Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Group Rights

Austen L. Parrish

Indiana University Maurer School of Law, austparr@indiana.edu

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the Indian and Aboriginal Law Commons

Recommended Citation
http://www.repository.law.indiana.edu/facpub/889

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
CHANGING TERRITORIALITY, FAADING SOVEREIGNTY, AND THE DEVELOPMENT OF INDIGENOUS RIGHTS

Austen L. Parrish*

Introduction

For much of the nineteenth and twentieth centuries, the international community resisted the notion of indigenous rights. In recent years, however, this has changed. The emergence of indigenous rights in international law finally may be upon us. At the very least, "the language of both international instruments and certain court decisions has indicated the emergence of a new era in which the rights of indigenous peoples may enjoy a more meaningful presence in international law." And "[a] great flow of contemporary discussion and debate has made the international public increasingly aware of the presence of peoples described as indigenous, who appear to exist in every inhabited region of the globe." Despite a past where victories for indigenous peoples' rights have been few, many scholars are cautiously optimistic for the

© 2007 Austen L. Parrish

* Irwin R. Buchalter Professor of Law, Southwestern Law School. J.D., Columbia University, 1997; B.A., University of Washington, 1994. The author is the Director of Southwestern’s Summer Law Program in Vancouver, B.C., Canada, where he teaches international and comparative law at the University of British Columbia. The author is grateful to Rebecca Bratspies and Russell Miller for the opportunity to participate in this important symposium, to Kal Raustiala and the participants of the UCLA workshop on territoriality and law, and to Southwestern Law School for its support and encouragement. The author also thanks Ron Aronovsky, Paul Horwitz, Sung Hui Kim, Gowri Ramachandran, and Angela Riley for their thoughtful comments on earlier drafts, and Natasha Hill and Christine Chung for their research assistance.


2. Patrick Thornberry, Indigenous Peoples and Human Rights 12 (2002); see also Manus, supra note 1, at 555 ("The latter decades of the twentieth century witnessed a steep growth in global awareness of both the importance and vulnerability of indigenous peoples . . . .").

3. "Indigenous peoples" is used to refer to non-dominant sectors of society "having a historical continuity with pre-invasion and pre-colonial societies that developed [in a particular territory, and which] consider themselves distinct from the societies now prevailing [in that territory]." Justin Desautels-Stein, National Identity and Liberalism in International Law: Three Models, 31 N.C. J. Int’l L. & Com. Reg. 463, 496-97 (2005); see also Declaration on the
The current momentum behind the development of indigenous rights leads to the question: Why now? Many of those who are optimistic attribute the development to the slow crystallization of international norms friendly to indigenous peoples that are a natural extension of human rights or environmental justice. Other scholars credit the dedication of indigenous


6. Benjamin J. Richardson, Indigenous Peoples, International Law and Sustainability, 10 REV. EUR. COMMUNITY & INT’L ENVTL. L. 1, 1 (2001) (discussing the concept of “environmental justice” for indigenous peoples); see also Firestone et al., supra note 4 (discussing environmental law and indigenous rights); Lawrence Watters, Indigenous Peoples and the Environment: Convergence from a Nordic Perspective, 20 UCLA J. ENVTL. L. & POL’Y
populations in national, regional, and international forums to advance and make others aware of indigenous issues. Certainly these observations are true. But they do not fully explain why international law is starting to recognize indigenous rights at this particular time in history. Nor do they explain why indigenous rights were not recognized earlier.

This essay suggests that another phenomenon is partly responsible for indigenous rights reaching an age of maturity in international law. The essay proceeds in three parts. First, it explores the role of the territorial nation-state in international law and why notions of territorial sovereignty have historically been unfriendly to the rights of indigenous peoples. Second, the essay describes how territoriality and sovereignty as organizing principles around which law coalesces are fading, and how non-state actors play an increasingly prominent role in international law and relations. Third, the essay explains why changing notions of territorial sovereignty has been a positive development for the continued growth and recognition of indigenous rights. As the strength of the classic nation-state wanes, and new non-state actors emerge with an international voice, no longer is the international system as blind to indigenous groups. The essay ends with a few observations and cautious confidence for the future. It suggests that indigenous groups would be wise to strengthen their alliances, rather than alienate human rights advocates and environmental groups.

I. Indigenous Peoples and the Territorial Nation-State

For the longest time, the nation-state — defined by its territorial borders — was privileged in the international legal system. As explained below, this state-centered focus of international law was historically inhospitable to the development of indigenous rights.

