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Indigenous Identity, International Law, and the and the 'New Constitutionalism'

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A. Claire Cutler, Indigenous Identity, International Law and the 'New Constitutionalism'[1]

This chapter focuses on the globalization of international law as an emergent form of governance that conditions conceptions and practices of sovereignty, with profound implications for claims to identity and autonomy in international affairs. The analysis seeks to isolate the specificity of the relationship between international law and global capitalism by showing how the "new constitutionalism" gives rise to legal forms and institutions that define what sovereignty means and thus who or what may legitimately lay claim to identity and autonomy. The new constitutionalism involves the creation of politico-juridical and constitutional frameworks that operate regionally, nationally, and globally to establish rules that govern local and global political economies and societies (Gill 2008, Cutler 2003; Gill and Cutler forthcoming). It is taking shape in the uneven emergence of de facto constitutional governance structures for the global political economy and coincides with recent expansions, both intensively and extensively, of global capitalism and private property rights (Schneiderman 2010). This form of governance highlights proprietary conceptions of sovereignty, identity, and autonomy that are rooted in the historical development of international law. It is here argued that the New Constitutionalism advances an increasingly commodified notion of governance as international legal forms constitute and set limits to identity and autonomy according to a market-friendly and economistic logic that is forming the template of global citizenship (see Bowden 2006, Baxi 2005). While states constitute an important location of political authority under this logic, mediating the terms under which non-state entities are recognized as subjects with autonomous identities, transnational business corporations also exercise considerable authority.

Implicit in this analysis is the belief that law is a fundamental "constitutive axis" of modern social life; law is not just an institution, but is constitutive of all social relations, including relations of domination (Biolsi 1995, 543).

> If we understand law as a state-sponsored field which grounds the conditions of possibility for actionable rights and legitimate social claims, then law is "deeply imbricated" in the very organization of modern society. Put differently, law is productive or generative of subjectivity in the nation-state. Understood in this way, law is a dimension (at least) of *all* modern social relations, since all social relations presume a ground of rights and legitimate claims. It is not possible to

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> think of subjectivity within modern society without seeing law – and the rights it allows or summons into existence – as one of the basic, constitutive axes of social self and other. (Biosli 1995, 543, references omitted).

Biosli is referring here to the constitutive role of national law in a domestic setting.[1] However, the analysis applies with equal force to international law and its fundamental role in the constitution of contemporary subjectivities (see Cutler 2003, 2009). The commodity form theory of international law is proposed as the theory that captures the materiality and normativity of international law's increasingly global reach and its intensive penetration into domestic politico-legal orders where it defines and regulates the terms of political engagement and contestation. The commodity form of international law facilitates the expansion of global capitalism by conditioning local political economies and societies according to what Stephen Gill (2008, 137) refers to as "neoliberal discipline" and the subordination of local social relations to the demands of global trade, investment, and financial markets. While more will be said later about the commodity form of law, its operation is evident in a number of areas of transnational economic law (see Cutler 2008a), but this analysis will highlight its impact on the claims to autonomy and identity under international law of non-state entities, such as Indigenous peoples.

As noted in the Introduction, property rights mediate the relationships between peoples and things. International law and the property rights it recognizes mediate the relationships between peoples and things through a statist framework that confers subjectivity, identity, and autonomy on some, but not on others. International law articulates the conditions of international legal identity and autonomy, substituting "juridical persons for real people" and presenting social relations as "a product of legal institutions, dependent on enforcement of an authoritative (legal) discourse, rather than as inherent in 'natural' existence" (D'Errico 1996/1997, 107). Law and the state are foundational in constituting entities that are accorded status as citizens and in ensuring the protection and enforcement of their rights (Yeatman 2004). Legal forms and the instrumentality of the state thus mediate identity, but this centrality is obscured by the naturalization of certain entities as legitimate, autonomous legal subjects or persons. International law creates, recognizes, and enforces rights that provide the conditions of possibility for the recognition of subjectivities and identities, according highly differentiated legal rights to non-state entities, including Indigenous peoples, individuals, and transnational business corporations. While the terms international legal personality, subjects, and objects, will be defined more fully later in the discussion, states emerge as fully sovereign, legal subjects or persons capable of possessing rights and enforcing claims under international law. As will become apparent, sovereignty and autonomy, as embodied in the right to self-determination under international law, are shaped by legal doctrines that accord these rights to *states* as rights of *national* self-determination. Non-state entities claiming recognition as legal subjects fare differently. Individuals and transnational corporations figure as objectified categories, for while they are not accorded the status of subjects, they are objects capable of having rights and duties bestowed upon them by states. So too, Indigenous peoples emerge as objectified identities, but their recognition also reflects the operation of racialized legal categories that are historically contingent upon practices of exclusion and inclusion that give rise to both oppressive and emancipatory conditions and possibilities.

This chapter argues that notwithstanding the growing diversity of claims to identity and subjectivity under international law, there is a singular logic to the globalization of international law in the commodity form that tends to flatten out differences, integrating disparate places and peoples. The globalization of international law is an important element of a "new imperialism" that is knitting the world together into a network of governance arrangements that is disciplining peoples and things through a neo-liberal economic logic and a neoconservative politico-strategic logic (Harvey 2003). In the commodity form, international law gives rise to contradictory impulses and dialectical tensions between subjects and objects of legality, localized and delocalized social relations, territorialized and de-territorialized systems of rule, as well as hard and soft forms of regulation. These impulses go to the heart of the relationship between the globalization of international law and the autonomy of states and peoples, reflecting sites of contestation and struggle, as well as emancipatory aspirations.

The defining global moments in this analysis are two, although they are perhaps better conceptualized as historical developments than as discrete moments. Historically, the first global moment involved the articulation of state sovereignty and the analytical foundations of international law through solidification of the doctrine and practice of international legal personality. The doctrine of international legal personality took shape in the nineteenth century, establishing the ontology of international law and the foundational distinction between "subjects" and "objects" of the law, and recognizing states as the original subjects and sovereigns of the international legal order. This doctrine also articulated the "sources" of the law, framing a positivist epistemology that limited the creation and recognition of international law to sovereign states and their delegates. At this time, the sovereign control of territory was a defining characteristic of the right to rule and international law formed a statist legal order moving out from Western Europe to embrace ever more parts of the globe, with non-state entities forming the periphery in both theory and practice.

The second defining moment or development involves contemporary transformations to delocalized and de-territorialized systems of rule, as international law takes on a transnational dimension, extensively, in broadening its substantive and geographic scopes and, intensively, in deepening its discipline under the new constitutionalism. The intensive reach into local politico-legal orders of instruments such as the WTO TRIPS and GATS agreements creates new forms of enclosure through privatizing and commodifying more dimensions of existence. The statist focus of the analytical foundations of international law remain doctrinally intact, but non-state challenges to the primacy of states are emanating from aspiring identities, including Indigenous peoples, individuals, transnational corporations, and private associations who often compete for recognition and for access to the benefits that flow from legal subjectivity (Cutler 2001). These aspirations are giving rise to tensions between the goals of further globalizing a universalizing and homogenizing international law and commitments to enhancing local autonomies of states and peoples.

The next section of the chapter addresses the analytical and theoretical foundations of international law in the context of the historical solidification of the doctrine of international legal personality. This state-centric foundation held significant implications for the status under international law of non-state entities. The following section identifies developments that are pushing up against the statist ontology and epistemology of international law, and under the new constitutionalism producing a transnationalized and significantly delocalized politico-legal order,

whilst globalizing the unifying logic of the commodity form. This order is advancing the global expansion of capitalism, both extensively and intensively, and creating new forms of neoliberal, market discipline and governance. This is argued to have a profound impact on the claims of Indigenous peoples to identity and autonomy. The concluding section then examines important instances of resistance to the globalization of international law, neoliberal discipline, and commodification in efforts to retain or regain local autonomy.

