

**RESPONDING TO ECONOMIC GLOBALIZATION: AN ANALYSIS  
OF INDIGENOUS CLAIMS TO RIGHT OF  
SELF-DETERMINATION AS A COUNTER-DISCOURSE**

by

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## Dedication

This is part of the story of my ancestors. It is part of the story of my generation. It will be part of the story of the generations after us who hopefully will live in a global community kinder to them than it has been to those who lived before them.

This is also part of the story of indigenous peoples all over the world.

To them I dedicate my work.

### Convergence\*

*Our pains are woven from the same thread  
We suffer -each in our worlds  
The screams that come from our lungs  
Are the same tortured lamentations  
Our songs have the same lyrics  
The same melody  
I listen to your story  
The face of your enemy blurs into the face of mine  
As if there is no distinction*

*We cup our palms to catch our blood  
Flowing into extinction  
From the mountains hemorrhaging with greed  
From the deep wounds of the land  
Cradling our ancestors' bones  
The lands that have owned us  
Have fallen into the hands of our oppressors  
They now own us  
Their hands eager to obliterate  
The footprints of our ancestors  
On the rivers, on the lakes, on the springs*

*My world blurs into your world  
Until they form one world  
Our worlds separated by oceans and mountains  
United by the same triumphs and tragedies  
We chase separate but same roads  
To generations thousands of years from now  
Away from extinction*

*Even across the distance  
We touch one another's hands  
We share our warmth, our strength  
Our combined power can not be blown away  
Like a formidable rock, resilient*

*In our triumphs, in our defeats,*

*We are one./ Cheryl L. Daytec (\*June 2008; for the people of CHT, Bangladesh)*

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*May the God of Justice bless all of you. Dakkel ay iyaman ken dakayo am-in.*

*Cheryl L. Daytec-Yañgot  
Baguio City, Philippines  
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## Abstract

*Economic globalization has recontoured the political influence of States which are now less powerful than the global financial conglomerates that target resource-rich indigenous lands for corporate expansion. Most domestic laws and policies repudiate indigenous claims to ancestral lands; thus, especially in developing countries where foreign investment climates are lax and regulatory mechanisms are enervated, indigenous peoples stand vulnerable. Considering the weakness of their position in power relations, there is a need for international oversight to cloister them from domestic policies that legitimate their expulsion from their territories to make way for expansion projects of the global corporate oligarchy. There is a need to recognize and adopt a legal counter-discourse to globalization to fence out its externalities and obviate the extinction of indigenous peoples.*

*The right of self-determination is the best and most viable vehicle that indigenous peoples can invoke to defend their lands and natural resources from development aggression facilitated by economic globalization because this right recognizes their power to control their natural resources. No other right enshrined in the International Covenant on Civil and Political Rights affirms their collective right to their resources. The problem is that legal scholarship continues to question their 'peoplehood,' which in effect questions their self-determination claims. And among those who agree that international law recognizes indigenous self-determination, there is a debate as to whether the configuration of this right encompasses a resource dimension, i.e. control of lands and resources, or it refers only to democratic entitlements the maximum of which are autonomy and self-government.*

*This study takes the position that indigenous self-determination is textually expressed in international law, and even if not, there are substantive norms that justify it. Thus, it surfaces the normative and legal justifications therefor. It also probes what legal scholarship has overlooked: the nexus between indigenous right to self-determination and economic globalization, and the relevance of this right to its bearers who must confront threats of development aggression on a regular basis. Hence, it argues that indigenous self-determination, packaged as participation in democratic processes and political institutions without a resource dimension, legitimizes the violation or suppression of indigenous rights. Owing to the fact that it exposes indigenous peoples' aspirations to the risk of being supplanted by the will of the dominant population, democracy reduces them into constructive co-authors of decisions that operate against their interests in an increasingly economically globalized world. But the recognition of resource control as an inherent dimension of self-determination constitutes indigenous peoples as equal players in the democratic arena since they possess a bargaining leverage in the political decision-making processes. Self-determination then becomes a relevant legal counter-discourse for peoples forcibly introduced into the circuit of economic globalization that threatens their right to exist on their lands.*

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## Chapter I: Situating Indigenous Peoples in the Bushes of Globalization and International Law

*We live in a world of economic globalization in which the power of transnational corporations often dwarfs the power of States. Many governments are overwhelmed by market forces. Acting alone, they can be ineffective at regulating corporate ventures, and in protecting indigenous peoples from destructive approaches.<sup>1</sup>*

### **From Shadows to Self-Proclaimed Peoples On the Brink of Annihilation**

For a long time, indigenous peoples were a silhouette in the international human rights discourse. Long referred to as indigenous populations, they were not regarded as subjects of international law.

As the international community was increasingly becoming economically globalized, transnational corporate actors whose powers have overwhelmed those of States assumed a more aggressive stance in exploiting Earth's remaining natural resources most of which are found in indigenous territories<sup>2</sup> preserved by peoples who believe that they borrowed the planet from generations yet to be born.<sup>3</sup> It is a paradox that they who preserved their natural wealth have materially benefited the least<sup>4</sup> and are the poorest in the world.<sup>5</sup> Worse, this wealth is their own curse as it magnets corporate capitalism which regards it as "fungible with cash."<sup>6</sup>

<sup>1</sup> Erica- Irene A. Daes, "Article 3 of the Draft UN Declaration on the Rights of Indigenous Peoples: Obstacles and Consensus" in *Seminar: Right to Self-Determination of Indigenous Peoples* (Montreal: International Centre for Human Rights and Democratic Development, 2002), p. 12; [http://www.ddrd.ca/site/\\_PDF/publications/indigenous/proceedingsExpertSeminarMay2002PRINT.pdf](http://www.ddrd.ca/site/_PDF/publications/indigenous/proceedingsExpertSeminarMay2002PRINT.pdf)

<sup>2</sup> When she was Chair of the UN Permanent Forum on Indigenous Issues, Victoria Tauli-Corpuz said that "majority of the world's remaining natural resources – minerals, freshwater, potential energy sources and more - are found within indigenous peoples' domains." See *Backgrounder: Indigenous Peoples - Lands, Domains and Natural Resources* available at [http://www.un.org/esa/socdev/unpfii/documents/6\\_session\\_factsheet1.pdf](http://www.un.org/esa/socdev/unpfii/documents/6_session_factsheet1.pdf). According to the University of Minnesota Human Rights Center, indigenous peoples "embody and nurture 80% of the world's cultural and biological diversity, and occupy 20% of the world's land surface." See *The Rights of Indigenous Peoples*, (University of Minnesota Human Rights Center, 2003) available at <http://www1.umn.edu/humanrts/edumat/studyguides/indigenous.html>

<sup>3</sup> For the indigenous concept of stewardship over lands, see S. James Anaya, "International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State," 21 *Arizona Journal of International and Comparative Law* (2004).

<sup>4</sup> *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57*. UN Doc. E/CN.4/2002/97, at para. 56. In this report, Mr. Stavenhagen said, "resources are being extracted and/or developed by other interests (oil, mining, logging, fisheries, etc.) with little or no benefits for the indigenous communities that occupy the land. ... [I]n numerous instances the rights and needs of indigenous peoples are disregarded, making this one of the major human rights problems faced by them in recent decades."

<sup>5</sup> Jan Knippers Black, *The Politics of Human Rights: Moving Intervention Upstream with Impact Assessment* (New York: Rowman and Littlefield Publishers, Inc., 2009), pp. 117-118;

<sup>6</sup> S. James Anaya, "International Human Rights and Indigenous Peoples. The Move Toward The Multicultural State," *Arizona Journal of International & Comparative Law* 21:1 (2004); p. 38



Indeed, in a global community dominated by capital, the indigenous territories are the most precarious places to inhabit. As Anaya said,

*Even the most isolated indigenous groups are now threatened by encroaching commercial, government, or other interests motivated by prospects of accumulating wealth from the natural resources on indigenous lands...*<sup>7</sup>

In the words of Stavenhagen, “(i)ndigenous peoples are said to bear disproportionately the costs of resource-intensive and resource-extractive industries, large dams and other infrastructure projects, logging and plantations, bio-prospecting, industrial fishing and farming, and also eco-tourism and imposed conservation projects.”<sup>8</sup> A raft of reports submitted to the United Nations Human Rights bodies<sup>9</sup> coming from indigenous peoples document States’ apathy to their oppositions to forced dislocation and other human rights abuses to pave the way for corporate industrial expansion, a telling proof that the prevailing practice of States is neither willing nor ready yet to affirm indigenous rights. The susceptibility of those in cash-strapped developing countries is exacerbated by the States’ frail regulatory mechanisms which come with the package to attract foreign investments.

With the formation of movements to struggle against the expansion of industry into their domains, indigenous peoples started to emerge from the shadows and their ignored if not forgotten identities began to take shape before the eyes of the international community. The aftermath witnessed the adoption of International Labour Organization (ILO hereafter) Convention 169<sup>10</sup> and the eventual declaration of the 1995-2004 as the United Nations’ International Decade of the World’s Indigenous People.<sup>11</sup> Progressively, they started to rise as

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<sup>7</sup> S. James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004), p. 4.

<sup>8</sup> Rodolfo Stavenhagen, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, submitted in accordance with Commission resolution 2001/65 E/CN.4/2003/90 21 January 2003

<sup>9</sup> Most of these cases will be discussed in the latter part of this Chapter.

<sup>10</sup> This is the only international treaty that applies specifically to indigenous peoples. It is the first to use the term *indigenous peoples* although its Article 1(3) States: “The use of the term **peoples** in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.”

<sup>11</sup> *International Decade of the World’s Indigenous People*, G.A. Res. 48/163, U.N. GAOR, 48th Sess., Agenda Item 114(b), U.N. Doc. A/RES/48/163 (1993).

actors in UN instruments<sup>12</sup> and movements for indigenous self-determination were configured and pursued.

Their entry into the age of rights was met with a deluge of literatures on them. Conferences and conventions were assembled in their name. Discourses and dialectics on their issues, their status and their claim to self-determination became very vibrant. With the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP hereafter),<sup>13</sup> a dizzying plethora of literatures on their claims to self-determination was produced. In the words of one writer, “much has been written about self-determination...in the literature about aboriginal peoples.”<sup>14</sup> Yet much of these legal writings are divorced from why they entered the age of rights: the threats to their survival posed by globalization projects. As rightly observed:

*(G)lobalization has triggered greater awareness among the indigenous peoples of self-empowerment and democratization, which are important forces in capturing globalization. Through their blockades and protest movements, they have shown that they know how to use ‘power’ to speak and to resist the globalizing forces that threaten their way of life and economic activities.*<sup>15</sup>

### **Theoretical Framework: Indigenous Self-Determination as a Shield Against Globalization**

In 1995, Cassese wrote that for developing countries self-determination also means “the struggle against all manifestations of neocolonialism and in particular the exploitation by alien power of the natural resources of developing countries.”<sup>16</sup> Had he been referring to indigenous peoples instead of developing countries, he would have been expressing what I believe to be the essence of indigenous self-determination in the era of globalization: the right against corporate invasions that displace them from their resource-rich ancestral domains, portending to disrupt their distinct ways of life and extinguish their identities inextricably

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<sup>12</sup> Cherie Metcalf, “Indigenous Rights and the Environment: Evolving International Law,” 35 *Ottawa L. Rev.* 101 (2003).

<sup>13</sup> United Nations General Assembly Sixty-first session, A/61/L.67, <http://daccessdds.un.org/doc/UNDOC/LTD/N07/498/30/PDF/N0749830.pdf?OpenElement>

<sup>14</sup> Laura Westra, *Environmental Justice and the Rights of Indigenous Peoples*. (London, Earthscan, 2008), p. 233

<sup>15</sup> Sabihah Osman, ‘Globalization and democratization: the response of the indigenous peoples of Sarawak’, *Third World Quarterly*, 21: 6 (2008), p. 987-988

<sup>16</sup> Antonio Cassese, *Self-determination of peoples : a legal reappraisal*. (New York: Cambridge University Press, 1995); p. 46

linked to the land. Indigenous claims to self-determination are in essence a counter-discourse to economic globalization. They challenge the very international legal structure that fosters a climate conducive to capitalism's unfettered encroachment into and expropriations of the last resources located in indigenous domains.

My paradigm of indigenous self-determination as an effective legal and even political counter-discourse to globalization possesses an inherent resource control dimension, along with democratic rights, as an indispensable element. This is premised on the fact that "secure, effective, collective ownership rights over the lands, territories, and resources (indigenous peoples) have traditionally owned or otherwise occupied and used are fundamental... to their very survival as viable territorial communities."<sup>17</sup> I repudiate the position that self-determination within existing States is simply the right to democratic entitlements to participate in political processes because it dilutes if not ignores the realities of global capital's encroachment on indigenous peoples' lands and its deleterious externalities.

### **Opening the Open Textures in Legal Scholarship**

Cassese's idea of self-determination's connection to neocolonialism and resource exploitation could have served as a springboard for the development of legal scholarship on indigenous self-determination in the context of economic globalization. Unfortunately, attempts to push theoretical as well as legal boundaries are conspicuously wanting. There is a lamentable dearth of legal literatures that indict corporations and globalization for gravely undermining or nakedly negating indigenous self-determination. Evictions and dislocations of indigenous peoples from their ancestral domains as a consequence of globalized development aggression are framed as assaults on specific rights: right to development, property rights and right to cultural integrity, or human rights in general. This is not devoid of utilitarian value. It supplies ideas to lawyers and indigenous rights defenders on how to seek remedies for indigenous causes of action. But, with the exception of the right to development, the rights

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<sup>17</sup> Erica Irene A. Daes, "Indigenous peoples' permanent sovereignty over natural resources," *Final report of the Special Rapporteur Erica-Irene A. Daes*, E/CN.4/Sub.2/2004/30, 13 July 2004, 13 July 2004

violated that legal scholarship emphasizes are individual rights. Such legal appreciation of abuses committed against indigenous peoples does not reinforce their ‘peoplehood’ and overlooks that they have been “othered” from the rest of society, forced to congregate around an identity for their own self-preservation.

To neglect to factor in self-determination in legal discourses on how globalization is impinging on indigenous rights is a grievous omission that fails to contribute to the development of international law towards the recognition of the international status of indigenous peoples. It also contributes to the widening of indigenous protection gaps because it proposes treatments for symptoms rather than for the disease itself. Moreover, it (unintentionally) exculpates the globalization regime from violating self-determination, the only right that poses the strongest challenge to the legitimacy of an international legal structure that endows corporate entities political weight which is ultimately used against indigenous peoples.

What reinforces the open space in legal scholarship in its treatment of indigenous issues has a shape: the doubt as to whether indigenous peoples are *peoples* as this term is used in the International Covenant on Civil and Political Rights (ICCPR hereafter) and the International Covenant on Economic, Social and Cultural Rights (IECSR, hereafter) in Article 1(1): “All peoples have the right of self-determination.” The implication of the doubt is obvious. If indigenous peoples are not *peoples*, they cannot be self-determining; therefore, the destructive impacts of globalization on them are not attacks on self-determination.

Still unfortunately- and this also contributes to the conceptual morass on self-determination - those who *do* agree that indigenous peoples are peoples *do not* speak with one voice on what self-determination entails. There are wrangles in opinions as to its content. Is it an entitlement to democratic rights only in the form of autonomy or self-government? Does it embrace indigenous control of ancestral lands? These are among the questions that remain unresolved.

## **Filling the Gap: Establishing Relevance**

This study is therefore an attempt to contribute to the evolution of an international legal order that positively responds to the claims of indigenous peoples for self-determination in an increasingly economically globalized world that threatens their survival and existence. Although it also draws from existing theories, it fashions these theories to apply to indigenous peoples as well as offers new theories and insights of its own around the proposition that economic globalization and self-determination are the thesis and anti-thesis of each other in indigenous dialectics.

As a modest effort to fill the gap in the legal discourses and dialectics on indigenous peoples' right to self-determination in the context of globalization, it asserts the following:

1. Indigenous peoples are peoples in contemplation of Art. 1 of the ICCPR and the IESCR because they have the right to self-determination. These include rectificatory justice and historical injustice, the exclusion of indigenous peoples from the distribution of sovereignty sanctioned by international law, the disregard of indigenous rights that pre-date colonialism and subsist to this day, and their exclusion from the distribution of resources, goods and opportunities threatening their collective identity, perpetuated through structural oppression.
2. Although there is no covenant or treaty with a binding character which categorically confirms their international status as peoples, international law recognizes the right of indigenous peoples to self-determination which is a recognition of their "peoplehood."
3. Self-determination is not equivalent to mere democratic rights or the right to participate in political institutions since it has an indispensable resource dimension which recognizes peoples' control over their lands.

4. In an economically globalized world where resource-rich indigenous territories are targeted for industrial expansion by corporations with States' imprimaturs, the right to self-determination, among all rights, serves to shelter indigenous peoples from development aggression. Essentially, indigenous self-determination is a response and is the most effective legal counter-discourse to economic globalization.

### **Catching the Tail of the Cat: Of Approaches and Methodology**

The orthodox approach toward resolving whether a group or entity belongs to a class is to recourse to legal taxonomy. Does the group exhibit the class characteristics? If it does, it belongs. The same approach may be employed to resolve if indigenous peoples are *peoples*. Do they belong within the loop created by the definition of *peoples*? The challenge here is that international law does not define *peoples*.<sup>18</sup> Even if it does, the ICCPR and the IECSR, the only two international documents with undisputed binding character that enshrine self-determination were drafted with the understanding that minorities were not among the *peoples* referred to.<sup>19</sup> This has led scholars like Xanthaki to conclude that “current international law does not give a positive answer to indigenous claims for self-determination.”<sup>20</sup>

There are actually two issues on the legal construction of indigenous international status that are sides of the same coin: one, whether or not they are peoples, and, two, whether or not they have the right of self-determination. One conclusion implies the other. “All peoples have the right of self-determination” means that “all who have the right of self-determination are peoples.”

Thus to rescue the embattled ‘peoplehood’ status of indigenous peoples from obscurity, this study surfaces substantive normative foundations of indigenous self-determination that exist independently of international treaties or documents recognizing it. It also analyzes

<sup>18</sup> Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge: Cambridge University Press, 2007), p. 135

<sup>19</sup>Paul Keal, *European Conquest and the Rights of Indigenous Peoples*. (Cambridge: Press Syndicate of the University of Cambridge, 2003), p. 192.

<sup>20</sup>Xanthaki, p. 132

and/or compares the jurisprudence of the Human Rights Committee (HRC hereafter) and Committee on Economic, Social and Cultural Rights (CESCR hereafter), the two international human rights bodies whose mandate is to monitor compliance of States with their obligation in respect of the right of self-determination of all peoples. Additionally, it scrutinizes the value of the UNDRIP in so far as it declares that “(i)ndigenous peoples have the right of self-determination”<sup>21</sup> in the struggle of these peoples for the recognition of their international status. In the end, it proves that indigenous peoples are bearers of the right to self-determination and are therefore peoples.

But establishing that indigenous peoples are peoples does not by itself show that development aggression facilitated by the economic globalization regime is a clear and present threat to their right of self-determination. A nexus has to be made between globalization and self-determination. This study, to prove such nexus and demonstrate the value of self-determination as a legal counter-discourse to globalization, argues for the existence of the right’s resource dimension which, like the ‘peoplehood’ of indigenous peoples, is overlooked if not repudiated in legal scholarship. It analyzes the legal and normative foundations of self-determination and their relevance to the situation of indigenous peoples as they are impacted by globalization. It also analyzes jurisprudences of the HRC, the CESCR and regional human rights mechanisms to weigh their appreciation of indigenous self-determination and its aspects. Furthermore, it compares legal norms and jurisprudence with indigenous constructions of self-determination to determine if a lacuna exists between what indigenous peoples claim and what international law recognizes.

### **Losing and Recapturing Indigenous Self-Determination in Legal Literature**

One of the most comprehensive and exhaustive literatures ever written on indigenous peoples, Alexandra Xanthaki’s *Indigenous Rights and United Nations Standards, Self-*

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<sup>21</sup> Article III, United Nations Declaration on the Rights of Indigenous Peoples.

*Determination, Culture and Land*<sup>22</sup> explores the indigenous peoples' right to self-determination, their culture, their land claims and related issues. An academic accurately described it as "one of the most informative, well researched and extremely well-argued books that has been published on the subject of indigenous peoples."<sup>23</sup> The book articulates the author's panic at threats to indigenous peoples' existence as a result of transnational corporate expansion into their domains and at "abusive practices" by both corporations and States.<sup>24</sup>

She advances the following propositions which this review will focus on:

1. International law does not recognize the right to self-determination of indigenous peoples. In her words, "current international law does not give a positive answer to indigenous claims for self-determination."<sup>25</sup>
2. The right to self-determination has a strictly political focus and gives a people democratic entitlements but it does not embrace the right to pursue economic development.
3. Indigenous claims related to the natural resources and to economic development "do not fall within the right to self-determination, but within the right to development."<sup>26</sup>

Thus, she considers the right to self-determination a weak if not a wrong vehicle for transporting indigenous land claims to litigation bodies and for sustaining indigenous movements to protect ancestral lands from development aggression.

### **Indigenous Self-Determination: A Gatecrasher in International Law?**

Correctly observing that the right of self-determination is axial to the indigenous peoples' claims,<sup>27</sup> Xanthaki says that international law has not resolved in guileless parlance the question, "Do indigenous peoples have the right to self-determination?" She avers that

<sup>22</sup> This book was published in New York by the Cambridge University Press in 2007.

<sup>23</sup> Malgosia Fitzmaurice, "Alexandra Xanthaki . *Indigenous Rights and United Nations Standards, Self-Determination, Culture and Land*" *European Journal of International Law* 19:4 (2008), p. 862

<sup>24</sup> Xanthaki, pp. 196-197

<sup>25</sup> Xanthaki, p. 132

<sup>26</sup> Xanthaki, p. 240

<sup>27</sup> *Ibid.*



international law does not affirm indigenous claims for self-determination<sup>28</sup> which she calls a thorny issue “with remarkable contradictions.”<sup>29</sup> She points to the reticence of the HRC to tackle the issue of self-determination in individual complaints<sup>30</sup> and to ILO Convention No. 169 which is the first UN document to use *indigenous peoples* but comes with a caveat 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>31</sup> one right being self-determination. She rightly says that the gap in international law created by the absence of a definition of *peoples*<sup>32</sup> heavily weighs on the struggle of indigenous peoples for the recognition of their international status.

The fact is that international law already settled that indigenous peoples have the right of self-determination. The problem is not that “current international law does not give a positive answer to indigenous claims for self-determination”<sup>33</sup> but rather that “a consensus on the precise formulation of indigenous self-determination has remained elusive.”<sup>34</sup> If ‘peoplehood’ entitles peoples to the right of self-determination under Art. 1 of the ICCPR and IESCR, then it is correct to conclude that international law affirms indigenous peoples as right-bearers. This stems from their being *peoples* since they “have their own specific languages, laws, values and traditions; their own long histories as distinct societies and nations; and a unique economic, religious and spiritual relationship with the territories in which they have so long lived.”<sup>35</sup> Daes rightly calls it illogical and unscientific to “treat them as their neighbors, who obviously have different languages, histories and cultures and who often have been their oppressors.”<sup>36</sup> Yet this is not immune from attacks by the Doubting Thomases especially the positivists considering the

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<sup>28</sup> *Ibid.*, p. 132

<sup>29</sup> *Ibid.*

<sup>30</sup> See discussions in Chapter II.

<sup>31</sup> Art. 1(3), ILO Convention 169.

<sup>32</sup> Xanthaki,

<sup>33</sup> *Ibid.*, p. 132.

<sup>34</sup> Anaya, p. 112

<sup>35</sup> Erica-Irene A. Daes, 'An overview of the history of indigenous peoples: self-determination and the United Nations', *Cambridge Review of International Affairs*, 21: 1 (2008), at p. 24

<sup>36</sup> *Ibid.*, p. 24

absence of an international law definition of *peoples* against which to determine if indigenous peoples snugly fit.

There are however categorical articulations of the HRC and the CESCR that indigenous peoples are self-determination right-bearers in a number of concluding observations such as the HRC's on Canada<sup>37</sup> and Norway<sup>38</sup> in 1999 and in the CESCR's *Concluding Observations on the Russian Federation*.<sup>39</sup> These pronouncements, emanating from the very bodies with pre-eminent authority to interpret the very treaties that recognized self-determination as a right of peoples, trump every claim to the contrary.

Furthermore, UNDRIP states in no uncertain terms that

*(i) indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*<sup>40</sup>

The Declaration is indubitably a legal foundation for indigenous self-determination. Admittedly, this is rejected by those who are quick to point out that it is not clothed with the force of a treaty. Xanthaki herself says that it is not “strictly binding, but hastens to add that “it may generate political pressure on states to comply with its terms.”<sup>41</sup> The innuendo that the UNDRIP creates no obligation for States is scathed by the fact that it is only a restatement of existing international laws.<sup>42</sup> In the words of Anaya as Special Rapporteur on the situation of the rights and fundamental freedoms of indigenous peoples,

*the Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples. The standards affirmed in the Declaration share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights. From*

<sup>37</sup> UN Human Rights Committee, Concluding Observations on Canada, UN doc. CCPR/C/79/Add.105 (1999).

<sup>38</sup> UN Human Rights Committee, Concluding Observations on Norway, UN doc. CCPR/C/79/Add.112 (1999).

<sup>39</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, UN Doc.E/C.12/1/Add.94 (12 December 2003) at para. 11

<sup>40</sup> Art. 3, UNDRIP

<sup>41</sup> Xanthaki, p. 281

<sup>42</sup> S. James Anaya and Siegfried Wiessner, “OP-ED: The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment,” *Jurist* (3 October 2007).

*this perspective, the standards of the Declaration connect to existing State obligations under other human rights instruments.*<sup>43</sup>

Thus, the right to self-determination is enshrined in the ICCPR and the ECSR as a right of *all peoples* and to withhold it from indigenous peoples while recognizing it for other peoples is discriminatory<sup>44</sup> if not a travesty of justice.

### **Not a Food Carrier: Stripping Self-Determination of a Resource-Dimension**

As to content, Xanthaki asserts that the right to self-determination carries an exclusively political dimension. She repudiates the view that it embraces the right to pursue economic development and of resource control. In other words, Xanthaki restricts self-determination to “the right to participate in deciding the structure of the state, the type of government and the persons to be entrusted with political power in a state,... the civil and political rights like the rights of association, to form political opinions, free expression including freedom of the press, liberty of the person,...(and) the right of respect for one’s religion and recognition and autonomy for distinct and different groups occupying different parts of the territory of a State.”<sup>45</sup>

If self-determination is how Xanthaki constructs it, what is its relevance to peoples whose interests are the antithesis of transnational industrial interests in an economically globalized world? How can democratic entitlements stop threats of territorial and economic dislocation posed by development aggression? Those who argue that self-determination entitles its right-holders to no more than space in the democratic arena fail to take into account the classic position of indigenous peoples: that of non-dominance<sup>46</sup> which I argue is a cause and effect of their being minoritized and disadvantaged. It is preposterous to believe that they can be equal players with the rest of society in the democratic playing field. Their participation in

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<sup>43</sup> S James Anaya, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Human Rights Council A/HRC/9/9, 11 August 2008.

<sup>44</sup> John Henriksen, “Implementation of the Right of Self-Determination of Indigenous Peoples,” *Indigenous Affairs* 3:1 (International Work Group for Indigenous Affairs (IWGIA), 2000), p 14.

