

Establishing Autonomous Regimes in the Republic of China:

The Salience of International Law for Taiwan's Indigenous Peoples

STEPHEN ALLEN*

I	INTRODUCTION	160
II	THE CROSS-STRAIT DISPUTE AND ITS IMPACT ON TAIWAN'S INDIGENOUS PEOPLES	162
III	THE RESONANCE OF INDIGENOUSNESS IN THE CONTEXT OF TAIWAN	166
	The Concept of Indigenousness	166
	Asian Perspectives on Indigenous Peoples	169
	Indigenusness on Taiwan	172
IV	THE SALIENCE OF INTERNATIONAL LAW FOR TAIWAN'S INDIGENOUS PEOPLES	183
	The Land/Territorial Rights of Indigenous Peoples in International Law	183
	The Current Indigenous Land Rights Regime on Taiwan	186
	Self-Determination in International Law: Statist and Indigenous Perspectives	188
	The Status of Autonomy in International Law	195
	Autonomy and Indigenous Peoples in International Law	201

* Stephen Allen read law at the universities of Kent and Bristol before practising as a barrister in London. In 2001, he joined the Law School at Brunel University where he teaches public international law and land law. His main research interests include international law and human rights (particularly the areas of statehood, territoriality, self-determination and the rights of minorities and Indigenous peoples). He has written a number of journal articles in these areas. In addition, with Joshua Castellino, he co-wrote *Title to Territory in International Law: A Temporal Analysis* (Ashgate, 2003). He is currently working on his forthcoming book, *International Law, Autonomy and Taiwan* (Ashgate).

160	Indigenous Law Journal	Vol. 4
	The Significance of Autonomy for Taiwan's Indigenous Peoples	205
V	THE DRAFT INDIGENOUS AUTONOMY LAW	209
VI	CONCLUSION	216

Since the 17th century, Taiwan's Indigenous peoples have been ravaged by a series of Asian colonizers and their ongoing oppression has largely conditioned their present status and treatment within the Republic of China. This paper focuses on the impact successive colonial strategies have had on the Indigenous territorial base and the capacity of Indigenous peoples to protect and promote their discrete cultural identities. However, despite the continuing effects of colonialism, the restrictions imposed by the "Taiwan Question" and the hostility of Asian states to the concept of Indigenism, Taiwan's Indigenous peoples have secured constitutional recognition and a Draft Indigenous Autonomy Law has been produced, which allows for the creation of Indigenous autonomous regimes. This paper seeks to critique the draft legislation in the light of existing and emerging international law, and to assess its viability as a mechanism for the delivery of effective Indigenous rights.

I INTRODUCTION

Taiwan's Indigenous peoples are the victims of injustices perpetrated by a series of Asian colonizers that have determined their current status and treatment within the Republic of China ("ROC"). Nevertheless, they have drawn great strength from the global Indigenous movement and its impact on nascent international law, particularly through its participation in the UN Working Group on Indigenous Populations ("WGIP"), which was responsible for formulating the draft *UN Declaration on the Rights of Indigenous Peoples* (1994).¹ However, even if the draft's core elements are incorporated into a final *Declaration*, the capacity of Taiwan's Indigenous peoples to utilize such rights would be severely limited as a consequence of the cross-Taiwan Strait dispute ("Taiwan Question") between the ROC and the Peoples' Republic of China ("PRC"), which has ensured that the ROC on Taiwan presently lacks international recognition and UN membership. The ability of Taiwan's Indigenous peoples to access evolving international

1. Adopted by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res. 1994/45 (1994), UN Doc. E/CN.4/Sub.2/1994/56 at 105 [*Draft Declaration*]; see UN Doc. E/CN.4/Sub.2/1993/29/Annex I.

standards has been further hampered by the refusal of major Asian states to accept that Indigenous peoples exist on their continent.

Until recently, successive ROC governments failed to grasp changing attitudes to Indigenous peoples occasioned by the International Labour Organisation's ("ILO") *Convention 169 on Indigenous and Tribal Peoples*.² However, the recent mobilization of Taiwan's Indigenous peoples has placed Indigenous rights firmly on the ROC's mainstream political agenda. Efforts have been made to incorporate certain aspects of the evolving international framework into municipal law; a development that has been bolstered by the creation of the Council of Indigenous Peoples, which has been empowered to promote and implement laws and regulations with the aim of enhancing Indigenous rights. A significant step in this regard has been its sponsorship of the *Draft Indigenous Autonomy Law* ("DIAL"), which claims to facilitate Indigenous self-government by creating territorialized autonomous regimes. At first glance, this radical development stands in sharp relief against the troubled debates concerning self-determination and land/territorial rights that continue to confound Indigenous campaigns around the world.³ And while the original text of the *Draft Declaration* endorses an Indigenous right to autonomy, it is unclear whether this right will manifest a decisive territorial component in the final *Declaration*.⁴ Thus, despite existing outside the UN framework, the prospect of enacting domestic legislation creative of Indigenous autonomous regimes seems to place the ROC in the vanguard of the global Indigenous cause.

This paper shows that despite its initial promise, in its present form, the *DIAL* is deficient in a number of fundamental respects. In particular, the draft legislation does not manifest the potential to deliver on the assurance of Indigenous self-determination, it fails to recognize the territorial dimension of Indigenous identity in any meaningful sense and its structural controls are inadequate to safeguard the viability of any autonomous arrangements developed under its auspices. Nonetheless, it should be recalled that this is draft legislation and, as such, there is still scope for reconsideration and revision. Moreover, the *DIAL* presents Taiwan's Indigenous peoples with the opportunity of engaging with the government of the settler society that enveloped them on the development of self-determination and territoriality, and the modalities through which Indigenous rights could be realized. Consequently, this represents a rare moment for Indigenous peoples, especially in the Asian context. Although the march of Taiwan's Indigenous

2. Adopted by the 76th Session of the ILO General Conference, 27 June 1989, 1650 U.N.T.S. 383 (entered into force on 5 September 1991) [*Convention 169*].

3. This paper interprets "land rights" as realty rights and "territorial rights" as public rights that can provide the basis for governmental structures.

4. The draft is currently being scrutinized by the open-ended inter-sessional working group on the draft UN *Declaration on the Rights of Indigenous Peoples* pursuant to Res. 1995/32 of the UN Commission on Human Rights.

peoples towards self-determination through autonomous regimes has been beset by problems, it makes for an important case study. Indigenous experiences on Taiwan provide useful insights into the challenges that many Indigenous peoples face in their search for the pragmatic realization of Indigenous self-determination and the genuine accommodation of Indigenous territorial/land rights in a spirit of coexistence and reconciliation. The current *DIAL* may not constitute a good legislative model for the provision of autonomous arrangements for Indigenous peoples, but by analyzing its shortcomings, Taiwan's Indigenous peoples can divine the prerequisites of an effective legislative model. This knowledge and experience can be used to negotiate a legislative program that will meet their needs and expectations. Moreover, this process of engagement could serve as a guide for other Indigenous peoples in their search for internal territorialized regimes.

This paper is divided into six principal sections. The next section provides a brief account of the Taiwan Question in a bid to assess the ramifications for the island's Indigenous peoples. The third section discusses the concept of Indigenousness and explores its resonance for the ancient communities of Taiwan. In particular, it shows how they have satisfied the "test" of Indigenousness and how they have utilized their Indigenous status to secure constitutional recognition and a raft of domestic reforms. The fourth part examines normative developments concerning territorial/land rights, self-determination and autonomy in international law from both statist and Indigenous perspectives, while bearing in mind the limited salience of such developments in the wider Chinese context. In turn, it explores the manner in which Taiwan's Indigenous peoples can rely on existing and emerging international law to underpin their claims for municipal legal rights. In the fifth section, the paper critiques the *DIAL*, measuring it against the evolving international standards on self-determination, territoriality and autonomy in the Indigenous context in an effort to gauge its viability as a mechanism for the provision of effective Indigenous rights. The final section provides concluding remarks.

II THE CROSS-STRAIT DISPUTE AND ITS IMPACT ON TAIWAN'S INDIGENOUS PEOPLES

The position of Taiwan's Indigenous peoples cannot be fully understood without an examination of the wider context in which their claims are made. Therefore, the *DIAL* must be viewed against a complex political background, which includes the impact of the unresolved Chinese civil war between the ROC and the PRC that culminated in the exclusion of the ROC on Taiwan from formal international society and the distancing of it from international law. As a result, the ROC is not a party to key international

human rights treaties which have proved to be particularly useful in the realization of Indigenous rights in other locales. Moreover, the ROC remains vulnerable to the PRC's internationally sanctioned claim to possess *de jure* sovereignty over the island and its commitment to reunification. Due to the PRC's approach to human rights, the prospect of reunification presents serious problems for the vast majority of inhabitants of Taiwan; however, it is particularly threatening to Taiwan's Indigenous peoples since the PRC maintains that no Indigenous peoples exist within its territory (including Taiwan). Consequently, the issue of reunification has tremendous significance in the present context as it may have major implications for any autonomous regimes created pursuant to the *DIAL* and for Indigenous rights in general.

Taiwan's indeterminate international status stems from responses to territorial claims that have characterized the cross-Strait dispute: Both the ROC and the PRC remain committed to the recreation of a single Chinese state, albeit with radically opposing visions of a reunified China. The abrupt collapse of imperial China, with its regimented political structures and vast territory, ensured that the infant ROC lacked the political cohesion and popular support necessary to safeguard its early development. China soon found itself in turmoil and, ultimately, a protracted civil war was waged between nationalist and communist factions, with each side promoting different conceptions of the Chinese nation. Although the communist forces eventually emerged victorious, the defeated ROC nationalists managed to retreat to the island of Taiwan. The conclusion of the military conflict witnessed the newly installed PRC government and the decimated ROC regime maintaining their commitment to "One China" with both sides promoting their own state-sponsored brand of Chinese nationalism in a bid to ensure the realization of their vision of the Chinese nation-state. The PRC perceived Taiwan as a renegade province, an inalienable part of its territory and was committed to "liberating" the island by force. In sharp contrast, the ROC considered itself to be the sole legitimate government of all China and was equally dedicated to recapturing the Chinese mainland.⁵

From an international perspective, notwithstanding its retreat to Taiwan, the ROC retained the China seat at the UN and was widely recognized as the legitimate sovereign government of China irrespective of the *de facto* reality for the best part of 30 years. The onset of the Cold War ensured that western liberal democratic states became increasingly sympathetic to the plight of the failing ROC. However, the promise of untapped mainland markets

5. Although directly affected by the Taiwan Question, in the initial stages, neither the island's Indigenous peoples nor the Taiwanese people were in a position to influence the dynamics of the dispute. For a discussion of current interpretations of the One China principle, see S. Allen, "Recreating 'One China': Internal Self-Determination, Autonomy and the Future of Taiwan" (2003) 4 *Asia Pac. J. H.R. & L.* 21 [Allen, "Recreating 'One China'"].

ensured that this fiction could not be maintained indefinitely. During the 1960s, the rapid expansion in UN membership prompted by decolonization marked the beginning of a new era within the organization. New members in particular sought to challenge the policy objectives of its predominant powers through the forum of the General Assembly.⁶ In accordance with the spirit of decolonization—that political realities should be acknowledged and given legal effect—members lobbied for the admission of the PRC on the grounds that the international community should recognize the political reality within modern China. Matters were brought to a head with the passage of resolution 2758 which sought to seat the PRC as the sole representative of China.⁷ Although both the PRC and the ROC were committed to the One China principle, each saw their own government as the only legitimate representative of the Chinese state and, therefore, both were ideologically incapable of accepting the existence of the other or any compromise solution. Ultimately, the General Assembly supported the cause of the PRC. With its withdrawal from the UN, the ROC faced the prospect of an international decline as the international community began the process of switching diplomatic allegiance from the “de-recognized” ROC to the PRC.⁸ This process was markedly accelerated after the United States recognized the PRC to be the sole *de jure* government of China and that Taiwan is part of China.⁹

The processes that culminated in the de-recognition of the ROC government had the effect of distancing Taiwan from the evolving canon of international human rights and international law in general. Prior to de-recognition, the ROC government played a significant international role, which was reflected in its status as a founding member of the UN and a permanent member of the Security Council. It ratified the *Convention on the Prevention and Punishment of the Crime of Genocide* and the *International Convention on the Elimination of All Forms of Racial Discrimination*.¹⁰ However, while it signed the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural*

6. V.W. Wang, “All Dressed Up But Not Invited to the Party: Can Taiwan Join the United Nations Now the Cold War Is Over?” in J.M. Henckaerts, ed., *The International Legal Status of Taiwan in the New World Order: Legal and Political Considerations* (London: Kluwer Law International, 1996) 85 at 89-90 [Wang, “All Dressed Up”].

7. UN, GA Res. 2758(XXVI) (1971).

8. Technically, the ROC regime withdrew from the UN when it was clear that this resolution would be voted on: See Wang, “All Dressed Up”, *supra* note 6 at 92.

9. See the “Joint Communiqué of the United States and the PRC Government” (1979) 73 Am. J. Int’l L. 227.

10. GA Res. 260A(III), UN GAOR (1948), 78 U.N.T.S. 277 (entered into force 12 January 1951); GA Res. 2106(XX), UN GAOR (1965), 660 U.N.T.S. 195 (entered into force 4 January 1969) [ICERD].