A. The Territorial State and Classic International Law

Until recently, international law largely focused on state-to-state relations and the rights and obligations of states. International law in the nineteenth and twentieth centuries — at least as classically conceived as the law of nations —


7. ANAYA, supra note 5, at 56-58 (describing the contemporary indigenous rights movement); Torres, supra note 4, at 151 (ascribing the emergence after 1972 of indigenous norms to the “increased activity by indigenous advocacy groups”).
did not concern itself with groups and their status or rights.® Centralized statehood, constructed in what is known as the Westphalian mold,® was the framework for all political privileges in international law.® Only the sovereign state entered into treaties. Customary international law bound only the sovereign state.® The state was the basic building block upon which the modern international system, until recently, revolved.®

This focus on the sovereign, territorial state gave rise to certain assumptions under international law. State sovereignty implied external independence: "the rights of the state freely to determine its relations with other states or other entities without the restraint or control of another state."® Sovereignty also had an internal component: "the state's right to devise its own constitutional and political institutions, enact and enforce its own laws, and to make decisions concerning citizens and residents of the state, without the interference of another state."® The twinned concepts of external and internal

8. NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 29 (2d ed. 2003).
11. The centrality of states in the international legal system is underscored by the structure of international institutions. Only states are recognized as having standing before the World Court. See Statute of the International Court of Justice, art. 34, June 26, 1945, 59 Stat. 1055, T.S. No. 993. And only states may be members of the United Nations. U.N. Charter art. 4, para. 1.
14. Id.; see also Brad R. Roth, The Enduring Significance of State Sovereignty, 56 FLA. L.
state sovereignty thus meant that each state possessed exclusive jurisdiction within its territory and, in theory, that each state shared a legal equality with other states, despite economic or military inequities.

Underpinning state sovereignty was the related concept of territorial integrity: territorial borders limited and defined state power. Law and land were therefore tightly and integrally linked. Power ended at the border.

---

Rev. 1017, 1023-27 (2004) (describing different conceptions of sovereignty and noting that in the international sense sovereignty creates "a presumptive duty [on the part of states] to respect the outcome of political processes internal to the others"); cf. U.N. Charter art. 2, para. 7 (providing that "matters which are essentially within the domestic jurisdiction of any state" are excluded from United Nations' jurisdiction); Corfu Channel (U.K. v. N. Ir. - Alb.), 1949 I.C.J. 4, 35 (Apr. 9, 1949) (rejecting a state's claim of a right of intervention to secure evidence from the territory of another state, noting that "[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations").


17. Stuart Elden, Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders, 26 SAIS Rev. 11, 11 (2006) ("Since the end of World War II, the international political system has been structured around three central tenets: the notion of equal sovereignty of states, internal competence for domestic jurisdiction, and territorial preservation of existing boundaries."); John Agnew, Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics, 95 Annals Ass'n Am. Geographers 437, 437 (2005) ("Implicit in all claims about state sovereignty as the quintessential form taken by political authority are associated claims about distinguishing a strictly bounded territory from an external world and thus fixing the territorial scope of sovereignty.""); see also M'Gonigle, supra note 10, at 160 ("Politically today, human territoriality is virtually equated with state sovereignty."); John Agnew, The Territorial Trap: The Geographical Assumptions of International Relations Theory, 1 Rev. Int'l Pol. Econ. 53, 55 (1994) (describing how the territorial state is the building block of the modern international political system).

domestic law applied only within state borders to peoples within the state, as did constitutional protections. So long as a state did not cause harm outside its territory, international law had little to say about what a state did internally.

Since the 1950s, this state-centric, positivist version of international law has been tempered. The "Nazi Holocaust prompted a rethinking of the virtually unlimited discretion states had regarding the treatment of their own citizens" and caused the global community to refocus on human rights. After the second world war, concepts of human dignity and human rights began to whittle away at the dominant concept of sovereign territorial supremacy. International human rights law began to "challenge[] traditional notions of sovereignty by viewing a state's treatment of its citizens as of international

& Barbara F. Walter eds., 2006); see also Mathias Albert, Territory and Modernization, in WORKSHOP: THE CLUSTER OF WATER, ENERGY AND THE HUMAN ENVIRONMENT: TOWARDS AN EXTRA TERRITORIAL CONCEPT FOR THE MIDDLE EAST 3 (2001), available at http://www.uni-bielefeld.de/soz/iw/pdf/albert_2.pdf ("The history of the modern system of states is a history of defining political power in exclusively territorial terms.").

19. This was not always the case. In England, prior to the creation of the monarchial state, no concept of territorial sovereignty existed. See John Gerard Ruggie, Territory and Beyond: Problematizing Modernity and International Relations, 47 INT'L ORG. 139, 150 (1993); see also M'Gonigle, supra note 10, at 160.


23. Wiessner, Rights and Status, supra note 5, at 98.
rather than merely domestic concern." As described in Part II, however, more significant changes were yet to come.

B. Territorial Sovereignty: Not A Friend To Indigenous Peoples

The classic conception of international law — state-centric, positivistic, and focused on territorial boundaries — rarely was friendly to indigenous peoples. First, statehood did not correspond with the socio-political and cultural groupings of indigenous groups. The very idea of the nation-state was based on European models of political and social organization — dramatically different from how indigenous groups have traditionally organized, through tribal and kinship ties, with decentralized political structures and overlapping spheres of territorial control. For some, the nation-state concept "granted a monopoly of legal personality to the European powers."