<1> International Law and the Expansion of International Society

From its inception, international law has been an imperial project in the sense of facilitating the material and cultural expansion of capitalism (Pashukanis 1980, Said 1993). From the framing of the legal principle of sovereignty in the sixteenth century in a way that enabled Spanish conquest and dispossession in the Americas (Marks 2003) to the articulation of the principle of freedom of the high seas by Hugo Grotius in the seventeenth century to facilitate Dutch challenges to the Portuguese Indian maritime trade monopoly (Miéville 2005), on to the nineteenth-century definition of international law as the law of "civilized" nations (Anghie 1999, Gong 1984), international law has been about constituting empire through the contestation, acquisition, and dispossession of property. While during the early years of colonial expansion the great trading companies were the engines of colonial growth and were granted significant powers, gradually these powers were framed as appropriate only to states which were emerging as the dominant form of politico-legal authority. The doctrine of international legal personality forms the analytical core of the nascent statist ontology. This doctrine identifies who or what is a "subject" of the law, and, hence, who is politically authoritative as possessing "rights and duties enforceable at law…" (Brownlie 2008, 57). The doctrine of international legal personality over time came to determine the entities that can declare war, enter into treaties, claim legal equality, autonomy, and territorial independence, become a member of international organizations, and make legal claims before international courts and tribunals. International legal personality thus determines who or what is a legal person or "subject" of international law.

Non-state entities, such as individuals or peoples and eventually transnational corporations, were in contrast, recognized as "objects" of international law. They were regarded as possessing no original rights or liabilities, save for those granted to or bestowed upon them, derivatively, by states. As "objects" they are devoid of subjectivity: "that is to say, they are like 'boundaries,' or 'rivers,' or 'territory' or any of the other chapter headings found in traditional textbooks" (Higgins 1985, 478). The identification of states as the proper subjects of international law is generally associated with the theory of legal positivism, which attributes the binding force of international law to states and state consent. Legal positivism developed along with the emergence of the modern states system and through the work of theorists such as Hans Kelsen, provided the legal equivalent of statist political theories advanced by Jean Bodin and Thomas Hobbes (Beck et. al. 1996). It informed the expansion of European society through colonialism at the end of the nineteenth century and the conquest of non-European peoples for economic and political advantage, which brought virtually all the territories of Asia, Africa, and the Pacific under the control of European states. Initially framed as *jus gentium*, or principles of law common to all peoples, international law came to be circumscribed by doctrines that reflected the growing significance of state sovereignty. Indeed, legal positivism formed the theory used by jurists of the day to address the imposition of an essentially European body of international law upon the peoples encountered through the annexation of Australia, the conquest of large parts of Asia, and the partitioning of Africa (Anaya 2004; Anghie 1999). With its

growing statist focus, legal positivist theories of international law worked with colonialism to create both a statist and racialized order wherein international legal personality and legal subjectivity were associated with states who possessed a set of cultural characteristics "essential to the membership of the family of nations" and emanating from European states and European international society (Lawrence 1895, 58).[2] In Australia, and elsewhere, legal doctrines of dispossession were developed to appropriate indigenous lands. According to the Roman law doctrine of *terra nullius*, which was incorporated into international law, vacant lands could be appropriated by states manifesting such intentions. As a result, a fictional representation was created which regarded the conquered lands as unoccupied, even though they were occupied by peoples, such as Indigenous peoples. The underlying premise was that as uncivilized peoples not forming a state, they could not be recognized as exercising sovereign rights of occupation. Consequently, they did not possess the international legal personality required to constitute them as legal subjects capable of holding rights and enforcing international legal obligations.[3]

International law thus differentiated between civilized and uncivilized states and peoples, demanding different standards of law and diplomacy and recognizing different degrees of sovereignty and autonomy (Anghie 1999). Under nineteenth-century positivism, international law came to be regarded as "the body of rules framed between states" (Westlake 1894, 1). Moreover, it was formulated epistemologically, not on natural, transcendent principles, as natural law would have had it, but as a science deriving from the actual practices of states (Lawrence 1895, 1). In creating a legal science based upon state action, positivists saw themselves as "creating order out of chaos" (Lawrence 1895, 94 and see Kennedy 1988, 14; Cutler 2001) and rooting legal subjectivity in rational, scientific, and objective foundations. Increasingly, the authority of international law was traced to the practices of state since "time immemorial," as a transhistorical authorization of the legal subjectivity of the state. This authorization was a move to the abstraction of law as part of the formalistic framing of the law as an independent, self-contained universe. It was a move outside of history, because it set up the analytical foundations of international law as a naturalized and transhistorical domain (see Cutler 2002a and 2003). These foundations permitted positivists to present statist international law as universal, eternal, rational, and natural. They also masked and neutralized the role of law in securing the political ambitions of European colonial powers and the economic ambitions of capitalist business enterprise.

Miéville (2005, 243) observes that a "standard of civilization" emerged in the middle of the 1800s "as a criterion without which a state could not engage in international legal relations." This standard was originally based upon "civilized, Christian nations" and later became one of "civilized nations." Increasingly, international law became that law created between sovereign European states. Legal positivists developed rules to regulate sovereign identity and created specialized legal arrangements to deal with non-European contacts, disciplining the relations between states and non-state entities and between the civilized and uncivilized. Nineteenth-century legal positivists established the modalities of sovereignty in the legal requirements for establishing statehood. These requirements helped constitute a highly racialized order that differentiated between "civilized, "uncivilized," and "semi-civilized" nations, as well as between sovereign and quasi-sovereign (or "not-full sovereign") states (Anghie 1999).

Thus legal doctrines regulating sovereignty that configured non-Europeans and Indigenous peoples as outside the family of nations and European civilization helped enable the colonial expansion of European economic and political empires. Criteria of statehood were developed to facilitate the expansion of political control and capitalist accumulation and to

generally regulate contact with the peoples of Asia, Africa, and the Pacific. Today, we recognize the criteria governing statehood as including the existence of a permanent population, a defined territory, a government, and the capacity to enter into relations with other states. These are set out in the *Montevideo Convention on the Rights and Duties of States* of 1933. These criteria have their origins in state practice and the works of the nineteenth-century positivists. The requirement of a defined territory clearly ruled out sovereignty and property rights for nomadic and wandering tribes. As Lawrence (1895, 136) observed, "[s]o entirely is its [international law's] conception of a state bound up with the notion of territorial possession that it would be impossible for a nomadic tribe, even if highly organized and civilized, to come under its provisions."

The requirement of a capacity to enter into diplomatic relations also ruled out tribal and nomadic peoples and resulted in differential and preferential treatment for states such as China, Persia, and Turkey, which had rich diplomatic traditions. Indeed, the treaties entered into between these states and European states, about which eighteenth-century jurists had written much, posed a real analytical problem for the positivists. How could non-sovereigns enter into treaties as "subjects" of the law? The only way of resolving these apparent instances of legal personality was to recognize a special category of "not-full sovereign states." Such recognition began the practice of reconfiguring non-Europeans in the periphery of international law and international society.

While special legal arrangements were developed to regulate the relations between sovereign states and peoples of Asia, Africa, and the Pacific, different legal mechanisms were created to facilitate colonial expansion and to manage contact with Indigenous peoples. They involved efforts to re-include these peoples into international society. The result, however, was a reconfiguration of indigenous identity, not as "subject" under international law, but as "object," subservient to both the state and to the great trading corporations.[4] These special arrangements include colonialism through assimilation under treaty arrangements, and rules regulating cession, discovery, annexation, conquest, occupation, recognition, and protectorate agreements. Legal doctrines were also developed to facilitate the activities of the trading companies. The latter were granted legal personality and state-like sovereign powers over non-European peoples, including the rights to trade, to war, to make peace with Indigenous peoples, to impose customs duties, and to create money.