Rights, they were never ratified.¹¹ Further, although *ILO Convention 107 on Indigenous and Tribal Populations* was signed in 1962, it too was never ratified.¹² Accordingly, at that time, the ROC's initial commitment to the international human rights project was, at best, equivocal. In any event, the process of the ROC's international de-recognition in favour of the PRC ensured that its UN treaty commitments lapsed automatically. Irrespective of questions surrounding the ROC's exact political identity,¹³ it is clearly not beyond the purview of customary international law. Indeed, in addition to continuing attempts to be readmitted to the UN, it has secured membership in the WTO and a number of regional intergovernmental organizations.¹⁴ Evidently, the ROC stands to gain legitimacy from adhering to international treaty standards even when they do not constitute customary international law. In particular, recent ROC governments have expressed their willingness to act in accordance with existing UN human rights instruments. However, while the ROC government may promote ostensible compliance with international standards within its jurisdiction, the regime is not subject to UN scrutiny through treaty- or Charter-based monitoring arrangements or ordinary UN institutional processes; therefore, the extent to which the ROC government is in fact honouring those standards cannot be directly tested by international law. As will be discussed below, another important consequence of ROC de-recognition is that Taiwan's Indigenous peoples have been denied direct access to UN fora and have to compete for international support against a background of PRC antipathy towards Indigenous rights in general.

-
11. The *International Covenants* were adopted by GA Res. 2200A(XXI), UN GAOR, UN Doc. A/6316 (1966); *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 (entered into force 23 January 1976) [ICESCR].
 12. Adopted by the 40th Session of the ILO General Conference, 26 June 1957, 328 U.N.T.S. 247 (entered into force on 2 June 1959) [*ILO Convention 107*].
 13. The ROC will be treated as being tantamount to a state for the wider doctrinal purposes of the present paper. For a detailed account of the international status of the ROC on Taiwan, see S. Allen, "Statehood, Self-Determination and the 'Taiwan Question'" (2003) 10 *Asian Y.I.L.* 191.
 14. However, given the PRC's opposition to any formal recognition of the ROC by the international community, the ROC has only been allowed to join international organizations on the proviso that it uses euphemistic names in an effort not to offend the PRC and its interpretation of the One China principle. As a result, the ROC is often referred to as "Chinese Taipei" for such purposes. In January 2002, it acceded to the WTO as the "Customs Territory of Taiwan, Penghu, Kinmen and Matsu."

III THE RESONANCE OF INDIGENOUSNESS IN THE CONTEXT OF TAIWAN

The steady exclusion of the ROC from formal international society and the consequent lack of access to internationally monitored standards have had a profoundly detrimental effect on the development of human rights in Taiwan. Against this background, this paper discusses the ways in which Taiwan's Indigenous peoples have capitalized on evolving international standards concerning Indigenous rights to improve their domestic position. Despite their lack of direct application, these standards have been used to provide the conceptual foundations of claims for recognition and rights in the municipal domain. However, if Taiwan's Indigenous peoples wish to attract the cogency and legitimacy of international standards in order to provoke domestic reform, it is imperative that they can justify their categorization as Indigenous peoples under international law. The paper endeavours to set out the "test" of Indigenousness as formulated by respected international scholars before assessing the manner in which Taiwan's Indigenous peoples have established and utilized their Indigenous status so as to acquire recognition and rights under domestic law. This section, therefore seeks to provide the necessary background for an effective critique of the *DIAL*. Moreover, the acquisition of recognition and rights constitute a prerequisite for the founding of autonomy regimes in any event.

The Concept of Indigenousness

In general, contemporary scholars have tended to eschew the formulation of definitions in favour of devising relevant criteria that can assist in the determination of Indigenousness.¹⁵ For instance, Thornberry divines four strands to Indigenousness: first, association with a particular place, thereby entrenching the idea of Indigenous peoples as territorialized communities; second, historical precedence over subsequent settler communities; third, the link between Indigenousness and Aboriginal inhabitation noted below; and

15. Although no definition of Indigenous peoples has ever been widely accepted, the *Martinez-Cobo Report* represents a well-respected attempt to capture the essence of Indigenousness:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

UN, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, para.379 [*Martinez-Cobo Report*].

fourth, the fact that Indigenous peoples usually exhibit different cultural patterns from those of the wider dominant society because they have traditionally existed outside modernity.¹⁶ Kingsbury also favours a broad and flexible conception as a means of combatting the attitudes of hostile states while, at the same time, promoting the coherence of Indigenous peoples as a recognized legal category.¹⁷ He also offers four factors, which he considers to be prerequisites to the attainment of Indigenous status: first, the Indigenous community identifies itself as a distinct ethnic group; second, it has experienced severe disruption, dislocation or exploitation; third, it can demonstrate a significant historical connection with a particular territorial unit; and finally, it wishes to retain its distinctive identity. Beyond these factors, Kingsbury posits additional criteria that are indicative of Indigenous status depending on the circumstances of a given case; these include non-dominance in the wider society, a close cultural affinity with a particular place and historical continuity with pre-colonial societies,¹⁸ socio-economic or cultural differences from dominant groups, objective ethnic characteristics and categorization as Indigenous by dominant groups. Daes also offers criteria for the purpose of determining Indigenous status: priority in time; voluntary perpetuation of their cultural distinctiveness; self-identification as Indigenous; and experience of subjugation, marginalization, dispossession, exclusion and discrimination by the dominant society.¹⁹

The element of self-identification requires some elaboration. Its value has long been acknowledged in the discourse of international human rights and article 1(3) of *Convention 169* recognized its importance as a fundamental criterion in the Indigenous context. Further, article 8 of the *Draft Declaration* seeks to strengthen and extend the principle of self-identification by holding that, “[I]ndigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as [I]ndigenous and

-
16. He also recognizes an additional criterion of self-identification: see P. Thornberry, *Indigenous Peoples and Human Rights* (Manchester: Manchester University Press, 2002) at 37-40 [Thornberry, *Indigenous Peoples*]. For a detailed account of historical perceptions of Indigenous peoples, see C. Tennant, “Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993” (1994) 16 Hum. Rts. Q. 1 at 6-24.
 17. See B. Kingsbury, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” (1998) 92 Am. J. Int’l L. 414 at 453-455.
 18. According to the *Martinez-Cobo Report*, *supra* note 15 at para. 380, “historical continuity” refers to the continuation for an extended period reaching into the present of one or more of the following factors: (a) occupation of ancestral lands, or at least part of them; (b) common ancestry with the original occupants of those lands; (c) culture in general, or in specific manifestations; (d) language; (e) residence in certain parts of the country or in certain regions of the world; and (f) other relevant factors.
 19. See UN Doc. E/CN.4/Sub.2/2000/10 (2000). Also see the procedural approach formulated in T. Makkonen, *Identity, Difference and Otherness, The Concepts of “Peoples,” “Indigenous People” and “Minority” in International Law* (Helsinki: University of Helsinki, 2000) at 51-58 and 110-136.

to be recognized as such.” Nonetheless, in practice, self-identification remains open to abuse by minority groups who cannot establish their Indigenous status by reference to the other criteria of Indigenousness, but who nonetheless seek Indigenous categorization in order to gain access to the evolving canon of Indigenous rights: if this were allowed to occur on a wide scale, it would render the category of Indigenous peoples meaningless. Therefore, in order to protect the attributes of Indigenous status, arguably, there is a need for an authoritative mechanism to validate Indigenousness from a more objective standpoint. States could not assume this role because of their strong association with colonialism, but it is conceivable that the treaty bodies could serve a useful purpose in this regard as evidenced by the decision of the Human Rights Committee in *Diergaardt v. Namibia*.²⁰ However, using treaty bodies in this way is fraught with problems: The need to establish jurisdiction and the limits of their complaint-based processes means that, from a practical perspective, they do not necessarily provide the most suitable method for regulating Indigenousness. More fundamentally, by placing great store in the decisions of a non-Indigenous body on Indigenousness, there is a serious risk of compromising the principle of self-identification. In this regard, the critical function of the Indigenous movement itself should be acknowledged; through informal regional and international channels, it constitutes the primary gatekeeper of Indigenousness, tying self-identification to wider processes of self-regulation.²¹ Finally, it is difficult to overestimate the salience of self-identification, as group consciousness is a prerequisite to the process of articulating the elements of Indigenousness outlined below.

The approaches to Indigenousness enumerated above appreciate that Indigenousness can only be determined by reference to criteria against which the Indigenous quotient of a particular community can be judged. Clearly, most communities will not be able to satisfy all criteria, but such approaches create a sliding scale of Indigenousness for the purposes of assessment. The fewer criteria a given community can satisfy, the greater the likelihood it will be labelled a minority, with a consequent diminution in the rights available to it. It is submitted that six common themes of Indigenousness can be distilled from the approaches outlined above, namely: (1) historical precedence; (2) communal attachments to a specific place; (3) experience of severe disruption, dislocation and exploitation; (4) “historical continuity”; (5) ongoing oppression/exclusion by dominant societal groups;

20. Communication No. 760/1997, UN Doc. CCPR/C/69/D/760/1997 (2000) [*Diergaardt*]. This case discussed the concept of Indigenousness in relation to the Rehoboth Baster Community of Namibia.

21. See generally, B. Burman & B. Verghese, eds., *Aspiring to Be: The Tribal/Indigenous Condition* (New Dehli: Konarck PVT, 1998).

and (6) distinct ethnic/cultural groups that identify themselves as Indigenous.

Further, it should be acknowledged that some Indigenous peoples and commentators would not accept the need for all of these criteria when determining Indigenous status. For example, those whose view of Indigenousness is predominantly based on the need to reinstate “historical sovereignty” would perhaps question an additional requirement to prove ongoing oppression/exclusion. Moreover, those who endorse *sui generis* classification primarily on the grounds of “cultural difference” would probably place less emphasis on the need for territorialized identities. Further, those whose theoretical standpoint is largely derived from the overwhelming evidence of continuing exploitation and discrimination would place greater store on the contemporary maltreatment than on arguments premised on instances of historical injustice.²² Accordingly, the common themes set out above represent an attempt to present a comprehensive view of Indigenousness that seeks to produce the widest appeal, as opposed to choosing one theory over another. Of course, these themes are only offered as indicia and, thus, the absence of one or more would not necessarily be fatal to a claim of Indigenousness if a preponderance of other criteria can be satisfied. In a subsequent subsection, these criteria will be applied in the context of Taiwan. However, before they can be applied, it is helpful to understand regional perspectives on Indigenousness as they may colour the application—and even have consequences for the ongoing validity—of these criteria in the present case.

Asian Perspectives on Indigenous Peoples

This subsection discusses the concept of Indigenousness in the Asian context; it then examines the specific views of the PRC government in this regard. Moreover, it attempts to show the barriers to securing recognition and Indigenous rights in the Chinese domain. Finally, this part acknowledges the dangers that Taiwan’s Indigenous peoples could face in the event of reunification.

The concept of Indigenous people has proved to be particularly difficult in Asia, as many Asian states do not accept that Indigenous peoples exist

22. For an overview of these theories on Indigenous rights, see D. Ivison, P. Patton & W. Sanders, “Introduction” in D. Ivison, P. Patton & W. Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 1. For a more detailed discussion, see W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford: Oxford University Press, 1999) at 120-132; S.J. Anaya, *Indigenous Peoples in International Law*, 2d ed. (New York: Oxford University Press, 2004); and S. Curry, *Indigenous Sovereignty and the Democratic Project* (Aldershot: Ashgate, 2004).

within their borders.²³ Their objections largely rest on two grounds: First, they assert that Indigenous peoples are the product of European colonialism through which European states established settler societies in the “New World” by driving Indigenous communities to the margins of their newly colonized territory. As similar patterns of colonial settlement did not generally arise in Asia, Asian states claim that the concept is peculiar to situations of European settlement and restricted to them. Second, in instances where European colonial regimes were founded in Asia, decolonization necessitated the predominance of state nationalism in order to promote the unifying strategy of “nation building,” which post-colonial states still considered to be fundamental to achieving effective governance over vast tracts of territory populated by diverse ethnic communities.²⁴ Consequently, major Asian states are unfailingly wary of legal principles or rules that threaten to fragment their territorial integrity; given that the right of self-determination constitutes a core demand of Indigenous peoples, many Asian states are reluctant to acknowledge their existence.²⁵

In particular, the PRC and India remain hostile to a liberal conception of Indigenous peoples in the Asian context.²⁶ Their position has been influenced by the notion of “salt-water” colonialism as evinced by Principle IV of General Assembly resolution 1541(XV) (1960), which defined a “non-self-governing territory” for the purposes of deciding which colonized peoples were entitled to exercise the right of self-determination pursuant to the *Colonial Declaration*,²⁷ as one that was geographically separate, and ethnically/culturally distinct from the metropolitan state administering it. This principle assisted in setting the parameters of classical colonialism by promoting the idea that colonialism was exclusively a European phenomenon. Moreover, the difficult task of identifying which segments of the state population could attract Indigenous status, given the innumerable instances of migration and absorption witnessed on the Asian continent through the millennia, has also affected the coherence of the concept in this respect.²⁸ In situations of European colonialism, the obliteration or prolonged

23. See M.C. Lãm, *At the Edge of the State: Indigenous Peoples and Self-Determination* (New York: Transnational Publishers, 2000).