Second, under a positivist view of international law, with the state as the primary unit, indigenous peoples had few rights. Indigenous groups did not

Prominent among the various rationales for disregarding or terminating an indigenous people’s territorial rights is the fact that indigenous peoples tend to live lightly on the land, and thus do not produce through their lifestyles the kind of evidence of dominion that European-rooted cultures are willing to recognize as worthy of legal protection.

Id.

26. ANAYA, supra note 5, at 26-28; see THORNBERRY, supra note 2, at 62 ("Through indigenous lenses, international law can look like a system for the vindication of Eurocentric State practice . . . . On such a view, it has done little to salvage indigenous societies and much to damage them . . . ."); see also Robert A. Williams, Jr., Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence’s "Learning to Live with the Plenary Power of Congress over the Indian Nations," 30 ARIZ. L. REV. 439 (1988) (arguing that a euro-centric vision of law denied indigenous rights and threatened to exterminate indigenous cultures).
28. JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW (1894) (explaining that indigenous peoples have no rights under international law); see Maggio, supra note 12, at 186 ("Indigenous and other long-term occupant societies and communities would
qualify as nation-states and therefore were “without full rights to group autonomy or ancestral lands.”

“[N]ot qualifying as states, [indigenous groups] could not participate in the shaping of international law.”

In addition, international law “regarded the cultural survival, territorial integrity, and self-determining autonomy of indigenous peoples as matters within the exclusive jurisdiction of the settler state regimes . . . .”

Thus, indigenous peoples became what scholars have characterized as “entrapped peoples” or “nations within.”

The confluence of a European-centered and positivist approach burdened, and often destroyed, the cultural and political life of indigenous groups. Indeed, “[t]he treatment of indigenous peoples has been so severe that it has been referred to as ‘genocide’ and as a ‘holocaust.’” “While the particular

be unable to seek redress [in international fora] even when their respective national governments refuse to recognize their legal rights to natural resources . . . .”); see also Will Kymlicka, Theorizing Indigenous Rights, 49 U. TORONTO L.J. 281, 284 (1999) (describing the “salt-water thesis” and noting that “internal minorities [were] not defined as separate peoples” and therefore had no right to self-determination); Oguamanam, supra note 4, at 357 (explaining that “[b]ecause indigenous peoples were not recognized under international law, there was no basis upon which they could enter into valid agreements with entities that were so recognized . . . .”).

29. ANAYA, supra note 5, at 23-26. Anaya further explains that “[t]o see indigenous peoples as ‘states’ would in the end prove all too difficult for Western eyes.” Id. at 26. Admittedly, at times, indigenous groups have domestically been recognized as separate nations with their own territorial sovereignty — but that was a product of domestic, not international, law.

30. Id. at 27; cf. Iorns, supra note 13, at 239 (noting that “international law . . . rejects arguments made by indigenous peoples that sovereignty is inherent in peoples”).


33. Iorns, supra note 13, at 200; see also Marina Hadjioannou, The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples Under International Law, 8 CHAP. L. REV. 201, 201 (2005) (noting that acts of cultural destruction have been described as “cultural genocide, ethnocide, and likened to acts of segregation, similar to apartheid”); W. Michael Reisman, Protecting Indigenous Rights in International
histories of different indigenous peoples differ, they have in common a history of conquest by another group and subordination within their present states, even where they may not numerically be in a minority.\textsuperscript{34} One scholar has described it starkly:

\textit{The process of colonization has left so-called indigenous peoples defeated, relegated to minor spaces, reservations, bread-crumbs of land conceded by the dominant society. Indians were separated from their sacred land, the land of their ancestors, and from their burial grounds with which they shared a deeply spiritual bond. Deprived of traditional environments, they were not only politically, but economically, culturally, and religiously dispossessed.}\textsuperscript{35}

Certainly, this was true in the United States with Native Americans. The United States established a trustee relationship over Indian lands,\textsuperscript{36} designated Indian tribes as "domestic dependent nations,"\textsuperscript{37} and proclaimed the plenary power of Congress to regulate Indian affairs.\textsuperscript{38} The "government viewed

\textit{Adjudication, 89 AM. J. INT'L L. 350, 350 (1995) (noting that "[f]rom the time that proto-human bands roamed the wilds, \ldots organized peoples have invaded inhabited territories and tried to make themselves dominant. \ldots The 'natives,' 'aborigines,' or 'indigenous peoples' were the ones who were there and lost \ldots"); Dean E. Cycon, When Worlds Collide: Law, Development, and Indigenous People, 25 NEW ENGL. L. REV. 761, 761 (1991) (describing how the exploration and development of natural resources had a negative "direct or indirect impact on the lives of indigenous peoples").}\textsuperscript{34}

\textit{Iorns, supra note 13, at 200; see also Wiessner, Rights and Status, supra note 5, at 57 (describing the "history of suffering, actual and cultural genocide, conquest, penetration, and marginalization endured by indigenous peoples around the world").}\textsuperscript{35}