<sup>45</sup> AA Idowu, “Revisiting the Right to Self-Determination in Modern International Law: Implications for African States” in *European Journal of Social Sciences – Volume 6, Number 4* (2008), p. 44

<sup>46</sup> UN Subcommission on the Prevention of Discrimination of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*. Special Rapporteur, José Martínez Cobo, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, para. 379

the “majority rules” processes legitimizes those decisions which isolate or further minoritize them. Democratic entitlements will not accomplish much to alleviate the situation of indigenous peoples in the globalization era. Mazower would support this with his observation that liberal democracy’s collapse in Europe that saw the ascent of fascism and communism in its wake was occasioned by its focus on process and not results. In his words, it “assume(d) mistakenly that a deep rooted social crisis could be solved by offering ‘the people’ constitutional liberties.”<sup>47</sup>

Xanthaki’s position appears not to ground itself on the normative justifications for indigenous self-determination. One of these is historical injustice which she herself recognizes as a legitimate basis for the right.<sup>48</sup> This injustice took on many forms- “genocide, territorial displacement and forced relocation,”<sup>49</sup> as well as “subjugation, marginalization, dispossession, exclusion or discrimination.”<sup>50</sup> Will these be rectified by democratic engagements when the dominant groups, by sheer majority status, can easily drown the indigenous voice?

Furthermore, Art. 1 of the ICCPR and of the IESCR clearly provide that by “virtue of (the right of self-determination), (all peoples) freely determine their political status and freely pursue their economic, social and cultural development.” Scheinin interprets this to mean that the right of self-determination has two dimensions: “all peoples’ right ‘to freely determine their political status’ (*political dimension*) and to pursue their ‘economic, social and cultural development’ (*resource dimension*).”<sup>51</sup> For Anaya, international norms pertaining to indigenous peoples that “elaborate upon the requirements of self-determination, generally fall within the following categories: cultural integrity, lands and resources, social welfare and development, and self-government.”<sup>52</sup> Xanthaki would say that among the requirements of self-determination Anaya enumerated, only self-government falls within the loop.

<sup>47</sup> Mark Mazower, *Dark Continent: Europe’s Twentieth Century* (New York: Knopf, 1998), p. 11.

<sup>48</sup> Xanthaki, pp. 4, 132.

<sup>49</sup> Patrick Macklem, “Indigenous Recognition in International Law: Theoretical Observations.” *Michigan Journal of International Law* Vol. 30:177 (Fall 2008); p. 185

<sup>50</sup> See *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities* (adopted at the Twenty-eighth Session, 2003).

<sup>51</sup> Martin Scheinin, *Indigenous Peoples Land Rights Under the International Covenant on Civil and Political Rights*; p. 8; <http://www.galdu.org/govat/doc/foredragavmartinscheinin.pdf>

<sup>52</sup> S. James Anaya, “The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs,” 28 *Ga. L. Rev.* 309 (1994), p. 342

To flout the resource dimension of the right to self-determination is to overlook feminist and Third World critiques on the interdependence of political and economic self-determination.<sup>53</sup> Property rights are a source of power and, as correctly said by Mason and Carlsson, this has been so throughout history.<sup>54</sup> For instance, they vest on the holder a considerable measure of influence on the lives of others<sup>55</sup> and accord women bargaining leverage in the household.<sup>56</sup> Conversely, lack of property rights detracts women's own empowerment.<sup>57</sup> Power inequalities between men and women are attributable to the disparity in land rights<sup>58</sup> especially in agricultural societies. Thus to empower women, their right to control assets or productive resources should be recognized.<sup>59</sup> The same goes for indigenous peoples: it should be recognized that inherent in their right to self-determination is their right to control their natural resources without which self-determination will be of no consequence.

### **The Food Basket Under the Umbrella of Self-Determination: In The Wrong Place?**

To Xanthaki, indigenous claims related to natural resources and to economic development "do not fall within the right to self-determination, but within the right to development"<sup>60</sup> and the right to self-determination "must maintain its political focus." Acknowledging that it is very difficult to demarcate the line between the two, she suggests that "a clear distinction between the right to self-determination, restricted to political power, and the right to development, encompassing economic claims, could prove helpful."<sup>61</sup> Remarkably, she does not attempt to make a clear-cut distinction. But she does admit that from her vantage point, the contours of the cleavage between the right to self-determination and those of the right to

<sup>53</sup> Karen Knopp, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002), p. 19

<sup>54</sup> Karen Mason and Helene M. Carlson, "Gender Equality and Land Rights" in Philip Alston and Mary Robinson (eds) *Human Rights and Development* (Oxford: Oxford University Press, 2005), p. 116

<sup>55</sup> CB Macpherson (ed.), *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978).

<sup>56</sup> Kerry Rittich, 'The Properties of Gender Inequality' in Philip Alston and Mary Robinson (eds) *Human Rights and Development* (Oxford: Oxford University Press, 2005), p. 99

<sup>57</sup> *Ibid.*

<sup>58</sup> Mason, et. al., p. 120

<sup>59</sup> *Ibid.*, p. 125

<sup>60</sup> Xanthaki, 240

<sup>61</sup> *Ibid.*, p. 241.

development are nebulous at best.<sup>62</sup> She states that the ICCPR provisions on land proclaim economic rights and nothing links them to the right of self-determination (which is strictly political).<sup>63</sup> Neither Article 1.2 of the ICCPR and the ICESR nor Art. 47 of the ICCPR and Art. 25 of the ICESR pertain to self-determination in her view.<sup>64</sup> I will delve into this in Chapter III. Just suffice it for the moment to state that in its General Comment No. 12, the HRC clarified that paragraph 2 (of Art. 1, ICCPR) “affirms a particular aspect of the economic content of the right of self-determination, namely the right of peoples, for their own ends, freely to ‘dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law.’”<sup>65</sup> Art. 47 adds to the value of Art 1(b) by recognizing that “the right of all peoples to enjoy and utilize fully and freely their natural wealth and resources” is an inherent right. Moreover, the HRC has stressed that “the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence”<sup>66</sup> a categorical affirmation that self-determination has an economic dimension and an indirect rejection of Xanthaki’s position.

### **Land Claims: Claims to Kitchen, Library, Laboratory and University**

I conclude from Xanthaki’s persistent characterization of land claims as an economic claim that she is equating control over ancestral lands with an economic venture although she does appreciate the other meanings that land holds for indigenous peoples. Precisely, these other meanings are what should stop one from looking at indigenous resource control as economic engagement. In *Maya Indigenous Communities Toledo District v. Belize*,<sup>67</sup> the Inter-American Court of Human Rights, ruling that Belize violated the land rights of the Maya peoples by

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<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, p. 239

<sup>64</sup> *Ibid.*

<sup>65</sup> Human Rights Committee. *General Comment No. 12: The right to self-determination of peoples (Art. 1) : 03/13/1984.* <http://www.unhchr.ch/tbs/doc.nsf/0/f3c99406d528f37fc12563ed004960b4?Opendocument>

<sup>66</sup> Human Rights Committee. Concluding observations on Canada. 07/04/99, UN Doc. CCPR/C/79/Add. 105. Concluding Observations/Comments (1999).

<sup>67</sup> Case 12.053, Inter-Am. Ct.H.R., Report No. 40/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1, (2004).

granting oil and logging concessions to corporate actors, pronounced that the “effective protection of ancestral territories implies not only the protection of an economic unit but the protection of the human rights of a collective that bases its economic, social, and cultural development upon the relationship with the land.” Moreover, a quotation from Daes is relevant:

*Land is not only an economic resource for indigenous peoples. It is also the peoples' library, laboratory and university; land is the repository of all history and scientific knowledge. All that indigenous peoples have been, and all that they know about living well and humanly, is embedded in their land and in the stories associated with every feature of the landscape.*<sup>68</sup>

Indigenous peoples' sovereignty over their natural resources functions not only to secure their means of subsistence but also affirms their right to self-determination as it guarantees their cultural survival and the maintenance of their identity which they have always intended to keep separate and distinct from that of the dominant society. To deny them their land is to deny them their self-determining status because

*(l)and is the foundation for the lives and cultures of indigenous peoples the world over. Without access to and rights over their land and natural resources, indigenous peoples' distinct cultures, and the possibility of determining their own development and future, become eroded.*<sup>69</sup>

### **Land Claims: The Wisdom (or Folly) of Boating on Two (or More) Rivers**

Xanthaki's proposal is to restrict self-determination to political power and to cast economic claims under the umbrella of the right to development.<sup>70</sup> This seems to find support in the UNDRIP itself which states that the historic injustices suffered by indigenous peoples “as a result of, *inter alia*, their colonization and dispossession of their lands, territories resources,... prevent(ed) them from exercising, in particular, their right to development in accordance with

<sup>68</sup>Erica- Irene A. Daes, “Article 3 of the Draft UN Declaration on the Rights of Indigenous Peoples: Obstacles and Consensus” in *Seminar: Right to Self-Determination of Indigenous Peoples* (Montreal: International Centre for Human Rights and Democratic Development, 2002); p8-14 at p. 13; [http://www.ddrd.ca/site/\\_PDF/publications/indigenous/proceedingsExpertSeminarMay2002PRINT.pdf](http://www.ddrd.ca/site/_PDF/publications/indigenous/proceedingsExpertSeminarMay2002PRINT.pdf)

<sup>69</sup> Marianne Wiben Jensen, Editorial, *Indigenous Affairs* 4 (4): 3-7. International Work Group for Indigenous Affairs (IWGIA, 2004), p.4

<sup>70</sup>Xanthaki, p. 241

their own needs and interests.”<sup>71</sup> But the UNDRIP only stresses the right to development as a particular right affected by colonization and dispossession and does not purport to suggest that no other right, such as the right to self-determination, was similarly obviated.

Framing land claims within the right to development poses practical and even legal complexities. For one, there is no treaty or convention or any other document with a binding character in international law that enshrines a right to development. It is still a nascent

concept and some scholars downplay the Declaration on the Right to Development as an aspirational document.<sup>72</sup> Although I agree that there are substantive norms that exalt it to the level of human rights, its not having been translated into positive law emasculates its value at least in so far as enforcement is concerned. There is no specific obligation imposed on States to recognize it, although at the minimum the those that voted for it are expected to honor its precepts. A classic definition of law was advanced in the 19<sup>th</sup> century by Spanish jurist Sanchez Roman thus: Law is “a rule of conduct, just, obligatory, promulgated by the competent authority for the common good of a people or nation, which constitutes an obligatory rule of conduct for all its members.”<sup>73</sup> Another describes law as an imposition of “certain conventional and obligatory forms of behavior” that bears a coercive influence.<sup>74</sup> What is common to the definitions is the perception that law has teeth with which it obliges adherence from those to whom it applies. Unlike the right to self-determination which has been recognized as an inherent right of all peoples and has a *jus cogens* character,<sup>75</sup> thus States are obliged to promote, protect and fulfill it, the right to development is still an ‘international law pending evolution.’

<sup>71</sup> See Preamble, UNDRIP.

<sup>72</sup> UN General Assembly Resolution A/RES/41/128; 4 December 1986

<sup>73</sup> Arturo Tolentino, *Civil Code of the Philippines: Commentaries and Jurisprudence, Vol. I* (Quezon City: Central Lawbook Publishing Co., Inc., 1990), p. 1.

<sup>74</sup> Geoffrey P. Miller. “The Legal Function of Ritual,” *Chicago-Kent Law Review*, Vol 80:1181 (2005), pp. 1181-1183

<sup>75</sup> Case Concerning East Timor (Portugal v. Australia), 1995 ICJ 90, 102 (June 30); *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem*, GA RES ES–10/15, UNGAOR, 10th special session, 27th Plenary Meeting, UN Doc A/RES/ES–10/15 (2004).



Also, Xanthaki's solution gives birth to remedial snags. The right to development has no enforcement mechanism while the right to self-determination has, never mind if it is weak.<sup>76</sup> Thus her characterization of the right to self-determination as 'fickle' holds no water as against the fluid right to development. I argue that land rights will be legally devalued if they are claimed under the shelter of the right to development which is still struggling to be accommodated by international law.

Realizing the legal quagmire in protecting indigenous claims to land, Xanthaki proposes to apply a principle of subsidiarity.<sup>77</sup> Such claims, she advises, may be advanced by grounding them on other human rights such as the right to culture and the right to development "rather than on the fickle right to self-determination."<sup>78</sup> Westra similarly avers that forced relocation or displacement of indigenous peoples to pave the way for corporate operations or corporate activities that decimate natural habitat and foment the dislocation of populations culminates in "the planned demise of culture" and is tantamount to eco-terrorism.<sup>79</sup> She concludes that to hold corporations liable, it is more expedient to allege violation of cultural integrity rather than employ the rhetoric of self-determination.

Considering the challenges in instituting complaints before the HRC for land claims anchored on self-determination rights, Xanthaki's proposal is indeed practical as illustrated by the HRC jurisprudence. For instance, in *Lubicon Lake Band v. Canada*,<sup>80</sup> the HRC held that the complaint on the violation of the right to self-determination could not be passed upon in an individual communication, but the facts raised by the author surfaced issues that fell under Art. 27 on right to culture (which the author did not invoke). It proceeded to conclude that Canada's act of expropriating the Band's land of "approximately 10,000 square kilometers"... for commercial interest (oil and gas exploration) "violated Art. 27 since the land was essential to

<sup>76</sup> The HRC has been enforcing the right of self-determination under Art. 40 of the ICCPR through Concluding Observations on the reports of States. In a number of cases, it refrained from entertaining self-determination claims raised in individual complaints under the ICCPR's Optional Protocol I on the grounds that the self-determination being a collective right cannot be addressed in an individual complaint.

<sup>77</sup> Xanthaki, p. 282.

<sup>78</sup> *Ibid.*, p. 281.

<sup>79</sup> Westra, p. 112.

<sup>80</sup> Communication No 167/1984, A/45/40 Annex 9(A) (26 March 1990)

their cultural survival.<sup>81</sup> In short, Xanthaki's approach of packaging land claims with the cover of rights other than self-determination allows indigenous peoples some recourse. This is not without loopholes, though, as I will demonstrate in the next Chapter.

But Gilbert soundly opines that "(t)he emerging human rights discourse on collective land ownership integrates all the social, cultural and spiritual facets of indigenous peoples' relationship with their territories and avoids the dangers of compartmentalization of the present dichotomy between right of ownership and right to use."<sup>82</sup> My reading is that he rejects the idea of partitioning the right to self-determination into smaller rights which seems to be Xanthaki's practical proposal. Of course, Xanthaki is right that pitching land rights under the rubric of self-determination is a challenge and it may be more realistic to invoke other rights to advance land claims. But this should not in anyway be a reason for indigenous peoples to capitulate and pull out their land rights from under self-determination and place it somewhere. Such approach detaches itself from indigenous assertions of 'peoplehood' which underpin demands for indigenous rights. Even the mere international litigation of indigenous rights is in itself an unspoken assertion of international status. This may not be obvious which is why lawyers should overstate it in their pleadings.

Indigenous movements traveled and continue to travel serpentine and thorny roads for the recognition of their right to self-determination. Considerations of expediency should not legitimize its devaluation.

### **What Lies Ahead: A Look at Structure**

At this time when economic globalization is fencing indigenous peoples out of their lands, the right to self-determination is still "the best vehicle to embark upon the recognition of their right to live" thereon<sup>83</sup> even as Xanthaki maintains that self-determination should not be

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<sup>81</sup> *Ibid.*

<sup>82</sup> Jeremie Gilbert, *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors*. (Ardsley: Transnational Publishers, 2006), p. 140.

<sup>83</sup> *Ibid.*, p. 200.

the shelter of all claims.<sup>84</sup> Thus her views that indigenous self-determination is not yet recognized by international law as a right, that a resource dimension does not attach to it since it only entitles right-holders to democratic entitlements and that indigenous claims to land should not be pursued under the banner of self-determination will not connect the current precarious situation of indigenous peoples in an economically globalized community to a violation of their right to self-determination.

This study proves otherwise. Thus, the succeeding Chapter II explores the substantive norms anchoring indigenous self-determination to surface those principles that justify it even in the absence of a positive law. It also scrutinizes the international legal environment of indigenous peoples to determine the availability and width of space that accommodates, promotes and protects indigenous self-determination. Chapter III scans the power relations between economic globalization (or simply globalization in this paper) and multinational enterprises<sup>85</sup> (which are interchangeably used with TNCs, MNCs and business in this paper), between corporations and States, and between States and indigenous peoples and shows that in the chain of relations, the abuses indigenous peoples suffer negate their exercise of self-determination and are directly traceable to the forces of economic globalization. Chapter IV demonstrates the restricted value of democratic entitlements to indigenous peoples in the exercise of their ‘*peoplehood*’ and argues that without the recognition of indigenous territorial control as an inherent dimension of their right to self-determination, the right is shrived of substance. In such case, the right will utterly fail to cloister them from the adverse consequences of globalization which are no different from, although worse, than the effects of colonization. Chapter VI is a summary of this study.

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<sup>84</sup> Xanthaki, p. 281.

<sup>85</sup> Van der Putten et al. outline the characteristics of MNEs: they originated in a developed economy where the head office is situated and from where control of assets and operations in developing countries is made; the enterprise “is large in terms of turn-over and employees, making it a comparatively large participant in the economy of the developing country;” it is listed in the stock exchange; it is engaged the field of extraction, manufacturing or services. See v Frans-Paul van der Putten, Gemma Crijns and Harry Hummels, “The Ability of Corporations to Protect Human Rights” in Rory Sullivan (ed.), *Business and Human Rights* (Sheffield: Greenleaf Publishing, 2003); p. 85.

## Chapter II. Indigenous 'Peoplehood': A Survey of Theoretical and Legal Frameworks

*Precisely because self-determination claims 'could lead to a very different world map', self-determination has been regarded as the 'most problematic topic in indigenous peoples' rights' and as one that 'strikes at the legitimacy of settler regimes'.<sup>86</sup>*

*Whatever form self-determination makes for every people, it is nevertheless the very first right that needs to be recognized before the other rights are to have any meaning.<sup>87</sup>*

To this very day, the rich legal scholarship on self-determination has not succeeded in establishing an international consensus as to its meaning which has become a contestation site for lawyers and academics. Beitz calls it "one of the most important and most obscure principles of contemporary international law and practice."<sup>88</sup> Although the "highest-order principle in the contemporary international system,"<sup>89</sup> Packer observes that it suffers from "lack of clarity surrounding both the definition of its content and right holders."<sup>90</sup> As it applies to indigenous peoples, it presents even more complex conceptual challenges. Among those questions that current scholarship has not settled are whether indigenous peoples hold the status of peoples to which self-determination right attaches, and whether this right, assuming it does attach, includes control over ancestral domains.

But as someone said in regard to the concept of *indigeneity* which also labours under chronic conceptual crisis, it is imperative to embrace a unifying international concept to foreclose "unsustainable fragmentation and inconsistency."<sup>91</sup> For as long as the international status of indigenous peoples wanders in a charivari of scholarly opinions and nebulous and

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<sup>86</sup> Paul Keal, *Indigenous Self-Determination and the Legitimacy of Sovereign States in International Politics*, *International Politics* 44:2-3 (2007), p.293.

<sup>87</sup> Rainy Blue Cloud Greensfelder (ed), *Toward a Campaign in Support of the UN Declaration on the Rights of Indigenous Peoples*, International Forum on Globalization (2 August 2007), p 17; <http://www.ifg.org/pdf/draft%20report%20UN%20Dec.pdf>

<sup>88</sup> Charles Beitz, *Political Theory and International Relations* (New Jersey: Princeton University Press, 1979), p. 92.

<sup>89</sup> S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996), p 75.

<sup>90</sup> John Packer, 'Considerations on Procedures to Implement the Right of Self-Determination' in Michael C. van Walt van Praag (ed), *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*. (Catalonia: UNESCO Division of Human Rights, Democracy and Peace, 1999), p. 152

<sup>91</sup> Benedict Kingsbury, "Claims by Non-State Groups in International Law," *Cornell International Law Journal* 25(3) (1992), p. 420

sometimes conflicting and cryptic interpretations of international law, they will continue to be victims of unfettered plunder of their lush resources by the economic globalization regime which is expanding extractive industries into their domains.

Some scholars submit that determining whether indigenous peoples have the right of self-determination hinges on whether or not international law regards them as peoples.<sup>92</sup> Theoretically, this is correct because the very status of being a *people* carries with it the right of self-determination. The problem is that international recognition of their status is lukewarm. With the exception of the UNDRIP whose binding character continues to dominate indigenous rights discourse, no international law categorically recognizes their ‘peoplehood.’ Thus, this chapter takes a reverse view- that is, to resolve whether indigenous peoples are *peoples* in contemplation of Art. 1 of the ICCPR and the IESCR, it is necessary to establish whether they have the right of self-determination; perforce, they possess the legal status of *peoples*. To do this, it is crucial to scrutinize the theoretical and legal foundations for indigenous self-determination. As Dworkin said, there are norms and principles that underlie laws.<sup>93</sup> This holds true for international instruments. The human rights bodies, in interpreting the constructive ambiguities surrounding indigenous claims to self-determination, should consult these norms. Scholars too must investigate to contribute to giving clarity to the international status of indigenous peoples.

### **Scanning and Transcending the Secession Debate**

Notwithstanding the definitional issues surrounding it, self-determination is “a powerful expression of the underlying tensions and contradictions of international legal theory: it perfectly reflects the cyclical oscillation between positivism and natural law, between an emphasis on consent, that is voluntarism, and an emphasis on binding objective legal principles,

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<sup>92</sup> Xanthaki, p. 135.

<sup>93</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), p.22.

between a statist and communitarian vision of world order.<sup>94</sup> Minority movements continuously invoke it to advance their issues and this has, to a degree, influenced legal paradigms in regard to how the concept is viewed. For instance, it has long been the prevailing view that self-determination simply meant secession but it evolved over time to accommodate an internal dimension, i.e. self-determination within an existing State.

Whether self-determination applies to peoples in non-colonial situations remains a raging debate because in the words of Kingsbury,

*(i)n conventional understandings, the right to self-determination has been represented as the right to an independent State, implying that it leads to sovereignty... The majority of States have been unable to satisfactorily resolve the self-determination claims of peoples within their borders, which are typically perceived as challenges to State sovereignty and the belief that sovereignty is indivisible.*<sup>95</sup>

Beitz, while conceding that self-determination is important in justifying colonial independence, questions attempts to use it to legitimate “other international realignments.”<sup>96</sup> But Anaya rightly advances that limiting self-determination to peoples in colonial situations “denies its relevance to all segments of humanity and overlooks its connection, as a principle, with human rights.”<sup>97</sup> The HRC implicitly recognized this in 1994 in its *Concluding Observations on the report of Azerbaijan* where it emphasized that the principle of self-determination under Art. 1 of the ICCPR applies to all peoples and “not merely to colonized peoples.”<sup>98</sup> Even Canada’s Supreme Court affirmed that a plurality of peoples may exist in an existing State and a *people* does not have to refer to its entire population.<sup>99</sup>

According to Wiessner, the claim to self-determination may, to indigenous peoples mean any of the following: “1) external self-determination, i.e. the right of peoples to freely determine their international status, including the option of political independence; 2) internal

<sup>94</sup> Antonio Cassese. *Self-determination of peoples: a legal reappraisal*. (New York: Cambridge University Press, 1995). In “Introduction”

<sup>95</sup> Kingsbury, p. 485. Here, he stresses that States “worry about whether self-determination for indigenous peoples ‘can be reconciled with (their) concern to maintain their territorial integrity and with the concern of the international community not to risk unlimited fragmentation of existing States.’”

<sup>96</sup> Charles Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1979), p. 93

<sup>97</sup> Anaya, *Indigenous Peoples in International Law*, p. 77

<sup>98</sup> UN Human Rights Committee, *Concluding Observations on Azerbaijan*, adopted on 3 August 1994. CCPR/C/79/Add.38; A/49/40.

<sup>99</sup> Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217

self-determination, the right to freely determine their form of government and their individual participation in the processes of power; and 3) their rights as minorities within a given nation-State structure to special rights in the cultural, economic, social and political sphere.”<sup>100</sup> He believes that “some important members” support “even greater rights of limited autonomy” but the option of full sovereignty and political independence or secession seems to unite the world community against it.<sup>101</sup>

Observing that there has been a perpetual disagreement on the applicability of self-determination to non-colonial situations, Hannum, echoing the position of many other scholars, expounds that it carries a contemporary flavour removed from the colonial situation.<sup>102</sup> Rejecting secession and dismissing it “a legacy of the past,” he posits that self-determination in its contemporary forms possesses two historically acceptable and morally justifiable purposes meriting the support of the international community. These purposes according to him are: “first, to protect the individual and group identity and second, to facilitate effective participation in government.”<sup>103</sup> The first, he claims, are reflected in human rights norms including those affecting indigenous peoples, and the second which he calls internal self-determination demands the identification of relevant layers of democratic self-government to guarantee effective participation of people in the affairs of the State. Both purposes can be “achieved within less-than-independent political entities.” Hannum however believes that the division of a State is permissible and may at times be the best solution, as long as the division is by agreement.<sup>104</sup>

In an apparent effort to calm the nerves of States apprehensive of irredentism that may culminate in territorial disintegration and to get them to recognize indigenous self-determination, Kingsbury notes that “(t)he self-determination claims made by indigenous peoples do not presently constitute an immediate crisis of political legitimacy for either the

<sup>100</sup> Siegfried Weissner, “Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis.” 12 *Harv. Hum.Rts. J.*(1999); p. 116

<sup>101</sup> *Ibid.*, p. 115-116

<sup>102</sup> Hurst Hannum, ‘The Specter of Secession: Responding to Claims for Ethnic Self-Determination’ in *Foreign Affairs*, Vol. 77, No. 2 (Mar. - Apr., 1998), p. 13

<sup>103</sup> *Ibid.*, p. 265.

<sup>104</sup> *Ibid.*, p. 269

institution of the State or the governments exercising authority within States that have indigenous populations.”<sup>105</sup> Keal’s words bear the same import when he theorizes that self-determination, while dominating the rights agenda of indigenous peoples, is forwarded not as a claim to statehood but rather as the power to chart their economic and cultural destinies within existing State polities.<sup>106</sup> Thus, even in the post-colonial period, self-determination did not become *functus officio* as it may be achieved “within the framework of...existing States.”<sup>107</sup>

In spite of this and of claims that secession has lost its practical currency, States are vexed by apprehensions that self-determination in a non-colonial context may culminate in the emasculation of their territorial integrity and the fragmentation of existing States.<sup>108</sup> The specter of secession continues to reside in States’ political imaginations, thus their reluctance to recognize indigenous ‘peoplehood.’ If the UNDRIP which unequivocally declares indigenous self-determination was adopted by the General Assembly, it is because it categorically ruled out secession.<sup>109</sup> But as Daes enunciated,

*It should be emphasized, once again, that it is not realistic to fear indigenous peoples’ exercising of the right to self-determination. It is far more realistic to fear that the denial of indigenous peoples’ right to self-determination will leave the most marginalized and excluded of all the world’s peoples without a legal, peaceful weapon to press for genuine democracy in the States in which they live.*<sup>110</sup>

Keal may be correct that most indigenous peoples do not interpret self-determination as statehood or sovereignty but this does not necessarily obliterate secession as their option. To be very sure, while there is no right to secession under international law, there is nothing that

<sup>105</sup> Kingsbury, p. 485. See also Omar Dahbour, “The Ethics of Self-Determination” in Carol C. Goulde and Pasquale Pasquino (eds) *Cultural Identity and the Nation-State* (Maryland: Rowman and Littlefield Publishers, Inc., 2001), pp. 9-11. According to Dahbour, indigenous peoples have shown not to be interested in Statehood but in “regional autonomy” which “does not challenge the sovereignty of the States in which they reside.” My understanding from the discourse of Dahbour is that he looks at regional autonomy to mean more than just self-government and also includes control of resources.

<sup>106</sup> Keal, p.288

<sup>107</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217

<sup>108</sup> Keal, p.288; Also the debates during the drafting of the UNDRIP

<sup>109</sup> Art. 46(1) of UNDRIP provides: *Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.* Art. 46(1), Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295.