24. As noted above, state nationalism has strongly influenced modern Chinese history despite the absence of formal European colonial rule.

25. On the issue of Indigenous self-determination in general, see P. Thornberry, “Self-Determination and Indigenous Peoples: Objections and Responses” in A. Pekka & M. Scheinin, eds., *Operationalizing the Rights of Indigenous Peoples to Self-Determination* (Tuku/Åbo: Åbo Akademi, 2000) 39; Anaya, *supra* note 22 at 97-184; and Lãm, *supra* note 23 at 42-84.

26. See Kingsbury, *supra* note 17 at 433-436; and R.L. Barsh, “Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immoveable Object and the Irresistible Force” (1996) 18 Hum. Rts. Q. 782 at 791-792.

27. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514(XV), UN GAOR, (1960) [*Colonial Declaration*].

28. Kingsbury, *supra* note 17 at 434-435.

oppression of pre-existing communities led to the dubious UN practice of labelling the whole non-European population “Indigenous”;²⁹ however, in Asia, questions of historical continuity have been less transparent, supporting the view that the concept has no resonance outside instances of “classical” colonialism. Clearly, states such as the PRC are reluctant to endorse a global formulation of Indigenous peoples on the grounds that, from their standpoint, the creation of a wide definition would be tantamount to the imposition of an unreconstructed Belgian Thesis.³⁰ Consequently, the PRC and other Asian states will only be prepared to accept a construction of Indigenous peoples that cannot be applied to them.³¹

The PRC does not accept that Indigenous peoples exist within its territory. It still refers to Indigenous peoples as *tuzu ren-min*, which translates to “savages” or “primitives,” a derogatory label that falls far below the outmoded standards established by *ILO Convention 107*.³² Disconcertingly, the PRC has refused to engage in the exercise of international standard setting as evidenced by its absence from the meetings of the WGIP and the inter-sessional Working Group of the UN Commission on Human Rights. While it does have a representative on the newly established Permanent Forum on Indigenous Issues,³³ given the elevated position the new body occupies in the UN hierarchy, this is largely for geopolitical reasons. And, although the PRC claims that its Minorities Commission protects minority groups, its record is open to challenge.³⁴ In response to criticisms about its “minorities” policy, it usually reiterates its brand of (Han) Chinese nationalism and the classical interpretation of self-

29. *Ibid.* at 426.

30. This Thesis asserted that the UN Charter was concerned with non-self-governing territories rather than colonialism per se; as a result, the question of self-government should be addressed to the constituent peoples of all states. Thus, if peoples within independent states were denied effective self-government, they should be granted the right of self-determination. Given Belgium’s colonial activities in the Congo, the Thesis was widely regarded as a cynical strategy designed to limit the scope of the right of self-determination by frightening existing states into refusing to condone its colonial application. See C.J. Iorns, “Indigenous Peoples and Self-Determination: Challenging State Sovereignty” (1992) 24 Case W. Res. J. Int’l L. 199 at 251-256 [Iorns, “Indigenous Peoples”].

31. The fact that the WGIP chose not to include a definition in the *Draft Declaration*, *supra* note 1, has served to fuel the debate as to the normative basis for the categorization of Indigenous peoples.

32. The Alliance of Taiwan Aborigines delegation objected to this phrase in their representations to the 11th Session of the UN WGIP (1993): See Kingsbury, *supra* note 17 at 432.

33. The creation of Permanent Forum represents a successfully realized aim of the UN International Decade of the World’s Indigenous People (1995-2004), UN GA Res. 50/157 (1995). For more information, see online: UN Permanent Forum of Indigenous Issues <<http://www.un.org/esa/socdev/unpfi/index.html>>.

34. See Z. Guobin & Y. Lingyun, “Regional Minority Autonomy in the PRC: A Preliminary Appraisal from a Historical Perspective” (2000) 7 Int’l J. on Minority and Group Rts. 39; and N. Tapp, “Minority Nationality in China: Policy and Practice” in R.H. Barnes, A. Gray & B. Kingsbury, eds., *Indigenous Peoples of Asia* (Ann Arbor: Association for Asian Studies, 1995) 195.

determination, which endorses state hegemony.³⁵ In any event, it is well known that “minorities” do not enjoy the same rights as “peoples” in international law.³⁶

Further, since the PRC maintains a claim to Taiwan, it follows that it is unwilling to recognize the existence of Indigenous peoples on the island. Although it does not exercise effective jurisdiction over Taiwan, its views on Indigenous peoples are important since they affect regional political debate on such issues. Moreover, the combination of the PRC’s interpretation of the One China principle and its disapproval of Indigenous rights has affected the ability of Taiwan’s Indigenous peoples to engage at a global level in an attempt to garner support for the realization of their rights in keeping with emerging international law. The significance of the PRC’s stance in this regard would be much more threatening if the PRC and the ROC were to reunify as this could result in the “de-recognition” of Taiwan’s Indigenous peoples and the eradication of Indigenous rights on the island. Given current cross-Strait relations, reunification seems unlikely in the near future, but the prospect of Taiwan becoming a special autonomous region of a new Chinese state in the medium term cannot be entirely discounted.³⁷

Indigeness on Taiwan

Although, unlike most Asian governments, the ROC has now recognized the status of Taiwan’s Indigenous peoples, given the wider concerns outlined above, it is necessary to establish that Indigenous peoples exist on Taiwan thereby evidencing the resonance of Indigeness in the wider Chinese context. By satisfying the “test” of Indigeness, Taiwan’s ancient communities can draw upon existing and evolving international standards to fuel their claims for specific contemporary entitlements. Accordingly, using the common themes set out above, this section shows how these communities can meet the quotient of Indigeness; in so doing, it also provides an account of the colonization of Taiwan’s Indigenous peoples.

Looking first at the two themes of *historical precedence* and *place*, the historical record suggests that Taiwan was first settled as far back as the Palaeolithic age some 15,000 years ago.³⁸ In contrast, the available evidence indicates the ancestors of Taiwan’s Indigenous peoples arrived on the island approximately 4,500–6,000 years ago. Accordingly, the ancient peoples who

35. See Michael Kryukov, “Self-Determination from Marx to Mao” (1996) 19:2 *Ethnic and Racial Studies* 352; and *Indigenous World 1996-1997* (Copenhagen: IWGIA, 1997) 157-158. The classical interpretation of self-determination is canvassed below.

36. See the section on self-determination in international law on pp. 192-200 below.

37. See Allen, “Recreating ‘One China’”, *supra* note 5.

38. This origins account draws heavily from M. Stainton, “The Politics of Taiwan’s Aboriginal Origins” in M. Rubinstein, ed., *Taiwan: A New History* (London: M.E. Sharpe, 1999) 28.

continue to occupy Taiwan were not the island's first inhabitants, a view endorsed by their own accounts.³⁹ Nevertheless, this evidence is potentially problematic. Taiwan's Indigenous peoples firmly identify themselves as Aboriginal: This term derives from *ab origine* ("from the beginning") and therefore relates to the original inhabitation of a territorial unit by a given people, whereas "Indigenous" refers, *inter alia*, to a situation where a people can demonstrate historical precedence over subsequent settler communities.⁴⁰ In this regard, historical priority is a defining quality of Indigenousness; if it can be shown that a particular people were the first inhabitants of a territorial unit, the more cogent the evidence of their Indigenous status becomes. Since, Taiwan's ancient peoples ousted the island's original inhabitants, they have no difficulty in establishing their historical precedence over subsequent (Chinese) settler communities. However, as a result, it is more accurate to refer to these communities as "Indigenous" rather than "Aboriginal."⁴¹ In any event, the principled distinction is questionable and potentially divisive since there is political cachet to be gained from claiming Aboriginal status, given that very few Indigenous peoples can indisputably assert claims of Aboriginality.

Extensive research has shown that the physical characteristics, languages and cultural practices of Taiwan's Indigenous peoples identify them as Austronesian. The predominant contemporary theory uses linguistic and archaeological studies to confirm patterns of migration from Southeast Asia during the Neolithic period.⁴² It suggests that once these ancient peoples reached Taiwan, their archaic proto-Austronesian languages evolved significantly, subsequently spreading to the Philippines, Borneo, Sulawesi and beyond. This theory promotes the image of Taiwan as an independent Austronesian homeland, a regional centre of sustained cultural development for several millennia. Given that "China" did not exist during this period, the vibrant cultural evolution occurring on Taiwan at this time cannot be connected to a latent Chinese identity, thereby reinforcing the distinct identity of the island's Indigenous peoples. Evidently, Taiwan's Indigenous peoples were well entrenched long before the period of Chinese colonization began. During this time, they scattered throughout the island and fostered their own territorial bases, thereby marking the origins of their communal

39. For instance, a founding legend of the *Saisiyat* people tells of how they drove out the original inhabitants after their arrival on Taiwan; they perform a bi-annual ceremony, the *Pasta'ay*, in celebration of this event.

40. See generally, A. Gray, "The Indigenous Movement in Asia" in Barnes, Gray & Kingsbury, *supra* note 34, 35 at 36-38.

41. The term "Indigenous" has been used wherever possible throughout this paper.

42. The "Dyen/Blust/Bellwood" hypothesis evolved between 1963 and 1991; for a more detailed account of this theory, see Staunton, *supra* note 38 at 37-41.

attachments to place, which endure despite the ravages occasioned by the forces of colonialism.⁴³

Taiwan's Indigenous peoples can evidence their *experiences of severe disruption, dislocation and exploitation*, the third theme of Indigeness, by the treatment meted out to them by a series of Asian colonizers. Before the 17th century, Taiwan was not formally part of imperial China and this period was characterized by a lack of official Chinese interest in the island. In part, Chinese disinterest derived from the hegemonic character of the "Middle Kingdom" and the innate belief of the Han Chinese in their own political and cultural superiority; any community living beyond it was regarded as barbaric and inferior. In this era, Taiwan was perceived as little more than a haven for pirates and its reputation was not enhanced by the fact that the island's Indigenous peoples engaged in the practice of headhunting.⁴⁴ Han Chinese contempt was later reflected in their categorization of the island's Indigenous peoples: The peoples of the western coastal plains were labelled *shu fan* ("cooked barbarians") indicating that they were "civilized," while the peoples of the central mountains and the eastern coast were called *sheng fan* ("raw barbarians") and therefore "uncivilized."⁴⁵

During this era, increasing levels of Chinese immigration deeply affected the lives of the Indigenous people of the western coastal plains (*Ping-pu*). Wholesale exploitation began with the retreat of the Han Ming imperial dynasty and was carried on by the Manchurian Ch'ing dynasty on its defeat. This period witnessed significant patterns of Chinese migration from the mainland province of Fujian (*Hoklo* Han people)⁴⁶ and was marked by official policies of encroachment, which brought Chinese immigrants into dispute with the island's Indigenous peoples.⁴⁷ Specifically, the *Ping-Pu* were deprived of the use of their lands through a land rights system that enabled Han Chinese immigrants to "rent" Indigenous lands through private contracts, albeit subject to the notional scrutiny of the Chinese state.⁴⁸ As the process of Chinese settlement gathered apace, the *Ping-pu* were effectively dispossessed. Further, members of the *Ping-Pu* were co-opted into Chinese military service where they were used to guard settled areas against the raids

43. For a brief overview of the territorial bases of Taiwan's Indigenous peoples, see *ROC Taiwan Yearbook* (2004), online: ROC Government <<http://www.gio.gov.tw/taiwan-website/5-gp/yearbook/P021.htm>> [*ROC Taiwan Yearbook*].

44. J.R. Shepherd, *Statecraft and Political Economy on the Taiwan Frontier, 1600-1800* (Stanford: Stanford University Press, 1993) at 3.

45. *Ibid.* at 7.

46. *Hakka* Han Chinese from northern Guangdong also migrated to Taiwan during this period.

47. See Shepherd, *supra* note 44 at 14-19.

48. It has been suggested that such arrangements were mutually beneficially since the plains Indigenous supposedly needed the revenue generated by renting their lands more than they needed lands that were now depleted of deer herds: see *ibid.* at 19. However, the extent and the consequences of this process of territorial dispossession militate against the cogency of this interpretation.

of mountain Indigenous peoples, who increasingly threatened settler populations as reclamation programs brought settlers closer to the island's mountainous regions.⁴⁹

The cession of Taiwan to Japan pursuant to the *Treaty of Shimonoseki* (1895) heralded a series of profound changes for the island's Indigenous peoples. Although, at this time, they still controlled approximately 2,000,000 square hectares, accounting for about half the island's territory,⁵⁰ the Japanese authorities soon began to undermine their territorial base. First, they abolished the Ch'ing dynasty's Indigenous (plains) land regime, replacing ownership rights with revocable use rights.⁵¹ Second, they embarked on a mission to bring the mountain Indigenous peoples under their control, a mission driven, in part, by the presence of rich natural resources that could fuel the Japanese colonial machine.⁵² The subjugation of the mountain peoples quickly became a core aim of the new colonial authorities and the abolition of Indigenous land-owning rights was soon extended to the whole island.⁵³ Nevertheless, Japan was required to apply considerable military pressure in order to suppress the Indigenous peoples of the mountain regions who frequently resisted invasion, despite the presence of overwhelming force. In 1910, in an attempt to quell the uprisings of several strong mountain peoples in northern Taiwan, Japanese military forces commenced the "Five-Year Expedition," which resulted in the massacre of 10,000 *Truku* (*Taroko*) Indigenes.⁵⁴ In southern Taiwan, guard posts, mines and electric fences were used to reinforce instances of territorial acquisition and to guarantee access to raw materials.⁵⁵ Militarism was combined with massive programs of forced relocation of mountain peoples to controlled lowland areas, a process that produced profound social disruption and disintegration.⁵⁶ Moreover, Taiwan's Indigenous peoples were confronted by

49. *Ibid.*

50. M. Munsterhjelm, "No Miracles: An Introduction to Taiwan Aboriginal Politics" (2000), online: Taiwan First Nations <<http://www.taiwanfirstnations.org/nomiracl.htm>> [Munsterhjelm, "No Miracles"].

