal Literature from 1945–1993*, 16 Hum. Rts. Q. 1 (1994).

diating role of states greatly reduced, this conception models also a space for the projection of particular interests and ethics by those with the power to do so. The perception of other is important in our perceptions of ourselves, and the perception of barbarous practices crying out for eradication is part of one liberal self-concept. The proposals for forcible intervention to support "democracy," while made *sui generis*, are indicative of a general tendency in one version of crusading liberalism.[40] (The historical experiences of indigenous peoples in "liberal" states may be salutary in the evaluation of liberal proposals for intervention.) There is a notable contrast between the vociferous support among some liberals for intervention in certain circumstances, and the quietness of the liberal transnational civil society literature on other fundamental problems of force, violence and war, which remain salient in many lives and which cannot be wished away by proclamation of a different theoretical construct.

These remarks have been too brief and narrow to evaluate adequately the enterprise of constructing a view of sovereignty and international law on the basis of a liberal theory of transnational civil society. The case of non-state groups is illustrative of the complexities that must be thought through in such an enterprise. The full-blown liberal theory of transnational civil society may seem to suggest that the question, Whose international law? should eventually be met from all quarters with the answer, Our international law. For non-state groups, however, such a seductively simple answer seems deeply improbable. This case indicates that the model of a pluralist international society and its legal system, while much criticized, may offer some advantages as a framework for understanding contemporary and emerging practice, and that proposals to supplant it, although holding analytical and political attractions for many non-state groups and others, require searching scrutiny and careful debate.