<sup>110</sup> Daes, “An overview of the history of indigenous peoples,” p. 19



interdicts it either.<sup>111</sup> Thus, when a State oppresses its citizens in a manner tantamount to colonialism, or “in cases of serious injustice where there is no other remedy available, there should at least be a moral if not a legal right to secede.”<sup>112</sup> Although “(t)he international community discourages secession as a remedy for the abuse of fundamental rights,”<sup>113</sup> “it should not be barred by the shibboleth of territorial integrity” when it is the only option<sup>114</sup> because a State “that gravely violates its obligations towards a distinct people or community within its boundaries loses the legitimacy to rule over that people.”<sup>115</sup> The absence of choice for oppressed peoples operates against a comprehensive theory of justice.

### **Theoretical and Normative Foundations of Indigenous Self-Determination**

Indigenous self-determination was not conceived in a vacuum and is not an empty concept. Indigenous peoples may have permeated the discourse on self-determination via “the backdoor of international developmental policy”<sup>116</sup> but their demand for recognition of their right of self-determination is not devoid of normative foundations. Stated differently, the right, to borrow the language of Beitz, “has an existence in the moral order that is independent of (its) expression in international doctrine.”<sup>117</sup> The belief in the existence of such moral order “does not fail to make the usual positivist distinctions among treaties, customs, and general principles of law but rather realizes that they must be evaluated and understood considering those values “that speak to *all of us*, and with attention to the realities of a changing world of diverse contexts in which previously unheard, and unheard of, groups wield increasing influence.”<sup>118</sup>

<sup>111</sup> Scholars who espouse the position that secession is unacceptable under international law invoke Provision 6 of the Declaration of the Granting of Independence to Colonial Peoples in GA resolution 1514 (XV) of 1960 which States: “Any attempt 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 United Nations Charter.”

<sup>112</sup> Weissner, *supra*. at note 12, p. 119-120

<sup>113</sup> Daes, *ibid.*, pp. 24-25

<sup>114</sup> Darlene M. Johnston, “The Quest of the Six Nations Confederacy for Self-Determination,” 44 *Toronto Faculty of Law Review* 1(1986), p. 28

<sup>115</sup> Henriksen, pp. 9-10

<sup>116</sup> Luis Rodríguez-Pinero, *Indigenous Peoples, Postcolonialism and International Law: The ILO Regime (1919–1989)* (Oxford University Press, Oxford, 2005), p. 332.

<sup>117</sup> Charles Beitz, “Human Rights and the Law of Peoples,” in Deen K. Chatterjee (ed.), *The Ethics of Assistance. Morality and the Distant Needy* (Cambridge: Cambridge University Press, 2004), p. 196. Take note however that Beitz himself considers this an orthodox view of human rights which he rejects as he believes in a practical conception of human rights.

<sup>118</sup> Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* (New York: Oxford University Press, 2009), p. 260

### **Rectificatory Justice and Historical Injustice**

According to Wiessner, the process of colonization saw the estrangement of indigenous peoples from their domains, resulting in their political, economic and cultural dispossession, forcing them to live in reservations or minor spaces or “breadcrumbs of land left to them by the dominant society,” rendering them “entrapped peoples,” or “nations within.”<sup>119</sup> One need not go apocryphal for accounts of what Macklem calls the “adverse consequences of colonization projects”<sup>120</sup> which include genocide, territorial displacement and forced relocation. The UNDRIP itself acknowledges that “indigenous peoples have suffered from historic injustices as a result of, *inter alia*, their colonization and dispossession of their lands, domains and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.”<sup>121</sup> These injustices endured under the new bearers of sovereignty in the post-colonial era and persist to this day. As indigenous peoples themselves contend,

*(i)ndigenous peoples face serious and urgent problems including the violation of our collective rights as indigenous peoples, oppression by States, development aggression and plunder of our land and resources by multinational corporations and international financial institutions in collusion with the local elite. Government policies and neglect have led to continuing impoverishment, discrimination and deprivation of our identity.*<sup>122</sup>

Daes correctly attributes the present-day minoritization of indigenous peoples as the consequence either of colonization projects or State expansion or both.<sup>123</sup> Xanthaki, writing from her position that self-determination has a political focus, theorizes that “historical and rectificatory justice” subjects to cavil States’ authority them.<sup>124</sup> Rightly she says that the latter perceive the acknowledgment of their self-determination rights in the UNDRIP as an official

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<sup>119</sup> Siegfried Weissner, “Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis” in Anaya, S. James (ed.), *International Law and Indigenous Peoples* (Hants: Dartmouth Publishing Company, 2003), p. 258-259.

<sup>120</sup> Macklem, p. 185

<sup>121</sup> See *Preamble*, United Nations Declaration on the Rights of Indigenous Peoples.

<sup>122</sup> “Declaration of Solidarity” from the *International Conference on IP Rights, Alternatives and Solutions to the Climate Crisis* held in Baguio City, Philippines from November 5-8, 2010.

<sup>123</sup> Daes, “An overview of the history of indigenous peoples, p. 24;

<sup>124</sup> Xanthaki, 132

condemnation of the "policies of destruction and assimilation" they were subjected to and a recognition of their capacity to chart their destinies without State meddling.<sup>125</sup>

One might consider it an anomaly that indigenous self-determination should be avowed while this is withheld from other groups whose sovereignty was similarly supplanted by colonialism. However, there is a cogent reason in making a distinction: Unlike other groups such as ethnic minorities who have chosen to "preserve and develop their separate group identity within the process of integration and participate actively in the common domain," indigenous peoples "consolidate and strengthen the separateness of (their indigenous identity) from other groups in society" and "participate less in the common domain" while maintaining "a separate culture which is closely linked to their particular ways of using land and natural resources."<sup>126</sup> These identities "pre-date historical encroachments by other groups and the ensuing histories that have challenged their cultural survival and self-determination as distinct peoples."<sup>127</sup> To deny them self-determination is to coerce them to assimilate which has no normative justification in a civilized world.

At this age when colonization has supposedly become a thing of the past, indigenous peoples are susceptible to the same "adverse consequences of colonization projects" this time not of invading foreign armies with their guns and cannons, but of the economic globalization regime committing development aggression using capital, technology, chainsaws, bulldozers and sometimes, armed security forces provided by States.<sup>128</sup> More than ever, indigenous self-determination must be respected to neutralize the adverse consequences of economic globalization projects. As a leader of an indigenous community explained,

*(s)elf-determination protects our right to subsist, and it protects as well our right to subsist in the way we as indigenous peoples see fit.*

<sup>125</sup> *Ibid.*

<sup>126</sup> Asbjorn Eide. "Categories of Rights: Some Initial Observations" in *Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*. Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights E/CN.4/Sub.2/2000/10, 19 July 2000

<sup>127</sup> S. James Anaya. *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*. *Arizona Journal of International & Comparative Law* Vol 21, No. 1 (2004), pp 13-14

<sup>128</sup> Cheryl L. Daytec-Yañgot, "Free, Prior and Informed Consent: A Shield for or Threat to Indigenous Peoples Rights?" *Indigenous Peoples Experiences on Free, Prior and Informed Consent: A Collection of Case Studies*, (Chiang Mai, Thailand: Indigenous Peoples Foundation for Education and Environment, 2010); pp. 39-43, 53.

*For if we consider the history of the world's indigenous peoples during the last 500 years..., one terrible and tragic conclusion emerges as a central theme: the denial of our own means of subsistence by those who came to live in our land. It is this violation of our right of self-determination that characterizes our recent history.*<sup>129</sup>

**Exclusion from the Distribution of Sovereignty Sanctioned  
by the International Legal Structure**

An equally strong normative framework for indigenous self-determination is propounded by Macklem who argues that indigenous peoples have a status in international law and, by implication, possess the right of self-determination because of “the structure and operation of international law itself.”<sup>130</sup> He points to the fact that indigenous peoples exist in State polities whose claims to sovereign power over them are legitimized by international law “because of an international legal refusal to recognize these peoples and their ancestors as sovereign actors “even if these peoples and their ancestors before them existed in self-governing domains prior to colonization.”<sup>131</sup> The effect of such refusal to recognize indigenous peoples as sovereigns while recognizing other collectivities legitimated the arbitrary assertion by States of sovereignty over them and their resources,<sup>132</sup> their ownership over which predates the States.

McNeil describes how colonizers imposed sovereignty on indigenous peoples:

*The European powers sought to fortify their shaky claims by whatever means they could, including assertions of discovery, symbolic acts of possession, papal bulls, the signing of treaties with rival States or local chiefs and princes, the establishment of settlements and outright conquest by force of arms. The juridical effect of these various acts is a matter of debate. In practical terms however, might made right, so that a sovereign who succeeded in exercising a sufficient degree of control was generally regarded as having acquired sovereignty.*<sup>133</sup>

A similar mode of “acquisition of sovereign power” was the imposition of the Regalian doctrine by Spain on its colonies which expropriated for the Spanish crown indigenous domains

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<sup>129</sup> Ted Moses, “The Right of Self-Determination and Its Significance to the Survival of Indigenous Peoples” in Pekka Aikio and Martin Scheinin, eds., *Operationalizing the Rights of Indigenous Peoples To Self-Determination* (Institute for Human Rights, Turku/Åbo: Åbo Akademi University, 2000), p 162

<sup>130</sup> Macklem, p. 186

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), p. 110; emphasis added.

regarded as *terra nullius*,<sup>134</sup> a mode of acquisition that the US Supreme Court would call feudal in the case of *Carino v. Insular Government*.<sup>135</sup> All of these modes of imposition of sovereign power on indigenous peoples and their domains were premised “on the basis that (they) were insufficiently civilized to merit legal recognition as sovereign actors.”<sup>136</sup>

Macklem draws attention to the fact that while the incivility of indigenous peoples as justification for colonization was subsequently hurled into the dustbins of law and philosophy,<sup>137</sup> their treatment as non-sovereigns by international law resulted in their exclusion from the international distribution of sovereignty” and inclusion “under imperial sovereign power.”<sup>138</sup> Thus, he argues that the international legal structure itself should be the basis for recognizing indigenous international status to correct the damage it inflicted, which is, in the parlance of Pommersheim “a shift—not without its own problems and tensions—that reclaims a moral dimension for international law.”<sup>139</sup>

### **Economic Globalization and Its Adverse Consequences as Creations of International Law**

I propose another normative foundation that draws inspiration from Macklem’s theory that the basis of indigenous self-determination is the structure of international law itself. Macklem argues that by giving legitimacy to the exclusion of indigenous peoples from the

<sup>134</sup> Cheryl L Daytec-Yangot. “The Displacement of Indigenous Peoples and Land Conflicts in Baguio City: Legal Calamities Descended from Civil Reservation Case No. 1;” paper presented during the *Baguio Land Congress*, at the University of the Philippines, Baguio City on 4 March 2009.

<sup>135</sup> US Supreme Court, *Carino v. Insular Government*, 212 US 449 (1909)

<sup>136</sup> Macklem, p. 184-186

<sup>137</sup> *Ibid.*, p. 185. The repudiation of claims that indigenous peoples did not possess a sufficient degree of civilization and therefore constituted a valid basis to assert sovereignty over them against their will was immortalized in landmark judicial decisions. For instance in the landmark case of *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992), Justice Brennan of the High Court of Australia said: “The fiction by which the rights and interests of indigenous inhabitants in land were treated as nonexistent was justified by a policy which has no place in the contemporary law of this country.” Likewise, the International Court of Justice in its *Advisory Opinion on Western Sahara* (62) (1975) ICJR, said: (A) determination that Western Sahara was a ‘terra nullius’ at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of ‘occupation’... (T) he State practice of the relevant period indicates that domains inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such domains the acquisition of sovereignty was not generally considered as effected unilaterally through ‘occupation’ of *terra nullius* by original title but through agreements concluded with local rulers. On occasion, it is true, the word ‘occupation’ was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an ‘occupation’ of a “terra nullius” in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as actual ‘cession’ of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*.”

<sup>138</sup> Macklem, p. 185

<sup>139</sup> Pommersheim, p. 269

distribution of sovereignty, international law obliges itself to reverse what it created by recognizing indigenous self-determination. I in turn argue that international law must recognize indigenous self-determination because it is responsible for erecting an economic globalization regime ruled by transnational corporations which are now more politically influential than States and which threaten indigenous existence. This is now the regime that ‘others’ indigenous peoples and exposes them to the adverse consequences of industrial expansions.

International law validates what Moghadam describes as “the deeper integration and more rapid interaction of economies through production, trade, and financial transactions by banks and multinational corporations” where the World Bank, the International Monetary Fund and World Trade Organization (WTO),<sup>140</sup> the so-called “handmaidens to the destructive and inequitable forces of global capitalism,”<sup>141</sup> play significant roles.<sup>142</sup> Economic globalization as the brainchild of the WTO effectively shrank the powers of States greatly diminishing their capacities to fulfill their human rights obligations.<sup>143</sup> The superior position that corporate capitalism occupies over States -which allows them to dictate the economic directions of the latter and to commit abuses in indigenous domains with impunity- is evident from the powers (and non-power) of the WTO erected to facilitate international trade and economic relations.<sup>144</sup>

Kinley and McBeth put it best when they complained that

*while the rules of international trade law regulate the conduct of States for the direct benefit of multinational corporations engaged in trade (and arguably for the indirect benefit of everybody...), the conduct of entities actually engaged in international trade (principally multinational corporations) is not regulated.”<sup>145</sup>*

<sup>140</sup> Valentine M. Moghadam, “Gender and Globalization: Female Labor and Women’s Mobilization,” *Journal of World-Systems Research* 5:2 (summer 1999), p.367;<http://jwsr.ucr.edu/>

<sup>141</sup> Andrew Hurrell, “Global Inequality and International Institutions” in Pogge, Thomas (ed) *Global Justice* (Surrey: Blackwell Publishing, 2007), p. 32.

<sup>142</sup> Moghadam, *ibid*/

<sup>143</sup> Erica- Irene Daes, “Article 3 of the Draft UN Declaration on the Rights of Indigenous Peoples,” p. 12.

<sup>144</sup> *Marrakech Agreement Establishing the World Trade Organization 1994*, “Preamble.”

<sup>145</sup> David Kinley and Adam McBeth, “Human Rights, Trade and Multinational Corporations” in Rory Sullivan (ed), *Business and Human Rights* (London: Greenleaf Publishing Limited Sheffield: 2003), p. 54

The economic globalization regime entrenched by international law brings and has brought with it the most ruthless expressions of oppression of indigenous peoples in the post-colonial era. In the words of the UN Permanent Forum on Indigenous Issues Chairperson,

*An aggressive drive is taking place to extract the last remaining resources from indigenous domains... There is a crisis of human rights. There are more and more arrests, killings and abuses... This is happening in Russia, Canada, the Philippines, Cambodia, Mongolia, Nigeria, the Amazon, all over Latin America, Papua New Guinea and Africa. It is global. We are seeing a human rights emergency. A battle is taking place for natural resources everywhere. Much of the world's natural capital – oil, gas, timber, minerals – lies on or beneath lands occupied by indigenous people.*<sup>146</sup>

Globalization practically treats indigenous peoples as invisible entities the way the colonizers dehumanized them by treating them as part of the flora and fauna and their territories as *terra nullius* during the colonization era. This is tantamount to ‘othering’ or excluding indigenous peoples from the mainstream which is a perpetuation of colonial and later State policies. It is not precise to conclude that indigenous peoples have chosen to constitute themselves as distinct societies simply because they wanted to. What is accurate is that indigenous peoples were and continue to be forced to be distinct because of the policies of the colonials, and later of States to which they were annexed that continue to regard them as *others*. They congregate around their identities as a way of resisting outsiders’ incursions that seek to displace and ultimately annihilate them. As Stavenhagen said, “indigenusness, independently of biological or cultural continuity, frequently is the outcome of governmental policies imposed from above and from the outside.”<sup>147</sup>

The culture of impunity under which TNCs and States “disrupt, displace and destroy indigenous peoples”<sup>148</sup> is possible because of the structure of international law itself prompting the attachment of the tag “leviathans”<sup>149</sup> on corporations. Thus, international law must redeem

<sup>146</sup> John Vidal, 'We are fighting for our lives and our dignity,' *The Guardian Saturday* (13th June 2009); quoting Victoria Tauli Corpuz, Chairperson of the UN Permanent Forum on Indigenous Issues.

<sup>147</sup> Stavenhagen, Rodolfo. Indigenous Rights: Some Conceptual Problems. In *Indigenous Peoples' Experiences with Self-Government*. IWGIA (International Work Group for Indigenous Affairs) and the University of Amsterdam, 1994), pp-14-15.

<sup>148</sup> Erica- Irene Daes, *ibid*.

<sup>149</sup> Sarah Joseph, “Taming the Leviathans: Multinational Enterprises and Human Rights,” 46 *Netherlands International Law Review* 171 (1999)

itself by recognizing indigenous self-determination since this is the only right that can effectively shelter the integrity and survival of indigenous peoples. It is the most powerful legal counter-discourse to economic globalization and the destruction it portends to bring them.

**Structurally Discriminatory Redistribution by States of  
Goods, Resources and Opportunities**

According to Dahbour who argues for self-determination short of statehood, the right's *raison d'etre*, is to guarantee communal autonomy which in turn seeks to redress "discriminatory redistribution" of goods, resources and benefits as well as opportunities of one group living within a well-defined region and "pursuing a distinctive way of life" to another by the sovereign that rules over them.<sup>150</sup>

Hendrix correctly avers that while in general, indigenous peoples wallow in poverty, are alienated and lack political influence, "this does not necessarily ground any rights to a separate status."<sup>151</sup> There are indeed other groups who similarly have limited access to power and resources. But what constitutes indigenous peoples as a class deserving of a self-determining status? Dahbour refers to an entrenched and continuing pattern adopted by the sovereign that rules over them jeopardizing the group's pursuit of their way of life, consigning them to a situation of "internal colonialism."<sup>152</sup> This "entrenched and continuing pattern" favors other groups over them resulting in patently unjust redistribution of goods and resources. Darbour cites two manifestations of discriminatory redistribution: the mistreatment and extreme disenfranchisement of a people from their material and spiritual culture, and economic exploitation in such manner that material wealth and opportunities are unfairly reallocated paralyzing a people's capability "to live independent and self-sustaining lives within their regional environments."<sup>153</sup> When these disrupt a people's capacity to pursue a way of life distinct from the rest of the politically dominant population, self-determination for them is

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<sup>150</sup> Dahbour, p. 10

<sup>151</sup> Burke A. Hendrix, *Ownership, Authority, and Self-determination*; (Pennsylvania: Pennsylvania University Press, 2008), p.24

<sup>152</sup> Dahbour, pp. 9-11.

<sup>153</sup> *Ibid.*, p. 11



legitimate. The Supreme Court of Canada articulated this same line of thought when, in recognizing right to secession in certain cases, it declared that

*a right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the State of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing State.*<sup>154</sup>

Dahbour rightly argues that the unjust discrimination in these premises cannot be remedied by appeals to human rights and democratic entitlements; hence, resort to self-determination is warranted. In the same vein, he contends that cultural identity as an argument for self-determination stands on frail theoretical leg to justify self-determination because the preservation of such identity may be addressed by resort to human rights and democratic processes.

### **The Non-Metamorphosis of the Self-Determining "Self"**

It is helpful to appreciate that self-determination is inherent<sup>155</sup> in all peoples and, therefore, is never lost unless the *self*- the people- is transmogrified. Indigenous peoples still carry their pre-colonization collective *selves* around which they united to frustrate efforts by colonizers operating under the banner of the "White Man's Burden,"<sup>156</sup> "Manifest Destiny"<sup>157</sup> and "Benevolent Assimilation"<sup>158</sup> to mutate their identities in the image of the latter. Thus, I contend that since the respective *selves* of the indigenous peoples remain substantively

<sup>154</sup> Supreme Court of Canada, Reference re Secession of Quebec, [1998] 2 S.C.R. 217; emphasis added.

<sup>155</sup> In *US v. Lara* {541 U.S. 193 (2004)}, Justice Steven expressed in his separate opinion that "(t)he inherent sovereignty of the Indian tribes has a historical basis that merits special mention. They governed territory on this continent long before Columbus arrived."

<sup>156</sup> This is based on the controversial 1899 poem of the British Rudyard Kipling, "The White Man's Burden" which on its face extolled US colonization of the Philippines and urged the US to civilize the Filipinos described in the poem as "new-caught, sullen peoples, half devil and half child." This poem was heavily denounced for its racism but defenders of Kipling insisted that it was a satire. The phrase "White Man's Burden" has since been adopted to refer to racist imperialism.

<sup>157</sup> This phrase was used to describe America's 19<sup>th</sup> century practice of annexing domains and taking over Indian land and sovereignty in the New World. It was coined by the journalist John O'Sullivan who wrote an essay calling for the annexation of Texas claiming that it is the US' "manifest destiny to overspread the continent allotted by Providence for the free development of our yearly multiplying millions." This term evolved to refer to colonization and imperialism. See Howard Jones and Donald A. Rakestraw, *Prologue to Manifest Destiny: Anglo-American Relations in the 1840s* (Wilmington: Scholarly Resources, Inc: 1997).

<sup>158</sup> This refers to US President William McKinley's policy announced in 1899 in relation to US annexation of the Philippines. The annexation was justified as an act of benevolent assimilation. See Stuart Creighton Miller, *Benevolent Assimilation: The American Conquest of the Philippines, 1899-1903* (New Haven and London: Yale University Press, 1984)

untransformed and distinct from that of the dominant population notwithstanding the imposition of foreign sovereignty on them and their introduction to the trajectory of globalization, their self-determining status under the pre-existing legal order endures to this day.

And what, one may ask, is the basis for claiming that there was a pre-existing legal order under which indigenous peoples exercised self-determination?<sup>159</sup> A scrutiny of some judicial pronouncements from varied jurisdictions is inductive of the recognition of this by States. These can serve as a watershed for indigenous self-determination

In the case of *Worcester v. Georgia*,<sup>160</sup> the United States Supreme Court, speaking through Justice Marshall, enunciated that Indian nations always enjoyed recognition as distinct, independent political communities and had the power of self-government flowing from their original tribal sovereignty and not because of a grant of power by the US federal government.<sup>161</sup> *Worcester* is significant in that the Court had occasion to rule that

*the settled doctrine of the law of nations is that a weaker power does not surrender its independence - its right to self-government - by associating with a stronger, and taking its protections. A weak State, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a State.*<sup>162</sup>

Other decisions recognize the survival of land rights which are essential to indigenous self-determination. In *Calder v. British Columbia*,<sup>163</sup> Canada's Supreme Court acknowledged that native title to land predated colonization, although it reached a stalemate because half of

<sup>159</sup> Marianne Wiben Jensen, "Editorial," *Indigenous Affairs* 4 (4): 3-7. (International Work Group for Indigenous Affairs (IWGIA: 2004), p.4

<sup>160</sup> United States Supreme Court, *Worcester v. Georgia*, 31 U.S. 515 (1832)

<sup>161</sup> Also see *Ex Parte Crow Dog* {109 U.S. 556 (1883)} involving the killing by an Indian of another Indian on Indian land. The case was settled according to tribal law. However Crow Dog, the accused, was indicted for murder in Nebraska and was convicted and sentenced to die by hanging, a decision affirmed by the territorial Supreme Court. He applied for a *Writ of Habeas Corpus* with the Federal Supreme Court. Recognizing tribal sovereignty, the Court speaking through Justice Matthews said of the case: "It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social State of which they have an imperfect conception and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality."

<sup>162</sup> *Ibid.*

<sup>163</sup> Supreme Court of Canada, *Calder v. British Columbia* (1973) S.C.R. 313

the Court adjudged that this right was extinguished by the subsequent imposition of sovereignty on aboriginals while the other half was of the view that extinguishment required more than such imposition. The survival of this right was reiterated in *Guerin v. The Queen*.<sup>164</sup> The South African Constitutional Court in *Alexkor Limited v. The Richtersveld Community*<sup>165</sup> held that the imposition of sovereignty did not operate to annihilate the pre-existing rights of the indigenous *Nama* who were displaced in the early 20<sup>th</sup> century from their diamond-rich domains in Namaqualand. In *Mabo v. Queensland*,<sup>166</sup> it was enunciated by Australia's Supreme Court that native titles were unaffected by and survived the Crown's acquisition of sovereignty and may only be extinguished by a valid exercise of sovereign power. Burying the doctrine of *terra nullius* on which was hinged Australia's claim that upon the acquisition of sovereignty, *ipso facto*, ownership of aboriginal lands vested in the Crown, the decision confirmed that the indigenous population had a pre-existing legal order and all rights subsisting under it remained in effect unless validly abrogated. In *Cal, et alis v. Attorney-General of Belize*,<sup>167</sup> the Belize Supreme Court stressed that neither the acquisition of nor change in sovereignty over Belize, first by the Crown and later by independent governments "did not displace, discharge or extinguish pre-existing interests in and rights to land." In the case of *Carino v Insular Government*,<sup>168</sup> an indigenous *Igorot*<sup>169</sup> who was characterized by the government as a member of a savage tribe elevated the decision of the Philippine Supreme Court denying his application for registration of land based on the Regalian Doctrine under which Spain expropriated all lands in the Philippine archipelago. The Supreme Court called this doctrine feudal and "an almost forgotten law of Spain" and upheld the *Igorot*'s native title.

These judicial pronouncements resonate with Dworkin's thesis that there are individual rights which exist *prior to* the rights created by explicit legislation and these enforceable against

<sup>164</sup> Supreme Court of Canada, *Guerin v. The Queen* (1984) 2 S.C.R. 335; 1984 CanLII 25 (S.C.C.)

<sup>165</sup> Constitutional Court of South Africa, *Limited v. The Richtersveld Community* (2001) (3) SA 1293

<sup>166</sup> Supreme Court of Australia, *Mabo v. Queensland* [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992)

<sup>167</sup> Supreme Court of Belize, *Cal, et alis v. Attorney-General of Belize, Claim No 171 of 2007*

<sup>168</sup> US Supreme Court, *Carino v Insular Government*, 212 US 449 (1909)

<sup>169</sup> This is the collective term for indigenous peoples in Northern Philippines.

States.<sup>170</sup> There too are collective rights that persist. In the case of the *self* in self-determination, while it remains substantially unmutated and therefore unterminated, it continues to possess its self-determining collective status which States must respect and which international law must affirm.

### **Non-Participation in State-Building and Constitution-Making**

Beitz who is skeptical about self-determination surmises that the “most obvious justification of self-determination follows from the *prima facie* impermissibility of governing people without their consent.”<sup>171</sup> Locke would support this with his thesis that political entities are erected upon the consent of the people to be governed by the majority. Since colonization and State expansion were both carried out without the participation, nay consent, of indigenous peoples, they retain their pre-colonial, pre-State expansion right to self-determination derived from the pre-colonial legal order. This right, in my view, is read as a substantive norm into States’ Constitutions<sup>172</sup> even if textually absent therefrom. It is a pre-existing right which, like every human right, requires no legislation to attach to the right-holder.

Daes stresses that indigenous peoples were generally ignored and thus had no participation in state-building as well as in designing the modern constitution of States, nor were they ever made meaningful participants in national decision-making.<sup>173</sup> Having been deprived of full participation in the political process, “they retain their right to self-determination.”<sup>174</sup> As Clinebell and Thomson argue, Article 2(7) of the UN Charter<sup>175</sup> may not be invoked “to perpetuate control or jurisdiction by a State over a people that has not chosen to be included within that State.”<sup>176</sup> Hendrix formulation is even more bold and forthright: “Where indigenous nations never voluntarily transferred their political rights to surrounding States, they

<sup>170</sup> Dworkin, p. xi

<sup>171</sup> Charles Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1979), pp. 94.

<sup>172</sup> Jeremy Waldron, “Pildes on Dworkin's Theory of Rights,” *The Journal of Legal Studies*, vol. 29 (January 2000), p. 1

<sup>173</sup> Daes, ‘An overview of the history of indigenous peoples,’ p. 24; emphasis added.