51. M. Munsterhjelm, "The First Nations of Taiwan: A Special Report on Taiwan's Indigenous Peoples" (2002) 26:2 Cultural Survival Quarterly, online: <http://www.culturalsurvival.org/publications/csq/csq_article.cfm?id=9CE18D70-E58B-4BC3-B76F-EA71BFA1B63C®ion_id=2&subregion_id=6&issue_id=7> [Munsterhjelm, "First Nations"].

52. The production of camphor accounted for 10-30 per cent of Japanese colonial revenues between 1895 and 1905: See Munsterhjelm, "No Miracles", *supra* note 50.

53. I. Chiang & L. Kau, "Report on the Human Rights Situation of Taiwan's Indigenous Peoples" in Barnes, Gray & Kingsbury, *supra* note 34, 357 at 360 ["Alliance of Taiwan Aborigines' 1993 UN Report"].

54. *Ibid.*

55. The most notorious incident, the "Wushe Rebellion" occurred in 1930. In retaliation for Indigenous military resistance, Japanese forces destroyed six Indigenous villages, culminating in the death of over 900 Sediq Indigenes, through the use of aerial bombing, artillery and poisonous gas: See Munsterhjelm, "No Miracles", *supra* note 50.

56. See "Alliance of Taiwan Aborigines' 1993 UN Report", *supra* note 53 at 360.

the wider policies of Japanese colonization including compulsory Japanese cultural assimilation.⁵⁷

The conclusion of World War II marked the withdrawal of the defeated Japanese forces and the subsequent Chinese civil war led to the retreat of the ROC government to Taiwan.⁵⁸ However, the transfer of sovereignty proved to be a classic case of re-colonization resulting in ongoing Indigenous suffering tied to paternalism and hierarchical notions of civilization.⁵⁹ The ROC government was keen to exploit natural resources of the mountainous regions to reinforce its position in Taiwan and, more immediately, to support its plan to recapture the Chinese mainland. In this respect, the welfare of mountain Indigenous peoples was of little concern to a regime focused on relocation.⁶⁰ The government commandeered much of Taiwan's forests and mountains for commercial exploitation and for reasons of "national security." Further, it enacted laws and regulations curbing Indigenous traditional practices, including hunting and gathering, on nationalized lands. The remaining Indigenous lands have been regulated to such an extent that Indigenous peoples have often lost their land rights through fraudulent and unethical practices.⁶¹ Moreover, as shown below, these (internal) colonial strategies are still ongoing.

Historical continuity, the fourth theme of Indigenousness, involves not only an ability to establish a genealogical connection with ancient

-
57. The Japanese authorities established a registration system that formally divided Taiwan's Indigenous peoples into "mountain compatriots of the mountainous areas" and "mountain compatriots of the plains." This constituted a refusal to accord recognition to the island's Indigenous peoples, a tactic that prepared the way for their acculturation. Indigenous peoples were encouraged to adopt Japanese names and their children were forced to attend schools in which they were "educated" through the medium of the Japanese language: *Ibid.* at 361 and 366.
58. See J.L. Charney & J.R.V. Prescott, "Resolving Cross-Strait Relations between China and Taiwan" (2000) 94 Am. J. Int'l L. 453 at 457-461. For a critical view of the legitimacy of this process, see L.C. Chen & W.M. Reisman, "Who Owns Taiwan: A Search for International Title" (1972) 81 Yale L.J. 599.
59. F.Y.L. Chiu, "Suborientalism and the Subimperialist Predicament: Aboriginal Discourse and the Poverty of State-Nation Imagery" (2000) 8 Positions: East Asia Cultures Critique 101 at 117. The ROC authorities embarked on a concerted policy of sinicization. By the Executive Order, "Identification Standards for the Mountain Natives of Taiwan Province," the ROC retained the Japanese system of classifying Indigenous peoples as "compatriots of the mountainous areas" (*sundee-tongbaus*) regardless of whether they lived in the plains or mountainous regions: They were sub-divided into "mountain compatriots of the plains areas" (*pingdee-sunbaus*) and "mountain compatriots of the mountain areas" (*sundee-sunbaus*): See "Alliance of Taiwan Aborigines' 1993 UN Report", *supra* note 53 at 366. These categories formed the basis of their ethnic characterization until the *Status Act for Indigenous Peoples* (2001), which formally recognized the status of Taiwan's Indigenous peoples. However, under section 2, the registration system is still the means by which an Indigene's identity is evidenced for official purposes: See online: ROC, Council of Indigenous Peoples <http://www.apc.gov.tw/en/laws/laws_detail_9.aspx> ["ROC Council"].
60. Chiu, *ibid.* at 118-119.
61. See the coverage of the fifth theme of Indigenousness (ongoing oppression/exclusion by dominant societal groups) below.

communities; it also requires the demonstration of an ongoing affinity with traditional cultural practices. DNA testing has proved the Austronesian heritage of Taiwan's Indigenous peoples, thereby reinforcing their common ancestry with pre-colonial communities.⁶² Moreover, they have maintained pre-colonial cultural practices including animism, shamanism, their use of closely related Austronesian languages, strong musical and festival traditions, slash and burn cultivation, tattooing, and ancient arts and crafts (for instance, rattan weaving, silver production, carving and especially construction techniques).⁶³ Thus, despite attempts to assimilate them, Taiwan's Indigenous peoples exhibit a rich cultural diversity and remain distinct from the dominant Han Chinese society.

According to the *Martinez-Cobo Report*, as well as being able to establish ethnic and cultural links, historical continuity is grounded in the capacity to demonstrate continuing occupation of ancestral lands. As noted above, although many of Taiwan's Indigenous peoples still live in their traditional areas (albeit vastly reduced in scope), their tenure is precarious. The island extends to approximately 36,000 square kilometres but, as a result of the forces of colonialism, its Indigenous peoples now hold only use rights to about 24,000 hectares, of which around 17,000 hectares constitute usable land.⁶⁴ Further, peoples such as the *Ping-pu* have lost their territorial/land rights; however, it would be grossly unfair to suggest that, through the vagaries of colonialism, they have lost their Indigenous status. The case of the *Ping-pu* indicates that the requirement of continuing occupation of ancestral lands should be reinterpreted to incorporate those communities that continue to reside in their traditional territories notwithstanding their appropriation and urbanization by settler communities and the absence of recognized Indigenous territorial/land rights. In this respect, the permissive nature of their occupation could be used as a campaign for the return of their ancestral lands, or at least an equitable share in them. In addition, it should be possible to de-territorialize Indigenous identity in favour of other organizing principles based on corporate forms of identity, which could protect those peoples that have suffered the destruction of their traditional territories by the forces of colonialism.

The internal colonial practices that are still being visited upon Taiwan's Indigenous peoples provide cogent evidence of the fifth theme of Indigenousness, their *ongoing oppression/exclusion by dominant societal groups*. In particular, their traditional lands are still being confiscated for

62. However, such testing has been controversial, especially given increasing evidence of DNA trafficking. See online: Taiwan First Nations <<http://www.taiwanfirstnations.org>>.

63. Nonetheless, the political systems, kinship groups and ritual practices of each Indigenous people vary enormously: See the *ROC Taiwan Yearbook*, *supra* note 43.

64. See "Alliance of Taiwan Aborigines' 1993 UN Report", *supra* note 53 at 360; and statistics compiled by the Council of Indigenous Peoples, online: ROC Council of Indigenous Peoples <<http://www.apc.gov.tw/en/admin/admin.aspx>>.

road building schemes, the creation of national parks and other recreational facilities; their remaining lands are blighted by the production of hydro-electricity, marble and cement. More insidiously, certain Indigenous territories are being turned into living museums for the benefit of the tourist industry.⁶⁵ Although Indigenous peoples have challenged instances of recent exploitation, it is clear that commercial enterprise has been favoured by dominant political elites at the expense of Indigenous ancestral lands. In addition, their lands are increasingly being subjected to environmental colonialism as exemplified by the covert operation to create a nuclear waste disposal facility on *Lan-yu* (Orchid) Island, the ancestral homeland of the *Yami* (*Tao*) people, a project that has produced high levels of nuclear contamination on the island and has attracted international condemnation for its unsafe practices.⁶⁶

In addition to the erosion of their territorial base, Taiwan's Indigenous peoples are still enduring the ill effects of the policies of artificial assimilation perpetrated by their Japanese and Chinese colonizers. Until 1998, Indigenous languages were banned in schools and Indigenous histories were excluded from the curriculum.⁶⁷ Further, until 2001, Indigenes endowed with Han Chinese names were unable to use their ancestral names for official purposes and pernicious legal standards ensured that Indigenous identity could be easily lost in cases of intermarriage with Han Chinese peoples without the right of reclamation.⁶⁸ Moreover, the combined processes of forced relocation, dispossession and environmental degradation force Indigenes to migrate to urban centres in search for work where they invariably encounter racial discrimination and exclusion, and are quickly driven to the margins of the urban landscape.

The final common theme of Indigenousness concerns the *existence of distinct societies that identify themselves as Indigenous*. The ethnic and cultural differences between Taiwan's Indigenous peoples and Han Chinese people can be discerned from the extent to which the former have maintained their historical connections to pre-colonial communities. But, under this theme, perhaps the best way of addressing their distinctiveness is by illustrating how these communities have embraced their Indigenous status (self-identification) and the steps they have taken to secure recognition of

65. Munsterhjelm, "First Nations", *supra* note 51.

66. L.G. Arrigo, Jilgilan Si & Maraos Si, "A Minority within a Minority: Cultural Survival on Taiwan's Orchid Island" (2002) *Cultural Survival Quarterly*, online: 26:2 <http://www.cultural-survival.org/publications/csq/csq_article.cfm?id=E6FAA6E2-62F1-4635-B0D8-0EA80B196098®ion_id=2&subregion_id=6&issue_id=24>.

67. See the *Education Act for Indigenous Peoples*, in "ROC Council", *supra* note 59. A recent survey showed that only 10 per cent of Indigenous children are fluent in their respective Indigenous languages: See Munsterhjelm, "First Nations", *supra* note 51.

68. The ROC authorities have attempted to rectify this travesty through the *Status Act for Indigenous Peoples* (2001) and the *Full Name Registration Law* (2001): See "ROC Council", *ibid*.

their distinct identities by ROC authorities. In an effort to mount a credible Indigenous campaign against the assimilationist policies of successive ROC governments, the Alliance of Taiwan Aborigines (“ATA”) was established in 1984. This coincided with the political mobilization of the Presbyterian Churches of Taiwan (“PCT”) in support of Indigenous rights. By 1988, the ATA had produced the *Manifesto of the Rights of Taiwan Aborigines*, which drew heavily from the *Declaration of Principles of the Indigenous Peoples* and did much to publicize the pan-Indigenous cause in Taiwan.⁶⁹ In 1991, ATA representatives attended the WGIP, where they reported on the plight of Taiwan’s Indigenous peoples and developed important links with the global Indigenous movement.⁷⁰ It was at this point that ATA representatives first became aware of the nuances within the discourse of self-determination. In particular, they learned the immense significance of the distinction between Indigenous “people” and Indigenous “peoples.”⁷¹ Moreover, the ATA soon joined the Asian Indigenous Peoples Pact and became a signatory to the *Declaration on the Rights of Asian Indigenous Peoples* (1993). In accordance with their claimed status, the Indigenous peoples of Taiwan began to promote themselves as *yuan-chu-min-chu*. (*yuan-chu* translates to “original residents” and *min-chu* to “peoples”). By seeking recognition as Indigenous peoples, the ATA and PCT sought to gain the support of the established and emerging international law on Indigenous rights. Arising from its newly found regional and international connections, the major goals of Taiwan’s Indigenous movement included the rectification of names imposed by the Han Chinese and the reclamation of their traditional territorial rights pursuant to their right of self-determination.