\textit{Wiessner, Rights and Status, supra note 5, at 58-59; see also Torres, supra note 4, at 133 (arguing that "[t]he dynamics of the colonial relationship have left indigenous populations with four basic needs, namely the need for: (a) cultural protections; (b) recognition of land claims; (c) recognition of individual, economic, and social (welfare) rights; and (d) political autonomy."). For a description of how the effects of development negatively impact indigenous groups, see generally Cycon, supra note 33.}\textsuperscript{36}

\textit{ANAYA, supra note 5, at 31 (describing that "the objective of the trustee doctrine was to wean native peoples from their 'backward' ways and to 'civilize' them"); Angela R. Riley, Recovering Collectivity: Groups Rights to Intellectual Property in Indigenous Communities, 18 CARDOZO ARTS & ENT. L.J. 175, 206-07 (2000) (describing the trust obligation); see also Mary Christina Wood, Indian Land and the Promise of National Sovereignty: The Trust Doctrine Revisited, 1994 UTAH L. REV. 1471, 1495-1508 (describing the trust doctrine); CHARLES WILKINSON ET AL., INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 51-62 (2d ed. 2004) (describing the trust doctrine and sovereignty).}\textsuperscript{37}

\textit{Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 13 (1831).}\textsuperscript{38}

\textit{See, e.g., Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (affirming Congress's...
Indians as genetically and culturally inferior to European-Americans and sought to protect them from, essentially, themselves. The United States was by no means unique: the relegation of indigenous groups occurred worldwide.

That nation-states have resisted recognizing indigenous rights is hardly surprising. The existence of indigenous groups with their own culture and traditions challenges the notion of national unity. "Several states argue that their constitutions do not permit the possibility of more than one 'people' within the national territory . . . ." Further, most states are controlled by an ethnic majority that "is able to exercise cultural hegemony over the rest of the nation." The concept of the territorial nation-state thus by its nature undermines recognition of indigenous groups because its purpose, in part, is plenary authority over tribal relations); see also United States v. Antelope, 430 U.S. 641, 648 (1977) (affirming the plenary nature of the power of Congress over Indian affairs, but noting that it is not absolute). See generally Nell Jessup Newton, Federal Power Over Indians: Its Sources, Scope and Limitations, 132 U. Pa. L. Rev. 195 (1984).


40. ANAYA, supra note 5, at 32-33 (describing attempts to "civilize" indigenous peoples in Britain, Canada, Brazil, Venezuela, and other countries).


42. Kingsbury, supra note 41, at 424. The main opposition to indigenous claims of self-determination has been the fear of creating nations with nations. See also Russell Lawrence Barsh, Indigenous Peoples in the 1990s: From the Object to Subject of International Law?, 7 Harv. Hum. Rts. J. 33 (1994) (addressing the political and legal issues indigenous peoples faced while pursuing self-determination and the expected struggles in international law in the 1990s).

43. Rudolfo Stavenhagen, Ethnic Conflicts and the Nation-State 9 (1996) (describing the ethnocratic state); see also Benedict Anderson, Imagined Communities: Reflections on the Unique Spread of Nationalism (1983) (arguing that natural nation-states do not exist, but rather that the nation must be "imagined").

to suppress cultural differences and to establish a theoretical unified cultural identity.\textsuperscript{45} Traditionally, "non-state institutions . . . such as the family, the ethnic group, the church, the mosque, and the village . . . represented . . . incidental, backward, and even illegitimate legacies that needed to be curtailed . . ."\textsuperscript{46} For that reason, nation-building is commonly understood to require national institutions that subsume smaller territorial groups and local cultures.\textsuperscript{47}

Even the development of human rights as an independent constraint on state action did not, at least historically, fully accommodate indigenous peoples’ concerns.\textsuperscript{48} The collective rights of indigenous groups often "go against the grain of traditional Western rights thought, which is based on the paradigm of pitting the individual against the state . . . ."\textsuperscript{49}

A powerful strand of Western liberalism takes the individual as the essential self-determining or at least freely choosing subject, is mistrustful of group-based claims extending beyond nondiscrimination, and calls for neutrality of the state
protect interests "related to a people’s culture and historical heritage,"50 "most human rights advocacy remains staunchly individualistic" and inhospitable to claims of collectives.51 For indigenous scholars, human rights imposes its own cultural values and prevents indigenous communities from fully realizing their collective identity. Human rights regimes largely have been forged out of a state-centered view of the world.52 Until recently, indigenous groups that "wanted something more than, or other than, the protection of their individual civil and political rights received little support from international law for their claims."53 Change, however, has occurred.

II. Fading Territorial Sovereignty in the Modern Globalized World

In recent years, the salience of the sovereign state, strictly defined by its territorial borders, has slowly declined.54 Contrary to the classic positivist

and other social institutions with respect to competing substantive views among groups as to what is good and how to live.