<sup>174</sup> *Ibid.*

<sup>175</sup> Art. 2(7) of the UN Charter provides: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

<sup>176</sup> John Howard Clinebell and Jim Thomson. “Sovereignty and Self-Determination.” *Buffalo Law Review*, Vol. 27 (1978), p. 709

retain an unrelinquished and foundational authority over their own members and historical domains and are thereby entitled to a quasi-independent or even fully independent political existence if they choose this.”<sup>177</sup> Indigenous peoples’ resistance to colonization is well-documented and needs no further elaboration here. But the resistance of some indigenous peoples in the Philippines merits mention because, as the historian William Henry Scott said,

*(i)t is a strange thing that history textbooks commonly in use...never mention the fact that the Igorot peoples... fought for their liberty against foreign aggression during the 350 years that their lowland brethren were being ruled over by Spanish invaders...They were never slaves to the Spaniards nor did they play the role of slaves. Quite the contrary, Spanish records make it clear that that they fought for their independence with every means at their disposal for three centuries, and that this resistance to invasion was deliberate, self-conscious and continuous.”*<sup>178</sup>

In the liberal democratic tradition, all peoples and individuals retain what John Locke called inalienable rights as they exist within States as pluralist polities even as they agree to be ruled by the majority. The permanent sovereignty of indigenous peoples over their resources – which I endlessly maintain is indispensable to self-determination- is an inalienable right and must be respected. Any State action on these lands must be legitimated with indigenous consent because in the words of Habermas, “only those norms can claim to be valid that meet (or could meet) with the approval of all concerned in their capacity as participants in a practical discourse.”<sup>179</sup>

### **The International Legal Environment of Indigenous Self-Determination: Legal Evolution and Current Configuration**

The only UN document that categorically recognizes the right of self-determination of indigenous peoples is the UNDRIP.<sup>180</sup> But its binding character remains disputed and this fact figures in discordant discourses among scholars and States alike.

<sup>177</sup> Hendrix, p. 3.

<sup>178</sup> William Henry Scott, *Of Igorots and Independence: Two Essays* (Baguio City: ERA Publications, 1993); p. 1

<sup>179</sup> Jürgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification* (Cambridge: MIT Press, 1990), p. 66.

<sup>180</sup> Its Art. 1 provides: *Indigenous peoples have the right to self-determination, By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

The earliest international document to give self-determination a paramount position in the international legal structure is the UDHR.<sup>181</sup> However, self-determination as enshrined therein was a mere principle and “was more of the order of desiderata than that of a legal right.”<sup>182</sup> Its evolution into a right took off the ground with the adoption by the UN General Assembly of the Declaration on Colonial Independence<sup>183</sup> which, “despite essentially being a political document with questionable legal authority, has formed the cornerstone of what may be called the new UN law of self-determination.”<sup>184</sup> It was finally recognized as a right with the adoption of the ICCPR which provides:

*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*<sup>185</sup>

The provision was replicated in the IESCR,<sup>186</sup> the other half of the International Bill of Rights. Both treaties are categorical that States “shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”<sup>187</sup>

The *jus cogens* character of the right to self-determination of all peoples was settled beyond cavil in the *East Timor* case<sup>188</sup> where the International Court of Justice declared that under customary international law, its recognition is an *erga omnes* obligation of States. This dictum was reiterated in the Court’s *Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territory*<sup>189</sup> given to the UN General Assembly in 2004. Being a peremptory norm of international law and pursuant to the provision of Article 53 of the Convention on the Law of Treaties, self-determination is a right which admits no room for

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<sup>181</sup>Article 1 of the UN Charter States in part that among the purposes of the United Nations is “(t)o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”

<sup>182</sup>Daes, “The history of indigenous peoples,” p. 11

<sup>183</sup>UN General Assembly 1960

<sup>184</sup>Daes, “Article 3 of the Draft UN Declaration on the Rights of Indigenous Peoples,” p. 8.

<sup>185</sup>See Art. 1(1)

<sup>186</sup>See Art. 1

<sup>187</sup>See para. 3 of Article 1 of each treaty.

<sup>188</sup>International Court of Justice, *Case Concerning East Timor (Portugal v. Australia)*, 1995 ICJ 90, 102 (June 30)

<sup>189</sup>International Court of Justice, *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem*, GA RES ES–10/15, UNGAOR, 10th special session, 27th Plenary Meeting, UN Doc A/RES/ES–10/15 (2004).

derogation and its modification is permissible only by a subsequent norm of general international law of the same nature; any treaty “is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”<sup>190</sup> Other documents, too numerous to enumerate here, would be adopted by the international community reiterating the rights of all peoples to self-determination.<sup>191</sup>

As Keal pointed out, it remains disputed whether the term *peoples* embraces indigenous peoples noting that the International Bill of Rights was crafted without them in mind.<sup>192</sup> In fact, when the ICCPR was being drafted, it was plainly equivocated that minorities were not included among the *peoples* contemplated in Art. 1.<sup>193</sup> Although in its General Comment No. 12,<sup>194</sup> the HRC underscored the importance of the right to self determination declaring that “its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights,” it and even the CESCR have not defined in precise terms the right and its contents. This failure to define has widened the empty space surrounding the concept. The problem with empty spaces in laws is that they invite motley ideas, some of which border on the speculative, especially as regards indigenous peoples.

### **Indigenous Peoples: Peoples Before, Peoples Today?**

Does the current normative framework of international law guarantee the right of indigenous peoples to self-determination? Pivotal to this question is the determination of whether or not indigenous peoples are *peoples* in contemplation of the ICCPR and the IESCR. It

<sup>190</sup> Article 53 on Treaties conflicting with a peremptory norm of general international law (“*jus cogens*”) provides: *A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*

<sup>191</sup> For example, the UN Declaration on Friendly Relations provides: “By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right to freely determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter. See also the Helsinki Final Act (1975) of the Conference on Security and Cooperation in Europe and the Vienna Declaration of the World Conference on Human Rights (1993)”

<sup>192</sup> Paul Keal, *European Conquest and the Rights of Indigenous Peoples*. (Cambridge: Press Syndicate of the University of Cambridge, 2003), p. 192.

<sup>193</sup> *Ibid.*

<sup>194</sup> Human Rights Committee, General Comment No. 12 [21]: *The right to self-determination of peoples (Art. 1)*, adopted on 13 March 1984.

is significant to note that the understanding that *peoples* refers to States is obsolete and has been completely devalued. The concept of *peoples* has since “escaped from its Pandora’s Box of limited applicability,”<sup>195</sup> to pirate Falk’s words, and now may include only a portion of the population of an existing State.<sup>196</sup> Xanthaki suggests that one way of ascertaining if indigenous peoples are peoples is to establish if they are within the ambit of the definition of *peoples* under international law.<sup>197</sup> The problem however -and Xanthaki acknowledges this<sup>198</sup>- is that not a single UN instrument categorically defines who is a *people* for the purpose of self-determination. A UNESCO constituted meeting of experts proposed in 1989 however proposed elements inherent in describing peoples, as follows:

*1) a group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; f) territorial connection; (g) common economic life;*

*2. the group must be of a certain number which need not be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a State;*

*3. the group as a whole must have the will to be identified as a people or the consciousness of being a people - allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly,*

*4. the group must have institutions or other means of expressing its common characteristics and will for identity.*<sup>199</sup>

Yet this has not succeeded in closing the gaps or what positivists call “open textures”<sup>200</sup>

in international law. Notwithstanding this, Brownlie argued that the concepts of nationalities, minorities, indigenous populations and peoples revolve around the same idea.<sup>201</sup> Indigenous

<sup>195</sup> Richard Falk. *Human Rights Horizons. The Pursuit of Justice in a Globalizing World* (New York and London: Routledge, 2000), p. 5.

<sup>196</sup> Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; In this case, the Canadian Supreme Court declared: “(T)he reference to “people” does not necessarily mean the entirety of a State’s population. To restrict the definition of the term to the population of existing States would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing States, and would frustrate its remedial purpose.

<sup>197</sup> Xanthaki, p. 135.

<sup>198</sup> *Ibid.*

<sup>199</sup> International Meeting of Experts on further study of the concept of the rights of peoples, *Final Report and Recommendations*, UNESCO, SHS-89/CONF.602/, 22February1990, p. 9; <http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf>

<sup>200</sup> HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994), pp. 121-132

<sup>201</sup> Ian Brownlie, “The Rights of Peoples in Modern International Law” in J Crawford (ed) *The Rights of Peoples* (Oxford: Clarendon Press, 1988), p.5.



peoples are minorities<sup>202</sup> but more than minorities they are indigenous peoples, an idea which is now widely accepted.<sup>203</sup> Scheinin, who does not agree that all indigenous peoples are peoples,<sup>204</sup> nevertheless opines that those groups who are “ethnically, linguistically, geographically, historically and politically – all things considered – sufficiently distinct from the dominant population to qualify as *peoples* under public international law, are bearers of the right to self-determination.”<sup>205</sup> Anaya postulates that indigenous peoples “are *peoples* to the extent they comprise distinct communities with a continuity of existence that links them to the communities, tribes, or nations of their ancestral past.”<sup>206</sup>

Many States remain skeptical<sup>207</sup> and one writer observes that indigenous self-determination under Art. 1 of the ICCPR has long been shadowy considering that the right “involves a substantial transfer of political and economic power from the centralized State to the indigenous communities.”<sup>208</sup> Truly, in rejecting the UNDRIP, the New Zealand representative, speaking for New Zealand, the US and Australia said,

*“Self-determination...could be misrepresented as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity, territorial integrity and the stability of existing UN Member States” and “separatist or minority groups, with traditional connections to the territory where they live- in all regions of the globe- could seek to exploit*

<sup>202</sup> Thus their issues continue to be taken up by the UN Human Rights Council’s Sub-Commission on Prevention of Discrimination and Protection of Minorities.

<sup>203</sup> Gudmundur Alfredsson, ‘Minorities, Indigenous and Tribal Peoples and Peoples,’ in Ghanea and Xanthaki (eds), *Minorities, Peoples, and Self-Determination* (Leiden: Martinus Nijhoff Publishers, 2005), pp. 163-172

<sup>204</sup> In an article, he wrote: “Many of the indigenous peoples of the world qualify as ‘peoples’ for the purposes of ICCPR article 1 and are, hence, entitled to the right of self-determination.” See Martin Scheinin, *Indigenous Peoples’ Land Rights Under the International Covenant on Civil and Political Rights*, p. 10; accessed from [http://www.galdu.org/govat/doc/ind\\_peoples\\_land\\_rights.pdf](http://www.galdu.org/govat/doc/ind_peoples_land_rights.pdf). In another article, he wrote: “In order to have their right of self-determination recognized, indigenous peoples will have to accept that being indigenous does not *automatically* bring with it being a people.” See Martin Scheinin, “What are Indigenous Peoples?” in Nazila Ghanea, et al. (eds) in *Minorities, Peoples and Self-Determination* (Leiden: Martinus Nijhoff Publishers, 2005), p. 13.

<sup>205</sup> Scheinin, *Indigenous Peoples’ Land Rights*, p. 2

<sup>206</sup> S. James Anaya. *Indigenous Peoples in International Law*, 2nd ed. (Oxford/New York, 2004), p. 3.

<sup>207</sup> For example, New Zealand argued before the HRC in the case of *Apirana Mahuika* that “(t)he rights in Article 1 attach to “peoples” of a State in their entirety, not to minorities, whether indigenous or not, within the borders of an independent and democratic State.” (See *Apirana Mahuika et al. v. New Zealand*, *Communication No. 547/1993*, *Views of 27 October 2000*, para. 7.6.) During the drafting of UNDRIP, Canada, Stated that “Canada’s acceptance of the term ‘peoples’ was subject to the inclusion of a qualifying phrase, failing which they would only support the use of the term ‘people.’” The United States representative “indicated that his government could not accept the term ‘peoples’” as used in the draft and suggested the inclusion of a caveat similar to that in ILO Convention No 169 (1989) that the “use of the term ‘peoples’ in that convention did not imply the right of self-determination as it was understood in international law.” See Daes, *History*, pp. 12-13.

<sup>208</sup> Xanthaki, p. 133.

*this declaration to claim the right to self determination, including exclusive control of their territorial resources.”*<sup>209</sup>

### **The ILO Convention 169 Framework**

The sole international law that specifically pertains to *indigenous peoples* whose binding character is not in issue is ILO Convention 169. In fact, it is the first to mention the term *indigenous peoples*. Its precursor, ILO Convention 107 was the first to bring indigenous peoples to the attention of the international community but it referred to them as *indigenous populations*. It was heavily criticized for supporting a policy of State assimilation instead of self-determination, as it considered indigenous peoples as transient societies on the road to integration into or absorption by the dominant ones.<sup>210</sup> ILO 169 was touted to eliminate the “assimilationist orientation of the earlier standards”<sup>211</sup> and reverse indigenous peoples’ fortunes with its reference to them as *peoples*. Unfortunately, the bubbles of expectations surrounding it were burst by Article 1(3) thereof which contains a caveat:

*The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.*

The implication is sharp: the Convention cannot be implored as a legal buttress for indigenous self-determination. During its drafting, there were vigorous objections to the use of *peoples* and the alternative was to substitute it with *populations* or, while *peoples* may be used, it had to be categorically declared that it did not imply the right to self-determination.<sup>212</sup> The compromise reached was the latter, a political solution that guaranteed States their territorial integrity while it left the door open for indigenous peoples to assert their right to determine the direction of their development. Yet it created shockwaves among States who were afraid of

<sup>209</sup>*The Declaration on the Rights of Indigenous Peoples: Hearing on Draft Resolution A/C.3/61/L.18/Rev.1 Before the General Assembly 61st Session, Item 64(a) (Oct. 16, 2006) (Statement by H.E. Ms. Rosemary Banks, Ambassador and Permanent Representative of New Zealand, on behalf of Australia, New Zealand, and the United States), available at <http://www.australiaun.org/unny/Soc%5f161006.html>.*

<sup>210</sup>Nico Schrijver, *Sovereignty over Natural Resources – Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997) p. 315.

<sup>211</sup>Preamble, ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989,

<sup>212</sup>See the ILO Working Document for 1986 meeting of Experts, p. 9.

irredentism that could emasculate their domains, and this most probably explains why it suffers from low ratification<sup>213</sup> which in turn “weakens the power of the standards that (it) sets.”<sup>214</sup>

Henriksen apparently attempts to ‘exonerate’ ILO 169 of weakness when he says that its caveat does not restrict indigenous peoples’ right to self-determination under international law since “it is only a Statement of coverage for this particular convention” and “merely reflects the fact that the ILO’s mandate is social and economic rights” and is incompetent to interpret the concept of self-determination.<sup>215</sup> This view is convincing especially in the light of the clarification by the ILO Office that the qualification in Art. 1(3) “does not pertain to self-determination because this might present an obstacle to further evolution of the concept with regard to these peoples.”<sup>216</sup> One wonders what it pertains to then considering that the significance of the status of peoples is the right of self determination attached to it.

The caveat used by ILO Convention 169 is not peculiar to it. In fact, the use of the term *indigenous peoples* in any UN document is almost always followed by the qualification that the term “cannot be construed as having any implications as to the rights which attach to the term under international law.”<sup>217</sup> This reserve is indicative of assumptions that States’ recognition of indigenous self-determination rights might pioneer their territorial fragmentation and is tantamount to digging their own graves.

### **Indigenous Self-Determination: A Survey of Jurisprudence**

In Communications instituted before it, the HRC had more than one golden opportunity to lay to rest the question of whether or not indigenous peoples are *peoples* in contemplation of Art. 1 of the ICCPR. Unfortunately, the HRC, apparently to quell fears of secession among

<sup>213</sup> According to the ILO website, the following ratified ILO Convention 169: Argentina, Plurinational State of Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, Bolivarian Republic of Venezuela; International Labour Organization, available at <http://www.ilo.org/ilolex/english/convdisp1.htm>

<sup>214</sup> Xanthaki, p. 91

<sup>215</sup> Henriksen, p. 9

<sup>216</sup> “Introduction” in International Labour Conference, Partial Revision of the Indigenous and Tribal Populations Convention 1957 (ILO 107), 76th Session, Report IV (2A), Geneva 1989, pp. 8-9.

<sup>217</sup> For example, par. 27 of the World Conference against Racism, Xenophobia and Related (WCAR) reads “*The use of the term ‘indigenous peoples’ in the WCAR cannot be construed as having any implications as regards the rights that may attach to the term in international law. Any reference to rights associated with the term ‘indigenous peoples’ is in the context of ongoing multilateral negotiations on texts that specifically deal with such rights, and is without prejudice to the outcome of these negotiations.*”

States, dismissed the question as beyond its mandate under Optional Protocol No. 1<sup>218</sup> which gives it the competence to take cognizance of individual complaints. The necessary implication is that individuals cannot raise collective rights as a cause of action.

In *Mikmaq Tribal Society v. Canada*,<sup>219</sup> the Human Rights Committee avoided taking cognizance of self-determination claims. The Communication was instituted by a member of the Mikmaq Tribal Society on the latter's behalf complaining that the Mikmaq peoples' right to self-determination was violated by Canada. The HRC, without touching on substance, declared the Communication inadmissible on grounds of the author's lack of *locus standi* for failure to prove that he had legal personality to sue on behalf of his tribe, and held the right of self-determination non-actionable.<sup>220</sup>

In the ensuing case of *Lubicon Lake Band v Canada*,<sup>221</sup> it is noteworthy that the author was acknowledged as a representative of his tribe and thus had authority to act for unlike the author in *Mikmaq*. However, this time, the HRC found another reason to dodge the issue: self-determination as guaranteed in the ICCPR is non-justiciable because

*(w)hile all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the Lubicon Lake Band constitutes a "people" is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated."*<sup>222</sup>

In the case of *Kitok v. Sweden*,<sup>223</sup> the HRC held that the Communication suing in his personal capacity did not satisfy the requirement of victimhood, declaring that Optional Protocol I provided for a mechanism to address individual complaints alleging violation of individual

<sup>218</sup>Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976.

<sup>219</sup>UN Human Rights Committee, *Mikmaq Tribal Society v. Canada*, Communication No. 78/1980 (30 September 1980), U.N. Doc. Supp. No. 40 (A/39/40) at 200 (29 July 1984).

<sup>220</sup>UN Human Rights Committee, *AD v. Canada*, Report of the Human Rights Commission, 39 UN GAOR Supp. No. 40 at 200, UN Doc. A/39/40 (1984).

<sup>221</sup>UN Human Rights Committee, *Lubicon Lake Band v Canada*, Communication No 167/1984, A/45/40 Annex 9(A) (26 March 1990)

<sup>222</sup>*Ibid.*

<sup>223</sup>UN Human Rights Committee, *Kitok v. Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (27 July 1988)

rights and does not cover the right of self-determination “conferred upon peoples as such.”<sup>224</sup> This doctrine was reiterated in *R. L. et al. v. Canada*<sup>225</sup> and in *Diergaardt et al. v. Namibia*.<sup>226</sup> Another case involving an ethno-German group where the HRC exercised restraint in confronting the issue of self-determination is *A. B. et. al. v. Italy*<sup>227</sup> where it said it “is not required to decide whether the ethno-German population living in South Tirol constitute “peoples” within the meaning of Article 1 of the International Covenant on Civil and Political Rights” because of Optional Protocol I which allows it to hear communications that raise individual rights, not collective one.

*Apirana Mahuika v. New Zealand*<sup>228</sup> effectively suffered a similar fate with the HRC noting “that the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated.” A significant gain of this case is that the HRC held that “the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27.”

### **The HRC Reticence: A Self-Negating Position**

The HRC’s restraint in resolving self-determination issues in individual complaints refutes its own mandate. The Optional Protocol itself which the HRC invokes to excuse its reticence or, more obviously, refusal provides that it (the HRC) may entertain “communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant,”<sup>229</sup> the right of self-

<sup>224</sup> It is odd however that in spite of finding that the author did not have standing as a victim, the HRC still proceeded to rule on the merits of the communication pronouncing that Kitok who lost his membership in his ancestral *sameby* which refused his readmission pursuant to domestic law did not sustain damage by way of violation of Art. 27 of the ICCPR. It said that although reindeer husbandry while an economic activity was essential to Sami culture, his rights under article 27 of the covenant had not been violated by the law restricting his participation in Sami culture as it was meant to protect the welfare of the Sami as a whole.

<sup>225</sup> UN Human Rights Committee, *R. L. et al. v. Canada*, Communication No. 358/1989, U.N. Doc. CCPR/C/43/D/358/1989 at 16 (1991). 6.2

<sup>226</sup> UN Human Rights Committee, *Diergaardt et al. v. Namibia*, Communication No 760/1997, UN Doc. CCPR/C/69/D/760/1996

<sup>227</sup> UN Human Rights Committee, *A. B. et. al. v. Italy*, Communication No. 413/1990, UN Doc. CCPR/C/40/D/413/1990

<sup>228</sup> UN Human Rights Committee, *Apirana Mahuika v. New Zealand*, Communication No 547/1993, UN Doc. CCPR/C/70/D/547/1993 (15 November 2000).

<sup>229</sup> The full text of Article I of the Optional Protocol States: *A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.*

determination being one of “any rights.” Scheinin, a former member of the HRC perhaps best explains that body’s refusal to tackle the self-determination question in individual communications:

*According to (Art. 1 of Optional Protocol I), the Committee may consider 'communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant'. While the right of self-determination (ICCPR article 1) falls under the notion of 'any of the rights set forth in the Covenant', it is a truly collective right proclaimed to 'all peoples', and individuals cannot, in the interpretation of the Committee, claim to be individually affected as victims of a violation of that right.*<sup>230</sup>

Remarkably, in its General Comment No. 12, the HRC expressed that the realization of self-determination "is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of these rights."<sup>231</sup> The UNESCO’s International Meeting of Experts also expressed that “(a) full enjoyment of individual human rights will not be possible if the people, of whom the individual is one, is denied its rights - such as to existence, self-determination, cultural identity, economic development.”<sup>232</sup> The view that individuals cannot be individually affected as victims of violation of the right of self-determination flies in the face of logic and is a negation of *General Comment No. 12*. It is an umbrella right that protects other rights of its bearers and this is clear from the language of Art. 1: “By virtue of (the right of self-determination), (peoples) freely determine their political status and freely pursue their economic, social and cultural development.”

No proof is necessary to demonstrate that when the self-determination of a people is violated, the members of the collective are individually prejudiced. When the government colludes with corporations to dispossess indigenous peoples of their domains to pave the way for mining, oil or gas exploration or any other corporate activity, individual members sustain direct

<sup>230</sup> Martin Scheinin, *Indigenous Peoples Land Rights*, p.11

<sup>231</sup> Human Rights Committee, *General Comment No. 12: The right to self-determination of peoples (Art. 1)* : . 03/13/1984.

<sup>232</sup> International Meeting of Experts on further study of the concept of the rights of peoples, *Final Report and Recommendations*, UNESCO, SHS-89/CONF.602/7, 22 February 1990; <http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf>

injury in the form of loss of means of subsistence. The hunger pangs resulting from the deprivation of a people's means of subsistence which self-determination under Art. 1 guarantees against, is suffered by individuals and not the *people* or collectivity. Being incorporeal, the *people* naturally lacks the biological endowments to feel hunger pangs. In other words, the violation of self-determination can be the proximate cause of individual damages for which individuals should be allowed to seek redress.

Furthermore, if the HRC considers itself competent to examine the right to culture of minorities and ethnic groups under Art. 27, it should be competent to examine self-determination. Culture, like self-determination, pertains to a collective and is a collective right<sup>233</sup> and cannot be practiced by an individual alone. Culture by its very nature is shared by members of the same society to whom it has relevance and is revealed in group dynamics that has significance for that group.<sup>234</sup> Even Article 27 acknowledges this in upholding the rights of persons to enjoy their culture "in community with other members of their group."

### **Framing Self-Determination Right Under Art. 27: A Backdoor Entry**

The reserve of the HRC has forced indigenous people's movements to resort to a tangential approach by ingeniously smuggling land rights into the protective ambit of Art. 27<sup>235</sup> which provides:

*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

This tangential approach may have been inspired by the HRC's pronouncement in *Lubicon Lake Band* that while self-determination could not be passed upon, some of the issues the author raised fell under Art. 27 which the author Chief Ominayak did not invoke. The HRC

<sup>233</sup> Maivan Clech Lam. *At the Edge of the State: Indigenous Peoples and Self-Determination*. (New York: Transactional, 2000), p. 5

<sup>234</sup> Douglas Sanders, *Collective Rights*, 13 Human Rights Quarterly (1991)

<sup>235</sup> For example in *Länsman et al. v. Finland* {Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994)} and in *Lansman (Jouni E.) et al. v. Finland* (Communication No. 671/1995, UN Doc. CCPR/C/58/D/671/1995 (1996), the complainants invoked Article 27 instead of Art. 1 of the ICCPR to protect their land rights.

found a violation of Art. 27 of the ICCPR since “inequitable historical failure” to guarantee the band land base and ongoing massive-scale operations of extractive industries imperilled the Lubicon Lake Band’s culture.<sup>236</sup> I believe that the HRC doctrine laid down in *Lubicon* may have been the compromise between its own convictions that indigenous land rights needed to be protected and that political convulsions should not be stirred among States apprehensive of secession that self-determination connotes.

Nevertheless, as a foundation for indigenous land rights, Art. 27 is friable. For one thing, it makes no reference to land. The HRC in applying Art. 27 has relied on the idealized concept of indigenous peoples’ relationship to the land as the bedrock of their spirituality.<sup>237</sup> Although such spiritual connection is not denied, the HRC “doctrine” fails to take into account that indigenous culture is, in many cases, forced to evolve because of outside forces and influences.<sup>238</sup> The degree of this spiritual connection varies from one indigenous group to another. As the HRC’s jurisprudence shows, indigenous land rights are sheltered by Art. 27 *only* when the cultural survival of indigenous peoples is inextricably tied to their ancestral territory which dangerously adopts a standard applicable to all indigenous peoples. Thus, in *Lansman (Jouni E.) et al. v. Finland*,<sup>239</sup> the HRC, denying the communication, said,

*Duly noting that the parties do not agree on the long-term impact of the logging activities already carried out and planned, the Committee is unable to conclude that the activities carried out as well as approved constitute a denial of the authors' right to enjoy their own culture...The Committee is not in a position to conclude, on the evidence before it, that the impact of logging plans would be such as to amount to a denial of the authors' rights under article 27...*<sup>240</sup>

Thus, a successful recourse to Art. 27 demands that indigenous peoples should remain virtually static in their cultures and avoid adapting to contemporary institutions and practices.

<sup>236</sup> UN Human Rights Committee, *Lubicon Lake Band v. Canada*.

<sup>237</sup> S. James Anaya. “International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State,” 21 *Arizona Journal of International and Comparative Law* (2004) p. 3.

<sup>238</sup> For a detailed account of how indigenous peoples are culturally adapting to the forces of economic globalization, see Dev Nathan, Govind Kelkar and Pierre Walter (eds), *Globalization and Indigenous Peoples in Asia: Changing the Local-Global Interface* (New Delhi: Sage Publications, 2004).

<sup>239</sup> UN Human Rights Committee, *Lansman (Jouni E.) et al. v. Finland*, Communication No. 671/1995, Views of 30 October 1996 CCPR/C/58/D/671/1995

<sup>240</sup> *Ibid.*



Kymlicka believes that the cultural integrity argument that the HRC unwittingly encouraged is debilitated by the fact of indigenous adoption of modern practices,<sup>241</sup> which I posit is an unavoidable, though perhaps undesired or undesirable effect of globalization.

With their introduction into the circuit of globalization and cash economy, some indigenous peoples' spiritual connection to their lands has been reconfigured.<sup>242</sup> Hence, the protection of ancestral domains should not be made dependent on spiritual connection but rather on the basic and simple fact that the domains are theirs. To make their land claims dependent on culture is to expose these claims to repudiation as the HRC's jurisprudence will show. With a few exceptions, land claims pursued under Art. 27 were not successful.