During this period, the *idea* of Taiwan’s Indigenous peoples and their political movement began to derive greater salience as a result of the building power struggle between the established “Mainlander” Han Chinese people,⁷² then represented by the KMT, and the rising Taiwanese (*Hoklo*) Han Chinese consciousness embodied within the Democratic Progress Party (“DPP”), brought about by Taiwan’s democratization.⁷³ In this respect, DPP leaders appreciated that Taiwanese cultural distinctiveness was weakened by the fact that similar cultural practices could be found in the mainland province of Fujian. Given that the island’s Indigenous peoples constitute the only groups with legitimate non-Chinese credentials, the DPP sought to emphasize the “Indigenous dimension” of Taiwanese identity, since this was

69. Adopted by the Fourth General Assembly of the World Council of Indigenous Peoples, (1984), UN Doc. E/CN.4/1985/22, Annex II (1985).

70. M. Stainton, “Aboriginal Self-Government” in Rubinstein, *supra* note 38, 419 at 423-424.

71. *Ibid.* at 424. The content of the right to self-determination is discussed in the next section.

72. The term “Mainlander” has been used to describe Han Chinese that migrated to Taiwan with the ROC forces at the end of the Chinese civil war.

73. See A.M. Wachman, *Taiwan: National Identity and Democratisation* (London: M.E. Sharpe, 1994); and C. Hughes, *Taiwan and Chinese Nationalism* (London: Routledge, 1997).

the only way that the Taiwanese people could be shown to be essentially different from those living on the Chinese mainland. This strategy of “Indigenization” is highly artificial since the Taiwanese people include a Han Chinese people who migrated from the Chinese province of Fujian between the 17th and 19th centuries. The claims of Taiwanese political elites rest on Indigenous connections forged by 400 years of intermarriage with Indigenous peoples,⁷⁴ a process, which, they alleged, is partially responsible for creating the distinctive Taiwanese (*i.e.* non-Chinese) national identity.⁷⁵ At this stage, the central complaint of both Chinese and Taiwanese nationalists arose from the term *min-chu*, which can mean “peoples” or “nations,” as this has serious consequences for wider Chinese or Taiwanese national identity. Chinese irredentists argued that such a term detracted from the One China principle and represented an act of separatism, while Taiwanese political elites were concerned that the emergence of a distinct Indigenous identity would harm the purported non-Chinese essence of the evolving Taiwanese national identity. In 1994, the ATA campaigned strongly for a constitutional amendment at the National Assembly, which would replace the inappropriate term *sunbaus* (“mountain compatriots”) with *yuan-chu-min-chu* (“Indigenous peoples”).⁷⁶

In 1996, the movement received a significant boost when the ROC created the Council of Indigenous Peoples, marking the transfer of jurisdiction over Indigenous affairs to a dedicated ministerial level body of the central government charged with responsibility for formulating Indigenous policies.⁷⁷ The Council has embarked on a number of major programs to bolster Indigenous cultural diversification, identity, autonomy,

74. See “Alliance of Taiwan Aborigines’ 1993 UN Report”, *supra* note 53 at 358; and Chen & Reisman, *supra* note 58 at 625-626.

75. According to Wachman, slightly less than 85 per cent of the national population self-identify as “Taiwanese,” 14 per cent as “Mainlanders” and just over 1 per cent as Indigenous: *supra* note 73 at 12. The combined population of Taiwan’s Indigenous peoples currently stands at 433,689 out of a national population of 22,610,000: *ROC Taiwan Yearbook*, *supra* note 43.

76. The ROC National Assembly is the 300-member non-standing constitutional organ. The proposed amendment was partially successful as the Third Amendment approved use of the term *yuan-chu-min* (“Indigenous people”), which was then included within articles 1 and 4 of the *Constitution*. Since this development failed to acknowledge the discrete identities of the various Indigenous peoples on Taiwan, the Indigenous movement continued to push for constitutional recognition as *yuan-chu-min-chu*.

77. The Council of Indigenous Peoples was the product of the increasing political salience of the Indigenous movement on Taiwan during the mid-1990s. However, the *Organic Law of the Council of Indigenous Peoples* (1996) was a considerably watered-down version of the bill first presented to the ROC Legislature: Stainton, *supra* note 70 at 427. While Indigenous representatives were consulted on the draft legislation, and Indigenous individuals hold prominent positions in the Council, there has been widespread disappointment regarding the extent of its remit, powers and influence within the central government.

development and human rights.⁷⁸ This breakthrough heightened political pressure to bring the question of Indigenous status into the political mainstream, which culminated in constitutional amendments contained within the *Additional Articles of the Constitution* (2000). Not only did they insert the term *yuan-chu-min-chu* into the ROC *Constitution*, more specifically article 10 provided:

10(11) The State affirms cultural pluralism and shall actively preserve and foster the development of [I]ndigenous peoples' languages and cultures.

10(12) The State shall, in accordance with the will of the ethnic groups, safeguard the status and political participation of [I]ndigenous peoples. The State shall also guarantee and provide assistance and encouragement for [I]ndigenous peoples' education, culture, transportation, water conservation, health and medical care, economic activity, land, and social welfare, measures for which shall be established by law.⁷⁹

In a parallel development, Taiwan's Indigenous peoples have been officially reclassified via the *Traditional Name Resumption/Correction Order* (1995) and subsequently, the *Regulations for Identifying Indigenous People's Ethnicity* (2002), which allowed the *Yami* to resume their traditional name of *Tao*, and the *Taya* to revert to their preferred name, *Atayal*. Further, before the period of political mobilization, the ROC government officially recognized the existence of nine Indigenous "tribes" (*zu*) on Taiwan: the *Ami*, *Taya*, *Bunun*, *Paiwan*, *Puyuma*, *Saisiyat*, *Tsou*, *Yami* and *Rukai*.⁸⁰ In August 2001, the *Thao* became the 10th Indigenous people, followed by the *Kavalan* in December 2002 and the *Truku (Taroko)* in January 2004. Nonetheless, by arrogating this process of recognition to itself, the ROC government ignored the fundamental importance of the principle of self-identification for Indigenous peoples.⁸¹

78. There has been a welter of new laws developed under the auspices of the Council of Indigenous Peoples, including the *Education Act for Indigenous Peoples* (1998), the *Status Act for Indigenous Peoples* (2001) and the *Full Name Registration Law* (2001): See "ROC Council", *supra* note 59. However, it cannot be inferred from the mere existence of such laws that conditions on the ground have, in fact, improved.

79. See "ROC Council", *ibid*.

80. The ROC government refused to recognize the status of other Indigenous "tribes," notably the *Ping-pu* (plains) people whose "tribal" status was withdrawn by the ROC government soon after it relocated to Taiwan on the grounds that they had been already been assimilated. See C.F. Shiu, "Legal Status of the Indigenous Peoples in Taiwan" (1999), online: Taiwan First Nations <<http://www.taiwanfirstnations.org/legal.html>>. Although the ROC now recognizes 12 Indigenous peoples pursuant to the *Regulations for Identifying Indigenous People's Ethnicity* (2002), the *Ping-pu* have not been accorded Indigenous status: See below.

81. *Ibid*. Although, for reasons discussed earlier, the ROC government is not a party to *Convention 169* (*supra* note 2), the notion of self-identification is an emerging standard of general international law. The prime example in this regard is the ROC's ongoing refusal to accord recognition to the *Ping-pu* people of the western plains. For a detailed discussion of this issue,

A prime example of the new found political authority of Taiwan's Indigenous peoples is the recently enacted *Basic Law of Indigenous Peoples* (2005).⁸² The *Basic Law* proclaims the ROC's apparent commitment to creating a comprehensive set of Indigenous rights, including rights to autonomy, land, intellectual property, development, languages, education and employment. However, at present, the legislation amounts to little more than a declaration of intent since it contains only vague statements supported by promises of specific legislation to be introduced in the future to achieve its stated goals.⁸³ Thus, while this development constitutes an important psychological achievement, the realization of a complete Indigenous legal regime still appears to be some way off.⁸⁴

The main purpose of this section was to determine whether Taiwan's ancient communities could satisfy the "test" for Indigenousness as devised by respected international scholars. To this end, it demonstrated the ways in which these communities qualify for Indigenous status. Specifically, the verifiable evidence of their historical priority over subsequent settler societies and their long evolved territorialized identities attest to this. Further, these communities have withstood the ravages of colonialism, which served to reinforce their cohesion. In the contemporary context, these collective experiences have coalesced in demands for redress, borne by eagerness on the part of groups to embrace their Indigenousness and to perpetuate their distinctive cultural practices. Pursuant to their political mobilization, Taiwan's Indigenous peoples have secured constitutional

see M.H. Sung, "The Hidden Reason for the Deadlock in the Achievement of Ethnic Recognition for the *Ping-Pu* of Taiwan" (2004) 11 Int'l J. on Minority and Group Rts. 75.

82. Enacted by the ROC Legislature on 21 January 2005, see online: ROC Government <<http://nwjirs.judicial.gov.tw/change/200501/29229.html>> (in Chinese) [*Basic Law*]. The *Basic Law* took over 10 years to become law. See "Law Protecting Aboriginal Rights is Praised" *Taipei Times* (22 January 2005), online: Taipei Times <<http://www.taipeitimes.com/News/taiwan/archives/2005/01/22/2003220456>>.
83. In relation to Indigenous autonomy, s. 4 provides that the wishes of Indigenous peoples should be respected and that autonomous regimes should be created in recognition of their equal status and democratic entitlement. It states that legislation will be enacted to facilitate the creation of such regimes, an obvious reference to the *DIAL*.
84. Another important development has been the series of consultations held at the Council of Indigenous People in 2004 concerning the insertion of a special clause relating to Indigenous peoples in the proposed new ROC *Constitution*. Government officials, Indigenous representatives and other interested parties participated in the process. The end result was a draft clause that recognized *inter alia* Indigenous peoples' *desire* to secure the right of self-determination, which should be realized by founding autonomous regimes that would protect their traditional lands and cultural practices. Although the discussions about the draft clause are in their infancy, the prospect of constitutional recognition for Indigenous autonomy clearly bolsters the resonance of the *DIAL*. See S. Scott, "Taiwan's Indigenized Constitution: What Place for Aboriginal Formosa?" (Paper presented to the Conference of the European Association of Taiwan Studies, Ruhr-Universitaet Bochum, 1-2 April 2005), online: Ruhr-Universitaet Bochum <<http://www.ruhr-uni-bochum.de/slc/EATS%20II%20Scott%20Simon.pdf>>. For the content of the draft clause, see C.F. Shiu (2004), online: <<http://mail.tku.edu.tw/cfshiu/seminar/20040722/2004722.htm>> (in Chinese).

recognition, which has led to the promulgation of a series of Indigenous-specific laws and the development of draft legislation, such as the *DIAL*, and other proposals, which have been designed to engender wide-ranging reform. In this respect, Taiwan's Indigenous peoples' quest for Indigenous status has been strongly influenced by evolving international standards on Indigenous rights. They have utilized recent developments in international law to inform and strengthen their demands for municipal recognition and rights. Given the specific focus of this paper, the next section scrutinizes relevant international standards, with the aim of discerning the extent to which they can bolster the campaign for the creation of viable Indigenous autonomous regimes on Taiwan.

IV THE SALIENCE OF INTERNATIONAL LAW FOR TAIWAN'S INDIGENOUS PEOPLES

The resonance of Indigenous status (and the rights it attracts) for Taiwan's Indigenous peoples flows from the development of Indigenous-specific and general international standards concerning, *inter alia*, territorial/land rights, self-determination and autonomy. Consequently, this section analyzes these areas of international law in an attempt to deduce the extent to which Taiwan's Indigenous peoples can utilize the canon of contemporary international law to underpin their efforts to foster autonomous regimes within ROC municipal law, notwithstanding the restrictive dynamics of the Taiwan Question and general Asian perspectives on Indigenous rights.

The Land/Territorial Rights of Indigenous Peoples in International Law

The prospect of devising autonomous regimes for Indigenous peoples presupposes the existence of a territorialized Indigenous identity that can provide the spatial context to justify their creation and to ensure their ongoing viability. Accordingly, this section explores the resonance of "place" for Indigenous peoples. Further, by surveying existing and emerging international instruments, it examines the extent to which Indigenous territoriality has been recognized in international law. This investigation then assesses the nexus between Indigenous territoriality and autonomy in an attempt to discover whether Indigenous property rights are capable of bolstering the fledgling Indigenous right to autonomy.