Another technique used by nineteenth-century jurists to manage colonialism and that had major bearing on property rights was the development of variations in the doctrine of sovereignty involving "quasi-sovereigns." Positivists reasoned that while they were not proper sovereign members of international society, non-European states were partial members. Although they had no legal personality, they were capable of entering into treaties insofar as they were recognized by European states. Rules governing recognition and the conditions under which quasi-sovereigns could enter into treaties were developed. Differentiations emerged between Asian and African states. The former were regarded as having the necessary capacity to understand the treaties to which they entered and as a result were recognized as quasi-sovereigns. African tribes, however, could not transfer their sovereignty because, according to nineteenth-century jurist Westlake, they were incapable of understanding the concept of sovereignty. Accordingly, different rules developed on the basis of the private law of property to govern the acquisition of territory, including discovery, occupation, conquest, and cession.[5] Their application depended in part on how much sovereignty or autonomy a people or country was considered "capable" of holding. For example, the sovereignty of a European state could only be affected by *conquest*. In

sharp contrast, if a territory were inhabited by a tribal people, who were not subject to international law, *mere occupation* was enough to establish property rights for the occupier on the grounds that the territory constituted *terra nullius* or unoccupied territory, as noted above (Anaya 2004, 29). If the tribal people were deemed politically organized, however, title, and thus rights over land could only be established through something more than mere occupation, as in *conquest* or *cession*. Anghie (1999, 51) observes that each "of these doctrines relied upon different notions of native personality, as the particular means of asserting title depended upon the positivist assessment of the degree of civilization of the peoples occupying the land."

In this vein, the Asian empires were higher on the sovereignty pole, being regarded as capable of meeting European standards of civilization. In these instances, *treaties of capitulation* were imposed, giving Europeans special rights and jurisdiction over their own nationals while in these states. *Protectorates* were an additional legal category developed to partially incorporate non-European states into the family of nations towards the end of the nineteenth century. The European state would acquire complete control over the external relations of the protectorate, while in theory the protectorate was to retain domestic control, which is what differentiated it from a colony. Despite these rules, jurists were still prepared to recognize exceptions to this general rule when "uncivilized nations" required assistance in the maintenance of good government. Over time, the distinction between a colony and a protectorate disappeared as European states deepened their controls over non-European peoples.

In summary, different legal mechanisms resulted in differential inclusion of peoples in international law with variable sets of property rights and claims to autonomy through the extension of economic, political, and legal imperialism. The picture presented of nineteenth-century international law illustrates the development of legal subjectivity through the exclusion of non-Europeans from law's empire and their differential reinclusion through racialized legal categories. Racialized legal categories are categories that confer identity, subjectivity, and autonomy depending upon differential assessments of the degree of civilization and humanity possessed by a race. This assessment resulted in a fundamentally different form of sovereignty for Europeans and non-Europeans and Indigenous peoples as international law's reach extended beyond Europe. This differential treatment persists today, although the development of international human rights law has muted the influence of racial discrimination through law. However, differential legal capacities persist and in some cases are intensified and deepened through the globalization of capitalist legal forms under the new constitutionalism. The new constitutionalism extends special rights and protections to some non-state entities, such as transnational corporations, but continues to reproduce statist barriers to claims to legal subjectivity and autonomy coming from non-state entities, such as individuals and Indigenous peoples.

<1>Globalization of International Law, Imperialism, and the New Constitutionalism

As mentioned earlier, the globalization of international law is an important element of the "new imperialism" that is knitting the world together and disciplining societies which Stephen Gill (2008) insightfully characterizes as the "new constitutionalism." Both its neoliberal economic logic and its neo-conservative politico-strategic logic are responding to a crisis of capital over-accumulation and the need to find what David Harvey (2003) refers to as spatio-temporal fixes to absorb capital and labour surpluses. Neo-liberal logic solves the problem by facilitating capital accumulation through dispossession and the assignment of property rights as progressively more peoples, places, and spaces are opened up to capitalist exploitation. Neo-

conservative logic lends coercive support by providing the political and military infrastructure to secure capital expansion and dispossession.

I have argued that non-state entities, such as individuals and Indigenous peoples, existed historically, both analytically and materially, as dispossessed "objects" on the periphery of the international legal order. The movement to sovereignty discussed above, while putatively an embodiment of international law's universalizing, civilizing, and rationalizing impulses, may be seen more critically as a highly particularized and racialized movement. And it continues to haunt the articulation of indigenous claims to autonomy, identity, and subjectivity under international law. Indeed, a better view approaches exclusion and re-inclusion as forming a continuing dialectical relationship under international law, a relationship powerfully characterized as one of continuing "irresolution" (Tully 2000, 40).[6] In contemporary times, international law continues to articulate a political economy and society premised upon the exclusion and re-inclusion of significant non-state entities under highly privatized and exclusive regimes of accumulation through dispossession. International law, in this way, continues to encode the cultural and material values and private property rights associated with international society, as framed by the European family of nations. But at the same time, the development of international human rights doctrines, the global emergence of a pan-Indigenous peoples' movement, and global institutions recognizing indigenous claims hold out the promise of enhanced indigenous autonomy and global citizenship (see Larson *et. al.*, 2008). Indeed, there is a continuing intersection, internationally, of conflict over identity/autonomy and conflict over property rights, which reflects the homology of the legal form and the economic or commodity form of global capitalism (Cutler 2003 and 2005b; Balbus 1977; d'Errico 1996/97).[7] International legal forms both reflect and constitute the mode of production of global capitalism by regulating subjectivity through the empowerment or interpellation of specific entities as legal "subjects" and the identification of specific interests as actionable legal rights (Cutler 2009, 2010). International law reveals and isolates the tendency of state sovereignty and processes of capitalist accumulation and production to configure and reconfigure legal personality/identity as a type of sovereignty and as a form of property. In fact, sovereignty and property regimes are "complementary in the process of capital accumulation" in that "both work together in the commodification of life-forms" (Çoban 2004, 755).

Under international law, the state provides a site for the articulation and enforcement of rules about sovereignty, social identities, subjectivities, property rights and the organization of labour. While states undergo significant transformation relating to conditions associated with globalization, they continue to be privileged by legal regimes that accord them sovereign authority and control over social and economic development and commercial laws that privilege corporate property rights. In contrast, many non-state entities are marginalized by these sovereignty and property regimes, constituted as they are through the legal dialectic of exclusion and re-inclusion, in some cases as racialized and objectified entities. Moreover, significant elements of identity are framed by the commodity form of law, as commodified identities. The commodity form of law is the specific legal form that property rights take under the new constitutionalism, in that predominantly those interests that can be bought and sold in the market as a commodity are recognized as protected property rights.[8] The operation of the commodity form of law as the juridical correlative to contemporary global capitalist structures of accumulation is visible in the framing of the right to self-determination of Indigenous peoples under international law. However, before examining the development of this right, further discussion of the new constitutionalism and the commodity form of law is in order.

As mentioned above, the new constitutionalism refers to the uneven emergence of a de facto constitutional structure for the global political economy. This development has largely coincided with the global expansion of capitalism since the 1980sand the pursuit over the past few decades by many states and associations of neo-liberal policies and constitutional reforms, both domestically and globally. The new constitutionalism is further reflected in a proliferation of neo-liberal trade and investment frameworks, such as the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO), and in legal and institutional changes in macroeconomic policy, exemplified by politically independent central banks and currency boards. Changes in public service provision involving the privatization of education, healthcare and many other aspects of life are linked to new liberal trade and investment frameworks and treaties, such as the General Agreement on Trade in Services (GATS) (Cutler 2008a, 2010) and the emerging intellectual property regime (Sell 2003) and are subordinated to the demands and regulatory power of transnational business corporations (Cutler 2009). The new constitutionalism increasingly informs bilateral and multilateral trade and investment agreements, and other economic, social and environmental policy frameworks (Schneiderman 2004). It is redefining politics and governance globally and, in the terminology of the World Bank, involves "locking in" states to neo-liberal frameworks of capital accumulation (World Bank, 2002). The new constitutionalism is increasingly significant in shaping global public policy, in ways that may have long-term effects on the ontological and epistemological bases of constitutionalism, as well as more broadly on institutions of social reproduction associated with public services, care and education (Bakker and Gill, 2003). In this regard, it provides the template for contemporary economic, social, and political regulation; it is the legal rendering of economic constitutionalism. Economic constitutionalism means the acceptance by society of the expansion of commodification through legal protection of private property rights as natural, common sensical, and rational modes of governance that serve the common interests of all, both the governors and governed. Private appropriation becomes constitutionalized through law and state as a public good. Through economic constitutionalism, the communal protection of private property rights becomes a natural and organic accompaniment of global production and exchange (Cutler 2005b).