Another stumbling block to the reliance on Art. 27 to vindicate land rights is the fact that it applies to ethnic, religious or linguistic minorities. While indigenous peoples may qualify as minorities,<sup>243</sup> there is substantive doubt as to whether international law will recognize their minority status in cases where they constitute the numerical majority in a State.<sup>244</sup> Scholars rely on the definition of minorities developed by Capotorti<sup>245</sup> that they are groups

*numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show if only implicitly a sense of solidarity, directed towards preserving their culture, traditions, religion or language.*<sup>246</sup>

Even the HRC in its *General Comment No. 23 on Art. 27* concluded that the existence of a minority must be established by "objective criteria," one of which is that the group must not exceed 50% of the entire population. Protecting land rights under Art. 27 potentially results in

<sup>241</sup> Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford: Oxford University Press, 1999), pp. 128-129.

<sup>242</sup> See n. 238.

<sup>243</sup> Gudmundur Alfredsson, 'Minorities, Indigenous and Tribal Peoples and Peoples,' pp. 163-172; UN Human Rights Committee, *General Comment 23: The Rights of Minorities* (Art. 27), April 8, 1994, UN Doc. CCPR/C/21/Rev.1/Add.5; UN Human Rights Committee, *Lovelace v. Canada*, Communication No. 24/1977, 68 ILR 17, UN Doc. CCPR/C/13/D/24/1977; UN Human Rights Committee, *Kitok v Sweden*.

<sup>244</sup> For example, indigenous peoples make up majority of Bolivia and Nepal's populations.

<sup>245</sup> Steven Wheatley, *Democracies, Minorities and International Law* (New York: Cambridge University Press, 2005), p. 18.

<sup>246</sup> Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (Geneva, United Nations Center for Human Rights, 1991), UN Doc E/CN.4/Sub.2/384/Add.1-7.

discrimination because in those cases where indigenous peoples are the dominant population,<sup>247</sup> their bid to seek refuge under its protective wings will be blocked.

The reliance on Art. 27 is not helpful to the struggle for the recognition of indigenous 'peoplehood.' Art. 47 ( which is identical to Art. 25 of the IESCR) provides:

*"Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."*

The provision clearly recognizes resource control as a right of peoples. Thus to protect indigenous land claims by seeking shelter under an individual right as the HRC interprets the rights under Art. 27 is to downgrade the resource control demands of indigenous peoples and is a virtual repudiation of their 'peoplehood.'

The HRC's self-restraint in accepting complaints seeking protection of indigenous peoples' means of subsistence under Art. 1 creates an irony where a non-derogable right is virtually unprotected under the ICCPR's Optional Protocol I. While the HRC's official mandate under the Optional Protocol is to ensure States' observance of the ICCPR, its conservative posture leaves indigenous peoples practically unprotected by the Protocol.

### **HRC's Room for Interpretation: Wider Than It Wants**

To be precise, nowhere is there a provision that officially vests the HRC with the power to interpret the ICCPR. But as one pointed out, "owing to the fact that some provisions in the Covenant are quite abstract or vague and lack precise definition, the issue of interpretation is not only possible, but also advisable and even inevitable in the process of monitoring the implementation of the Covenant by the Committee."<sup>248</sup> Interpretation being an inevitable function, the HRC has become "the pre-eminent interpreter of the ICCPR."<sup>249</sup>

<sup>247</sup> In Bolivia, Guatemala and Peru for example, indigenous peoples are the numerical majority. See Minority Rights Group International, *World Directory of Minorities*, available at <http://www.minorityrights.org/?lid=185&tmpl=printpage>.

<sup>248</sup> Null Shuyan Sun, "The Understanding and Interpretation of the ICCPR in the Context of China's Possible Ratification" in *Chinese Journal of International Law* (March 2007), p. 22-23

<sup>249</sup> Patrick O'Neill, Simon Rice, Roger Douglas. *Retreat from Injustice: Human Rights Law* (Sidney: The Federation Press, 2004), p. 163.

In its own General Comment No. 24, the HRC explained that "(t)he Committee's role under the Covenant necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence." Through its *General Comments*, it explains the scope and meaning of the provisions of the ICCPR and casts light on general issues as they crop up in the course of implementation.<sup>250</sup> While it is settled that the *General Comment* itself carries no legal binding force, it is a legal truism that the HRC's interpretations are of colossal importance in the appreciation of the Covenant and its specific provisions. More than that, such interpretations are strong indications of legal obligations, and in the same vein, rejection by States of such obligations are indicia of violation of the principle of *pacta sunt servanda*. While HRC decisions are not strictly enforceable, they are imbued with great moral weight and States, in some cases, comply with them<sup>251</sup> perhaps afraid of international shame. Its coyness in taking cognizance of the issue of the international legal status of indigenous peoples in individual complaints is therefore disappointing and, as one writer alleged, has courted scholars' displeasure.<sup>252</sup>

### **"Self-Determining Entities are Peoples": Putting the Cart Before the Horse**

So the HRC's reticence brings us back to the question: Are indigenous people's *peoples*? The orthodox approach is to characterize a group of people as a *people* and on that basis recognize its self-determining status. But this results in an impasse, at least in the case of indigenous peoples whose 'peoplehood' labors under uncertainty due to the absence of an international definition of the word. My approach puts the cart before the horse: One should pore over substantive and/or legal norms to determine if a group of people qualifies for self-determination. If it does, then it is a *people*. Thus far, this paper has succeeded in presenting the substantive norms justifying indigenous self-determination. But to satisfy positivism, it will also have an excursion into the domains of international law to search a room that accommodates

<sup>250</sup> Christian Tomuschat, *International Covenant on Civil and Political Rights*, (New York 16 December 1966), <http://untreaty.un.org/cod/avl/ha/iccpr/iccpr.html>

<sup>251</sup> For instance, the Canadian government amended the Indian Act in the wake of the HRC Recommendation in *Lovelace v Canada* (30 July 1981) Com No 24/1977, CCPR/C/13/D/24/1977.

<sup>252</sup> Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the ICCPR* (Oxford: Clarendon Press, 1991), p. 250

indigenous self-determination. If there is, then even positivists will relent that indigenous peoples are *peoples*.

### **HRC and CESCR Pronouncements**

While it is true that the HRC never declared that indigenous peoples are *peoples* in contemplation of Art. 1 of the ICCPR, it does not mean that it has no position on indigenous right to self-determination. Its 1999 *Concluding Observations* on Canada's report on implementing the ICCPR included a request on the State to report on the implementation of Art. 1 in relation to indigenous peoples and urged that "the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with Article 1 of the Covenant."<sup>253</sup> This is a landmark *Observation* because it was the first time that the HRC ever conceded that indigenous peoples have the right of self-determination<sup>254</sup> and it opened the floodgates for its ensuing pronouncements bearing similar import. It was most likely an aftermath of Canada's Supreme Court's ruling in the *Quebec Secession Case*<sup>255</sup> affirming the possibility of the existence of several peoples within a State. That same year, the HRC called on Norway to report on "the Sami people's right to self-determination under article 1 of the Covenant"<sup>256</sup> and on Mexico to increase indigenous peoples' participation in political institutions and their exercise of self-determination.<sup>257</sup> It also said that the "forced evictions of indigenous populations from their land and the lack of legal remedies to reverse these evictions and compensate the victimized populations for the loss of their residence and subsistence" violated Art. 1 and Art. 27.<sup>258</sup> It would subsequently make similar observations on other countries' reports.<sup>259</sup> The CESCR has done the same as implied from its Concluding Observation on Russia in 2003 where it expressed

<sup>253</sup> Human Rights Committee, Concluding Observations on Canada, UN doc. CCPR/C/79/Add.105 (1999).

<sup>254</sup> Scheinin, *Indigenous Peoples Land Rights*, p. 10.

<sup>255</sup> Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217

<sup>256</sup> UN Human Rights Committee, Concluding Observations on Norway, UN doc. CCPR/C/79/Add.112 (1999).

<sup>257</sup> UN Human Rights Committee, Concluding Observations on Mexico, UN doc. CCPR/C/79/Add.109 (1999).

<sup>258</sup> UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : concluding observations of the Human Rights Committee : Brazil*, 1 December 2005, CCPR/C/BRA/CO/2.

<sup>259</sup> See for example its Concluding Observations on Denmark (UN doc. CCPR/CO/70/DNK {2000}), on Australia (UN doc. CCPR/CO/69/AUS {2000}), on Sweden (UN doc. CCPR/CO/74/SWE {2002}) and on the United States of (UN Doc. CCPR/C/USA/CO/3/Rev.1 {18 December 2006}).

its concern "about the precarious situation of indigenous communities in the State party, affecting their right to self-determination under article 1 of the Covenant."<sup>260</sup> This is to date the lone Concluding Observation where the CESCR affirmed indigenous self-determination that it must have escaped the notice of one writer who wrote in 2007 that the CESCR "does not bring up questions relating to Article 1 in (its) examination of State parties' reports."<sup>261</sup>

By implication, these observations, declared in terms not shrouded in a cloud of doubt, operate as the HRC and CESCR's recognition of the status of indigenous peoples as peoples, clearly positioning them within the protective parameters of the International Bill of Human Rights. So even in the absence of a categorical pronouncement that indigenous peoples are *peoples*, the consequence of admitting their right to self-determination under Art. 1 of the ICCPR is to recognize their international legal status.

### **The UNDRIP: Old Wine in a New Bottle**

Overwhelmingly adopted in 2007,<sup>262</sup> the UNDRIP is "one of the strongest statements of the rights of indigenous peoples in the context of international law"<sup>263</sup> and is "a visionary step towards addressing the human rights of indigenous peoples."<sup>264</sup> Its rhetoric on self-determination<sup>265</sup> is identical to Art. 1 of the ICCPR and of the CESCR except that the Covenants use *all peoples* rather than *indigenous peoples*." On the bases of the fairly recent HRC and CESCR *Observations* affirming that indigenous self-determination under the International Bill

<sup>260</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Russian Federation*, UN Doc.E/C.12/1/Add.94 (12 December 2003).

<sup>261</sup> Hans Morten Haugen, "The Right to Self-Determination and Natural Resources: The Case of Western Sahara," 3/1 *Law, Environment and Development Journal* (2007), p.73

<sup>262</sup> The UNDRIP was adopted by an overwhelming affirmative vote of 143. Four (4) voted against it while 11 abstained. The 4 were Australia, Canada, New Zealand and United States. The following abstained: Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine. The following were absent: Chad, Côte d'Ivoire, Equatorial Guinea, Eritrea, Ethiopia, Fiji, Gambia, Grenada, Guinea-Bissau, Israel, Kiribati, Kyrgyzstan, Marshall Islands, Mauritania, Montenegro, Morocco, Nauru, Palau, Papua New Guinea, Romania, Rwanda, Saint Kitts and Nevis, Sao Tome and Principe, Seychelles, Solomon Islands, Somalia, Tajikistan, Togo, Tonga, Turkmenistan, Tuvalu, Uganda, Uzbekistan, and Vanuatu. See Department of Public Information, UN 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 (13 September 2007), available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

<sup>263</sup> Resolution 1994/45, Annex 26, 1994, adopted without changes from the *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45<sup>th</sup> Session, Agenda Item 14, UN Doc. E/CN.4/Sub/1993/29

<sup>264</sup> Ban Ki-moon, Secretary-General's Message on the International Day of the World's Indigenous People, 9 August 2008 - <http://www.un.org/events/indigenous/2008/sgmessage.shtml>

<sup>265</sup> See Art. 3, UN Declaration on the Rights of Indigenous People, E/CN.4/Sub.2/1994/2/Add.1 (1994).

of Rights and the provision of the UNDRIP unambiguously recognizing it, the controversy on indigenous ‘peoplehood’ has been laid to rest.

It is conceded though that the UNDRIP’s binding character remains in question since it is a mere declaration and is not impressed with the force of a treaty. Adoption by the General Assembly does not instantly convert a declaration into international law. But the UNDRIP reflects existing customary international law, “insofar as they connect with a pattern of consistent international and State practice”<sup>266</sup> and general principles of international law since “the Declaration relates to already existing human rights obligations of States, as demonstrated by the work of United Nations treaty bodies and other human rights mechanisms.”<sup>267</sup> Well-settled now is self-determination as a principle of customary international law and a *jus cogens* or peremptory norm.<sup>268</sup>

The UNDRIP does not create new rights for indigenous peoples and as a declaration, does not bear that function for “it merely recognizes and reaffirms the inalienable human rights that every individual is born with, that every community and nation possess as a collective inheritance from their ancestors...already affirmed in other international instruments, constitutions and court rulings.”<sup>269</sup> It (fills) in normative framework of international human rights to protect the survival of indigenous peoples who do not enjoy any collective protection which guarantees their continuity.”<sup>270</sup> In fact, the UNDRIP intentionally borrowed the language of the International Bill of Human Rights<sup>271</sup> because “indigenous peoples would almost always invoke Article 1 of the Covenant, when claiming the right to self-determination.”<sup>272</sup>

<sup>266</sup> S. James Anaya and Siegfried Wiessner, “OP-ED: The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment”, *Jurist* (3 October 2007).

<sup>267</sup> *Ibid.*

<sup>268</sup> Ian Brownlie, *Principles of Public International Law* (Oxford: 1990), p. 515

<sup>269</sup> S. James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Human Rights Council, 11 August 2008 (A/HRC/9/9; available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/9session/A-HRC-9-9AEV.doc>

<sup>270</sup> Diana Vinding (ed), *The Indigenous World 2001-2002* (Copenhagen: The International Work Group for Indigenous Affairs (2002), p. 441.

<sup>271</sup> S. James Anaya, “The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs” in *International Law and Indigenous Peoples*, Anaya (ed) Ashgate Dartmouth Publishing Company 2003, Burlington, p.339

<sup>272</sup> Sotirios Zackheos, “Secession and Self-Determination- The Case of Cyprus” in Gudmundur Alfredsson and Maria Stavropoulou (eds) *Justice Pending: Indigenous Peoples and Other Good Causes* (The Hague/London New York: Martinus Nijhoff Publishers, 2002), p. 278

### **Judicial and Quasi-Judicial Recognition of Legal Force of UNDRIP**

There are developments that are enhancing the legal weight of UNDRIP. MacKay invites attention to trends among international treaty bodies notably the HRC, the CESR and the CRC to make reference to the UNDRIP and to entreat States to utilize it “as a guide to interpret (their) obligations under the Convention relating to indigenous peoples.”<sup>273</sup> Regional bodies are doing the same. In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*,<sup>274</sup> the African Commission, deciding that the indigenous *Endorois* of Kenya should be restored to their land from which they were dispossessed, referred to the UNDRIP provision on indigenous peoples’ right “to restitution or compensation of domains confiscated, occupied, used or damaged without their free and informed consent.”<sup>275</sup> In 2007, the Supreme Court of Belize in *Cal, et alis v. Attorney-General of Belize*<sup>276</sup> recognized the force of the UNDRIP thus:

*Of course, unlike resolutions of the Security Council, General Assembly resolutions are not ordinarily binding on member States. But where these resolutions or Declarations contain principles of general international law, States are not expected to disregard them.*

In *Saramaka People v. Suriname*,<sup>277</sup> the Inter-American Court held that pursuant to the UNDRIP and other international standards on human rights, the rights of indigenous peoples to their domains must be protected for their physical and cultural perpetuation.

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<sup>273</sup> He cites the CERD’s Concluding Observation on the United States, 08 May 2008, CERD/C/USA/CO/6. See also the CESCR’s *Concluding Observation on Nicaragua*, 28/11/2008, E/C.12/NIC/CO/4 where the CESR “encourages the State party to continue with its efforts to promote and implement the principles of the United Nations Declaration on the Rights of Indigenous Peoples”); and the Committee on the Rights of the Child, *General Comment No. 11, Indigenous children and their rights under the Convention*, UN Doc. CRC/C/GC/11, January 2009.

<sup>274</sup> African Commission on Human and Peoples’ Rights, 276/2003, 4 February 2010.

<sup>275</sup> UN Declaration on the Rights of Indigenous Peoples, preambular para. 5, E/CN.4/Sub.2/1994/2/Add.1 (1994).

<sup>276</sup> Supreme Court of Belize, *Cal, et alis. V. Attorney-General of Belize, Supreme Court of Belize Claim No 171 of 2007*, paragraph 131; emphasis added; In that case, the Supreme Court Chief Justice said: *I am therefore, of the view that this Declaration, embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it. Belize, it should be remembered, voted for it. In Article 42 of the Declaration, the United Nations, its bodies and specialized agencies including at the country level, and States, are enjoined to promote respect for and full application of the Declaration’s provision and to follow up its effectiveness.* (Par. 132)

<sup>277</sup> Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

### **Finding Its Way in Domestic Laws: Incorporating the UNDRIP**

It is worth noting that in 2007 Bolivia transformed the UNDRIP into a national law as Law No. 3760<sup>278</sup> and incorporated the same into its new Constitution promulgated on 7 February 2009.<sup>279</sup> The Democratic Republic of Congo and Colombia, both of which abstained when the UNDRIP was put to a vote eventually endorsed the Declaration while Australia,<sup>280</sup> New Zealand and Canada<sup>281</sup> which voted against reversed their positions. Chile, Ecuador and Nepal who are working on constitutional and legislative reforms expressed their intention to incorporate the UNDRIP into their legal system.<sup>282</sup> Likewise, the UNDRIP is being used by the Organization of American States as “the baseline for negotiations and ... a minimum standard” in the drafting of the American Declaration on the Rights of Indigenous Peoples.<sup>283</sup>

Although it is a *mere* declaration and is thus an aspirational document, it has some value in that it “represents a commitment on the part of the United Nations and Member States to its provisions, within the framework of the obligations established by the United Nations Charter to promote and protect human rights on a non-discriminatory basis.”<sup>284</sup> It is a demonstration of the international community’s recognition of indigenous right to self-determination and of their international status as peoples. A State that voted for it is not expected to disregard it<sup>285</sup> as

<sup>278</sup> The Republic of Bolivia: National Law No. 3760 as amended by National Law No. 3897 (Rights of Native Peoples), June 26, 2008, *Gaceta Oficial* from July 11, 2008; cited in R. Kearns: “Declaring autonomy in Bolivia” in *Indian Country Today*, April 12, 2009, available at <http://www.indiancountrytoday.com/archive/42800197.html>.

<sup>279</sup> Implementation of the UN Declaration on the Rights of Indigenous Peoples: Positive Initiatives and Serious Concerns. Joint Statement of Different Organizations and Indigenous Groups to the Expert Mechanism on the Rights of Indigenous Peoples Second session, Geneva, 10-14 August 2009

<sup>280</sup> *Ibid.*

<sup>281</sup> CBC News. *Canada endorses indigenous rights declaration*. 12 November 2010; available at <http://www.cbc.ca/politics/story/2010/11/12/indigenous-declaration.html>.

<sup>282</sup> Statement by S. J. Anaya, Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples, 8th Session of the UN Permanent Forum on Indigenous Issues, May 20, 2008, p. 3.

<sup>283</sup> Refer to n. 278.

<sup>284</sup> S. James Anaya. *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Human Rights Council, 11 August 2008 (A/HRC/9/9; available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/9session/A-HRC-9-9AEV.doc>

<sup>285</sup> In *Aurelio Cal, et al. v. Attorney General of Belize (Claim 121/2007; 18 Oct 2007)*, the Chief Justice of the Belize Supreme Court said, “I am therefore, of the view that this Declaration, embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it. Belize, it should be remembered, voted for it. In Article 42 of the Declaration, the United Nations, its bodies and specialized agencies including at the country level, and States, are enjoined to promote respect for and full application of the Declaration’s provision and to follow up its effectiveness.”



“although ...not be strictly binding, it may generate political pressure on States to comply with its terms.”<sup>286</sup> Otherwise, why should a State vote for a declaration and then reject its contents?

### **Jurisprudence of Regional Bodies**

Regional human rights bodies are now contributing to the recognition of indigenous peoples as peoples. The African Commission on Human and Peoples' Rights held in *The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*,<sup>287</sup> a case involving the indigenous *Ogoni* that the term *peoples* referred to in Article 21 of the African Charter on Human and Peoples' Rights recognizing a right of "(a)ll peoples" to "freely dispose of their wealth and natural resources" also pertains to indigenous peoples within a State. In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, the same Commission came close to reiterating itself when it expressed that it is aware

*that there is an emerging consensus on some objective features that a collective of individuals should manifest to be considered as “peoples”, viz: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy... or suffer collectively from the deprivation of such rights. What is clear is that all attempts to define the concept of indigenous peoples recognize the linkages between peoples, their land, and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people.*<sup>288</sup>

### **Recognition by Other International Actors**

Xanthaki notes the growing trend among international actors and bodies to refer to indigenous peoples as peoples.<sup>289</sup> But she also hastens to express her doubt as to whether these serve as evidence of international law recognition of indigenous right to self-determination,

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<sup>286</sup> Xanthaki, p. 281

<sup>287</sup> *The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96, (2001)

<sup>288</sup> African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, 4 February 2010.

<sup>289</sup> Xanthaki cites the World Bank Operational Directive 4.20 and the more recent Operation Policy 4.10 on Indigenous Peoples. the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the IFAD Regional Programme in Support of Indigenous Peoples and many others. See Xanthaki, p 134

noting that they are not binding. Be that as it may, this trend along with the recent pronouncements of the ICCPR and the overwhelming adoption by the community of States of UNDRIP recognizing indigenous self-determination, among others, puts to rest the controversy on whether indigenous peoples are peoples.

### **Clearing the Cobwebs**

Opinions of scholars that “current international law does not give a positive answer to indigenous claims for self-determination”<sup>290</sup> appear erroneous in the face of several pronouncements by UN Bodies that indigenous peoples fall within the purview of Art. 1 of the ICCPR and IESCR. The overwhelming adoption by the international community of the UNDRIP which does not grant new rights but rather recognizes basic human rights long denied indigenous peoples seals their international status. Not the least of these rights is self-determination. Thus this Chapter has demonstrated that they are peoples because they have the right of self-determination and conversely, they have the right of self-determination because they are peoples.

This notwithstanding, the challenges to the recognition of indigenous self-determination have not been overcome. The problem is not whether international law accommodates indigenous self-determination but how much States are ready to recognize this and how much space international law provides to shelter it. The utility of international law is as good as the willingness of States to submit to its force<sup>291</sup> considering that there are no sanctions on States that refuse to recognize indigenous self-determination except perhaps for them to be “blamed and shamed” before the international community. Even after the HRC and the CESCR

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<sup>290</sup>Xanthaki, p. 132

<sup>291</sup> For example, the HRC’s conclusion in *Lubicon Lake Band* that Canada was violating the land rights of the Lubicon Lake Band did not change the Band’s situation more than a decade after. In its *2004 Concluding Observations on Canada*, the HRC noted that the “land claim negotiations between the Government of Canada and the Lubicon Lake Band are currently at an impasse” and also raised concern about information that there are ongoing logging and large-scale oil exploration on the Band’s ancestral lands in violation of Articles 1 and 27 of the ICCPR. It called on Canada to “make every effort to resume negotiations with the Lubicon Lake Band, with a view to finding a solution which respects the rights of the Band under the Covenant.” See Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations, Canada*, 20 April 2006, CCPR/C/CAN/CO/5.

recognized that indigenous peoples are peoples, some States continued to assert otherwise or argue claims that defeat the right,<sup>292</sup> among them States that adopted the UNDRIP.<sup>293</sup>

As borne out by the jurisprudence of the HRC, the only way by which indigenous peoples can bring their issues before it is through the reporting mechanism under Art. 40 of the ICCPR. This is done by submitting shadow reports to counter or comment on reports of governments on their compliance with their treaty obligations. The same is true with the CESCR which has no complaints procedure. The rather disappointing reticence of the HRC in resolving self-determination claims raised in individual complaints contributes to the weakness of the international mechanisms in enforcing indigenous self-determination.

But the value of the international recognition of indigenous status is that indigenous peoples can invoke this right against States without ambiguity hounding their claims. Thus, they should frame their demands for the protection of their lands from development aggression within their right to self-determination more than their right to cultural integrity. But again, there is a hurdle to overcome. Does international law recognize that their self-determination right embraces their right to their domains? This is what the succeeding Chapter will delve into.

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<sup>292</sup> India has been claiming that all Indians are indigenous since it is beyond the realm of possibility to establish who settled in India first “in the wake of centuries of migration, assimilation and cultural diffusion.” <sup>292</sup> See Prabhu Dayal, *Statement on Behalf of India to the United Nations Working Group on Indigenous Populations* (31 July 1991), cited by Kingsbury p. 232; also refer to *Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples* submitted to the Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights during its Fifty-second session. China, claiming that all of the nationalities have lived there for ages, echoes the Indian position. Indonesia is “not keen on adopting the term *indigenous peoples*” because the ancestors of most Indonesians, predated Dutch colonization. See Castro, Nestor, *Doing Ethnographic Research Among Indigenous Filipinos*, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.123.3716&rep=rep1&type=pdf>

<sup>293</sup> The Minority Rights Groups International reported that Thailand “does not recognize the existence of indigenous peoples” in it and “maintains that they are migrants and thousands of them continue to be denied registration for an identification card.” There are “(a)s many as 20 different ‘hill tribes’, totalling 1 million people according to some estimates, live in Thailand and include, among the more numerous, the Akha, Karen, Lahu, Lisu, H’mong and Mien.” See Minority Rights Group International, *State of the World’s Minorities and Indigenous Peoples 2009 - Thailand*, 16 July 2009, available at: <http://www.unhcr.org/refworld/docid/4a66d9a3c.html> [accessed 21 November 2010]

### Chapter III. Power Dynamics in Globalization: Shrinking the State, Inflating Corporate Capital and Negating Indigenous Self-Determination

*We live in a world of economic globalization in which the power of transnational corporations often dwarfs the power of States. Many governments are overwhelmed by market forces. Acting alone, they can be ineffective at regulating corporate ventures, and in protecting indigenous peoples from destructive approaches. There is an urgent need to develop new international legal machinery to extend the power of States in order to defend their citizens and their environment against irresponsible trans-boundary corporate activities, including in particular corporate activities that disrupt, displace and destroy indigenous peoples.*<sup>294</sup>

The dynamics of capitalist globalization, the balance -or more appropriately the imbalance- of power between transnational corporations, supported by the core countries as well as the World Trade Organization and the international financial institutions on one hand and developing countries on the other, and between these developing countries on one end and their constituent indigenous peoples on the other, seem to either present a challenge to many legal scholars or is not interesting. This is judging from the fact that even if a flood of literatures on corporations and human rights has been produced, only a few touch on the nexus between indigenous self-determination and globalization. The closest expression in existing legal scholarship of a connection between MNC plunder of resources and self-determination is what Westra averred:

*(T)he collaboration between States and multinational corporations (MNCs) violates Article 1(2) of the (ICCPR and IESCR)... (O)ur main concern is with the disenfranchised victims of globalized 'development', where resources, lands, water and way of life are taken and destroyed. The States wherein these groups live, in general, do not respect the law of self-determination, nor the mandates of international law regarding indigenous rights to their own resources.*<sup>295</sup>

This part of the paper explores why under the current global economic regime, indigenous peoples are strategically targeted for dispossession from their domains by transnational and multinational corporations which have now become “the most powerful non-

<sup>294</sup> Erica- Irene Daes, “Article 3 of the Draft UN Declaration on the Rights of Indigenous Peoples,” p. 12.

<sup>295</sup> Westra, p. 14

State actors in the world<sup>296</sup> with the complicity of States pressured by the demands of the global economic regime operating under the shibboleths of neoliberalism.