Id. at 425; cf. Hand, supra note 39. For a discussion of the difficulties of accommodating illiberal tribal culture in a liberal society, see Angela R. Riley, Sovereignty and Illiberalism, 95 CAL. L. REV. (forthcoming 2007) (exploring American Indian tribal sovereignty and liberalism, and concluding that "internal tribal decisions regarding Indian culture and tradition be left to Indian tribes, even when those decisions are inapposite to Western liberal ideals").

50. Manus, supra note 1, at 564-65 (noting the limitations of human rights to address indigenous peoples’ concerns); see also THORNBERRY, supra note 2, at 96 (explaining that “it can easily be assumed that self-determination as a group right goes against the grain of human rights”); see also Benedict Kingsbury, Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law, 34 N.Y.U. J. INT’L L. & POL. 189, 193 (2001) (noting the “fundamental political debate” as to “whether issues raised by indigenous peoples can be addressed exclusively within the existing framework of international human rights law”).

51. Rosenn, supra note 41, at 242; Richard Herz, Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights, 79 VA. L. REV. 691, 695 (1993) (arguing that the “[d]iscourse on human rights is carried on within the context of the law of nations, even as this ‘deference to governmental supremacy’ is challenged by international human rights law”); Kymlicka, supra note 28, at 291 (noting a “major controversy concerning indigenous rights — namely, whether standard human-rights norms apply to indigenous self-government, or whether it is a form of cultural imperialism to expect indigenous communities to abide by ‘Eurocentric’ principles of individual civil and political rights.”).

52. Kymlicka, supra note 28, at 283.

54. See generally STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999). For other well-known books on the topic, see ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS
view of international law, "[s]tates are no longer the sole bearers of rights and duties in the international sphere, nor are they the sole actors in the international arena."  

Non-state actors are now important in international relations and law. "Domestic interest groups, transnational corporations, and global networks of NGOs all take part of the new global, political, and social constellation that defines the age of globalization." While domestic groups at one time had no power, now groups of all kinds, are "increasingly becoming major actors in the emerging global legal order." Even non-state judicial systems appear to be on the rise. This is not to say that the state sovereignty is ending, but rather that the power of non-state actors is growing.


56. Peter J. Spiro, Nonstate Actors in Global Politics, 92 AM. J. INT'L L. 808 (1998) (reviewing literature describing the recent rise of nonstate actors in international law); Philippe Sands, Turtles and Torturers: The Transformation of International Law, 33 N.Y.U. J. INT'L L. & POL. 527, 529 (2001) (describing a system in the nineteenth and twentieth centuries where the "state was the only player, and the need to protect its sovereignty was paramount" and recent changes to this model).


61. A significant amount of scholarship explains why the end of sovereignty is a myth, but
Concomitant with the growing importance of non-state actors in international law and relations has been the emergence of "transnational agreements, institutions, and adjudicatory tribunals . . . reflecting the corresponding move from international to transnational law." As a result, an enormous number of international agreements and organizations exist. International institutions are now often a source of norms that states previously supplied. In part, the changing role of the territorial state in international law can be attributed to globalization. The permeability of borders and the fluidity of community affiliations challenge ideas of inviolate nation-state sovereignty. As capital, labor, goods and ideas are able to freely move without regard to borders, the significance of the territorial state declines and is refocused on private actors. In economic terms, "centrist power has moved even further

still recognizes the growing influence in international relations of non-state actors. See, e.g., Richard H. Steinberg, Who Is Sovereign?, 40 STAN. J. INT'LL. 329, 334-40 (2004) (arguing that despite changes, the existence of the state system has not ended and criticizing scholars who argue otherwise).


63. For a discussion, see Kal Raustiala, Refining the Limits of International Law, 34 GA. J. INT'L & COMP. L. 423, 423-25 (noting a more portent role of international law and institutions to constrain state behavior than some attribute to it).


65. Kal Raustiala, Rethinking the Sovereignty Debate in International Economic Law, 6 J. INT'L ECON. L. 841, 857 (2003) ("It has become commonplace to argue that qualitative changes in the global economy have weakened the ability of states to pursue autonomous policies — or have at least markedly raised the costs of doing so."). For a discussion of the legal challenges that globalization poses for indigenous groups, see Angela R. Riley, Indigenous Peoples and the Promise of Globalization: An Essay on Rights and Responsibilities, 14 KAN. J. L. & PUB. POL'Y 155 (2004), and Miles Kahler & David A. Lake, Globalization and Governance, in Governance in a Global Economy 1-2 (Miles Kahler & David A. Lake eds., 2003).

66. Berman, From International Law, supra note 57, at 524 (discussing jurisdiction).

67. Saskia Sassen, Territory and Territoriality in the Global Economy, 15 INT'L SOC. 372 (2000); see also Paul Schiff Berman, The Globalization of Jurisdiction, 151 U. PA. L. REV. 311 (2002). Indeed, because of the globalization of capital, the movement of people and goods across borders, the reach of global corporate activity, the impact of worldwide NGOs, and the development of literally hundreds of international or transnational tribunals over the past two decades, "local communities are now far more likely to be affected by activities and entities with no local presence." Id. at 319. See generally THE EMERGENCE OF PRIVATE AUTHORITY
from territory — into a new managing elite that exists within, but also above and beyond, the state.  