What is novel in the contemporary period is the globalization of new types of exclusion through the enclosure and privatization of more forms of common property and the hardening of global regimes of accumulation by dispossession. In these processes, the analytical and theoretical foundations of international law work with neoliberal constitutionalism and the commodity form of law to configure important dimensions of indigenous autonomy, not as inherent human rights to self-determination, but as commodified property rights, mediated by state sovereignty. Indeed, Indigenous peoples have had difficulty in "inserting" themselves into international law "as a category" because they are not states; they lack international legal personality as "subjects" and thus do not have legal standing to assert claims. Nor do they possess unmediated rights of access to and standing in international legal tribunals and they are not regarded as legitimate participants in multilateral treaty negotiations (Koivurova 2008, 3).

The inability of non-state entities, such as individuals, to claim the protection of international human rights laws against states has been a major barrier to the development of international human rights and was the reason that the Optional Protocol to the International Covenant on Civil and Political Rights was developed. The Optional Protocol provides an individual situated within a state that is party to the Covenant and the Optional Protocol to assert a human rights complaint against that state by petitioning the Human Rights Committee (HRC)

established under the Covenant (Higgins 1985). However, the HRC has interpreted the right of access to be limited to individuals, and not to collectivities. This interpretation has made it an awkward point of legal access for groups, such as Indigenous peoples, and has conditioned the legal form in which indigenous autonomy claims have evolved under international law. To illustrate, Article 1 of the Covenant on Civil and Political Rights provides that "[a]ll peoples have the right of self-determination" to "freely determine their political status and freely pursue their economic, social, and cultural development." In a number of cases brought by Indigenous peoples under this provision, through the Optional Protocol, the HRC stated that it could not hear a complaint brought by a collectivity. However, in the *Lubicon Lake Band* case and in a series of cases that followed,[9] the HRC allowed the petition to proceed, recasting it as a submission of the Chief of the Band on behalf of the collective, not under Article 1 of the Covenant, but, significantly, under article 27 providing for the protection of minorities cultural, religious, and language rights (Koivurova 2008, 5). This interpretation was crucial in recasting indigenous autonomy claims as *cultural* claims, a matter examined more closely below.

In addition, the statist ontology and racialized differentiations of international law do not extend the right of national self-determination to non-state entities or to Indigenous peoples, but limit this right to nations emerging to statehood from former colonial settings. The "Salt Water Thesis," articulated by the United Nations General Assembly, set limits on decolonization by limiting the right of national self-determination to only those territories separated by water from the colonial power (Anghie 1999, 76; Koivurova 2008). Insofar as self-determination is recognized for Indigenous peoples, it takes the form of self-governance arrangements *within the existing territorial borders of the state*. This position is adopted by three of the most significant international processes addressing the right to self-determination of Indigenous peoples: The United Nations Declaration on the Rights of Indigenous Peoples, the Nordic Saami Draft Convention, and the practices of the HRC in interpreting provisions relating to self-determination in the International Covenant on Civil and Political Rights, mentioned above. It is instructive that in adopting the United Nations Declaration on the Rights of Indigenous Peoples, four states opposed the final vote (USA, Australia, Canada, and New Zealand) because they feared its terms would compromise their sovereignty and potentially lead to the political and territorial fragmentation of their states.[10] Byrd and Heyer (2008, 2) observe that the fact that "these four countries, whose origins are rooted in British colonialism and imperialism, continue to oppose indigenous peoples' recognition and rights within international forums demonstrates the degree to which issues of indigenous governance, sovereignty, and self-determination remain troubled and troubling sites of disruption to the nation-state." Indeed, Koivurova (2008, 18) similarly concludes that "[I]t seems very difficult indeed to convince states that indigenous peoples should (re)gain their self-determination."[11]

As a consequence of the statist ontology of international law, the claims of Indigenous peoples to autonomy and recognition under international law have not been able to proceed as claims to political and territorial, national self-determination or as holistic conceptions of a right to indigenous development. Rather, they have emerged as claims to protected cultures, traditional knowledge, and ways of life. As Byrd and Heyer (2008, 3) observe "indigenous sovereignty is continually recast as cultural rather than political and territorial self-determination." Similarly, Larson *et. al*, (2008) note that the Japanese policy of defining Ainu issues as "cultural matters" "has kept Ainu claims to land rights, economic rights, and political rights off the national agenda." This separation of political autonomy from cultural autonomy is directly attributable to the statist analytical foundation of international law that reserves legal

subjectivity for states, and the tendency flowing from the HRC interpretation of the Optional Protocol to recast self-determination claims as cultural claims. As a consequence, Indigenous peoples' claims to self-determination have generally proceeded through the legal forms provided for peoples and collectivities through the prism of cultural rights. Accordingly, Holder (2008, 15) observes that Indigenous peoples' "cultural rights can be fully understood only against the background of a fundamental and persistent denial of indigenous peoples' basic right to self-determination."

Moreover, Holder (2008, 8; 10) notes that, historically, international legal documents treated "culture" as a "thing" or an "object" or commodity to be owned, possessed, used, bought and sold and conceived of "as rights of access and consumption." She adds, "there is a tendency to treat culture as a type of good – as an object or a state of affairs, valuable for its potential to be consumed, experienced or used," rather than as an activity to be enhanced and preserved.[12] Although Holder (2008, 11-12) argues that this tendency has been valuable in protecting some indigenous rights of access to and control over ancestral lands and resources, it is also problematic because it tends to treat cultural rights as less fundamental than other human rights, such as freedom of speech or freedom from torture. Moreover, it "places important limits on the extent to which non-state groups can challenge state activities that threaten their continuing ability to live as a people" because it "sets a very high threshold for the impact that decision making must have on a group's way of life before it constitutes a human rights violation" (Holder 2008, 13). Holder illustrates this tendency with examples of judicial failures to protect indigenous lands from logging and to protect Maori fishing rights.

In addition, by directing attention to the criteria of cultural impact and results, attention is diverted from the formation of deeper, holistic conceptualizations of indigenous autonomy which recognize a right to indigenous, self-determined, development (Gibbs 2005; Loomis 2000).[13] There is a tendency in adopting the discourse of rights to advance indigenous self-determination through legal forms that are limited by their Western epistemology and ontology, which employ Lockean conceptions of property,and commodity fetishism that privilege private rights and corporate capital.[14] This orientation neglects deeper ecological and philosophical issues of sustainable development, food security, and community renewal due, in part, to the separation of "questions of homelands and natural resources from those of political/legal recognition of a limited indigenous autonomy within the existing framework of the host state(s)" (Corntassel 2008, 107). Corntassel (2008, 109) identifies significant limitations posed to indigenous autonomy by these tendencies and proposes an alternate conception of "sustainable self-determination" as "a credible benchmark for future indigenous political mobilization."