### **Indigenous Peoples' Resources: Magnets of Oppression**

The indigenous resource management system has ensured the survival of indigenous peoples everywhere and preserved the wealth of their domains even with the barest access to services known to the dominant population. They may be a numerical minority in the globe making up 5% or 370 million of the world population<sup>297</sup> but they inhabit the larger part of Earth's last frontiers.<sup>298</sup> In the Philippines for example, they are estimated to make up seventeen (17) percent of the population but most of the country's remaining biodiversity is located in their domains and the large-scale mining companies operate in their ancestral domains.<sup>299</sup> However, with the onslaught of globalization, the vastness of their resources, their rights over which are "contested or inadequately protected,"<sup>300</sup> has become their curse because it is a magnet for neoliberal capitalist expansion. Thus, according to Osman,

*The indigenous peoples have become major victims of the policies that have been pushed by the globalization strategy. Market-led developments such as logging and hydroelectric power dams affect their economic system and their traditional livelihood."*<sup>301</sup>

<sup>296</sup> David Weissbrodt and Muria Kruger, "Human Rights Responsibilities of Businesses as Non-State Actors," in Philip Alston, ed., *Non-State Actors and Human Rights* (New York: Oxford University Press, 2005), p. 315.

<sup>297</sup> IFAD (2007), *Statistics and key facts about indigenous peoples cited in Secretariat of UN Permanent Forum on Indigenous Issues, "Indigenous Peoples and the MDGs: We Must Find Inclusive and Culturally Sensitive Solutions" in UN Chronicle NO. 4, 2007; pp. 1-3 at p. 1; available at <http://www.un.org/esa/socdev/unpfii/documents/MDGs%20article%20in%20UN%20Chronicle.pdf>*

<sup>298</sup> When she was Chair of the UN Permanent Forum on Indigenous Issues, Victoria Tauli-Corpuz reported that "majority of the world's remaining natural resources – minerals, freshwater, potential energy sources and more - are found within indigenous peoples' domains." See Backgrounder: Indigenous Peoples - Lands, Domains and Natural Resources available at [http://www.un.org/esa/socdev/unpfii/documents/6\\_session\\_factsheet1.pdf](http://www.un.org/esa/socdev/unpfii/documents/6_session_factsheet1.pdf). According to the University of Minnesota Human Rights Center, indigenous peoples "embody and nurture 80% of the world's cultural and biological diversity, and occupy 20% of the world's land surface." See University of Minnesota Human Rights Center, *The Rights of Indigenous Peoples*, 2003; available at <http://www1.umn.edu/humanrts/edumat/studyguides/indigenous.html>

<sup>299</sup> Cheryl Daytec-Yañgot, "A Bipolar Philippine Constitution: Reinforcing the Oppression of Philippine Indigenous Peoples under a Double-Edged Legal Framework," paper presented during the *Regional Training on International and National Mechanisms to Promote Indigenous Peoples Rights* sponsored by the Asian Indigenous and Tribal Peoples Network, Kathmandu, Nepal, Aug. 2-6, 2008; citing the speech of Atty. Eugenio A. Insigne, Chairman, National Commission on Indigenous Peoples (NCIP) on *The Important Role of Free and Prior Informed Consent (FPIC) in Responsible Mining* before the Chamber of Mines on November 19, 2007.

<sup>300</sup> Amnesty International and the Prince of Wales International Business Leaders Forum, *Business and Human Rights. A Geography of Corporate Risk. Extractives Sector*, p. 5; <http://www.iblrf.org/docs/geography/extractives.pdf>

<sup>301</sup> Sabihah Osman, 'Globalization and democratization: the response of the indigenous peoples of Sarawak,' *Third World Quarterly*, 21:6 (2000), p. 981.

The most significant nexus between globalization and indigenous peoples pertains to the intensification of operations of extractive industries.<sup>302</sup> The chain of relationship between them finds eloquent expression in the following:

*The extractive sector is unique because no other has so enormous and intrusive a social and environmental footprint' ... which operates in contexts where 'there is clearly a negative symbiosis between the worst corporate-related human rights abuses and host countries that are characterized by a combination of relatively low national income, current or recent conflict exposure, and weak or corrupt governance.'*<sup>303</sup>

*Unsustainable mining confronts sustainable traditional societies. Rich and powerful multinationals will impose potentially severe impacts on inexperienced, weak, largely illiterate and poor Indigenous Peoples. Multinationals have great difficulty even in communicating with the affected people. Practically all the benefits will accrue to two stakeholders, namely the multinationals as they will reap a saleable commodity ... and the government as they will reap taxes and royalties. These two stakeholders will gain substantial benefits, but bear no adverse impacts. The Indigenous Peoples, on the contrary, will bear practically all the negative impacts and few, if any, of the benefits.*<sup>304</sup>

As indigenous leaders recently declared, “the root cause of the enormous problems we face today is the neoliberal global capitalist system, which puts profits before people and the planet. Central to this system is the expropriation and control of resources by multinational corporations, and dispossession and marginalization of ... indigenous peoples.”<sup>305</sup> They stand vulnerable to a maelstrom of abuses as the “battle for natural resources... (lying) on or beneath lands occupied” by them<sup>306</sup> is escalating with the expansion of primarily extractive corporate industries, generating what Westra calls “eco-footprint crimes” manifested in severe

<sup>302</sup> César A. Rodríguez-Garavito and Luis Carlos Arenas, “Indigenous Rights, Transnational Activism and Legal Mobilization: The Struggle of the U'wa People of Columbia,” in Boaventura de Sousa Santos and César A. Rodríguez Garavito (eds), *Law and globalization from below: towards a cosmopolitan legality* (New York: Cambridge University Press, 2005), p. 244-245.

<sup>303</sup> John Ruggie, Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (Interim Report), 2006, UN Doc E/CN.4/2006/97.

<sup>304</sup> Robert Goodland, *Environmental and Social Reconnaissance: The Bakhuis Bauxite Mine Project. A report prepared for The Association of Indigenous Village Leaders of Suriname and The North-South Institute* (2006), p. 6; [http://www.nsiins.ca/english/pdf/Robert\\_Goodland\\_Suriname\\_ESA\\_Report.pdf](http://www.nsiins.ca/english/pdf/Robert_Goodland_Suriname_ESA_Report.pdf)

<sup>305</sup> “Declaration of Solidarity.” *International Conference in Indigenous Peoples Rights: Alternatives and Solutions to the Climate Crisis*. 4-9 November 2010, Baguio City, Philippines; See also Fabio Marcelli, *I diritti dei popoli indigeni*, (Roma: Aracne, 2009).

<sup>306</sup> See n. 140.

infringement of human rights “beyond the overuse of local resources to the detriment of indigenous peoples and their lands”<sup>307</sup> and assaulting their basic right to self-determination.

### **On the Precipice of Destruction: Official Pronouncements on Corporate Threats to Indigenous Peoples**

The corporate expansion projects targeting indigenous lands resulting in dispossession, among others, are ringing the alarm bells even among UN bodies and other human rights mechanisms and have helped lifted veils that camouflage indigenous issues. A UN official reported acute threats to indigenous peoples’ rights as a result of resource extraction operations by States and TNCS from which they receive little or no benefit and which gravely restrict their capacity to sustain themselves physically and culturally.<sup>308</sup> Another elaborated that “for many indigenous peoples throughout the world, oil, gas and coal industries conjure images of displaced peoples, despoiled lands, and depleted resources” which, she says “explains the unwavering resistance of most indigenous communities with *(sic)* any project related to extractive industries.”<sup>309</sup>

In the last decade, the UN monitoring bodies such as the HRC, CESCR and CERD, using very diplomatic language, expressed concern about business activities in indigenous domains seriously imperiling indigenous peoples in different parts of the world. On the basis of these common *Observations*, along with pronouncements of other human rights bodies that overlap national frontiers, it is obvious that there is a global structure that systematically disregards indigenous land claims in the name of profit. It is also obvious that the practice of States does not yet recognize indigenous self-determination even if this is affirmed at the international level as shown in the previous Chapter. These bodies are too careful to indict economic globalization, due in part to the fact that they deal with each State individually and not in comparison with others. Most of these *Observations* are summarized below.

<sup>307</sup> Westra, p. 86

<sup>308</sup> *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57.* UN Doc. E/CN.4/2002/97.

<sup>309</sup> E. Caruso *et al.*, (eds.), *Extracting Promises: Indigenous Peoples, Extractive Industries and the World Bank* (Manila: Tebtebba Foundation & Forest Peoples Programme 2003), at p. 9.

**Observations of the Committee on the Elimination of All Forms of Racial  
Discrimination**

With an urgent tone, the CERD in 1997 expressed alarm that

*in many regions of the world indigenous peoples have been, and are still being discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.*<sup>310</sup>

It articulated its apprehension about the impact of large-scale oil exploration in the Ogoni lands in Nigeria and its alarm at reports regarding “assaults, use of excessive force, summary executions and other abuses against members of local communities by law enforcement officers as well as by security personnel employed by petroleum corporations.”<sup>311</sup> It pointed to past and threatened displacement of Guatemala’s indigenous peoples from their domains due to armed conflict or economic development plans.<sup>312</sup> It decried the “past and new actions of the United States of America to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers, the ongoing and/or planned destructive activities on sacred and cultural lands of the Shoshone who are denied access to use the same area, the “federal efforts to open a nuclear waste repository at the Yucca Mountain,” and the “use of explosives and open pit gold mining activities,” all of which are being protested by Western Shoshone peoples who were not consulted.”<sup>313</sup>

The CERD noted scientific research and large-scale mining in Guyana threatening indigenous communities whose ancestral lands are not registered and who are not entitled to a village council. It urged the State “to remove the discriminatory distinction between titled and untitled communities from the 2006 Amerindian Act and from any other legislation,” as well as

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<sup>310</sup> Committee on the Elimination of all Forms of Racial Discrimination. *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee's 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4.

<sup>311</sup> Committee on the Elimination of all Forms of Racial Discrimination, *Concluding Observations/Comments on Nigeria*, CERD/C/NGA/CO/18 01/11/2005.

<sup>312</sup> Committee on the Elimination of all Forms of Racial Discrimination, *Concluding Observations/Comments on Guatemala*, CERD/C/GTM/CO/11 15 May 2006.

<sup>313</sup> Committee on the Elimination of all Forms of Racial Discrimination, *Decision 1(68), United States of America, (Early Warning & Urgent Action Procedure)*. CERD/C/USA/DEC/1, 11 April 2006



recognize village councils or equivalent indigenous institutions “for the self-administration and the control of the use, management and conservation of traditional lands and resources.”<sup>314</sup>

### **Observations of the Human Rights Committee**

The HRC noted the limited space given by Sweden to the Sami Parliament in democratic processes that tackle their ancestral lands threatened by such projects as in the fields of “hydroelectricity, mining and forestry, as well as the privatization of land.”<sup>315</sup> It called on the Philippines to consider “human rights implications for indigenous groups of economic activities, such as mining operations.”<sup>316</sup> It also observed the unabated discrimination against “indigenous and minority communities” in Colombia and the “lack of forums for consultation with representatives of the communities with regard to the distribution of land to the indigenous peoples” as well as the lack of guarantees with respect to “the exercise by the indigenous communities of the right to property” noting the existence of extractive projects that could affect them. Thus it entreated the State party to guarantee the rights of the minorities “in particular with respect to the distribution of land and natural resources, through effective consultations with representatives of the indigenous communities.”<sup>317</sup>

It expressed its concern about the forced eviction and resettlement of ‘Highlanders’ in Thailand from their ancestral lands and the construction of a gas pipeline and other “development projects which have been carried out with minimal consultation with the concerned communities.”<sup>318</sup> It also said that Brazil’s “forced evictions of indigenous populations from their land and the lack of legal remedies to reverse these evictions and compensate the victimized populations for the loss of their residence and subsistence “violated Art. 1 and Art. 27.”<sup>319</sup>

<sup>314</sup> Committee on the Elimination of all Forms of Racial Discrimination, *Concluding Observations/Comments on Guyana*, CERD/C/GUY/CO/14 4 April 2006.

<sup>315</sup> UN Human Rights Committee, *Concluding Observations on Sweden*, UN doc. CCPR/CO/74/SWE (2002).

<sup>316</sup> UN Human Rights Committee (HRC), *Concluding Observations on the Philippines*, 1 December 2003, CCPR/CO/79/PHL.

<sup>317</sup> UN Human Rights Committee (HRC), *Concluding Observations on Colombia*, 26 May 2004, CCPR/CO/80/COL.

<sup>318</sup> UN Human Rights Committee (HRC), *Concluding Observations on Thailand*, 8 July 2005, CCPR/CO/84/THA.

<sup>319</sup> UN Human Rights Committee (HRC), *Concluding observations on Brazil*, 1 December 2005, CCPR/C/BRA/CO/2.

**Observations of the Committee on Economic, Social and Cultural Rights**

The CESCR expressed its concern about “the adverse effects of the economic activities connected with the exploitation of natural resources, such as mining in the Imataca Forest Reserve and coal-mining in the Sierra de Perijá, on the health, living environment and way of life of the indigenous populations living in these regions” in Venezuela.<sup>320</sup> It noted that the land rights of indigenous peoples in Panama are undermined by mining and cattle activities approved by the State resulting in their displacement from their traditional ancestral and agricultural lands.<sup>321</sup> The reduction or occupation of indigenous domains in Colombia, “by timber, mining and oil companies, at the expense of the exercise of (the indigenous peoples’) culture and the equilibrium of the ecosystem”<sup>322</sup> was highlighted by the CESCR. It declared its concern about the forcible eviction from their lands of indigenous peoples in Brazil whose lives are under threat, with some having been executed. It also noted “that the right of indigenous peoples to own land is not respected and that mineral, timber and other commercial interests have been allowed to expropriate, with impunity, large portions of land belonging to indigenous peoples.”<sup>323</sup> It also called attention to the grant by Ecuador of extracting concessions to transnational companies on indigenous domains without the consent of the concerned communities and “the negative health and environmental impacts of natural resource extracting companies’ activities at the expense of the exercise of (indigenous) land and culture rights... and the equilibrium of the ecosystem.”<sup>324</sup> In the same vein, it expressed alarm at reports regarding the exploitation with impunity of the economic rights of indigenous peoples in Russia by oil and

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<sup>320</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on Venezuela*, 21 May 2001, E/C.12/1/Add.56.

<sup>321</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on Panama*, 24 September 2001, E/C.12/1/Add.64.

<sup>322</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) *Concluding Observations on Colombia*, 30 November 2001, E/C.12/Add. 1/74.

<sup>323</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations on Brazil*, 26 June 2003, E/C.12/1/Add.87.

<sup>324</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations on Ecuador*, 7 June 2004, E/C.12/1/Add.100.

gas companies and recommended “that action be taken to protect the indigenous peoples from exploitation” by the companies.<sup>325</sup>

### **Findings of Regional Human Rights Bodies**

In *Maya Indigenous Community of the Toledo District v. Belize*,<sup>326</sup> Mayans assailed the granting by the State of logging concessions covering half a million acres of their land “including sizeable concessions” to two-foreign firms, and of oil concessions on a wide tract of land including 749,222 acres encroaching on most of Maya lands in Toledo. These concessions were granted without the consent of the Mayans whose spiritual, cultural, physical and economic survival has been exposed to jeopardy. The Inter-American Commission of Human Rights Stated that the obligation to obtain indigenous peoples’ consent is “applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.”<sup>327</sup> Most recently, in the *Twelve Saramaka Clans Case*,<sup>328</sup> a case involving logging and mining concessions, the Commission confirmed “in light of the way international human rights legislation has evolved with respect to the rights of indigenous peoples that the indigenous people’s consent to natural resource exploitation activities on their traditional domains is always required by law.”<sup>329</sup> On appeal, the Inter-American Court of Human Rights said that indigenous peoples “have the right to own the natural resources they have traditionally used within their territory.”<sup>330</sup>

In its *Ogoni* decision, the African Commission on Human and Peoples’ Rights found that the Government of Nigeria had violated the collective human rights of the *Ogoni* people by

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<sup>325</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) *Concluding observations the Russian Federation*, 20/05/97. E/C.12/1/Add.13, at para. 29-30.

<sup>326</sup> *Maya Indigenous Community of the Toledo District v. Belize* Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004).

<sup>327</sup> *Ibid.*.

<sup>328</sup> Inter-American Commission on Human Rights, *Twelve Saramaka v Suriname*, Case No. 12.338 (June 23, 2006).

<sup>329</sup> Inter-American Commission on Human Rights, *Twelve Saramaka Clans Case*, *supra*, at para. 214

<sup>330</sup> Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname* (Prel. Obj., Merits, Reparations, and Costs), 2007 Inter-Am. Ct. H. R., para. 121 (Judgment, Nov. 28).

allowing the extraction of oil in their domains without their consent.<sup>331</sup> The same Commission acknowledged in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*<sup>332</sup> that “many (marginalized vulnerable) groups have not been accommodated by dominating development paradigms and in many cases they are being victimised by mainstream development policies and thinking and their basic human rights violated” and “that indigenous peoples have, due to past and ongoing processes, become marginalised in their own country and they need recognition and protection of their basic human rights and fundamental freedoms.”

*Awas Tingni Community vs Nicaragua*<sup>333</sup> was instituted by indigenous peoples to challenge the concession granted to Sol de Caribe SA (SOLCARSA), a foreign timber company, to log on lands traditionally held by the Awas Tingni. In sustaining their cause, the Inter-American Court of Human Rights found that Nicaragua violated the indigenous peoples’ right to their natural resources by granting concessions to a foreign company without their consent. It also ordered Nicaragua to demarcate delineate, demarcate and register indigenous lands “in accordance with their customary laws, values, customs, and mores.”<sup>334</sup> In *Kichwa Peoples of Sarayaku Community and Members v. Ecuador*,<sup>335</sup> the Inter-American Court of Human Rights declared that “acts denounced by the (indigenous Kichwa) regarding irregularities in the consultation process conducted by the State with respect to the oil exploration and exploitation concession granted to a company to be carried in the ancestral territory of the Kichwa indigenous people of Sarayaku” constitute violations of indigenous rights under the American Convention if substantiated.

<sup>331</sup>African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*, Comm. No. 155/96, (2001)

<sup>332</sup>African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, 4 February 2010.

<sup>333</sup>Inter-American Court of Human Rights, *Awas Tingni v. Nicaragua*, 79 Inter-Am. Ct.H.R. (Ser C) (2001)

<sup>334</sup>This case is comprehensively and incisively reviewed in Anaya, S. James & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 Arizona Journal of International and Comparative Law 1 (2002).

<sup>335</sup>Inter-American Court of Human Rights Petition, 167/03, Inter-Am. Ct H.R., Report No. 64/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1 (2004);

## **Economic Globalization: In the Image Frankenstein's Monster**

The cases leave one to wonder why indigenous peoples spread across the globe share similar tragedies caused by the forces of globalization and why these forces commit abuses under a culture of impunity for which someone tagged them as “leviathans.”<sup>336</sup> But Marx and Engels seem to have predicted this more than a century ago when they wrote:

*The need of a constantly expanding market for its products chases the bourgeoisie over the whole surface of the globe. It must nestle everywhere, settle everywhere, establish connections everywhere. The bourgeoisie has through its exploitation of the world market given a cosmopolitan character to production and consumption in every country. To the great chagrin of reactionists, it has drawn from under the feet of industry the national ground on which it stood. All old-established national industries have been destroyed or are daily being destroyed. They are dislodged by new industries...that no longer work up indigenous raw material, but raw material drawn from the remotest zones; industries whose products are consumed, not only at home, but in every quarter of the globe...*<sup>337</sup>

The picture Marx and Engels depicted may have been strange during their time but not today. Whether they were referring to indigenous domains when they spoke of “remotest zones” from which new industries will extract raw materials is debatable. But in the words of Hobsbawm, they “did not describe the world as it had already been transformed by capitalism in 1848; they predicted how it was logically destined to be transformed by it.”<sup>338</sup>

The *Observations* affirm that economic globalization is “clearly the greatest revolutionary force of our time.”<sup>339</sup> As said earlier, they point to a regime that allows TNCs to access indigenous resources, committing abuses in the process with impunity. How this is possible is explained by the ensuing discussions on how international law itself created the economic globalization regime: from transforming sovereignty resulting in the shrinking of States’ powers and the catapulting of multinational enterprises to the international power throne to the culture of impunity under which abuses of indigenous rights are perpetrated.

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<sup>336</sup> Sarah Joseph, “Taming the Leviathans: Multinational Enterprises and Human Rights,” 46 Netherlands International Law Review 171 (1999)

<sup>337</sup> Karl Marx and Frederick Engels, *The Communist Manifesto* (London: Phoenix 1996), pp8-9; emphasis supplied.

<sup>338</sup> Hobsbawm, Eric. ‘Introduction’, in K. Marx and F. Engels, *The Communist Manifesto* (Verso: New York and London 1998), p. 17.

<sup>339</sup> Bennett Freeman, *Corporate Responsibility and Human Rights*; <http://www.lse.ac.uk/collections/globalDimensions/seminars/humanRightsAndCorporateResponsibility/freemanTranscript.htm>

## Shrivelling the State, Transforming Sovereignty

The recontouring of the global political economy under the tenets of neoliberalism carried with it a political dimension emasculating the sovereignty of States and elevating capital to the dais of global politics.<sup>340</sup> Sassen calls this the “transformation of sovereignty.”<sup>341</sup> In Black’s words:

*In the now globalized economic system, the idea that the role of government is to represent and promote the public interest has given way to the assumption that the government’s role is to mediate between public and private interests. Having lost the protective role—such as it was—of the government, virtually all States are, in a sense, vanquished States—that is, the public sector has been eaten up by the private sector.*<sup>342</sup>

Anderson precisely observes that in the age of globalization, the State’s sovereignty, viewed as its capacity to exercise political power, is “increasingly under threat” and it is no longer the “principal container of politics.”<sup>343</sup> Its role is declining<sup>344</sup> as large corporations are “supplanting (its) political functions.”<sup>345</sup> He refers to a three-fold diffusion of State power spawned by globalization. First, it shrank the State “whether by limiting the policy levers it can deploy to influence macro-economic policy...or by hollowing out the State of its former functions” such that private corporations are the ones that deliver public services.<sup>346</sup> Traditionally, privatization involved the ministrant, e.g., optional functions of States but now even the constituent or so-called governmental functions have been privatized such as prisons,<sup>347</sup> air traffic control,<sup>348</sup> law and order.<sup>349</sup>

<sup>340</sup> Miles Kahler and David A. Lake, “Globalization and Governance” in Mike Kahler and David A. Lake, *Governance in a Global Economy: Political Authority in Transition* (Princeton and Oxford: Princeton University Press, 2003), p. 1-4.

<sup>341</sup> Saskia Sassen, *Losing Control?: Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996), p. 14.

<sup>342</sup> Jan Knippers Black, *The Politics of Human Rights: Moving Intervention Upstream with Impact Assessment* (New York: Rowman and Littlefield Publishers, Inc., 2009), p. 82

<sup>343</sup> Gavin Anderson, *Constitutional Rights After Globalization* (Oxford and Portland Oregon: Hart Publishing 2005), p. 17.

<sup>344</sup> *Ibid.*, p.15

<sup>345</sup> *Ibid.*

<sup>346</sup> *Ibid.*, p. 20

<sup>347</sup> For example, in the United Kingdom, Premier-Serco, a private corporation operates four prisons and a juvenile delinquency center. See Craig Paterson, “Virtual Private Prisons” in *Corporate Watch*, April/May 2006; available at <http://www.corporatewatch.org.uk/?lid=2513>

<sup>348</sup> Günter Knieps, “Privatisation of Network Industries in Germany: A Disaggregated Approach,” Paper presented at the CESifo/University of Warwick Conference: *Privatisation Experiences in the EU*, Cadenabbia (1- 2 November 2003); <http://www.econstor.eu/bitstream/10419/23014/1/disk100.pdf>

<sup>349</sup> Boubakri Narjess, Jean-Claude Cosset and Houcem Smaoui, “Does Privatization Foster Changes in the Quality of Legal Institutions?” in *Journal of Financial Research* Volume 32, Issue 2(Summer 2009), pp. 169-197.

Kennedy declares something similar when he says, “Technocratic governance, a displacement of public by private, of political alignments by economic rivalries (has) shrivelled the range of the politically contestable.”<sup>350</sup> Clapham agrees as he says that among some commentators, there is an assumption that States have ceased to be the “main actors on the international stage,” and their space for maneuver has been constricted.<sup>351</sup>

Second, “the shift of functions from public to private hand also seeks to reorient our view of the political nature of these functions.”<sup>352</sup> Hence public policy now delves into public service issues “not in the political vocabulary of the equitable allocation of resources, but rather in the technical vocabulary of efficiency and effectiveness.”<sup>353</sup> Globalization is

*privileging the private over the public sphere and over the commons. It is eroding the authority of States differentially to set the social, economic and political agenda within their respective political space. It erodes the capacity of States in different degrees to secure the livelihoods of their respective citizens by narrowing the parameters of State activity.*<sup>354</sup>

Third, the emergence of the global economy is affecting States as it leads to “intensification of global economic integration” relocating political decision making.<sup>355</sup> Sassen calls the relocation site the “new geography of power” whose principal protagonists and sites include global capital markets, transnational law firms, novel forms of regulating transnational business like international commercial arbitration, and electronic economic activity.<sup>356</sup> But Anderson is quick to point out that the reshaping of the powers of States has not rendered them irrelevant: in fact, they remain necessary if not indispensable “to provide the infrastructure for global capitalism.”<sup>357</sup>

<sup>350</sup> David Kennedy, “The Forgotten Politics of International Governance,” *European Human Rights Law Review* (2001), p. 120.

<sup>351</sup> Andrew Clapham, *Human Rights Obligations of Non-State Actors*. (Oxford: Oxford University Press, 2006), p. 4.

<sup>352</sup> Anderson, p.21.

<sup>353</sup> *Ibid.*, p 21.

<sup>354</sup> Carolyn Thomas, “International Financial Institutions and Social and Economic Rights: An Exploration” in T. Eavns (ed) *Human Rights Fifty Years On: A Reappraisal* (Manchester: Manchester University Press, 1998, p. 163

<sup>355</sup> *Ibid.*

<sup>356</sup> Sassen, p. 4.

<sup>357</sup> Anderson, p. 21.

## **Inflating the Corporations**

As States are deflated, corporations are inflated. With their capacity to bestride national boundaries, they control finances and possess economic powers that far outweigh those of developing countries.<sup>358</sup> Alston reported that in 2003, Walmart, the world's biggest corporation generated sales amounting to US\$256 billion which was larger than the economies of the world's countries except those of the thirty richest, and its daily sales are equivalent to the gross domestic product of thirty-six (36) countries combined!<sup>359</sup>

Corporate capitalism's formidable economic might is even greater as a consequence of the merger of corporate power with the power of the core States and capitalist organizations. The largest MNCs were conceived in the affluent developed States which, with their power over poor States, guaranteed MNCs a global presence.<sup>360</sup> Thus, van Boven avers that "the extensive movement in favour of market-oriented economies has made TNCs mobilizers of capital, generators of technology and international actors with considerable impact on so-called global governance."<sup>361</sup> Their access to technology and capital, which the developing world does not have, gives them a sizeable influence in the latter's economies.

As the US Department of State was quoted to say, "Where indigenous people clash with developmental projects, the developers almost always win."<sup>362</sup> It needs no overemphasis that the remaining resources of the world are found, to borrow Marx and Engel's words, in the "remotest zones"- the ancestral lands of indigenous peoples.

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<sup>358</sup> Susan Strange, (1996). *The Retreat of the State: The Diffusion of Power in the World Economy*. Cambridge: Cambridge University Press, (1996).

<sup>359</sup> Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?" in Alston (ed.) *Non-State Actors and Human Rights* (Oxford: Oxford University Press (2005), p. 17.

<sup>360</sup> Geoffrey Jones, *The Evolution of the International Business: An Introduction* (London: Routledge, 1996), pp. 194-105.