As noted above, place represents the core criterion of Indigenous identity.⁸⁵ Its symbolic value is founded on significant historical cultural

85. See the *Martinez-Cobo Report*, *supra* note 15; and E. Daes, "Human Rights of Indigenous Peoples, Indigenous Peoples and Their Relationship to Land" UN Doc. E/CN.4/Sub.2/2000/25 (2000) at para. 11.

attachments to specific territories, which underpin communal consciousness.⁸⁶ Nevertheless, in the Indigenous sense, place only derives meaning to the extent that it provides a context for the expression of social relations. Thus, while the utility of territory in any society cannot be ignored, the values historically ascribed to it by Indigenous peoples do not reflect the strategic and ideological functions performed by territory in the modern nation-state.⁸⁷ In this respect, Indigenous peoples do not seek territory for its own sake; they seek to secure a particular territorial unit that has been invested with communal resonance for social and historical reasons. Beyond the economic imperative, modern societies rarely make qualitative distinctions regarding territory and, as a result, they fail to appreciate the cultural values attached to place by Indigenous peoples: It is this failure of comprehension that lies at the heart of the Indigenous territorial question.⁸⁸ In situations where Indigenous peoples are displaced or dispossessed, states do not comprehend the consequent impact that such events have on Indigenous cultural identities, especially where “equivalent” lands are provided by way of substitution.⁸⁹

Against this background, recent international instruments have sought to reflect the foundational significance of place in constructions of Indigenous identity. In emphasizing the special nexus between Indigenous cultural/spiritual values and their traditional lands, article 13(1) of *Convention 169* attaches great significance to the collective dimension of this relationship. Article 14(1) holds that rights of Indigenous ownership and possession over lands that they traditionally occupy shall be recognized, while 14(2) firmly places the responsibility for guaranteeing Indigenous land rights on governments. Article 15(1) provides that Indigenous rights to the natural resources pertaining to their lands shall be specifically safeguarded and that Indigenous peoples are entitled to participate in the use, management and conservation of these resources. Moreover, article 17 acknowledges that Indigenous customs relating to the transmission of their lands shall be respected. This article regards questions of alienability as a matter for Indigenous customary law; Indigenous peoples should retain the authority to determine procedures relating to the transfer of land rights that belong to them.⁹⁰ Further, article 16 provides for instances of removal and

86. H.J. Heintze, “On the Legal Understanding of Autonomy” in M. Suksi, ed., *Autonomy: Applications and Implications* (London: Kluwer Law International, 1998) 7 at 18-20; Daes, *ibid.*; and Pekka & Scheinin, *supra* note 25.

87. See A. Allott, “The Changing Legal Status of Boundaries in Africa” in K. Ingram, ed., *Foreign Relations of African States* (London: Butterworths, 1973) 111 at 117; and J. Castellino, “Territory and Identity in International Law: The Struggle for Self-Determination in the Western Sahara” (1999) 28 *Millennium Journal of International Studies* 523.

88. See Ivison, Patton & Sanders, *supra* note 22 at 10.

89. Art. 16(4) of *Convention 169*, *supra* note 2.

90. See Thornberry, *Indigenous Peoples*, *supra* note 16 at 357-358; also see *Convention 169*, *supra* note 2 at art. 8.

relocation. In addition to a blanket statement that Indigenous peoples shall not be removed from the lands that they occupy, the article limits the scope for relocation, where such a process is considered necessary as an exceptional measure, by stressing the desirability of informed consent and the need for rigorous procedural steps in its absence. The article enshrines a right to return to traditional lands where the grounds for relocation cease to exist, and an entitlement to full compensation in the form of equivalent lands, money or in kind.⁹¹

The UN *Draft Declaration* adopts a more radical view of Indigenous land rights that is strongly tied to the right of self-determination and the concept of collective rights. It insists that Indigenous entitlements must be assessed by reference to the lands they “traditionally owned or otherwise occupied or used” and that such rights should extend beyond the lands that they currently occupy to include those lands they held in the distant past.⁹² Further, article 26 adopts a wide interpretation of Indigenous *territorial* rights, which extends to “lands, territories, waters and coastal seas and other resources,” thereby covering the total available environment.⁹³ It also aims to secure full recognition for Indigenous laws, traditions and customs, land-tenure systems and institutions for the development and protection of environmental resources in a similar manner to *Convention 169*.⁹⁴ In addition, article 27 refers to the right of restitution, or just and fair compensation, in the currency of equivalent lands, where Indigenous lands, territories, *etc.*, have been confiscated, occupied, used or damaged without free and informed consent. Article 25 also addresses the issue of alienation by imposing a solemn duty on Indigenous peoples to uphold their land rights for future generations, a broad responsibility that is clearly not amenable to state interference and a view that reinforces the position adopted by *Convention 169*.⁹⁵

Although these instruments are equivocal regarding the question of the parameters of Indigenous territoriality, they manifest an incremental commitment to the concept of Indigenous property rights. States favour the

91. While it constitutes an important source of international standards concerning Indigenous rights, it should be noted that, at the time of writing, only 17 states have ratified *Convention 169*, *ibid.*; therefore, it is doubtful whether it represents customary international law. However, some scholars would disagree with this interpretation: See Anaya, *supra* note 22 at 61-72.

92. Arts. 25-27; this continues to be a controversial issue especially for settler states: See Thornberry, *Indigenous Peoples*, *supra* note 16 at 392-394.

93. The complex distinction between “land” and “territorial” rights was unconvincingly addressed in *Convention 169*, *supra* note 2.

94. See arts. 8, 15 and 17 of *Convention 169*, *ibid.*

95. For the latest developments on the *Draft Declaration*, *supra* note 1, see the *Report of the Tenth Session of the CHR Inter-sessional Working Group*, UN Doc. E/CN.4/2005/89, online: Office of the UN High Commissioner for Human Rights, <<http://www.ohchr.org/english/issues/indigenous/groups/groups-02.htm>>. Also see the *Summary Report of the Commission's Sixty-First Session*, UN Doc. E/CN.4/2005/SR.43.

recognition of private rights (land rights) over public rights (territorial rights) due to their perceived implications for state sovereignty. It is, therefore, unsurprising that the provisions discussed in this section do not provide a solid platform on which to construct Indigenous autonomous regimes. While the material evidence of Indigenous territoriality is incontrovertible, as yet, states have great difficulty in accepting its full consequences. However, notwithstanding the desirability of strengthening these provisions, it is suggested that, when combined with progressive interpretations of self-determination, they provide sufficient recognition of Indigenous territoriality to justify the doctrinal transposition of Indigenous property rights into the public sphere, thereby reinforcing the evolving Indigenous right to autonomy in contemporary international law.

The Current Indigenous Land Rights Regime on Taiwan

In keeping with the strategies of internal colonialism highlighted in the discussion concerning the fifth theme of Indigenes above, the ROC government began registering remaining Indigenous lands in the mountainous central region as “reserve” land through the *Regulations Regarding the Development and Management of the Reservations of the Mountain Brothers in Taiwan Province Order* (1968). Although these regulations were supposed to be a protective mechanism, they confirmed the previous regime, which held that Indigenous peoples would only be entitled to use rights over their ancestral lands. Moreover, these rights were granted on the condition that Indigenous lands would be used for the purposes of cultivating crops for a period of 10 years, and if Indigenous failed to comply, their lands would revert to the government.⁹⁶ While the regulations did formalize Indigenous land rights, they damaged the existing subsistence culture, which was based on hunter-gatherer methods and slash and burn agriculture, forcing affected Indigenous peoples to abandon their traditional methods in order to produce cash crops.⁹⁷ However, since these Indigenous peoples could not own their traditional lands, they could not secure mortgages in order to improve them. The government-imposed ban on hunting and gathering in the nationalized forests and parks, combined with the latest land rights regime, functioned to ensure a sharp decline in traditional subsistence practices that represent a fundamental component of Indigenous cultural identity. Further, although these regulations limited the ability of Indigenous peoples to alienate their lands to Han Chinese

96. S. Scott, “The Underside of a Miracle: Industrialization, Land and Taiwan’s Indigenous People” (2002) 26:2 *Cultural Survival Quarterly*, online: <http://www.culturalsurvival.org/publications/csq/csq_article.cfm?id=8F2F3936-C363-4638-B866-E6F2D8F90C04®ion_id=2&subregion_id=6&issue_id=7>.

97. *Ibid.*

individuals and companies, legislative loopholes allowed Indigenous lands to be “leased” to companies either by Indigenous or the government in default of cultivation.⁹⁸

The government’s present position on Indigenous land rights in the central mountainous region is reflected in section 37 of the *Mountain Slope Conservation and Utilization Law* (2000), which provides:

Indigenous peoples’ reservation lands located within the mountain region should be taught to develop land and obtain cultivation rights, land surface rights, and lease rights. Individuals continuing to operate their cultivation and land surface rights for a period of five years are entitled to acquire gratis ownership of the said land, except for land designed for special purposes. Land ownership transfer is limited to [I]ndigenous peoples. Land development management procedure is provided by the Executive.⁹⁹

Evidently, the qualifications placed on ownership and possession rights by ROC laws patently fail to satisfy both the standards expressed in *Convention 169* and the *Draft Declaration*. Indeed, with arcane references to teaching Indigenous peoples how to use their lands, section 37 echoes the paternalism of *Convention 107*, which has no place in a contemporary Indigenous rights regime. This section removes the issue of alienability from Indigenous control and, since it exclusively focuses on the individual, it ignores the significance attached to collective rights by Indigenous peoples.¹⁰⁰ Further, neither section 37 nor the 1968 regulations make provision for the removal and relocation of Indigenous peoples; if lands are not utilized in the manner envisaged by these laws, such rights simply accrue to the government without regard to question of reparation. The current land rights regime of Taiwan exhibits many of the hallmarks of internal colonialism discussed above. The profound failings of the ROC’s limited Indigenous realty system warrants the creation of devolved governmental structures that will recognize Indigenous territorial/land rights in keeping with international developments, enabling Indigenous peoples to govern themselves and protect their traditional homelands against the forces of ongoing internal colonialism.

98. See I. Shiban, “Our Experience of the Incursion of Cement Companies onto the Land of the Taroko Peoples, Hualien, Taiwan” in *Report to the United Nations Working Group on Indigenous Populations* (25 July 1997), online: Native Web <www.nativeweb.org/pages/legal/taroko.html>.

99. See “ROC Council”, *supra* note 59. Trans. by Council of Indigenous Peoples.

100. On collective rights, see W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995); and P. Thornberry, “Images of Autonomy and Individual and Collective Rights in International Instruments on the Rights of Minorities” in Suksi, *supra* note 86, 97 [Thornberry, “Images of Autonomy”].

Self-Determination in International Law: Statist and Indigenous Perspectives

The case for Indigenous territorial/land rights can stand alone. Nevertheless, for such rights to constitute the basis of (internal) governmental structures, they must be underpinned by a wider principle that can legitimize the creation of territorialized autonomous regimes in both international and municipal law; this task falls to the principle of self-determination. This subsection begins by mapping the rise of the right of self-determination, while analyzing the interplay between statist and Indigenous perspectives as to its meaning, scope and application in the Indigenous context. In particular, it focuses on the extent to which the right of internal self-determination can validate the development of autonomous regimes for oppressed, territorialized peoples (including Indigenous peoples) under customary international law.

While the principle of self-determination is now widely regarded to be a peremptory norm of international law (*jus cogens*), its precise nature and scope remains immensely controversial. Initially, states recognized self-determination as an organizing principle of international society;¹⁰¹ however, it was only when the spectre of (classical) decolonization arose that it began to be perceived as a right belonging to colonized peoples.¹⁰² Although customary international law envisaged that the right would be exercised through a wide range of political arrangements,¹⁰³ in practice, this process of decolonization strengthened the association between self-determination and independent statehood, and thus reactivated the nationalist interpretation of self-determination.¹⁰⁴

The external colonial patterns imposed on the inhabitants of Taiwan by successive external governments mirrored those adopted by European

101. Art. 1(2) of the *UN Charter* provides that one of the purposes of the UN is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of people.”

102. The right was first canvassed in the *Colonial Declaration*, *supra* note 27.

103. Principle VI of *ibid.*, expressly referred to the forms of integration, association and independent statehood. The *Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625(XXV), UN GAOR, (1970) endorsed these forms while recognizing the validity of any other political status freely determined by a people.

104. The nationalist interpretation of self-determination was premised on the idea that the state was the political manifestation of its constituent “nation,” thereby allowing a “nation” to recreate its political form in the light of national developments so as to ensure that the political unit (the state) and the “nation” or “people” remained congruent. The (radical) nationalist interpretation of self-determination was considered a threat to the established international society since it promised a political entitlement to independent statehood for national minorities contained within states, thereby serving the political ends of nationalist movements in their search for “authenticity.” See E. Gellner, *Nations and Nationalism* (Ithaca: Cornell University Press, 1983); A.D. Smith, *Ethnic Origins of Nations* (Oxford: Blackwell, 1986); and N. Berman, “But the Alternative is Despair” (1993) 106 *Harvard L. Rev.* 1792.

settlers in the Americas, Australia and New Zealand in fundamental terms.¹⁰⁵ Thus, from the perspective of customary international law, the restrictive “salt-water” test propounded in the *Colonial Declaration* presents no bar to equating Chinese/Japanese acts perpetrated on Taiwan with the brand of colonialism practised by European powers in the New World. In this context, it is arguable that the right of external self-determination has not been restricted in the same way as for many other Indigenous peoples in Asia.¹⁰⁶ However, this claim can be thwarted because the process of classical decolonization was effectively curtailed by the narrow interpretation given to the right of self-determination in the colonial context. Paragraph 2 of the *Colonial Declaration* envisaged that external colonialism must be ongoing at the time (or after) the right was declared, thereby giving colonialism a temporal dimension.¹⁰⁷ Consequently, where Indigenous peoples were subjected to overseas colonialism and notionally assimilated or integrated into settler states in a period before the *Colonial Declaration* was adopted, their claims of self-determination could be denied since their cases did not conform to the temporal characteristics of external colonialism. Continuing support for this interpretation has ensured that Taiwan’s Indigenous peoples cannot be the beneficiaries of classical decolonization.