That rights discourse tends to frame indigenous autonomy in terms of enforceable (i.e. commodified) private property rights and not inherent, natural, or communal rights to self-determining development is also relevant to the emerging global intellectual property regime (May 2000; see chapter by Lanoszka in this volume for elaboration).[15] This regime reveals "tensions between North and South in ownership and control of natural resources" and "between the growth of a market-based culture and a communitarian, gift-based culture" that have important implication for indigenous autonomy (Ghosh 2003-2004, 497). The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the United Nations Framework Convention of Biological Diversity (CBD), and the World Intellectual Property Organizations's work on intellectual property, genetic resources, traditional knowledge, and folklore signal a transition from international to global regulation, albeit enforcement remains with the state. This new global intellectual property regime enables the creation and expansion of

opportunities to commodify and market non-material sources of wealth (Cutler 2002b, 2005b), with the assistance of biotechnology and globalized knowledge and information technology. The commodification of genetic materials (Barsh 2003-2004), germplasm (Aoki 2003-2004), sacred traditional knowledge (Gervais 2003-2004), and folkeore (Austin 2003-2004) expose "a series of fault-lines dividing the technology-rich industrialized countries located primarily in the temperate zone of the Northern hemisphere, and the biodiversity-rich developing countries located primarily in the tropics and Southern Hemisphere" (McManis 2003-2004). In this regard, the economic significance of the capacity to appropriate traditional or indigenous knowledge is profound. It is estimated that the annual market value of medicinal products derived by pharmaceutical companies under protected intellectual property rights (IPRs) from the traditional healing practices of Indigenous peoples in the tropical rain forests is more than $32 billion, while 25 percent of American prescription drugs come from such plants (Oguamanam 2004, 140). The patenting of genetic resources and knowledge obtained from Indigenous peoples in developing countries has occurred largely without their knowledge or consent, a process highly reminiscent of the dispossession of land in previous centuries (see Aoki 2003-2004). Just as the international law relating to title to land was incompatible with customary, communal holdings, many question the conceptual, theoretical, and functional propriety of addressing Indigenous autonomy through the prism of intellectual property rights (Gervais 2003-2004; Davis 2003-2004; Graham and McJohn 2005).[16] For example, traditional knowledge is typically regarded by Indigenous peoples as community property and as such, is not subject to appropriation by any individual. The difficulty is that the community as claimant faces very practical procedural problems of establishing the natural or corporate legal personality required to legitimately claim or hold an IPR. On a more conceptual and theoretical level, postcolonial theorists question the ability to advance notions of indigenous knowledge through a language of rights derived from Western concepts and institutions (Spivak 1988; hooks 1990; see also Coombe 1999). As Briggs and Sharp (2004, 667) note, dominant approaches to traditional knowledge adopted by the World Bank and other global development organizations provide "no sense of dealing with embedded knowledges which are part of the wider world-view of the people involved, such as understandings of social justice, gender relations, familial responsibility, and so on." They continue (669) that some approaches to indigenous knowledge lead to a "freezing of traditional cultures and ways of knowing," as in protecting traditional knowledge by requiring Indigenous peoples to maintain traditional fishing, resource use, or conservation methods.

There are also practical problems in enforcing rights over traditional knowledge, which is often passed on through oral traditions, thus is not written down in a protectable material or publishable form, and for which misappropriation is difficult to assess (Oguamanam 2004, 140). The idea that indigenous land is fungible as cash and that a claim to historic lands might be adequately settled through a monetary payment commodifies such claims and neglects losses suffered through the dispossession of a way of living and being (for an example of these processes, see Mackey, this volume). Finally, this process of commodification is being mediated by transnational corporations, suggesting that powerful corporate interests are at stake in the content to be given to indigenous culture (Macklem 2000-2001). The value flowing from international legal recognition of a cultural right is not lost on peoples aspiring to autonomy. As Coombe (1999, 268) observes, those "who can make the strongest claims to possessing culture are more internationally empowered to protest local injustices. We should not be surprised, therefore, to witness the emergence of strategic rhetorical movements to 'indigenize' culture and

to ‘culturalize’ knowledge in local articulations of sustainable development, because Indigenous peoples are those most accepted as having cultures worthy of respect and preservation.” However, she also notes the doubtful political and functional capacity of achieving this through the existing intellectual property regime.

The creation of new technologies of appropriation through the globalization of IPRs is also giving rise to new forms of sovereignty and new claims to autonomy. To the extent that indigenous claims to identity are framed as claims to traditional knowledge and “cultural property,” they are constituted as commodifiable and appropriable private property rights (Çoban 2004). The linkage of identity and property evokes images of primitive accumulation, developed by Karl Marx to describe pre-capitalist patterns of producing wealth (Harvey 2001, 304- 307; 2003, chapter 4).[17] Indigenous peoples and others on law’s periphery are not being “included” as “subjects” at all, but instead are excluded by intellectual property laws. These laws produce a commodification of important dimensions of indigenous identity, open it up to appropriation and dispossession by others, and then lock Indigenous people out by making it increasingly difficult for them to compete with corporate rights holders or to constitute recognized legal claims of right (Anghie 1999; Boyle 1996). Indigenous peoples continue then to be dispossessed and configured “objects” on law’s periphery. Indeed, Harvey (2003, 147-8) is worth quoting at length:

> Wholly new mechanisms of accumulation by dispossession have also opened up. The emphasis upon intellectual property rights in the WTO negotiations (the so-called TRIPS agreement) points to ways in which the patenting and licensing of genetic material, seed plasma, and all manner of other products can now be used against whole populations whose practices had played a crucial role in the development of those materials. Biopiracy is rampant and the pillaging of the world’s stockpile of genetic resources is now under way to the benefit of a few large pharmaceutical companies. . . . The commodification of cultural forms, histories, and intellectual creativity entails wholesale dispossessions (the music industry is notorious for the appropriation and exploitation of grassroots culture and creativity). The corporatization and privatization of hitherto public assets (such as universities), to say nothing of the wave of privatization (of water and public utilities of all kinds) that has swept the world, indicate a new wave of “enclosing the commons.”

While the rights to culture and to cultural property are being increasingly recognized in international legal documents as rights that reflect the special and intimate relationship between Indigenous peoples and their lands and the traditional knowledge deriving from that special relationship, there are real limitations to achieving or preserving cultural identity through property rights (Holder 2008; Halewood 1998-1999; Roht-Arriaza 1995-1996; O’Keefe 1998).[18] These limitations are particularly relevant when cultural recognition does not emerge as part of a protective regime oriented towards nurturing and preserving indigenous culture, but through a regime advancing commodified property rights whose functions and goals may be quite at odds with achieving indigenous autonomy: “a major goal of IP [intellectual property] is to alter, not preserve, its subject matter by encouraging innovation and thus modifications thought of as improvements, to existing inventive and expressive works” (Davis 2003-2004, 817). As Coombe (1999, 263) observes the “cultural logic of intellectual property law entrenches a European colonial worldview in which individuals (including corporations) lay claim to intellectual

properties by means of deploying genius and innovation to transform resources, information and ideas into 'expresssions' or 'inventions' which can be protected as 'works' of intellectual property. Nature is transformed into culture by such processes of human creativity, and such 'works' are encouraged as contributions to 'progress' in the arts and sciences."

Commodified identity formation thus becomes integral to common sense understandings of Indigenous peoples and to the framing important dimensions of indigeneity under international law.[19] What appears on its face to be an exciting opportunity for emancipatory politics and the inclusion of Indigenous peoples as "subjects" of international law, in fact, constitutes their further objectification. Their collective identity as peoples and their rights to culture are filtered through the lenses of property rights that are difficult for them to acquire or enforce. International law facilitates the global expansion of capitalism and accumulation through dispossession through a globalized, exclusive, individualized, and privatized intellectual property regime that is most inhospitable to the recognition of indigenous collective identity.