These changes may also be the result of new ways of thinking about international relations that pay greater attention to actors within states, or emphasize the role of transnational processes and global, transgovernmental networks. Scholars in the 1980s and 1990s, who vigorously attacked the notion of inviolate nation-state, territorial sovereignty, may also be partly responsible for the changes. At the very least, modern theorists recognize the diversity of voices in international law and reject the over-simplified concept of a unitary, territorial state.

III. Cautious Optimism For Indigenous Groups

This essay so far has attempted to briefly sketch the recent changes in international law and relations where local governments, non-governmental entities, and domestic interest groups play an ever more important role on the international stage. The question remains how these changes benefit the development of indigenous rights.

---

68. M’Gonigle, supra note 10, at 170.
72. Perhaps the best known is Louis Henkin. Henkin, supra note 22, at 31; see also Krasner, supra note 54, at 3-42 (describing and criticizing notions of strict territorial sovereignty).
73. Berman, Seeing Beyond the Limits, supra note 69, at 1305.
A. The Growing Voice of Indigenous Groups

Several reasons suggest that the disassembling of the territorial nation-state and the rise of non-state actors has been, and will continue to be, a positive development for indigenous groups. First, in a world where non-state actors have a say in shaping international law, little reason exists for the international system to exclude indigenous groups. If local governments, NGOs, IFOs, and a whole host of other groups can influence international law and participate in global government, then why not indigenous peoples? Indeed, "indigenous peoples are increasingly viewed as separate from the states they reside in, with their own voice in the decision-making process."74 "Indigenous groups . . . [have] expend[ed] vast amounts of time and resources . . . to participate in [international regimes]."75

Second, in a system where territorial borders are more permeable and territoriality is less constraining, the historical reluctance of states to embrace the concept of multiple "peoples" within a state's borders declines. Globalization of labor and capital renders the traditional concept of a nation-state — with one distinct, if not imagined, culture — to be unattainable.76 Many peoples now live near, or regularly cross borders, and identify themselves with multiple communities.77 In the modern world, a "wide variety of community affiliations and social interactions . . . defy territorial boundaries."78 Said differently, in a post-Westphalian world the nation-state

74. Firestone et al., supra note 4, at 242; see also Bluemel, supra note 58 (describing indigenous group participation in global governance).
75. Bluemel, supra note 58, at 59; see also Berman, Seeing Beyond the Limits, supra note 69, at 1300 ("Assisted by a global network of NGOs and activists, indigenous movements use international norms to influence local political or judicial actors."). See generally Sarah Radcliffe et al., Indigenous People and Political Transnationalism: Globalization from Below Meets Globalization from Above? (Econ. & Soc. Research Council, Working Paper No. WPTC-02-05, 2002), available at http://www.transcomm.ox.ac.uk/working%20papers/WPTC-02-05%20Radcliffe.pdf (describing how increased global interdependence has given ethnic groups unprecedented access to enter the political processes of the global system).
77. Berman, Seeing Beyond the Limits, supra note 69, at 1303-04 (citing AIHW A ONG, FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY 6 (1990)); see also Berman, From International Law, supra note 57, at 512 ("As many commentators have observed, cultural differences no longer can be based on territory because of mass migrations and transnational culture flows of late capitalism.").
78. Berman, Seeing Beyond the Limits, supra note 69, at 1306 (describing "epistemic communities, transnational groups who, over time, come to conceive of themselves as bound-up
is no longer "the perfected form of political organization towards which all political energy necessarily aspires." 79 Given that reality, states are "mov[ing] from a state-centric model — where dominant cultures impose their cultural norms and values on non-dominant cultures — to a model [of multiculturalism]." 80 This has borne out in practice with indigenous groups. As Anaya describes, "[t]he core idea of the right of self-defined indigenous communities to continue as distinct units of human interaction has taken root internationally, making any discussion of their assimilation into larger societies virtually obsolete among social science and legal experts and even government representatives." 81

Third, as non-indigenous groups begin to identify themselves not by nation, but by other affiliations, 82 one should expect the respect for indigenous groups to increase. In such a world, communities that are already culturally, socially, or politically cohesive — as indigenous groups are — should have a comparative advantage. Indeed, indigenous peoples often identify themselves as a unified community, even where those communities cross distinct political boundaries. 83

B. Emerging International Law on Indigenous Rights

Whether a direct causal link exists or not, the changing nature of territorial sovereignty has been concomitant with the rapid development of international law on indigenous rights. Several international instruments and decisions now seek to empower, protect, and even promote indigenous peoples and their cultures. The most important include:

---

79. Lâm, supra note 25, at 616.
80. Firestone et al., supra note 4, at 291.
82. AKHIL GUPTA & JAMES FERGUSON, Beyond "Culture": Space, Identity, and the Politics of Difference, in CULTURE, POWER, PLACE: EXPLORATIONS IN CRITICAL ANTHROPOLOGY 33, 34 (1997) (noting that it may be impossible for people living on a border to find a unified cultural identity, and asking "[w]hat is the 'the culture' of farm workers who spend half a year in Mexico and half in the United States?"); see also Robin Cohen, Diasporas and the Nation-State: From Victims to Challengers, 72 INT'L AFF. 507, 517-18 (1996) (arguing that people increasingly do not identify with their nation-state, but rather identify with others based on shared opinions, tastes, ethnicities, religions and other interests).
• the United Nations Draft Declaration on the Rights of Indigenous Peoples, which in June 2006 the Human Rights Council adopted and recommended that the General Assembly also adopt;\textsuperscript{84}

• the 2005 proposed American Declaration on the Rights of Indigenous Peoples;\textsuperscript{85} and

• the 1989 ILO Convention No. 169, which entered into force in 1991, and during the 1990s was considered international law's most concrete manifestation of the growing responsiveness of indigenous people’s demands.\textsuperscript{86}

Many other international treaties and instruments, drafted in the last ten to fifteen years, recognize the need to protect indigenous peoples, their lands, and their cultures.\textsuperscript{87} Resolutions adopted at “major U.N. conferences — the 1993 World Conference on Human Rights, the 1994 U.N. Conference on Population and Development, the World Summit on Social Development of 1995, the Fourth World Conference on Women of 1995, and the World Conference


\textsuperscript{86} \textit{See} Anaya, \textit{International Human Rights,} supra note 5, at 47; \textit{ANAYA, supra} note 5, at 59.

Against Racism of 2001 — similarly include provisions” that reiterate the precepts of indigenous rights. Indeed, “the proliferation of domestic and international declarations . . . dealing . . . with indigenous issues,” since the 1980s has been remarkable. So much so that scholars now identify a specific “international legal regime devoted to indigenous peoples.”

Not only have international instruments embraced indigenous rights, so too have international courts, national governments, and legal scholars. In 1985, the U.N. Human Rights Committee, in the landmark Kitok v. Sweden case, found that the collective rights of indigenous groups prevailed over the individual rights of the group’s members. The Inter-American Court of Human Rights, in another seminal decision (Awas Tingni v. Nicaragua), recognized the territorial rights of indigenous people, and so too did the Inter-American Commission on Human Rights in the recent Dann decision. Likewise, national governments in the 1990s began to “explicitly recognize[] indigenous peoples’ collective rights to internal decisionmaking, representation in national decision-making, land, and control of development.” As Russell Barsh has argued, “[s]ince 1989, a consensus has developed [among national governments] that indigenous peoples have distinct collective rights, such as rights to land and natural resources, cultural integrity,

88. ANAYA, supra note 5, at 67.
89. Torres, supra note 4, at 156.

These declarations include: the Resolutions of the Inuit Circumpolar Conference, the Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere . . ., Resolutions of the First Congress of Indian Movements of South Africa, Conclusions and Recommendations Regarding the Rights of Indigenous People by the Seminar on Human Rights in the Rural Areas of the Andean Region . . . [and many others].

Id. at 156-57.
90. Oguamanam, supra note 4, at 350; Barsh, Indigenous Peoples in the 1990s, supra note 42, at 34 (explaining how “indigenous peoples are gaining recognition of their legal personality as distinct societies with special collective rights and a distinct role in national and international decisionmaking”).
92. Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001), available at http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html; see also Manus, supra note 1, at 621-32 (discussing the case decisions); Anaya, Divergent Discourses, supra note 5 (discussing decision).
94. Barsh, Indigenous Peoples in the 1990s, supra note 42, at 43.
environmental security, and control over their own development." The growth of indigenous rights in international law has not gone unnoticed among scholars. In academia, many have described the advances made in customary international law as well as in treaty law. Customary international law specifically focused on indigenous groups, now includes the right of self-determination, the right to cultural integrity, and the right to participate.

Lastly, indigenous groups continue to influence international law and relations through their participation in national and international forums specifically designed to address indigenous issues. Most recently, in May 2006, the Fifth Session of the U.N. Permanent Forum on Indigenous Issues was held in New York, while in September 2005, the U.N. held a workshop on Traditional Knowledge and Indigenous Peoples in Panama City. The U.N. Working Group on Indigenous Populations also continues to be active. The results have been concrete. As just one example, the General Assembly adopted a resolution for the "Second International Decade of the World's Indigenous Peoples," which began in January 2005. This resolution specifically sought to more actively include indigenous peoples in the design, implementation, and evaluation of international law, and also sought to promote the full and effective participation of indigenous peoples in decisions which directly, or indirectly, could impact their lifestyles, traditional lands, and cultural integrity.

95. Id. at 43; see also Oguamanam, supra note 4, at 373-87 (describing individual country and regional developments recognizing indigenous rights).
96. Oguamanam, supra note 4, at 398-99.
99. See generally ANAYA, supra note 5, at 221-22 (describing developments by the Working Group).
C. Words of Caution

This essay has suggested that recent developments in international law are positive for indigenous peoples as they become recognized subjects of international law. Yet this essay ends on a cautious note. Two points are worth emphasizing.