Given its association with the breakup of states and nationalist overtones, the exercise of the right of self-determination outside instances of classical decolonization has remained problematic for the state-centred international system. From a statist perspective, the potentially destructive consequences of an untrammelled right of self-determination were largely avoided by invoking its classical interpretation. In this sense, the political existence of a state and the international order that developed in support of it provides the principal example of a nation’s right to choose its own political status. Since the nation has already exercised its right of self-determination through the genesis of the state, in the absence of situations of state disintegration, there is no need to reopen the issue of national self-determination.¹⁰⁸ Accordingly, traditional international law maintained that

105. See generally J. Castellino & S. Allen, *Title to Territory in International Law: A Temporal Analysis* (Aldershot: Ashgate, 2003).

106. The typical experience of Asian Indigenous peoples was characterized by a period of European colonialism, which was replaced by re-colonization strategies in the hands of post-colonial Asian states. See generally A. Xanthaki, “Land Rights of Indigenous Peoples in South-East Asia” (2003) 4 *Melbourne J. Int’l L.* 467; and the Asian Indigenous Peoples Pact, General Assembly Meeting, “Declaration on the Rights of Asian Indigenous Peoples” 1993 (2000) 1 *Asia-Pacific J. Hum. Rts. L.* 165 [AIPP, “Declaration”].

107. Iorns, “Indigenous Peoples”, *supra* note 30 at 297.

108. M. Koskenniemi, “National Self-Determination Today: Problems of Legal Theory and Practice” (1994) 43 *I.C.L.Q.* 241 at 245-246. The classical interpretation should not be confused with the notion of democratic self-determination. Not only does it pre-date the era of democratization, it is generally perceived as a “once and for all right” and, therefore, does not possess the ongoing dimension essential to representative democracy.

the appropriate unit for the purposes of self-determination (“the people”) is the entire population of an existing state, an approach reflected in its refusal to endorse the legality of unilateral secession. Evidently, the fiction that statehood and peoplehood are compatible concepts remains deeply embedded within the state psyche.¹⁰⁹

Given the above view of self-determination, the vast majority of states are afraid that the recognition of a right of self-determination for Indigenous peoples will lead to demands for the creation of Indigenous states carved out of their territory, and this view is a prime cause of the widespread denial of Indigenous peoplehood. Evidently, an instinctive test for peoplehood already exists through which international law administers the right of self-determination. Indigenous communities have had great difficulty in satisfying this test because it has been formulated in reverse: States are not prepared to condone the advent of Indigenous states; consequently, they will not recognize the means through which Indigenous self-determination could be realized (peoplehood).¹¹⁰ Therefore, most states have only been willing to acknowledge that Indigenous communities constitute a visible component of the wider state population and not distinct peoples for the purpose of acquiring rights in international law. The orthodox view that a people must comprise the whole population of an existing sovereign state has largely prevailed.

In addition to using the device of peoplehood to curb the scope of self-determination in an attempt to protect the structure of the current international system, states have also refocused the right. Specifically, through joint article 1 of *International Covenants*, they chose to promote a right to *internal* self-determination, which would enable the entire population of an existing sovereign state to determine its political status vis-à-vis that state.¹¹¹ Consequently, in treaty law, self-determination was, first

109. R. Falk, “The Rights of Peoples (In Particular Indigenous Peoples)” in J. Crawford, ed., *The Rights of Peoples* (Oxford: Clarendon Press, 1988) 17 at 26.

110. Iorns, “Indigenous Peoples”, *supra* note 30 at 290.

111. The right was first proclaimed in joint article 1 of the *International Covenants*, *supra* note 11, which provides:

- (1) All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
- (3) The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

and foremost, a domestic matter for those living in independent sovereign states.¹¹² However, the blanket legitimacy derived from the eligibility of all segments of the state population to participate in their political institutions on the basis of democratic processes has limited salience for the vast majority of Indigenous peoples. While the governmental structures that such processes produce may contribute to the provision of effective human rights, it is clear that even sophisticated democratic models have not delivered the kind of political, social and cultural rights needed to sustain vulnerable territorialized communities.

Further, the right of internal self-determination conceived by joint article 1 of the *International Covenants* has not yet been transposed into customary international law.¹¹³ The issue of sources is particularly important in the Chinese context since the PRC has not ratified the *ICCPR*¹¹⁴ and, due to its UN non-membership, the ROC is presently incapable of becoming a party to the *Covenants*. Thus, although the provisions of the *ICCPR* have been critical to jurisprudential developments in Indigenous and minority rights,¹¹⁵ the ramifications of the Taiwan Question have meant that their practical significance is limited for Taiwan's Indigenous peoples. Further, given the PRC's entrenched commitment to the 19th century paradigm of state sovereignty,¹¹⁶ in the Chinese context (unlike in the Western sphere of influence), there is very little scope for constructing broad normative reformulations designed to bind a state that is not a party to a specific treaty regime through processes of cross-fertilization.¹¹⁷

112. A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1998) at 59.

113. *Ibid.* at 102.

114. However, it did sign the *ICCPR* in 1998. At present, 148 states have ratified the treaty, online: Office of the UN High Commissioner for Human Rights <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>.

115. In particular, art. 27 provides:

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

See the case law relating to art. 27, *infra* note 162.

116. See Allen, "Recreating 'One China'", *supra* note 5.

117. For instance, the Inter-American Commission on Human Rights accepted the relevance of article 27 of *ICCPR* to a complaint made by the Yanomami people against Brazil, Case No. 7615 Inter-Am. CHR Res. 12/85 (1985), founded on a claimed right to special protection for all characteristics necessary for the preservation of the cultural identity of ethnic groups notwithstanding the fact that Brazil was not a party to the *Covenant*. It is apparent that such an approach can be sustained by the doctrinal revisions that have attempted to reconstitute customary international law as primarily a normative (rather than rule-based) source of international law: See the arguments advanced by Anaya, *supra* note 22 at 61-72. While there is clearly merit in these arguments, they unavoidably contradict the enduring matrix of the Westphalian system, thereby producing systemic incongruence: See M. Koskenniemi, *From Apology to Utopia* (Helsinki: Finnish Lawyers' Publishing, 1989) at 192-263.

Nevertheless, the right of internal self-determination has resonance in the Indigenous context since it is now generally accepted that colonialism also displays an internal aspect that has resonance for independent states.¹¹⁸ Internal colonialism occurs in situations where the developed core of a state exploits its periphery, politically and economically marginalizing minority groups in a vicious cycle that replicates external colonial practices.¹¹⁹ Although a wide range of vulnerable groups have experienced the vagaries of internal colonialism, its impact has been particularly acute in relation to Indigenous peoples, and the combination of external and internal aspects has reinforced their continuing subjugation at the hands of their colonial oppressors.¹²⁰ The recalibration of the notion of colonialism therefore attracts a fresh entitlement to decolonization for affected Indigenous peoples. However, the theory of internal colonialism needs to be tied to a specific form of internal self-determination if it is to have any traction for Indigenous peoples, particularly in the Asian context.

Through the “saving clause” of the *Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States* (1970), customary international law initially recognized that the right of internal self-determination was only available to racial/religious groups denied the opportunity to participate in the political processes of the state by an unrepresentative government.¹²¹ However, the level of representation required to satisfy this standard appears to be met by the absence of government-sponsored strategies of discrimination against particular segments of the national population.¹²² Nonetheless, despite the problems that the test of “representivity” presents for many minority groups, given the ongoing systematic oppression of Indigenous peoples in many countries,

118. See J. Tulley, “The Struggle of Indigenous Peoples for and of Freedom” in Ivison, Patton & Sanders, *supra* note 22, 37.

119. Iorns, “Indigenous Peoples”, *supra* note 30 at 298-301.

120. *Ibid.* at 296-297.

121. The saving clause provides:

Nothing in the forgoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair totally or in part the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race creed or colour. Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

On its possible permutations, see Cassese, *supra* note 112 at 108-121.

122. See P. Thornberry, “The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism” in C. Tomuschat, ed., *Modern Law of Self-Determination* (The Hague: Martinus Nijhoff, 1993) 101 at 114-119 [Thornberry, “Democratic Aspect of Self-Determination”].

they can legitimately claim an exceptional right to internal self-determination by virtue of customary international law.¹²³

Since then, the *Vienna Declaration and Programme of Action* (1993) has arguably extended this right to encompass all situations in which a government fails to represent the whole of its people by making a distinction of any kind.¹²⁴ Consequently, it has been claimed that the right of internal self-determination is now conferred on all peoples as a matter of customary international law.¹²⁵ This interpretation is supported by the wider recalibration of sovereignty as a popular, fragmented concept, a post-Cold War development that has re-energized the debate on the meaning of peoplehood and the pragmatic application of internal self-determination. Specifically, human rights scholars have sought to divorce peoplehood from statehood, thereby rendering the arbitrary distinction between “minorities” and “peoples” obsolete.¹²⁶ This conceptual revision is attractive to states because it does not necessarily threaten existing governmental structures.¹²⁷ Moreover, it has been conditioned by the prevailing (statist) view that

123. However, it is unclear whether the PRC accepts that sub-state groups possess the right of internal self-determination at all. For instance, when quoting from the saving clause of the *Declaration on Friendly Relations* in relation to the Taiwan Question, the PRC only referred to the maintenance of the territorial integrity of existing states and any mention of rights arising due to an unrepresentative government was omitted. See the PRC’s first White Paper, “The Taiwan Question and the Reunification of China” (1993), online: PRC’s Embassy, Sweden <<http://www.chinaembassy.se/eng/zt/twwt/twwtbps/default.htm>>.

124. UN Doc. A/CONF.157/24 (1993), 32 I.L.M. 1661 [*Vienna Declaration*]. The *Vienna Declaration* was the product of the UN World Conference on Human Rights (1993), which involved 171 states and a significant number of non-governmental organizations. It was subsequently endorsed by GA Res. 48/121 (1993).

125. F. Kirgis, “The Degrees of Self-Determination in the United Nations Era” (1994) 88 Am. J. Int’l L. 304 at 306.

126. For instance, see Anaya, *supra* note 22 at 100-103; and Thornberry, “Democratic Aspect of Self-Determination”, *supra* note 122 at 124-128. The Canadian Supreme Court in *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 123-124, tentatively endorsed this theoretical advance when it stated:

It is clear that a people may include only a portion of the population of an existing state. The right of self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain reference to “nation” and “state.” The juxtaposition of these terms is indicative that the references to “people” does not necessarily mean the entirety of a state’s population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.

127. An unfortunate consequence of this revision has been that states and international institutions have chosen to recognize Indigenous peoplehood in a global, rather than a national, context (for instance, see the International Decade of the World’s Indigenous *People*). By promoting the term Indigenous *people* (rather than Indigenous *peoples*), states have attempted to destroy the discrete political identities of particular Indigenous communities: If all Indigenous communities can be classified *en masse* as a people, specific Indigenous communities cannot possess separate political identities and cannot invoke the right of self-determination.

different peoples can properly exercise their right to self-determination through the common democratic processes of the same state, rather than validating an entitlement to secede.¹²⁸ Notwithstanding this reinterpretation, customary international law condones the exceptional right to create internal governmental structures to ensure that vulnerable territorialized peoples can exercise their right of self-determination, a right that cannot be realized through the common political institutions of the wider state.

Despite the ability of Indigenous peoples to access the customary right of internal self-determination, the right of self-determination has not been developed with Indigenous peoples in mind. As noted earlier, until recently it was predominantly state-centred, and while it has become more responsive to the views of non-state actors, there are inherent risks in advancing general norms which are not imbued with the ideology of those claiming under them.¹²⁹ This is reflected in Indigenous constructions of the right to self-determination in international law. Indigenous representatives typically interpret joint article 1(1) of the *International Covenants* as being declaratory of customary international law while ignoring the *Covenants'* internal gaze. In their view, all peoples have the right to self-determination and any failure to recognize the universality of this right can be attributed to systemic discrimination.¹³⁰ Alternatively, Indigenous peoples claim that self-determination is the inherent right of all peoples and that customary international law has effectively transposed the *jus naturale* traditions of *jus gentium* into contemporary international law.¹³¹ However, this argument is compromised by the widely held modern standpoint that, as a social construct, law cannot be grounded in natural rights.¹³²

Many Indigenous representatives do not accept such qualifications on their right to self-determination. They tend to disregard the nuances of positive international law in favour of more purposive constructions driven by (legitimate) demands for remedial justice. From the political perspective, this is understandable, but such a policy-oriented approach runs into difficulty when used as the basis for engaging with states on the issue of Indigenous rights. It is clear that Indigenous peoples possess the right to internal self-determination under existing customary international law as a consequence of their ongoing oppression by dominant societal groups. However, at present, the availability of this right seems to be tied to the

128. See *Reference Re Secession of Quebec*, *supra* note 126 at para. 154.

129. Thornberry, *Indigenous Peoples*, *supra* note 16 at 418-419.

130. For example, see J.B. Henriksen, "The Right of Self-Determination: Indigenous Peoples Versus States"; and T. Moses, "The Right of Self-Determination and its Significance to the Survival of Indigenous Peoples" in Pekka & Scheinin, *supra* note 25 at 85 and 155 respectively.