<1>Resistance in the Periphery

The globalization of international law gives rise to tensions between local and global politico-legal orders, which raise questions about the potential for resistance at the local level where hegemonic laws favour appropriation and dispossession, and where common sense understandings about power and authority may be challenged.[20] Resistance and contestation are thus linked to the dialectical operation of law as a mediator of local and global political economies and societies (Cutler 2003, 2005a). Gramscian political economy teaches that counter-hegemony involves "wars of movement" and "wars of position" (Gramsci 1971, 104-9; 229-32. See generally Amoore 2005). The former involve direct and open action against the dominant group or state, whereas the latter contemplates non-violent forms of resistance. The latter is also associated with "passive revolution" or revolution from above (Chin and Mittelman 1997) and the important concept of "*trasformismo*." *Trasformismo* (Gramsci 1971, 58-9) is the process by which opposition and resistance to hegemony is absorbed into the dominant ideology, resulting in the "decapitation" and "annihilation" of the opposition. The adoption of non-binding declarations, such as the UN Declaration on the Rights of Indigenous Peoples, rather than the adoption of binding multilateral treaties, is an illustration of *trasformismo.* For non-binding declarations generate the appearance of legality and obscure the unchanging power relations structuring indigenous autonomy. So too is the global promulgation of private, non-binding codes of corporate conduct and "soft" legal disciplines intended to foster corporate social, labour, environmental or human rights responsibilities through voluntary self-regulation, an example of *trasformismo*.[21] Soft law is promoted as the efficient and rational means for humanizing globalization, but this mythology conceals its nature as a safety valve for capital (Cutler 2005b). Similarly, hard legal disciplines enforcing private property rights in the trade, investment, financial, and intellectual property regimes purport to create an equal playing field for all, but through the concealing and commodifying moves of law constitutionalize private regimes of accumulation.

The most acute example may be found in the interface of indigenous identity claims and the intellectual property regime where *trasformismo* is reframing collective rights into commodified private property rights subject to dispossession through hard legal disciplines (see Mollett and Mackey in this volume). Indeed, the acceptance of neoliberal market discipline in the idea that indigenous autonomy, cultural rights, biodiversity, and sustainable development are best achieved and protected through intellectual property rights informs "a new global bargain or

transnational contract" whereby the "'Northern We' now values 'Southern others' for maintaining cultural diversity because 'their' cultural difference ensures 'our' biodiversity" (Coombe 1999, 2680). The idea that the intellectual property regime generates the sort of market-based incentive structures necessary and adequate for indigenous governance and is able to generate sustainability and preserve biodiversity, as promoted by liberal theories of economics and political economy,[22] is an integral dimension of *trasformismo*. Governance through property plays directly into the hands of hegemonic corporate laws and institutions. It is no accident that the movement to commodify and regulate germplasm through intellectual property rights occurred with the development of the relevant technology by the seed industry and the concentration of the industrial sector dominated by transnational agrichemical and bio-tech corporations, such as Monsanto, Novartis, Ciba-Geigy, and DuPont (Aoki 2003-2004, 303). It is also no accident that these and other transnational corporations control the content of the emerging global intellectual property regime (Sell 2003). As noted by Graham and McJohn (2005, 316) "[i]ntellectual property law has been expanded for corporate interests in a number of sweeping ways…. Indigenous interests have hardly received the sort of attention that corporate interests have" (see too Cutler 2009).

Aoki (2003-2004) describes the legal regime governing patentable germplasm as the "apotheosis of germplasm as a commodity - the means of (re)production have now been separated from the commodity," for it separates the farmer from legal ownership of the seed he farms.[23] The implications of this for indigenous autonomy are great. Far from ensuring biodiversity, the intellectual property regime is producing "genetic erosion" in the developing world and "genetic vulnerability" in the developed world as genetic uniformity emerges due to the introduction of proprietary varieties and the increasing vulnerability of these to new disease sand threats (Aoki 2003-2004, 306-7). The situation is further complicated by distinctions between natural resources and artefacts that form part of the "common heritage of mankind" and are therefore not protectable by patents or copyright. These are free to appropriation by all and sundry, including transnational corporations who profit through their collection and use. There is a real asymmetry when supposedly "primitive" plant germplasm is legally constituted as the "common heritage" of (hu)mankind, whereby the genetic materials may be freely appropriated by large corporations in the developed world where they are researched, developed, patented, and sold at a premium. The possibility of indigenous dispossession through "gene piracy" was a very live issue in negotiations over biodiversity and traditional knowledge and has generated deep angst about the ability of intellectual property laws to function in a remedial way (McManis 2003-2004, 548; Harding 2003-2004).[24]

The relationship between Indigenous peoples and transnational corporations is paradoxical. Today, neither Indigenous peoples nor transnational corporations are recognized as "subjects" under international law. Both are "objects," but with widely and wildly different powers. Without being formally recognized as "subjects" of international law, transnational corporations have configured themselves as "objects" and as "subjects" simultaneously, deftly managing the boundaries of international legality. Transnational corporations are actively involved in activities that bear directly on the autonomy and property of Indigenous peoples, but by virtue of their "invisibility" under international law (Johns 1994; Cutler 2003) they remain unaccountable. As McLean (2003, 376) observes, "[d]epending on the circumstances, the absence of legal personality can be a marker of both power and relative powerlessness. In fact, some collectivities, which exhibit enormous power, do not enjoy legal status. The WTO, for

example, has no legal personality (as protestors found when they attempted to sue it). Lack of legal status can render a group above the law.…"

There is growing recognition that pitting the "rights of traditional knowledge holders with the rights of Western companies" "is not a fruitful way of framing the discussion," because it "polarizes the positions without adequately resolving the underlying questions of markets, ownership and control" (Ghosh 2003-2004, 501). But, one really must question the functional capacity and political legitimacy of addressing indigenous autonomy through the intellectual property regime (Davis 2003-2004; Heald 2003-2004). As Davis (2003-2004, 829) cautions, "the solution is certainly not more IP [intellectual property], but to repeal TRIPS…. To suggest that the language of IP offers a remedy, when it is the language of IP that causes its poverty and misery is to trap indigenism into legitimizing the source of its tragic misery."

Transnational corporations and their laws continue to mediate indigenous autonomy (Macklem 2000-2001). For example, in British Columbia, licenses granted by the government to the transnational forest company, Interfor, to log areas claimed as spiritual lands by the Kikatla First Nation pitted indigenous rights against the property rights of a powerful transnational forest company. In Nicaragua, the Indigenous peoples, Awas Tingni, claim forest granted under a timber concession by the government to the Korean corporation Solcarsa. In both cases, indigenous claims, rights, and property were mediated by corporate property rights granted by the state -- the very same state that stands in way of indigenous legal subjectivity. As a result, as "objects" on law's periphery, the indigenous identity continues to be mediated by corporate and statist influences on particularized, partial, and racialized terms that work dispossessions of both culture and property. However, dispossession is no longer affected under doctrines of dispossession, such as *res nullius* and discovery, but under the granting by governments to corporations of leases and concessions to forestry, land, fisheries, mineral, and development rights. To the extent that such grants are made to transnational corporations, governments are participating in the delocalization and diminution of indigenous and local autonomy.[25]

The inadequacy of international legal protections for Indigenous peoples has generated legal challenges to the operations of transnational corporations under domestic and regional systems of law. The Awas Tingni successfully challenged the corporation in the Inter-American Court of Human Rights, which found that Nicaragua violated the indigenous community's right to property over their ancestral lands. In Canada and Australia, a number of very high profile cases articulated principles that are building a body of jurisprudence, recognizing significant indigenous rights.[26] Extra-legal efforts include those of groups working to establish alternative localized regimes in the form of community-based intellectual property rights and resource rights regimes. Such groups are the Indian NGO Gene Campaign, the Third World Network, GRAIN, the Research Foundation for Science, Technology and Ecology, and the International Cooperative Biodiversity Groups Program (ICBG). [27]

Dissatisfaction amongst the world's Indigenous peoples with the new constitutionalism and neoliberal economic discipline has generated an Indigenous renaissance over the past decades. Examples of indigenous "revitalization" may be found in Bolivia, Ecuador, and elsewhere in Latin America (Fenelon and Murguia 2008). Maori resistance in New Zealand (Gibbs 2005; Austin 2003-2004), Lakota, Navajo and Wampanoag resistance in the US, Zaputec and Zapatista-led Mayan resistance in Mexico, and Adivasi resistance in India are just a few examples of indigenous mobilization (Fenelon and Hall 2008). In these cases, as Fenelon and Hall (2008, 1869) note, some of the "most significant forms of resistance are the various ways that resources are managed collectively for the communal good, and not solely as conventional

'public goods'." Rather, the objective "goes deeper than collective ownership of goods," for there is a rejection of satisfying indigenous autonomy through commodification (Fenelon and Hall 2008, 1870). The refusal of the Lakota peoples to accept monetary compensation for land they claim as sacred in the Black Hills, which they insist must be returned, illustrates this form of refusal.