<sup>361</sup> Theo C. Van Boven, "Non-State Actors: Introductory Comments" in Theo C. Van Boven, et alis (eds.), *The Legitimacy of the United Nations: Towards an Enhanced Legal Status for Non-State Actors* (SIM Special No. 19), (Utrecht: Netherlands Institute of Human Rights, 1997), p. 5.

<sup>362</sup> Simon Handelsman, "Mining in Conflict Zones" in Rory Sullivan (ed.), *Business and Human Rights*; (Sheffield: Greenleaf Publishing: 2003), p 129



## **Developing States: Infrastructure for Global Corporate Control**

Developing countries where most indigenous peoples are situated have become economically dependent on the direct investments of TNCs whose license to operate is that “they bring economic benefits such as technology and capital.”<sup>363</sup> This dependence is spawned by the reality of prevailing negative economic circumstances<sup>364</sup> such as heavily indebted central banks, lack of technology to turn their resources to cash, and burgeoning pressures coming from the major actors such as the World Bank to allow foreign investments. The Bank measures a State’s wealth based on its capacity to convert its natural wealth into commercial commodities circulating in free trade regimes, thus a State’s natural resources becomes its secure comparative advantage over others.<sup>365</sup> The affluent States supply the sophisticated technology and capital to convert these resources into commercial commodities. In Latin America, for instance, the pressure to service debts coupled with the inability of domestic products to compete with “heavily subsidized exports from the US” has led States to “increase resource extraction, from timber to mining and oil.”<sup>366</sup>

De Shutter best captures the “damned-if-you-damned-if-you-don’t” position that developing countries now find themselves in:

*For all the sour feelings that the acts of certain transnational corporations have aroused in developing countries where they have operated, there is one thing which, for a developing country, is even worse than to attract foreign direct investment: it is to attract none.”*<sup>367</sup>

Desirous of attracting capital and succumbing to pressures from international finance institutions and the World Trade Organization, they abandoned protectionism and indigenization and created investment climates with enervated regulatory mechanisms

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<sup>363</sup> Van der Putten, *et alis*, p. 89.

<sup>364</sup> ‘Gbenga Bamodu, “Managing Globalization: UK Initiatives and Nigerian Perspective” in Janet Dine and Andrew Fagan (eds), *Human Rights and Capitalism: A Multidisciplinary Perspective on Globalisation*, (Cheltenham: Edward Elgar Publishing Limited, 2006) ; p. 147

<sup>365</sup> Fernando Coronil, “Towards a Critique of Globalcentrism: Speculations on Capitalism’s Nature,” *Public Culture* 12:12 (2000); pp. 363-364

<sup>366</sup> Rodríguez-Garavito, et al., pp. 244-245.

<sup>367</sup> Olivier De Schutter, ‘Transnational Corporations as Instruments of Human Development’ in Philip Alston and Mary Robinson (eds), *Human Rights and Development* (Oxford: Oxford University Press, 2005), pp. 403.

favourable to transnational corporate participation in domestic economies<sup>368</sup> packaged as necessary for corporate growth and development. This is because “(a) government that for lack of resources is unable to follow through on a popular mandate does not simply wither away, however; rather, it becomes more vulnerable to being pressed into the service of domestic or foreign elites.”<sup>369</sup>

Even worse is that human rights have to play a backseat if States must give in to the wishes of corporate capital. Weissbrodt laments that governments, afraid of the prospect of losing the economic benefits brought in by businesses, look the other way when these businesses perpetrate human rights violation on their soils.<sup>370</sup> He expounds that

*(t)he interdependent and joint powers of national and international economic and financial actors, in particular transnational corporations and financial institutions, are gaining a great deal of strength and influence at the expense of the State, thus weakening the State's role as the protector of social rights and social welfare. Due to the process of globalization, the imperatives of social justice aimed at promoting and protecting the rights of the weak and the marginalized are increasingly being jeopardized.*<sup>371</sup>

Thus, the combined force of the international trade and financial institutions and transnational corporations has “construct(ed) a global economic order that violates the rights of many millions<sup>372</sup> and created human rights problems in the “less developed economies and political systems”<sup>373</sup> where the imperatives of social justice for the promotion and protection of the rights of the weak are clearly in jeopardy.<sup>374</sup>

While foreign investment in natural resource extraction generates profits for TNCs and their domestic partners, the poverty of indigenous peoples is worsened and their cultural integrity and security are endangered.<sup>375</sup> A 2003 World Bank Group evaluation reported that

<sup>368</sup> Bamodu, p. 147

<sup>369</sup> Black, p. 79

<sup>370</sup> Weissbrodt and Kruger, p. 254

<sup>371</sup> Theo Van Boven, “A Universal Declaration of Human Responsibilities?” in B. van der Heijden and B. Tahzib-Lie (eds) *Reflection on the Universal Declaration of Human Rights* (The Hague: Martinus Nijhoff, 1998), p. 76.

<sup>372</sup> Asbjørn Eide, “Globalization and the Human Rights Agenda: The Petroleum Industry at Cross-roads” in A Eide, H.O. Bergesen and P.R. Goyer (eds), *Human Rights and the Oil Industry* (Antwerp: Intersensia, 2000), pp. 25-45

<sup>373</sup> Van der Putten, *et al.*, p. 82.

<sup>374</sup> Van Boven, p. 76.

<sup>375</sup> Kay Treake, “Ecuador: Structural Adjustment and Indigenous and Environmental Resistance” in J. Fox & L. Brown (eds.) *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (Cambridge: MIT Press, 1998), p. 219

mining and energy projects expose to peril the lives, properties and economic livelihood of indigenous peoples and that

*modern technology allows interventions in hitherto remote areas, causing significant displacement and irreparable damage to IP land and assets. In this context, IP living on these remote and resource rich lands are particularly vulnerable, because of their weaker bargaining capacity, and because their customary rights are not recognized in several countries.*<sup>376</sup>

The Bank's hands are not immaculate. Between 1990 and 2003 alone, it funded or otherwise imposed the revision of extractive industry and energy-related laws in over one hundred (100) borrower countries.<sup>377</sup> Yet, with an order that the "borrower must engage in free prior and informed consultation with indigenous peoples" regardless of whether it is the only lender or is one of a plurality,<sup>378</sup> it is indubitable at this point that corporations it funded are among the violators of indigenous peoples' rights.<sup>379</sup> In spite of its declared commitment to "avoid unnecessary or avoidable encroachment onto domains used or occupied by tribal people," to rule out business operations "not agreed to by tribal peoples, and to require guarantees from borrowers that they would implement safeguard measures and advocate respect for indigenous peoples rights to self-determination,"<sup>380</sup> a review by the Bank itself disclosed that out of thirty-three Bank-funded projects, only two substantially observed the policies.<sup>381</sup> A

<sup>376</sup> *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Evaluation of Results*. OED Report No. 25754, 10 April 2003, World Bank: Washington DC, p. 26; [http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/05/01/000160016\\_20030501182633/additional/862317580\\_200306204005416.pdf](http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/05/01/000160016_20030501182633/additional/862317580_200306204005416.pdf).

<sup>377</sup> *Striking a Better Balance. The World Bank Group and Extractive Industries. The Final Report of the Extractive Industries Review*, Vol. I, December 2003, p. 8; also see, Heike Mainhardt-Gibbs, *The World Bank Extractive Industries Review: The Role of Structural Reform Programs towards Sustainable Development Outcomes* (August 2003); <http://www.eireview.org/doc/Structural%20Adjustment%20EIR%20Exec%20Summary%20Mainhardt%20Aug%2014.doc>

<sup>378</sup> WB 4.10 in its Operational Manual Statement

<sup>379</sup> Fergus MacKay writes: (*Indigenous peoples*) explain that in many cases they continue to experience severe negative impacts and human rights abuses in relation to WBG projects and therefore a strong and effective safeguard policy that is grounded in and consistent with international human rights law is needed. See Fergus MacKay, "The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or More of the Same?" *Arizona Journal of International & Comparative Law* Vol 22, No. 1 2005 ; <http://www.ajicl.org/AJICL2005/vol221/MacKay%20Formatted.pdf>

<sup>380</sup> WB 4.10 in its Operational Manual Statement

<sup>381</sup> World Bank Group (International Bank for Reconstruction and Development and the International Development Association), *Economic Development and Tribal Peoples: Human Ecologic Considerations* (1981) cited in MacKay, "The Draft World Bank Operational Policy," p. 65

<sup>381</sup> *Ibid.*

troubling research revealed that less than half of borrower developing States derived benefits from the loans while the situations of a considerable number deteriorated.<sup>382</sup>

### **Indigenous Self-Determination: Relevance in an Economically Globalized World**

It is beyond debate that indigenous peoples' lands are treated by States as resources to be exploited<sup>383</sup> and, for the developing ones, to be converted into cash to satisfy pressures for debt services and fill up cash-strapped central banks.<sup>384</sup> Foreign investments and affluent States' technology are absolute requirements for the exploration and exploitation of the profitable resources<sup>385</sup> which, with favourable investment climates, the policies of the economic globalization regime bring together into the indigenous domains.

Obviously, therefore, the issue of land and resource rights is the most significant question for indigenous peoples more so in the milieu of globalization when their lands are being targeted for corporate expansion. No right serves to shield ancestral domains from the economic externalities of abuses committed by the global power arising from the combination of forces of States, transnational corporations and the international trade and financial institutions except the right of self-determination under Art. 1 of both the ICCPR and the IESCR. This right is still the most viable channel through which to course the struggle for indigenous peoples' right to inhabit their lands,<sup>386</sup> the most powerful legal counter-discourse to globalization and all its attendant externalities. But this right can only have utility for indigenous peoples as a legal counter-discourse if international law acknowledges its resource dimension, i.e., control over their resources, as much as its political dimension, i.e., the right to participate in democratic processes.

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<sup>382</sup> Mike Moore, *A World Without Walls: Freedom, Development, Freedom, Development, Free Trade and Global Governance*. (New York: Cambridge University Press, 2003), p. 230.

<sup>383</sup> Handelsman, p. 126.

<sup>384</sup> Joshua Castellino, "Conceptual Difficulties and the Right to Indigenous Self-Determination" in N Ghanea and A Xanthaki (eds), *Minorities, Peoples and Self-Determination* (Dordrecht: Martinus Nijhoff, 2005), pp. 55-74

<sup>385</sup> Rodríguez Garavito, *et alis*, p. 245.

<sup>386</sup> Gilbert, p. 200.

## Chapter IV. The Resource Dimension of Indigenous Self-Determination in the Context of Globalization

*Self-determination may make some people think of the right to vote, or the right to belong to political parties or even the right to independence. And those are all aspects of self-determination. But when I think of self-determination, I think of hunting, fishing and trapping. I think of the land, of the water, the trees, and the animals. I think of the land we have lost. I think of all the land stolen from our people. I think of hunger and people destroying the land. I think of the dispossession of our peoples of their land.*<sup>387</sup>

If, in Dworkinian terms, the right to self-determination, like every human right, is essentially the trump card<sup>388</sup> of the minority indigenous peoples against the will of the majority, then international law should be interpreted by examining the principles underlying the right to self-determination which reflect society's morality<sup>389</sup> with a view for social results in the context of how they are situated in an economically globalized world. Chapter II showed the functions of self determination culled from its normative foundations.

I argue that self-determination, packaged as the right to participate in democratic political processes without a guarantee of control over resources does not respond to the pathologies that self-determination is supposed to address. In fact, democracy in this context becomes the anti-thesis of self-determination. The platform of self-governance or autonomy, without basis in international law, is flimsy and does not give substance to the normative core of the right to self-determination. This right becomes meaningful to indigenous peoples forcibly introduced into the circuit of globalization only if it carries with it control over their natural resources. With a resource dimension, it can serve as a powerful legal counter-discourse to globalization.

<sup>387</sup>Ted Moses, "The Right of Self-Determination and Its Significance to the Survival of Indigenous Peoples" in Pekka Aikio and Martin Scheinin, eds., *Operationalizing the Rights of Indigenous Peoples to Self-Determination*. (Turku/Åbo: Åbo Akademi University, 2000), p. 162; also see Rainy Blue Cloud Greensfelder (ed), Editor, "Toward A Campaign in Support of the UN Declaration on the Rights of Indigenous Peoples" in *The International Forum on Globalization*, August 2, 2007: 15, <http://www.ifg.org/pdf/draft%20report%20UN%20Dec.pdf>

<sup>388</sup>Jeremy Waldron, Pildes on Dworkin's Theory of Rights. *The Journal of Legal Studies*, vol. 29 (January 2000), p. 1

<sup>389</sup>Ronald Dworkin, *Taking Rights Seriously* (2002), p. 22.

## **Self-Determination as Democratic Entitlements: A Chainsaw in the Desert?**

Franck says that self-determination is “the right of a people organised in an established territory to determine its collective political destiny.”<sup>390</sup> In a non-colonial climate, it is said to be a right to equal participation in decision-making whose normative justification hinges on the value of democracy.<sup>391</sup> If this is what it is, then indigenous self-determination connotes no more than democratic entitlements and behoves States to do no more than provide a space for indigenous peoples’ participation in crafting and implementing public policy including through degrees of autonomy.<sup>392</sup> What value does it hold then for the weakest in the power relations among the major actors in the economic globalization regime? Does it connect to self-determination’s normative justifications as enunciated in the previous Chapter?

Indigenous self-determination is characterized as the right “to negotiate *freely* (the indigenous peoples’) political status and representation in the States in which they live...in a belated state-building...through which (they) are able to join with all the other peoples that comprise the States on mutually agreed-upon and just terms after many years of isolation and exclusion.”<sup>393</sup> In liberal democratic terms, to *freely* negotiate means that in the dialogic processes in the State polity, “(t)he people govern themselves each as a full partner in a collective political enterprise so that a majority’s decisions are met that protect the status and interests of each citizen as a full partner in that enterprise.”<sup>394</sup>

Can indigenous peoples be equal partners in decision making if their self-determination is appreciated to mean no more than democratic entitlements? It is sheer naiveté to think that their tragedies will be reversed simply by letting them loose and free to participate in democratic processes where they occupy a position of non-dominance. To field them as players in the democratic field is to foster their further oppression as democracy is a guarantee of the recognition of majority will. The implication is even worse because their oppression is

<sup>390</sup> Thomas Franck, “The Emerging Right to Democratic Governance.” 86 *American Journal of International Law* (1992), p. 52.

<sup>391</sup> David Held, *Democracy and the Global Order* (Cambridge: Polity Press, 1995).

<sup>392</sup> Caroline Foster, “Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples.” *European Journal of International Law*, Vol. 12(2001), p. 147;

<sup>393</sup> Daes, History,

<sup>394</sup> Ronald Dworkin, *Is Democracy Possible Here?* (New Jersey: Princeton University Press, 2006), p. 131

legitimated by their participation in the democratic process that produced it. In other words, they become inadvertent co-authors of their own minoritization, reduced to what Paulo Freire calls a condition of internalized oppression.<sup>395</sup> Indeed, as Gilbert claims, the value of democratic rights *per se* to indigenous peoples is limited<sup>396</sup> because in fine, the essence of the democratic process is to surface the will of the majority. Indigenous peoples may be forced into capitulation to the dictates of the rule of the mob or populist democracy on account of the lack of inherent capacity for institutional controls against the will of the majority.<sup>397</sup> A statement of Daes appears to me to demonstrate how the indigenous will can become lost in the democratic process especially in transitional democracies:

*To attract foreign investment and trade, many developing countries have opened to extractive industries, such as mining and logging, hitherto isolated parts of their domains which are often the last refuges of indigenous peoples and their cultural diversity. By such means, indigenous peoples are collectively sacrificed in order to increase the income of other citizens. Racism against indigenous peoples makes it relatively easy for national political and business leaders to contemplate such measures and to mobilize wider public support for them.*<sup>398</sup>

Indigenous self-determination on the other hand seeks to protect the interests of the minoritized indigenous peoples from the imposition of the majority will that defeats them. I argue then that democracy and indigenous self-determination are virtual enemies in the context of globalization. This is even more so in weak democracies such as those in developing countries where majoritarian decisions are effectively the decisions of those who control the political system and these are often couched in terms of “national interest. An observation in the Philippines is perhaps inductive of this:

*For so long, generations of IPs have been painfully excluded from enjoyment of the bounties within their ancestral territories which became protected areas, timberlands, national parks, government reservations, mines, or plantations of the oligarchy. Without letting up, the State has*

<sup>395</sup>Paulo Freire, *Pedagogy of the Oppressed*. Trans. by Myra Bergman Ramos. New York: Penguin Books, Ltd., 2002.

<sup>396</sup> Gilbert, *Indigenous Peoples' Land Rights Under International Law*, p.220-221

<sup>397</sup>Roberto Gargarella, “A Majoritarian Reading of the Rule of Law” in Adam Przeworski, et al. (eds) *Democracy and the Rule of Law*. Cambridge: Cambridge University Press (2003), p. 147

<sup>398</sup> *Working paper on combating racism against indigenous peoples submitted by Mrs. Erica-Irene A.Daes, member of the Working Group on Indigenous Populations of the Sub-Commission on the Promotion and Protection of Human Rights*. UN. Doc. A/CONF.189/PC.3/4, 20 July 2001.

*been trampling down (indigenous peoples rights) rights for the sake of “national interest” translated into the interest of the ruling elite or oligarchy that dominates the political system.*<sup>399</sup>

It is important to refer to the history of Europe as told by Mazower. The collapse of democracy in the continent and the rise in its place of communism and fascism during the 20<sup>th</sup> century was attributed to single-minded attention to processes rather than outcomes.<sup>400</sup> The recognition of people’s constitutional liberties entitling them to participate in discourses and processes to decide the fate of the collective political enterprise failed to resolve the prevailing “deep rooted social crisis.”<sup>401</sup> Self-determination with a strictly political focus will fare no better than democracy obsessed with processes and less focused on results.

### **Self-Government and Autonomy: Gifts, Not Rights**

Many scholars and leading international jurists agree that although indigenous peoples do not normally have the right to secession, they can enjoy self-determination in the form of self-government or autonomy within existing States. To Hannum and Lillich, self-governance and autonomy refer to a measure of “actual as well as formal independence enjoyed by the autonomous entity in its political decision-making process.”<sup>402</sup> Indubitably, the existence of autonomous entities may secure indigenous participation “supported by citizen and collective rights in all levels of political power”<sup>403</sup> and may sponsor a measure of “actual as well as formal independence enjoyed by the autonomous entity in its *political* decision-making process.”<sup>404</sup> One asserts that it is “the means of upholding the necessary balance between various communities or minorities in a pluralistic society.”<sup>405</sup> But Anaya, who argues for a resource

<sup>399</sup>Cheryl L. Daytec-Yañgot and Mary Ann M. Bayang, “IP Imprimatus To Mining: Symptoms Of Internalized Oppression,” *Mindanao Examiner*. August 2008 [http://mindanaoexaminer.com/news.php?news\\_id=20080828215645](http://mindanaoexaminer.com/news.php?news_id=20080828215645)

<sup>400</sup> Mazower, p. 11

<sup>401</sup> *Ibid.*

<sup>402</sup>Hurst Hannum and Richard B. Lillich, “The Concept of Autonomy in International Law,” *The American Journal of International Law*, Vol. 74, No. 4. (Oct., 1980), p. 860

<sup>403</sup>Donna Lee Van Cott, “Explaining Ethnic Autonomy Regimes in Latin America.” (Miami: XXII International Congress of the Latin American Studies Association, 2000), p.12.

<sup>404</sup> Hannum Hurst and Richard Lillich, *Materials on International Human Rights and US Constitutional Law* (Washington D.C.: Procedural Aspects of International Law Institute, 1985), p.218.

<sup>405</sup>Emilio Cardenas and Maria Canas, “The Limits of Self-Determination,” Wolfgang Danspeckgruber with Arthur Watts (eds.) *Self-Determination and Self-Administration- A Sourcebook* (Colorado: Lynne Rienner Publishers, 1997), p.159.



component of self-determination, refers to self-government as its political dimension<sup>406</sup> and by itself does not translate into control over other aspects of a *people's* existence.

Many developing States with pluri-ethnic societies have adopted models of autonomy that fail to take into account the economic globalization regime which endangers indigenous peoples and the survival of local economies.<sup>407</sup> For instance, in the case of the Philippines, an autonomous region was created for Muslim Mindanao to give flesh to the Constitution's provision on promotion of indigenous rights<sup>408</sup> but Mindanao's indigenous peoples continue to struggle against corporate plunder of their resources, the exploitation of which is determined by national development policies and not those of the autonomous structure.<sup>409</sup> It was also reported in 1999 by Miguel Alfonso Martinez, UN Special-Rapporteur on treaties, agreements and other constructive arrangements between States and indigenous populations, that "'autonomy regime' (did) not amount to the exercise of the right to self-determination by the population of Greenland."<sup>410</sup> He agreed that autonomy regimes "have brought (or may bring) certain advantages to indigenous peoples" but most probably will not automatically end States aspirations to eventually exert the fullest authority possible (including integrating and assimilating those peoples), nor, in that case, nullify whatever inalienable rights these people may have as such."<sup>411</sup> Under the old autonomy arrangements between Greenland and Denmark, the latter exercised joint power with the autonomous government over mineral resources.<sup>412</sup> The

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<sup>406</sup> S James Anaya, "The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs" 28 *Ga. L. Rev.* 309 (1994), p. 354.

<sup>407</sup> Rudi Colloredo-Mansfeld, "Autonomy and Interdependence in Native Movements: Towards a Pragmatic Politics in the Ecuadorian Andes," *Identities* 9:2 (2002), p. 174

<sup>408</sup> The following provisions of the Philippine Constitution are pertinent: Art. VII, Sec. 5- *The State shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being.* Art. 10, Sec. 15 provides: *There shall be created autonomous regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities, and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines.*

<sup>409</sup> For an account of corporate plunders in Zamboanga, Philippines which is located in the Autonomous Region in Muslim Mindanao, see Cheryl L. Daytec-Yañgot, "Free, Prior and Informed Consent: A Shield for or Threat to Indigenous Peoples Rights?" in *Indigenous Peoples Experiences on Free, Prior and Informed Consent: A Collection of Case Studies.* (Chiang Mai: Indigenous Peoples Foundation for Education and Environment, 2010), pp 17-84.

<sup>410</sup> Miguel Alfonso Martinez, *Study on treaties, agreements and other constructive arrangements between States and indigenous populations*, Final Report of the Special Rapporteur to the Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, Fifty-first session, E/CN.4/Sub.2/1999/20 22 June 1999

<sup>411</sup> *Ibid.*

<sup>412</sup> Expert Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples: "The Greenland Home Rule Arrangement in brief", *Background paper prepared by Ms. T. S. Pedersen*, Dec. 15-17, 2003. UN Doc.

same may be said of the institutions of self-government that the United States has allowed for the Native Americans. The content of their self-government “is whatever the U.S. Congress, which the (Supreme) Court invests with plenary, and indeed unilateral, power over Indian nations, is pleased to say it is at any given time.”<sup>413</sup> As the Supreme Court said, “Constitution grants Congress broad general powers of legislation in respect to Indian tribes, powers we have consistently described as ‘plenary and exclusive.’”<sup>414</sup>

Thornberry eloquently expounds on why autonomy and self-government are not synonymous to self-determination:

*Self-determination is a right, autonomy is not; autonomy is essentially a gift by the states . . . though it can be entrenched. Autonomy may be a good idea, but it does not flow freely from the sources of international law as an obligation on States. It is not difficult to understand the attachment of indigenous groups to the dynamic of self-determination; they benefit from its flexibility and dynamism, and contribute to its conceptualization. People would lay down their lives for self-determination; they might not do so for autonomy.*<sup>415</sup>

Echoing a position that resembles Thornberry’s, Stavenhagen commented that autonomy “does not produce miracles: it is but a juridical framework within which the national States and indigenous peoples can freely and constructively confront the large-scale problems of poverty and well-being, identity and equality.”<sup>416</sup> It is erroneous to equate it with self-determination because it is also a right of minorities who need not constitute peoples. Packer notes under the UN Declaration on the Rights of Minorities, minorities have the right to “effective participation in public affairs” which includes “autonomy on a territorial basis” and

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HR/GENEVA/TSIP/SEM/2003/BP.5. Now, Greenland’s control over its resources has been recognized by Denmark. Refer to Smith, A.: “The Big Question: Is Greenland ready for independence, and what would it mean for its people?” in *The Independent*, Nov. 27, 2008, available at <http://www.independent.co.uk/news/world/europe/the-big-question-is-greenland-ready-for-independence-and-what-would-it-mean-for-its-people-1036735.html>.

<sup>413</sup> Maivân Clech Lam, “The Self-Determination of Indigenous Peoples: Past Debt and Future Promise” in *Seminar: Right to Self-Determination of Indigenous Peoples* (Montreal: International Centre for Human Rights and Democratic Development, 2002), p. 19; [http://www.dd-rd.ca/site/\\_PDF/publications/indigenous/proceedingsExpertSeminarMay2002PRINT.pdf](http://www.dd-rd.ca/site/_PDF/publications/indigenous/proceedingsExpertSeminarMay2002PRINT.pdf)

<sup>414</sup> United States Supreme Court, *US v. Lara*, 541 U.S. 193 (2004).

<sup>415</sup> Patrick Thornberry, *Self-Determination and Indigenous Peoples. Objections and Responses*. In Pekka Aikio and Martin Scheinin, eds., *Operationalizing the Rights of Indigenous Peoples to Self-Determination*. (Turku/ Åbo: Åbo Akademi University, 2000), pp. 56-57

<sup>416</sup> Quoted in George Yúdice, “The Globalization of Culture and the New Civil Society,” in S.E. Alvarez, E. Dagnino, and A. Escobar (eds) *Cultures of Politics, Politics of Cultures: Re-Visioning Latin American Social Movements*. (Boulder: Westview Press, 1998), p. 368

“self-administration where autonomy does not apply.”<sup>417</sup> The grant of autonomy to indigenous peoples does not in any way have a bearing to their ‘peoplehood’ and it is to self-determination what banana is to plantain: similar but different.

Obviously aware of the difference, States during the drafting process of the UNDRIP were adamant to replace the term self-determination or “to narrowly define it to mean self-government and autonomy.”<sup>418</sup> Also, the HRC noted in its *2000 Concluding Observations on Australia*<sup>419</sup> that the State party prefers self-management and self-empowerment to self-determination “to express domestically the principle of indigenous peoples' exercising meaningful control over their affairs.” It is rather obvious that self-determination stimulates political convulsions among States.

Of course, this is not to say that participation in democratic processes has no value to the indigenous movement in the context of globalization. It is an essential dimension of self-determination. Indisputably autonomy or self-government opens the conference chambers to indigenous peoples and gives them one- or perhaps two or more- seats at the discussion table. But it falls short of a promise or guarantee that their ancestral domains will be protected from the expansion projects of global capitalism which ultimately seeks to evict them.

### **Control of Natural Resources: Axis of Indigenous Self-Determination**

What then is the construction of indigenous self-determination that constitutes indigenous peoples into equal partners in the collective political enterprise they share with the dominant population? It is one that respects their right to control the resources in their domains,

<sup>417</sup>John Packer, “On The Content of Minority Rights,” in Juha Raikka (ed) *Do We Need Minority Rights? Conceptual Issues* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1996), p. 157-158; citing Patrick Thornberry, “The UN Declaration on the Rights of Persons Belonging to National, or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and an Update,” in Allan Phillips and Alan Rosas (eds) *Universal Minority Rights* (London and Abo: Minority Rights Group and Abo Akademi University Human Rights Institute, 1995), p.43.

<sup>418</sup>Christian Erni and Marianne Jensen, “Editorial,” *Self-Determination, Indigenous Affairs* 3/01 (2001).

<sup>419</sup>UN Human Rights Committee, *Concluding Observations on Australia*. 24/07/2000. A/55/40.

a view shared by Scheinin,<sup>420</sup> a former HRC member, and Stavenhagen,<sup>421</sup> former Special Rapporteur on the situation of rights and fundamental freedom of indigenous peoples

If self-determination functions to ensure the survival of indigenous peoples whose existence is threatened by the expansion of neoliberal capitalist operations into their ancestral domains, it is incomprehensible that it does not entail sovereignty over their natural resources.