First, much more thinking needs to be done about how indigenous groups can meaningfully take advantage of the new international order. Although much has been written about sovereignty, international scholars are just starting to explore the changing role of territoriality in international law. Indigenous rights scholars, for their part, have not focused or written at all (or at least not in any depth) about these broader changes. Most recent scholarship has been directed to assessing the current status of international law as it relates to indigenous groups, without seriously analyzing the "why" question. Theorizing how changes in concepts such as territoriality and sovereignty affect indigenous groups is important: the changes impact how indigenous groups should, or can, advance their interests in international fora. The declining force of territoriality is particularly worth exploring because "[i]ndigenous peoples, more than other ethnic groups, rely on their connection to the territory . . . to reproduce their place-specific cultures."\(^\text{102}\)

One example immediately comes to mind where thinking about the role of sovereignty and territoriality impacts indigenous rights. Some indigenous groups have adopted "the rhetoric of nationhood . . . to posit indigenous peoples as states, or something like states."\(^\text{103}\) This claim for self-determination asserts that "indigenous peoples exercised historical sovereignty [over lands], which was wrongfully taken from them."\(^\text{104}\) "Reviving historic sovereignty" thus attempts to carry "the hope of reversing the consequences of wrong."\(^\text{105}\) But is such rhetoric wise? In a world where nation-states fight to cling onto territorial integrity, embracing territorial sovereignty as a means of advancing indigenous rights may be a non-starter. It seems odd that indigenous groups would adopt the very language (i.e., territorial sovereignty) that the international community has begun to reject as a cornerstone of international law.

102. Lâm, supra note 25, at 621.
103. Anaya, Divergent Discourses, supra note 5, at 241.
104. Kymlicka, supra note 28, at 286.
Alternatively, the decline of the strict territorial integrity of states may mean that states are more receptive to creating nations within nations. This essay does not provide an answer; both positions seem plausible. But this issue deserves serious thought. To date, the scholarly indigenous community has largely overlooked it.

Second, the rise of non-state actors as important players in international law suggests that indigenous groups need to be careful to cultivate their allies. In the past, indigenous groups have been particularly effective in advancing indigenous rights by allying themselves with environmentalists and human rights activists, human rights NGOs, and others. These alliances were crafted because of shared goals, if not a “romantic attachment to cultural diversity and saving indigenous peoples from ‘vanishing.’” The strategy was successful. “At present there is considerable political support among Western liberals for ‘indigenous peoples’...” Human rights groups and environmentalists have been strong supporters, and significant forces in incorporating norms favorable to indigenous groups into international law.

But how strong these alliances will remain is unclear. They may only be passing alliances of convenience. The support of human rights activists “is tempered by unresolved concerns about consistency with other liberal precepts, and these concerns appear quickly in the face of such concrete issues as relations between group autonomy and individual human rights.” This is especially true with the recent push by indigenous groups for the international community to recognize so-called group rights. Indigenous groups risk alienating their staunchest supporters if, as some indigenous scholars suggest, indigenous groups exercising self-determination can abridge or limit the fundamental human rights of its members. Similarly, the environmentalists’ conception of indigenous groups as “passive victims living at one with nature and beset by unwelcome modernity” is not an accurate

106. Torres, supra note 4, at 153-55 (describing the role of the media in advancing indigenous rights).
108. Id. at 426.
109. Id.
110. W. Michael Reisman, Autonomy, Interdependence, and Responsibility, 103 YALE L.J. 401 (1993). As Laurence Rosenn has described it, a “wide range of nations and cultures [are forced] to address such issues as female circumcision, the capacity of individuals to further themselves despite conventions of their group, and the right of individuals to leave the religions of their birth.” Laurence Rosenn, The Right to Be Different: Indigenous Peoples and the Quest for a Unified Theory, 107 YALE L.J. 227, 230-31 (1997) (book review).
111. Id. at 440; see also Manus, supra note 1, at 641 (“Empowerment of indigenous peoples
characterization of the aspirations of many indigenous groups. To the extent that indigenous groups embrace goals inconsistent with sustainable development (perhaps modernity itself), they may quickly lose environmentalist support. Without the leverage these groups provide, indigenous groups will have difficulty ensuring that the international community enforces the newly developing international norms, and indigenous peoples may once again lose their voice in international law.

Conclusion

In recent years, indigenous rights have begun to reach an age of maturity in international law. Certainly, the development of indigenous rights can be attributed to the crystallization of human rights norms and the dedication of indigenous groups. In addition to these traditional explanations, the disassembling of the territorial nation-state and the growing voice of non-state actors in international law is also likely responsible for the development of indigenous rights. At the very least, traditional forces for suppressing indigenous rights have been weakened. The changes in the international legal system and international relations should be a cause for optimism. But indigenous groups must be careful in their rhetoric and not alienate their most ardent supporters. Unless careful, indigenous groups may find their new voice in international law lost.