Organizations dealing with indigenous issues, such as Cultural Survival International Working Group on Indigenous Affairs, the Center for World Indigenous Studies, and the United Nations Working Group on Indigenous Populations are assisting in providing sites to support collective approaches, resistance, and political participation (Fenelon and Hall 2008, 1871). Many Indigenous peoples have benefited significantly from these transnational networks. For example, the Ainu, who are not recognized as Indigenous peoples by the Japanese state, have gained significant support and legitimacy for their claim to recognition through the transnational indigenous peoples' movement (Larson et. al. 2008). Similarly, Indigenous peoples in Indonesia have been able to "deploy indigenous identity as a strategy in their claim over land and natural resources," while indigenous identity is evoked in claims over cultural goods in China, where indigenous peoples are not recognized (Aiku and Spencer 2007, 6).

In fact, Indigenous peoples have made some advances in gaining enhanced legal status in international society. Their legal personality as distinct societies with special collective rights and a distinct role in national and international decision making is gaining recognition. The International Labour Organization (Convention 169) recognizes Indigenous peoples' right to self-government. However, it is a right of internal self-government and not of secession in that it recognizes a collective right to participate in the state's internal decision making. This is also the situation with the UN Declaration on the Rights of Indigenous Peoples, as discussed earlier. The Earth Summit in Rio de Janiero (1992) recognizes the Indigenous peoples' right to environmental security -- again a right articulated within the context of the state, contemplating for instance special land and development controls. 1992 was celebrated as the International Year of the World's Indigenous Peoples, while the UN General Assembly proclaimed a Decade of the World's Indigenous Peoples. In promoting these developments, Indigenous peoples are also demanding fuller representation in the UN system, in the World Bank and in other assorted multilateral and regional fora. However, international legal doctrine is slow to recognize this enhanced profile (Barsh 1994). It continues to differentiate between the rights of Indigenous peoples and the rights of "other peoples," such as colonized peoples. The international legal right to self-determination is being withheld from Indigenous peoples, as appropriate only for peoples emerging from colonialism. To the extent that Indigenous self-government is being recognized as a legal right, it must be exercised within the confines of an existing state. The explicit recognition of an unqualified right of Indigenous peoples to self-determination, thus, remains elusive. Recognition as "peoples" under the United Nations Charter would establish that Indigenous peoples are members of international society possessing legal personality under international law, but states have consistently resisted this recognition.

Other chapters in this volume show that there is increasing evidence of subordinate groups organizing and expressing their opposition to privatized legal regimes, which may construct an alternative counter-hegemony. Resistance to the intellectual property regime is mounting in India, Malaysia, Nepal, Indonesia, Thailand, Sri Lanka, Bangladesh, and the Philippines, as well as in Nigeria, where Indigenous peoples are organizing and demanding compensation and remedies for rights dispossessed by transnational mining, logging, pharmaceutical, and oil corporations (see Bengwayan 2003; Obi 2000). Other examples of local

resistance to the globalization of neo-liberal market civilization are found in the mobilization of labour in Asia and Latin America (Schmidt 2000; Stevis and Boswell 2000), and in Mexico and North America (Morton 2000; Pieterse 2000), challenges by citizen groups in Canada and the United States to corporate taxation laws and policies that shift tax burdens to individuals (Thomas 2000), Islamic social movements (Pasha 2000), opposition to structural adjustment policies in Bangladesh and Zimbabwe (MacLean, Quadir, and Shaw 2000), and civil society mobilization in the anti-globalization protests in Seattle during the WTO ministerial conference in 1999. These are indications of fractures in the discipline of neo-liberal economic law and the commodity form of capitalism.

Mark Rupert (2000, chapter 7) cautions that right-wing populist opposition to neo-liberal discipline in the United States has been recognized and is generating *trasformismo* in the form of efforts by world leaders and international organizations to "sustain globalization" by giving it a "human face." He also notes (Ibid., 153), however, that "[r]esistance to globalization has opened up possibilities for new forms of political practice which are not circumscribed by the territorial state or by the conventional separation of politics from the economy." Indeed, Oguamanam (2004, 166) argues that globalization has empowered Indigenous peoples, because it "generates increased consciousness of cultural membership and identity. "Indigenous renaissance and its impact on boosting various forms of cultural emancipation are incidences of globalization. In fostering homogenization, globalization also engenders resistance to domination and cultural appropriation, which the integration initiative symbolizes. Cultural preservation and expression are platforms for resisting domination." Oguamanam (Ibid., 152-3) identifies proliferating conferences, workshops, resolutions, and declarations, such as the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples as evidence of a growing solidarity amongst Indigenous peoples.

Indigenous resistance is facilitated by the growing global network and strategic alliances of indigenous groups who are challenging the conventional intellectual property law regime (Coombe 2001, 278). There is a growing movement amongst Indigenous peoples and international organizations, such as the World Intellectual Property Organization and operations pursuant to the Convention on Biological Diversity, to catalogue and develop localized *sui generis* intellectual property law regimes (see also Coleman and Reed, this volume). Some derive from customary laws and tribal rituals and provide protections for community held property, collective rights, and in some cases, comprehensive local biodiversity legislation (Oguamanam 2004; McManis 2003).

However, there is also growing recognition that the rights-based approach to indigenous autonomy has profound limitations. Loomis (2000) argues that a new epistemology is required to create new governance structures that incorporate holistic, self-determined development for Indigenous peoples. The poverty of governance through property is echoed by Corntassel (2008) in assessing the Nisga's Final Agreement in the British Columbia Treaty Process, which effectively extinguished indigenous rights for a cash payment affording little promise of cultural sustainability as a people. Johnson (2008, 31) speaks of indigenous self-determination in "third spaces," "outside of the hegemonic control of the settler-state" and created through bicultural and binational partnerships between Indigenous peoples and states. Theses spaces are "holes in the fabric of the state that sit outside of this binary relationship [between the settler and the colonized]," which Johnson (31) argues are transforming the meaning of citizenship in New Zealand.

Holder (2008) positively notes the emergence of a different approach to culture that is having some impact on state practices. This approach treats culture, not as a noun or a good to be owned, bought, or sold, but as an activity to be enhanced, nurtured, and preserved, and is evident in recent international documents and interpretations addressing the cultural heritage of Indigenous peoples. However, only time will tell whether local assertions of indigenous autonomy will succeed in disrupting the trend of conventional IPRs and rights-discourse to embed globalized legal disciplines in localized practices and laws. Their existence, however, does suggest crucial openings at both the local and global levels for resisting the globalization of law.

While Cox (1993, 65) instructs that "the task of changing world order begins with the long laborious effort to build new historic blocs within national boundaries," this examination of Indigenous peoples and international law suggests a significant dialectic operating between local and global political economies and civil societies that provides openings for contestation and resistance.

[1] See Cutler (2003, chapters 2 and 3) for different theorizations of the role of law in the global political economy and see Hunt (1993) for discussion of constitutive theories of law.

[2] See Anghie 1999 for a full exposition of the racialized and colonial foundations of the conceptual absence of Indigenous peoples in the field of modern International Law as it took shape in the nineteenth century. For a parallel account of the colonial nature of the field of International Relations see Beier 2005.