Thus the claim that many governments often oppose international recognition of indigenous peoples' right to self-determination "more through fear of losing control over indigenous lands and natural resources than fear of losing some of their overall political power"<sup>422</sup> is not unfounded.

To abjure the resource dimension of self-determination is to overlook the reality that political sovereignty and economic sovereignty are dependent upon each other.<sup>423</sup> While institutions of government are necessary components of self-determination, "sovereignty over natural resources and domains (should precede) their appearance."<sup>424</sup> To indigenous peoples, "land rights arise from customary systems, which consolidate indigenous control over lands and delineate structures of self-government."<sup>425</sup> Thus, speaking of the indigenous peoples of Hawaii, Anaya wrote: "Without an effective land base, surviving Native Hawaiian customs- intertwined with land use and stewardship patterns- are suppressed."<sup>426</sup> Since indigenous peoples' self-

<sup>420</sup> Martin Scheinin, *Indigenous Peoples Land Rights*, p. 15. He wrote, "The right of an indigenous group that qualifies as a people under article 1 to control their traditional lands and the natural resources on those lands is an important dimension of self-determination."

<sup>421</sup> Rodolfo Stavenhagen, U.N. Economic and Social Council [ECOSOC], Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65, E/CN.4/2003/90*, (21 January 2003); available at <http://www.galdu.org/govat/doc/g0310544.pdf>. He reported that "(t)he issue of extractive resource development and human rights involves a relationship between indigenous peoples, Governments and the private sector which must be based on the full recognition of indigenous peoples' rights to their lands, domains and natural resources, which in turn implies the exercise of their right to self-determination."

<sup>422</sup> Henriksen, p. 10. Note that all the States except the United States that voted against the UNDRIP cited its provisions on the recognition of rights over ancestral lands and resources as the reason for their votes. See Department of Public Information, UN 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 (13 September 2007), <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

<sup>423</sup> Antony Anghie: *Imperialism, Sovereignty, and the Making of International Law*, (Cambridge: Cambridge University Press, 2005), p. 211.

<sup>424</sup> Aoife Duffy, "Indigenous Peoples' Land Rights: Developing a *Sui Generis* Approach to Ownership and Restitution," *International Journal on Minority and Group Rights* 15 (2008), p. 509

<sup>425</sup> Jeremie Gilbert, "The Treatment of Territory of Indigenous Peoples in International Law," in Joshua Castellino (ed.), *Title to Territory in International Law: A Temporal Analysis* (2003), p. 202

<sup>426</sup> S. James Anaya, "The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs" 28 *Ga. L. Rev.* 309 (1994), p. 318.

determining status was gravely reduced to impotence when they were divested of their domains by colonizers or States to which they were integrated, then the first thing that needs to be done to restore them to their former status is to reinstate their control over their domains.

Aureliu Cristescu, the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1981 said that self-determination means that indigenous peoples should freely determine their political institutions, freely explore and utilize their economic resources and determine the construction of their social and cultural development sans outside interventions.<sup>427</sup> Indeed, without economic power, indigenous peoples can become dependent on corporate offerings or be “pliable to corporate will”<sup>428</sup> in the wake of corporate destruction of their traditional subsistence economies, autonomy notwithstanding. To constitute them as partners in state-building or be active stakeholders in the democratic processes, their ownership of, not just mere access to, their domains must be recognized.<sup>429</sup> Thus, Chinkin and Wright lambasted the focus on the political aspect of self-determination arguing that satisfying basic needs and stable existence must be at the apex of the agenda on how individuals and collectives self-determine.<sup>430</sup> It is clear that even in cases where indigenous peoples have been granted self-management, a viable land base is required for its success.<sup>431</sup> As held by the African Commission of Human and Peoples Rights, without control of their lands,

*indigenous peoples would remain vulnerable to further violations/dispossession by the States or third parties. Ownership (of lands) ensures that indigenous peoples can engage with the states and third parties as active stakeholders rather than as passive beneficiaries.*<sup>432</sup>

<sup>427</sup> Aureliu Cristescu, Sub-Commission on Prevention of Discrimination and Protection of Minorities: “The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments”, *Study by Special Rapporteur Aureliu Cristescu*, 1981, p. 43, para. 288(k), UN Doc. E/CN.4/Sub.2/404/Rev.1.

<sup>428</sup> Fleur Johns, “The Invisibility of the Transnational Corporation,” 19 *Melb. U. L. Rev.* 893, 906 (1994), p. 908

<sup>429</sup> African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, 4 February 2010.

<sup>430</sup> Chinkin, *et alis*, p. 294

<sup>431</sup> New South Wales Aboriginal Land Council The Aboriginal Land Rights Act; <http://www.alc.org.au/about-nswalc/land-rights-act.aspx>

<sup>432</sup> African Commission on Human and Peoples' Rights, *ibid.*

## **Indigenous Constructions of Self-Determination**

It is beyond cavil that indigenous peoples ascribe their right to control their natural resources to their right to self-determination. Daes, as chair of the UN Working Group on Indigenous Populations, reported that indigenous peoples assert that their right to lands, territories and natural resources is the basis for their collective survival and is inextricably linked to their right to self-determination.<sup>433</sup> They have declared that

*(t)he right of self-determination is fundamental to the enjoyment of all human rights. From the right of self-determination flow the right to permanent sovereignty over land – including aboriginal, ancestral and historical lands – and other natural resources, the right to develop and maintain governing institutions, the right to life and physical integrity, way of life and religion.*<sup>434</sup>

They maintained this same position in their submissions to the UN bodies. For example, in *Diergaardt et al. v. Namibia*,<sup>435</sup> indigenous *Khoi* complained to the HRC that Namibia has been violating their right to self-determination “since they are not allowed to pursue their economic social and cultural development, nor are they allowed to freely dispose of their community’s national wealth and resources.” In *Lubicon Lake Band v. Canada*,<sup>436</sup> the Chief of a band of indigenous people filed an individual communication before the HRC seeking to stop the exploitation of oil, gas and timber resources in areas traditionally used by the band for hunting and fishing claiming that industrial operations in their area were preventing them from exercising their right of self-determination.

Alleging that Canada was depriving his indigenous community of its means of subsistence, the author in *Mikmaq Tribal Society v. Canada*<sup>437</sup> complained that the society’s right to self-determination was being violated. In *Apiraka Mahuina v. New Zealand*,<sup>438</sup> authors, all indigenous Maori maintained in a complaint before the HRC that the Treaty of Waitangi

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<sup>433</sup>Daes, 'An overview of the history of indigenous peoples, p. 8

<sup>434</sup>Cited in A. Xanthaki, p. 152.

<sup>435</sup>UN Human Rights Committee, *Diergaardt et al. v. Namibia*, Communication No 760/1997, July 2000 CCPR/C/69/D/760/1996

<sup>436</sup>UN Human Rights Committee, *Lubicon Lake Band v Canada*, Communication . No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).

<sup>437</sup>UN Human Rights Committee, *Mikmaq v Canada*, Communication No. 78/1980 (30 September 1980), U.N. Doc. Supp. No. 40 (A/39/40) at 200 (1984).

<sup>438</sup>UN Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, 27 October 2000

(Fisheries Claims) Settlement Act, which in effect confiscated their fishing resources violated their right “to freely determine their political status and interferes with their right to freely pursue their economic, social and cultural development.” They also argued that “the right to self-determination under article 1 of the (ICCPR) is only effective when people have access to and control over their resources.”

### **Legal Construction of Self-Determination**

Asserting that control over domains is an inherent aspect of self-determination is not theoretical adventurism nor is it overstressing the right’s legal implications. This view finds support in the International Bill of Rights. Art. 1 (1 and 2) each of the ICCPR and the IESCR provides:

*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

*All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*

Art. 47 of the ICCPR and Art. 25 of the IESCR identically provide:

*“Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.”*

Article 1 clearly provides that by virtue of self-determination, peoples “freely determine their political status and freely pursue their economic, social and cultural development.” The meaning is clear that it is through self-determination that peoples can pursue their economic development. Can this be accomplished without a land base? The answer is in the negative. Xanthaki’s position that the ICCPR provision on land has no nexus to the right of self-determination<sup>439</sup> is unconvincing. She deposes that neither Article 1.2 of the ICCPR and the

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<sup>439</sup> Xanthaki, 239

ICESR nor Art. 47 of the ICCPR and Art. 25 of the ICESR relate to self-determination.<sup>440</sup> But the use of the term *peoples* in the two articles is significant. It is the very nexus Xanthaki is looking for. The usage of the term implies that the right is collective rather than individual, and connects to the parlance of self-determination. Possessing the status of a *people* necessarily implies a self-determining status. Self-determination inheres in peoples. Thus the two articles in declaring rights to resources of peoples is affirming the resource aspect of self-determination. To be precise, if we follow the policy of avoidance adopted by the HRC in dealing with individual complaints where self-determination is raised, Art. 47 of the ICCPR cannot be invoked by individuals and even groups of people who do not constitute *peoples*.

The HRC may have created the impression that control of resources is distinct from the right of self-determination when it said identically in *R. L. et al. v. Canada*<sup>441</sup> and *A. B. et. al. v. Italy*<sup>442</sup> that “all peoples have the right to self-determinations *and* the right freely to determine their political status, pursue their economic, social and cultural development and may, for their own ends, freely dispose of their natural wealth and resources.”<sup>443</sup> But pronouncements of this nature cannot be taken in isolation of the HRC’s *General Comment No. 12* where the resource dimension of the right to self-determination was stated in non-ambivalent terms. In this *Comment*, the HRC has never been categorical that the ICCPR “affirms a particular aspect of the economic content of the right of self-determination, namely the right of peoples, for their own ends, freely to “dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law.”<sup>444</sup>

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<sup>440</sup> Xanthaki, 239

<sup>441</sup> See

<sup>442</sup> See *n. A. B. et. al. v. Italy*, Communication No. 413/1990, U.N. Doc. CCPR/C/40/D/413/1990 at 30 (1990)

<sup>443</sup> Communication No. 358/1989 *R. L. et al. v. Canada*, Communication No. 358/1989, U.N. Doc. CCPR/C/43/D/358/1989 at 16 (1991).

<sup>444</sup> UN Human Rights Committee, *General Comment No. 12: The right to self-determination of peoples (Art. 1) : 03/13/1984*.



It is also worthy to repeat that in its *Concluding Observations on the 1999 report of Canada*,<sup>445</sup> the HRC acknowledged the conclusion of the Royal Commission on Aboriginal Peoples (RCAP) that "without a greater share of land and resources, institutions of aboriginal self-government will fail." The HRC emphasized that under Article 1, paragraph 2, "the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence." In October 1999, it reiterated this position when it considered the report of Norway saying that "it expects Norway to report on the Sami people's right to self-determination under article 1 of the Covenant, including paragraph 2 of that article" on matters of natural wealth and resources.<sup>446</sup> The implication of this is beyond question: the HRC appreciates a resource dimension of self-determination.

In its *2004 Concluding Observations on Canada*,<sup>447</sup> the HRC noted that the "land claim negotiations between the Government of Canada and the Lubicon Lake Band are currently at an impasse" and also raised concern about information that there are ongoing logging and large-scale oil exploration on the Band's ancestral lands in violation of Articles 1 and 27 of the ICCPR. It called on Canada to "make every effort to resume negotiations with the Lubicon Lake Band, with a view to finding a solution which respects the rights of the Band under the Covenant." It also stated that Canada "should consult with the Band before granting licences for economic exploitation of the disputed land, and ensure that in no case such exploitation jeopardizes the rights recognized under the Covenant."<sup>448</sup> In its *2000 Concluding Observations on Australia*, it pointed to the pertinent provision of the ICCPR on self-determination ("art. 1, para. 2") and urged the State to adopt "the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural

<sup>445</sup> Human Rights Committee, *Concluding Observations on Canada*, UN doc. CCPR/C/79/Add.105 (1999).

<sup>446</sup> UN Human Rights Committee, *Concluding Observations on Norway*, UN doc. CCPR/C/79/Add.112 (1999)

<sup>447</sup> UN Human Rights Committee (HRC), *UN Human Rights Committee: Fifth Periodic Report, Canada*, 18 November 2004, CCPR/C/CAN/2004/5,

<sup>448</sup> UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations, Canada*, 20 April 2006, CCPR/C/CAN/CO/5, available at: <http://www.unhcr.org/refworld/docid/453777a50.html> [accessed 16 November 2010]

resource”<sup>449</sup> lucidly implying that control over resources is a necessary aspect of self-determination.

When the CESCR urged Russia in its *2003 Concluding Observation* to ensure that the precariously-situated indigenous peoples are not deprived of their means of subsistence, it linked this to their right to self-determination under article 1 of the IESCR.<sup>450</sup> In my view the presence of the right of self-determination within the protective ambit of the IESCR which deals with economic, cultural and social rights, confirms that self-determination does bear an economic dimension.

Xanthaki speculates that the UNDRIP “allows States to perceive indigenous self-determination merely as autonomy and participation in the life of the States.”<sup>451</sup> This seems not to be supported by the UNDRIP itself. It provides that the right means that indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs,<sup>452</sup> and “to maintain and strengthen their distinct political, legal, economic, social and cultural institutions”<sup>453</sup> which are based on the land. It is safe to conclude that from self-determination flow the rights detailed by UNDRIP that “indigenous peoples shall not be forcibly removed from their lands or domains,” that “no relocation shall take place without (their) free, prior and informed consent of the indigenous peoples,”<sup>454</sup> that they “have the right to the lands, domains and resources which they have traditionally owned, occupied or otherwise used or acquired,” and “the right to own, use, develop and control the lands, domains and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”<sup>455</sup>

<sup>449</sup> *Concluding observations of the Human Rights Committee : Australia*. 24/07/2000. A/55/40.

<sup>450</sup> *Committee on Economic, Social and Cultural Rights, Concluding Observations on the Russian Federation*, UN Doc.E/C.12/1/Add.94 (12 December 2003) at para. 11

<sup>451</sup> P. 283-284

<sup>452</sup> See Article 4, UNDRIP

<sup>453</sup> See Article 5, UNDRIP

<sup>454</sup> Article 10, UNDRIP

<sup>455</sup> Art. 26

## **Shriving Permanent Sovereignty Over Natural Resources of Secessionist Complexion**

The UN General Assembly itself declared that “permanent sovereignty over natural wealth and resources (is) a basic constituent of the right to self-determination.”<sup>456</sup> As bearers of the right of self-determination under international law, indigenous peoples, *ipso jure*, enjoy permanent sovereignty over their resources. For international law to negate this is to engender discrimination by constituting indigenous peoples as a different kind of *peoples*. Tauli-Corpuz as Chair of the UN Permanent Forum on Indigenous Issues affirmed this in her pronouncement that indigenous peoples are peoples with the right to self-determination following from which they possess permanent sovereignty over their natural resources.<sup>457</sup>

As Chairperson of the UN Working Group on Indigenous Populations, Daes has always been of the view that indigenous self-determination necessitates permanent sovereignty over their natural resources.<sup>458</sup> She justifies this on certain grounds among which are that indigenous peoples are in the same footing as colonized peoples in “the political, economic and historical sense” and that they are subjected to unjust and inequitable arrangements pertaining to their resource-rich domains which they have always owned even before colonization or statehood. She concludes “that meaningful political and economic self-determination of indigenous peoples will never be possible without indigenous peoples’ having the legal authority to exercise control over their lands and domains.”<sup>459</sup> She also claims that “permanent sovereignty over natural resources is necessary to level the economic and political playing field and to provide protection against unfair and oppressive arrangements.”<sup>460</sup>

Permanent sovereignty over natural resources does not have to conjure up images of secession or figurative blue waters between indigenous peoples and the dominant population.

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<sup>456</sup> See 2<sup>nd</sup> Preambular Statement, G.A. res. 1803 (XVII), 17 U.N. GAOR Supp. (No.17) at 15, U.N. Doc. A/5217 (1962).

<sup>457</sup> Victoria Tauli-Corpuz, *Self-Determination and Sustainable Development: Two Sides of the Same Coin* in Victoria Tauli-Corpuz (ed.) *Reclaiming Balance* (Baguio City: Tebtebba Foundation, 2004), p. 55

<sup>458</sup> Erica-Irene Daes, *Indigenous peoples’ permanent sovereignty over natural resources*. Final report of the Special Rapporteur. Final Report to the Sub-Commission on the Promotion and Protection of Human Rights, Commission on Human Rights. E/CN.4/Sub.2/2004/30 13 July 2004.

<sup>459</sup> ([www.unpo.org/news\\_detail.php?arg=02&par=3367](http://www.unpo.org/news_detail.php?arg=02&par=3367)).

<sup>460</sup> *Ibid.*,

When self-determination is exercised within the framework of existing States, it simply means that indigenous peoples exercise control over their resources and, in an increasingly economically globalized world, the exploitation thereof must bear their imprimatur as UNDRIP requires. This does not in any way diminish or run counter to States' sovereignty.

### **Indigenous Self-Determination as the Struggle Against Neoliberal Capitalism**

The indigenous peoples' worldview (*Weltanschauung*) differs radically from that of modern neoliberal capitalism<sup>461</sup> which regards natural resources as commercial commodities. As territorial communities,<sup>462</sup> land is the essential foundation for the propagation of their indigenous identity and culture and their very survival. It is apparent that the indigenous struggle for self-determination is essentially a struggle against the neoliberal economic globalization regime which is now frantically rushing to expropriate Earth's last frontiers mostly located in their domains.

If self-determination must protect them from the deleterious externalities of neoliberal capitalism, then it must be acknowledged that it comprehends "secure, effective, collective ownership rights over the lands, domains, and resources they have traditionally owned or otherwise occupied"<sup>463</sup> beyond the democratic entitlements that the right carries.

While their control over resources is denied them, there will always be a protection gap between human rights legislation and their pressing problems<sup>464</sup> escalating in the name of globalization. If indigenous self-determination is to be elevated from the lowly platform of rhetoric to the lofty realization of its even loftier promises of justice and equality, international law must recognize that it does not have a strictly political focus. International law must concede and recognize in its compendium of treaties and declarations the normative core of indigenous self-determination. This normative core repudiates a self-determination model with a strictly political focus. It is only when the indigenous peoples' control over their

<sup>461</sup> Fabio Marcelli, *I diritti dei popoli indigeni* (Roma: Aracne, 2009).

<sup>462</sup> Daes, Erica Irene. E/CN.4/Sub.2/2004/30  
13 July 2004

<sup>463</sup> Daes, Erica Irene. E/CN.4/Sub.2/2004/30, 13 July 2004

<sup>464</sup> Anaya, *Indigenous Peoples in International Law*.

resources is respected and honoured that they can be shielded from the deleterious consequences of economic globalization projects akin to another conquest.

If self-determination must bear relevance for indigenous peoples, then it should mean more than democratic entitlements, otherwise it will not respond to the realities of the globalized development aggression. It will not be a meaningful counter-discourse to the economic globalization. Mere participation in the democratic processes does not fence out majoritarian or dominant corporate interests threatening to displace or actually displacing them from their resource-rich domains. Self-determination “is not simply a political right as it is often characterized” but is a constellation of “closely woven and inextricably related rights which are interdependent,”<sup>465</sup> one of which is the right to control resources.

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<sup>465</sup>Ted Moses, “The Right of Self-Determination and Its Significance to the Survival of Indigenous Peoples,” in Pekka Aikio and Martin Scheinin, eds., *Operationalizing the Rights of Indigenous Peoples to Self-Determination* (Turku/Åbo: Åbo Akademi University), p. 156.

## Chapter V. Some Parting Words and Statements of Vision

This study was conceived from a very obvious reality: Indigenous peoples are the most impacted by the deleterious effects of globalization which is what pushed their legal struggles in the international community. Yet this very obvious reality has been virtually unacknowledged in legal scholarship.

While there is a markedly verdant jungle of legal literatures on indigenous peoples and their international status, the verdure is matched by aridity of the space to contextualize their status in economic globalization. Legal scholarship has accomplished much in terms of surfacing issues of indigenous peoples in the international discourse. But these issues were couched in the language of assaults on their human rights as individuals. It failed in establishing the nexus between globalization and the non-recognition of their basic right to self-determination. Thus, the relevance of this right to their oppression by the forces of the economic globalization regime is unappreciated. It failed in appreciating the value of indigenous self-determination as a counter-discourse to economic globalization, challenging this single biggest threat to indigenous peoples' existence which international law itself allows to thrive.

Two problems caused this apparent failure of legal scholarship to establish the nexus and recognize the value of indigenous self-determination as a challenge to globalization: a) the obscurity of international law in regard to the 'peoplehood' of indigenous peoples in turn subjecting to constructive ambiguity their claims to self-determination, and b) the common belief that self-determination as a right refers to democratic entitlements, that is, to self-management and autonomy and other forms of political arrangements where indigenous peoples can become active players.

To the question, "Are indigenous peoples *peoples* as this term is used in the International Bill of Rights?" this study concludes with an affirmative answer. In establishing the 'peoplehood' of indigenous peoples, it surfaced the substantive norms that justify

indigenous self-determination, which exist independent of expressions by international law recognizing it: to rectify past and prevent future injustices inflicted on indigenous peoples which no other right can remedy; to redistribute sovereignty which was denied indigenous peoples by the international legal order as Macklem contends;<sup>466</sup> to prevent the adverse consequences of economic globalization, a trend in the international community which was conceived in the womb of international law itself; to give effect to pre-existing rights of indigenous peoples founded under pre-colonial and pre-statehood legal orders and preserve the indigenous *selves* which current laws have not yet extinguished and which serve as their protection from economic globalization; and to correct the structurally discriminatory distribution of resources and goods in States politics preventing indigenous peoples from pursuing their distinct way of life.<sup>467</sup> This study concludes that based on its normative justifications, indigenous self-determination is the strongest counter-discourse to economic globalization.

This study further inquired into the legal norms relating to indigenous self-determination. The absence of a definition of *peoples* in international law poses a practical and even legal challenge. To be sure, an affirmative answer to the question, “Are indigenous peoples *peoples*?” essentially means they are self-determining. The implication of the definitional crevasse is that there is no clear-cut legal standard against which to measure if indigenous peoples qualify. But this study overcame the challenge by escaping from the limitations imposed by the lack of definition. While it half-heartedly attempted to answer the question, it focused more on combing international law for express and/or implicit acknowledgement of indigenous self-determination. Rather than establishing the ‘peoplehood’ of indigenous peoples to determine if they possess the right to self-determination, it established that they possess the right in order to confirm their ‘peoplehood.’ This was premised on its realization that there are two propositions

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<sup>466</sup> Macklem, pp. 185-186.

<sup>467</sup> Omar Dahbour, “The Ethics of Self-Determination” in Carol C. Goulde and Pasquale Pasquino (eds) *Cultural Identity and the Nation-States* (Maryland: Rowman and Littlefield Publishers, Inc., 2001), pp. 9-11.

which are two sides of the same coin: A collectivity with a self-determining status is a people and a people is a collectivity with a self-determining status. Proof of one is proof of the other.

The recognition of indigenous self-determination is expressed in the interpretation of international instruments by the human rights mechanisms that monitor States' observance of peoples' right of self-determination. Among others, *Concluding Observations* of the HRC and the CESCR affirm that indigenous peoples have the right of self-determination. Likewise, the UNDRIP declares that indigenous peoples are bearers of this right and, in so doing, does no more than confirm that a right that has long been recognized to attach to peoples extends to indigenous peoples as well.

But indigenous self-determination operates as a counter-discourse to globalization if its resource dimension is recognized. Indigenous peoples are the most impacted by globalization for a host of reasons weaved together to generate a powerful oppressive structure. One, they occupy the very territories where the resources needed for the growth of corporate capitalism are located. Two, having been historically marginalized if not rendered invisible by colonials and subsequently by the States into which they were forcibly assimilated, they are virtually voiceless and are easily pushed into the fringes by capitalism's "invisible hand" acting through the transnational corporations. Three, most of these indigenous peoples are located in South countries which, needing to fill their debt-ridden national coffers, are all too willing to adopt domestic investment climates auspicious to profit-generation by transnational enterprises and lax in protecting rights of indigenous peoples. Four, the most powerful major actors of globalization are the transnational corporations whose interests are being protected by international law through international trade and financial institutions. Thus, States' capacities to protect indigenous peoples have been seriously undermined.

However, self-determination challenges economic globalization and acts as a shield against the adverse consequences of globalization projects if its resource dimension is recognized. Many scholars perceive self-determination within the framework of existing States



as a right to democratic entitlements such as autonomy or self-government. But indigenous self-determination and democracy are actually antithetical. Democracy protects the will of the majority whereas indigenous self-determination seeks to protect the most vulnerable, minoritized peoples in an economically globalized world from the impositions of the majority. However, a resource dimension provides indigenous peoples a bargaining leverage in the democratic field. Needless to state, economic power is in itself political power.

Indigenous hopes have been raised by pronouncements of human rights bodies and the UNDRIP that they are bearers of the right of self-determination as other peoples are. But the practice of States in whose arenas the ‘peoplehood’ status of indigenous peoples should really be recognized does not seem to have changed much if we are to judge on the basis of the recent *Concluding Observations* of the HRC and CESCR as well as pronouncements of UN Officials dealing with indigenous issues.

If legal scholarship is to contribute to the development of international law that responds to the issues of indigenous peoples in the context of globalization, it should abandon its focus on whether or not indigenous peoples have a status in international law, this being a foregone conclusion. While it continues to debate on the ‘peoplehood’ status of indigenous peoples, many issues of indigenous peoples in respect to their right to exist on their lands are foreshadowed. Thus, it should contribute to developing an international law that strengthens indigenous self-determination as a counter-discourse to economic globalization.

Aside from producing more literature on economic globalization in relation to indigenous self-determination, legal scholarship can help in evolving an international law regime that recognizes and enforces direct liability of corporations for abuses they commit on indigenous territories. As this study argues, the power of private business enterprises has overwhelmed States especially the developing ones whose capacities to fulfill their human rights obligations have been considerably diminished in the name of serving the interests of corporate capital. It is ludicrous for the international community to remain stuck in a paradigm that makes

States liable for the acts of transnational corporations over which they have no power. International law should blaze new trails in view of the expanding influence of corporations on political matters by making them directly liable for human rights violations. Corporate social responsibility seems to be a jargon co-opted by corporations to promote public goodwill and to hide the resemblance of economic globalization to Frankenstein's monster. Otherwise, it has not reduced corporate abuses.

Legal scholarship should also probe into cracks in international law to widen the space the HRC opens to accommodate concerns for the redress of violations of indigenous peoples' self-determination. While Optional Protocol I is not the panacea for such violations, it is certainly a less-weak remedy compared to the reporting procedure under Art. 40. Packer laments that the Art. 40 remedy is the only procedure under which the HRC exercises international oversight on matters of violation of the self-determination right.<sup>468</sup>

It need not be stressed that scholars' opinions are relied upon by human rights bodies in the interpretation of international law. The clarion call on legal scholarship is urgent before the last resources of indigenous peoples are exploited and they become extinct. Thus Packer issues an entreaty to legal scholarship in regard to self-determination - and I give him the last word on this:

*...a procedure guaranteeing an independent and impartial determination will lead us quite far in the right direction....(Scholars) cannot afford to be complacent. We should find some peaceful alternative- some procedures. This follows also from Tomuschat's observation that "No right can be isolated from the mechanisms available for its implementation and enforcement...The international community cannot afford to simply ignore the demands by ethnic groups pressing for self-determination. Secession is an explosive issue...Mechanisms should be put in force and objective criteria should be evolved."*<sup>469</sup>

<sup>468</sup> Packer, "Considerations on Procedures to Implement the Right of Self-Determination," p. 151.

<sup>469</sup> *Ibid*, p.165.

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