[3] This is not to say that indigenous peoples have not been accorded rights under national legal systems of law (see Wilson 2002 and Special Issues of *Alternatives* 32 (2007) and 33 (2008) for examination of indigenous rights under various national jurisdictions), but rather that historically international law recognized their lands as *terra nullius or* as vacant lands which are open to acquisition. The doctrine of *terra nullius* was widely applied in South Africa and Australia, although it was abandoned by the Australian Supreme Court in *Mabo and Others* v. *Queensland (No. 2)* (1992) 175 CLR 1 F. C. 92/10 (see Russell 2005).

[4] See Higgins (1985, 478) for what continues to be a very useful discussion of the subject/object distinction in international law.

[5] Anghie (1999, 50, note 173) emphasizes the significance of understandings of private property law deriving from Roman law to the development of international legal conceptions governing the acquisition of property.

[6] Tully (2000, 40) refers to the "irresolution" of the colonial relation between indigenous peoples and the state, which he characterizes as "internal colonialism" to capture its temporary "as in unresolved nature:" "It is irresolution, so to speak, of the relation: a matrix of power put in place and continuously provoked by and adapted in response to the arts of resistance of indigenous peoples.…"

[7] Ikeda (2004) presents this intersection as three cycles in citizenship "participation/exclusion" that correspond to three different structures of capitalist accumulation. The "imperial subject" corresponds to sixteenth century imperialism and colonialism, the "national subject" corresponds to state-building projects of the eighteenth century, while the "corporate subject" coincidences with the current conjuncture of neoliberal globalization.

[8] Marx (1956) regarded capitalism as developing initially through processes of primitive accumulation through which producers were dispossessed of the means of production and alienated from the products of their labour, commodities, through the wage contract. Thus workers or farmers, once dispossessed of the fruits of their labour or their land were deprived of accumulating surplus value from exchange, which through the commodity system accrued to the owner. This dispossession, Marx argued, produced alienation and resulted in the fetishism of commodities whereby the commodities appeared to take on a life of their own, divorced as they were through market exchange from their human creators. For further theorization of the

commodity form of law and its application to international law, see Cutler 2005b, 2008a, and 2009 and Miéville 2008.

[9] See Anaya, 2004, 254-5 for a discussion of these cases and the HRC interpretations.

[10] The Declaration on the Rights of Indigenous Peoples was adopted only after a guarantee was secured providing that self-determination meant self-governance within the existing territorial boundaries of the state (Koivurova 2008, 19).

[11] After the Rudd government took power in Australia in 2008, that country changed its position and agreed to the Declaration.

[12] Holder (2008,10- 11) identifies this commodification of culture in a number of central international legal texts, including the UNESCO Declaration of the Principles of International Cultural Cooperation, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, and the European Charter for Regional or Minority Languages.

[13] The concept of the right to development in international law may be traced back to the Universal Declaration on Human Rights, the Charter of the United Nations, multiple United Nations General Assembly Resolutions, and finally the non-binding Declaration on the Right to Development adopted by the United Nations General Assembly in 1986. It is most interesting that international recognition of the right to development under international law has paid such little attention to Indigenous peoples, although as Gibbs (2005) notes, the application and development of the right to the Maori peoples in domestic practices in New Zealand may well have far-reaching implications. Increasingly, the right to development is being folded into the notion of sustainable development. See Loomis (2000) for analysis of the limitations on deriving a holistic conceptualization of self-determined development on the basis of the present dominant conceptualizations of sustainable development and the need for a new epistemology of development.

[14] See Cutler 2002b and 2008 for analysis of the epistemological and ontological foundations of different conceptions of property and their relation to the mode of production of capitalism.

[15] D'Ericco (1996/97, 109) develops a similar analysis of the economistic and commodified definitions of freedom and civil rights that emerged as the commerce clause was used as the constitutional legal form to realize the human rights of black peoples in the US: "The essence of commodification is the transformation of unique individuality into generic form. In this case, the uniqueness of black people's historical relation to the Constitution was transformed into the generic form of the consumer in a market economy…. The market-based civil rights in the promised land of the 'Great Society' translated human values into an abstract context. It rested on and reinforced a system of human relations in which people are subordinated to property and have 'rights' and 'freedoms' only on the basis of marketability." Moreover, as White (1986,

191) notes the dominant tendency to root the total culture in capitalist market economics results in "the greatest difficulty in reflecting the reality of human community and the value of communal institutions. Its necessary tendency seems to be to destroy the idea of public action, indeed of community itself."

[16] Increasing reliance on "private bioprospector contracts" (Roht-Arriaza 1995-1996) raises still another issue of dispossession through the imperialism of contract law, which is a vehicle for universalizing the commodity form of law.

[17] Marx (1976, 875) defines "primitive accumulation" as "nothing else than the historical process of divorcing the producer from the means of production. It appears as 'primitive' because it forms the pre-history of capital, and the mode of production corresponding to capital." He continues that "[t]he expropriation of the agricultural producer, of the peasant, from the soil is the basis of the whole process" (ibid., 876).

[18] Holder (2008, 16-17) identifies the activity-conception of culture in the following: in the interpretations adopted by the HRC concerning the use of land resources by Indigenous peoples which has influenced state practices in Argentina, Chile, and Canada; the interpretation adopted by the Inter-American Commission on Human Rights, evident in the *Awas Tingni* decision, recognizing the "close ties of indigenous peoples with land" as a fundamental basis of cultural, spiritual, and economic survival; the UN Declaration on the Rights of Indigenous Peoples.

[19] Davis (2003-2004) identifies "indigenism" or "indigeneity" as involving at least five different goals, which illustrate the extent to which indigenous autonomy is today infused by market culture: the ownership and control of cultural information, the ability to exploit and profit from the use by others of that information, the promotion and encouragement of cultural information, the protection and preservation of bio-cultural information and biodiversity, and the protection and preservation of cultural artifacts.

[20] See Amoore (2005) for a collection that provides an inspirational introduction to analyzing and theorizing resistance.

[21] See Cutler 2008b for a critical analysis of corporate social responsibility initiatives as examples of neoliberal market discipline that function to obscure corporate power and influence by neutralizing opposition.

[22] The ideological foundations of belief in governance through property is beyond the scope of this chapter, but lies at least in part in the law and economics movement, which has had a profound influence on modern law (see White 1986-1987). For champions of the governance capacities of private property law, see Graham and McJohn (2005) and Ghosh (2003-2004) and see Coombe (1999 and 1998-1999) for more nuanced support. For a classic statement of the liberal economic view concerning the efficiency of property-rights regimes in supplying common goods see Ostrom (2002); for a review of liberal political economy theories advancing the governance capacities of economic markets and corporate actors in governing through the supply of common goods, see Keohane 1984, Rittberger and Nettesheim 2008; Cutler, Haufler

and Porter 1999. For a critique of the logic of the private provision of common goods see Cutler 2002 and 2008b and see Heald 2003-2004 for an insightful analysis of the inability of neoliberal economic theory to ground indigenous autonomy claims through intellectual property rights.

[23] *Monsanto v. Schmeiser*, T-1593-98, [2001] FTC 256 is the celebrated case in commodification of germplasm.

[24] Note that the International Treaty on Plant and Genetic Resources for Food and Agriculture negotiated in the Food and Agriculture Organization abandons the "common heritage" designation and makes states responsible for exploration, conservations and sustainable development of plant resources. See Coleman and Reed, this volume.

[25] The deterritorializing and delocalizing nature of global international economic law and practice is growing even more acute through the proliferation of bilateral investment treaties that are knitting global production, investment, and trade into a seamless, delocalized web of legal transactions and dispute settlement mechanisms.

[26] See Keal (2003, 124-25) for summaries of the Australian *Mabo* case referred to above and the key Canadian cases, *Calder*, *Sparrow*, and *Delgamuukw* involving indigenous rights.

[27] The ICBG program operates as a public-private partnership involving scientists, government agencies, corporations, others engaged in agricultural research and production in projects involving work with terrestrial plants of medicinal significance. One project, the ICBG-Peru project involves a partnership with the Aguarna peoples of Peru and is reported as involving these peoples in the patenting of indigenous medicines (McManis 2003-2004).

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