131. For instance, see Iorns, "Indigenous Peoples", *supra* note 30 at 301-308.

132. See M. Koskenniemi, "The Politics of International Law" (1990) 1 E.J.I.L. 4. But see J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

existence of ongoing oppression and dependent on states being receptive to nuances within the discourse of self-determination. Consequently, there is an urgent need to expressly recognize the right of Indigenous peoples to self-determination as a matter of customary international law in a manner that does not appear to make the right contingent on societal oppression. To this end, the adoption of a UN *Declaration on the Rights of Indigenous Peoples* is critical to the crystallization of a new rule of customary international law.

Against this background, article 3 of the *Draft Declaration* provides:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Although the substance of the article was lifted from joint article 1(1) of the *International Covenants*, like that article and the *Covenants* themselves, the *Draft Declaration* rests squarely on its internal dimension. Further, this bald statement provides a broad canvas on which to develop more nuanced interpretations of self-determination, an approach that facilitates the dialogue between states and Indigenous peoples as to the scope and application of the right.¹³³ Despite this open-ended approach, many states now accept the legitimacy of an Indigenous entitlement to self-determination on the condition that it is restricted to the right's internal manifestation.¹³⁴ In this vein of compromise, while many Indigenous peoples demand equal status with all other peoples, they are keenly aware of state concerns over territorial integrity and mindful of the need to foster relationships with states in "a spirit of coexistence, mutual benefit and full respect,"¹³⁵ a viewpoint which strengthens the value of internal self-determination as a practical mechanism for delivering effective Indigenous rights.

The Status of Autonomy in International Law

This subsection examines the extent to which the concept of autonomy has become a norm of international law via the right of self-determination. In addition, it explores the practicalities of establishing autonomous regimes and the problems of maintaining them given the enduring notion of state sovereignty and the limited authority of the international human rights treaty

133. Tennant, *supra* note 16 at 29-32.

134. Thornberry, *Indigenous Peoples*, *supra* note 16 at 384-385. Although Indigenous representatives can attend and participate at its meetings, the Working Group is composed entirely of states. For the *Report of the Eighth Session*, UN Doc. E/CN.4/2003/92 (2003) and the *Report of the Ninth Session*, UN Doc. E/CN.4/2004/81 (2004), see online: Office of the UN High Commissioner for Human Rights <<http://www.unhchr.ch/indigenous/groups-02.htm>>. For the *Report of the Tenth Session*, see *supra* note 95.

135. See the Preamble of the *Draft Declaration*, *supra* note 1.

regimes, especially in the context of China and Taiwan. By considering the resonance of the norm of autonomy in a wider context, this subsection facilitates the subsequent discussion about whether international law is capable of sustaining an Indigenous-specific entitlement to autonomy and the broader implications that this holds for Indigenous self-determination.

A major difficulty with the application of internal self-determination in the Indigenous context lies in discerning the mechanism through which it could be implemented. As noted above, its general manifestation (“democratic self-determination”) has limited resonance for Indigenous peoples. However, a prime solution lies in promoting autonomy as a specific and exceptional mechanism of the right to internal self-determination. Arguably, the construction of territorialized autonomous regimes, which enable oppressed peoples to recapture or reinforce the pre-existing territorial dimension of their cultural identity, is one of the most pragmatic means of achieving internal self-determination. Territory provides an unrivalled basis on which to found and secure group identity and internal structures do not threaten the overall authority and territorial integrity of established states.¹³⁶ Moreover, at one level, viable autonomous regimes actually support the state since they ensure that its structures are responsive to the needs of the various peoples who come within its jurisdiction. Such representative regimes can assuage the concerns of vulnerable communities and promote relations of trust with central authorities that, in turn, will ameliorate the threat of secessionist activity and the potential dismemberment of existing states. Nonetheless, it is important to emphasize that autonomy confers supplementary rights, powers and duties on territorialized communities, it does not affect the rights of its members to participate in the social, political, economic and cultural process of the wider state.

Although the concept of autonomy has been touted in international instruments,¹³⁷ states have been reluctant to endorse it as a general standard of international law.¹³⁸ In this regard, autonomy has often been categorized as

136. H. Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990) at 463-465; and Thornberry, “Images of Autonomy”, *supra* note 100 at 123.

137. For instance, see para. 35 of the CSCE “Document of the Copenhagen Meeting of the Conference on the Human Dimension” (1990) 29 I.L.M. 1305 at 1319.

138. It must be acknowledged that states perceive the concept of autonomy as being compromised by its close relationship with self-determination. Opposition stems from the view that it is insufficiently removed from external self-determination and may ultimately facilitate the precipitation of existing states through secession. As the cases of Eritrea and Kosovo show, this view is not without justification. From the federal perspective, see the coverage of the dissolution of Yugoslavia in Castellino & Allen, *supra* note 105 at 157-198; also see H. Hannum, “Territorial Autonomy: Permanent Solution or Step Toward Secession” in Z.A. Skurbaty, ed., *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* (Leiden: Martinus Nijhoff, 2005) 153 at 156-159.

a political claim rather than a legal right.¹³⁹ While some scholars have argued it lacks the substance and coherence necessary to acquire legal validity,¹⁴⁰ others have suggested that attempts to positivize autonomy should be consciously avoided since legal sanctity would diminish its utility as a tool for delivering contextual political arrangements, which facilitate decision-making processes.¹⁴¹ The uncertainty surrounding the status of autonomy in international law necessitates a search for another source of legal validity, one that invariably leads to the right of self-determination.

While customary international law recognizes a right to internal self-determination for oppressed peoples, the application of this right remains uncertain.¹⁴² For guidance, reference must be made to the principle of self-determination, which possesses residual authority to legitimize self-governing institutional arrangements that are in keeping with its normative essence. Its core meaning was articulated in the *Western Sahara* case, which proclaimed the need for governments to “pay regard to the freely expressed will of peoples.”¹⁴³ According to Cassese, the principle can act as a basic standard of interpretation in situations where customary rules are ambiguous.¹⁴⁴ Given the core aim of autonomy is to ensure that the people of a specific locality or region effectively control matters that most concern them, it falls within the purview of the principle of self-determination.¹⁴⁵ Despite the failure of both customary and treaty law to develop the norm of territorial autonomy,¹⁴⁶ its application can be sustained by the principle of self-determination and does not require an alternative source of authority to ensure its validity under international law. Another function of the principle relates to the method of exercising the right of self-determination—the procedures through which the free and genuine expression of the will of the people can be channelled.¹⁴⁷ To this end, it is necessary for the inhabitants of the territory that would form the basis of a proposed autonomous unit to invoke their political will through genuine (state-funded) democratic electoral processes concerning the creation of an autonomous regime. If a majority of the inhabitants voice their desire for territorial autonomy, it

139. H. Hannum, “Book Review of M. Suksi, ed., *Autonomy: Applications & Implications*” (2000) 7 Int’l J. on Minority and Group Rts. 279 at 283.

140. See Thornberry, “Images of Autonomy”, *supra* note 100 at 121-124.

141. See Z.A. Skurbaty, “Is There an Emerging Right to Autonomy? Summary Reflections, Conclusions and Recommendations” in Skurbaty, *supra* note 138, 565 at 565, 568.

142. On this issue of democratic governance, see S. Marks, *The Riddle of All Constitutions* (Oxford: Oxford University Press, 2000); and G. Fox & B. Roth, eds., *Democratic Governance in International Law* (Cambridge: Cambridge University Press, 2000).

143. *Advisory Opinion*, [1975] I.C.J. Rep. 12 at para. 59. On the salience of principle, see Cassese, *supra* note 112 at 128-133; and K. Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002) at 29-49.

144. Cassese, *ibid.* at 132.

145. Hannum, *supra* note 136 at 468.

146. Cassese, *supra* note 112 at 332.

147. *Ibid.* at 131-132.

would be incumbent on the state in question to embark on good faith negotiations concerning the creation of an autonomous regime.

Autonomous regimes must be made specific and enforceable through an array of elaborate constitutional measures that are required to entrench and implement such regimes.¹⁴⁸ As the unique political and legal circumstances of a particular case will invariably dictate the exact content of an autonomous regime, a definitive blue print for their creation cannot be devised. While the flexibility of the concept is sufficiently broad to encompass a wide array of quantitative and qualitative jurisdictional arrangements,¹⁴⁹ if an autonomous regime is intended to be a viable entity embodying the principle of self-determination, certain core elements need to be present to satisfy its normative essence. In particular, matters of regional or local concern should fall within the exclusive jurisdiction of the autonomous entity, including direct control over education, language, cultural issues, natural resources, economic policy, transport and healthcare.¹⁵⁰ Further, it would often be appropriate to confer a degree of international standing on the autonomous entity, allowing it to enter into international agreements with states and international organizations concerning economic/cultural matters, and secure membership of inter-governmental organizations to facilitate such purposes.¹⁵¹

Moreover, the precise division of powers between the central government and the autonomous entity represents a critical factor in the viability of the autonomous regime. Although exclusive jurisdiction in certain areas will be a prerequisite to the creation of an effective autonomous entity, as it will still be located within existing state structures, certain powers will inevitably be shared with the central government, or with other powers (usually those relating to defence, national security and foreign policy) remaining within the exclusive preserve of the central authority.¹⁵² Given the complexity of governmental structures, representatives of the autonomous entity must be allowed to participate in central political processes so as to reflect their legitimate interest in national issues and provide a suitable means for consultation regarding matters that would affect the rights of their constituent people(s).¹⁵³ Further, where shared powers exist, the parties should endeavour to found a joint body designed to coordinate the exercise of common powers. Clearly, the parties will be

148. Or other legal mechanisms that will at least ensure that such arrangements are not susceptible to challenge by the vagaries of ordinary state law: L. Hannikainen, "Self-Determination and Autonomy in International Law", in Suksi, *supra* note 86, 79 at 91.

149. F. Harhoff, "Institutions of Autonomy" (1986) 55 *Nordic J. Int'l L.* 31 at 32.

150. Hannikainen, *supra* note 148 at 91-93; also see Hannum, *supra* note 136 at 458-468.

151. R. Lapidoth, "Autonomy: Potential and Limitations" (1994) 1 *Int'l J. on Minority and Group Rts.* 269 at 277.

152. *Ibid.* at 277.

153. *Ibid.* at 278-279.

unable to prescribe for all eventualities and this underlines the need for genuine political commitment from both sides if the autonomous model is to prove successful.¹⁵⁴ Nevertheless, irrespective of the presence of political will, unforeseen events and the inherent scope for interpretation contained within any autonomous regime will invest the relationship with a latent power dynamic and, as such, jurisdictional disputes are bound to arise at some point.¹⁵⁵ Therefore, it is incumbent on the parties to establish an arbitration mechanism and procedures for the resolution of disputes in such instances.¹⁵⁶

One of the most attractive features of autonomy flows from the argument that even where an autonomous regime has been domestically agreed and implemented under municipal constitutional law, if the target population can establish its “peoplehood,” the operation of the regime will be subject to international law by virtue of the right of self-determination, and the state concerned will be under an obligation not to abolish or diminish its status without the consent of the affected people.¹⁵⁷ This view is particularly valuable to Taiwan’s Indigenous peoples as, in theory, not only would the establishment of effective autonomous regimes protect them against the vagaries of the ROC government, they ought to bind the PRC—or the new Chinese government—in the event of reunification as well. This argument strengthens the case for fostering Indigenous autonomous arrangements on Taiwan, ensuring that autonomy constitutes the most promising method for the realization of (internal) self-determination for a significant proportion of the island’s Indigenous peoples.

In the context of Taiwan, the interplay between international law and municipal law is complicated by the dynamics of the cross-Strait dispute. As discussed above, the ROC’s non-membership in the UN means that it is not a party to the major international human rights treaties. Nevertheless, where domestically agreed, autonomous regimes are internal arrangements dependent on constitutional and/or municipal laws for their validity, content and remedies. Accordingly, the absence of UN membership and widespread international non-recognition are not, by themselves, detrimental to the viability of Indigenous autonomous regimes created and operated in good faith. Of course, if such regimes were established by the ROC government

154. Y. Dinstein, “Autonomy” in Y. Dinstein, ed., *Models of Autonomy* (New Brunswick: Transaction Books, 1981) 292 at 295-296.

155. K. Nordquist, “Autonomy as a Conflict Solving Mechanism: An Overview” in Suksi, *supra* note 86, 59 at 69-70.

156. Hannikainen, *supra* note 148 at 92.

157. Harhoff, *supra* note 149 at 40; and M. Suksi, “On the Entrenchment of Autonomy” in Suksi, *supra* note 86, 151 at 164-165. Although both these scholars use the term “principle” as opposed to “right” in this context, they appear to use these terms interchangeably. The present author believes that they are actually referring to the operation of the right of self-determination.

and subsequently abused, there would be political limits on the capacity of internal procedures to resolve a fundamental dispute. In such circumstances, it would be preferable to have access to the leverage of international monitoring processes and court-based complaint procedures. However, without diminishing the important contribution that the *ICCPR*, *IESCR* and *ICERD* have made to the promotion of international human rights,¹⁵⁸ given their “soft” approaches, there is no guarantee that the relevant treaty provisions can be enforced and, therefore, the practical succour offered to affected groups may be limited in any event.

In particular, there are significant limitations to the operation of the *ICCPR*. First, individual complaints can only be made when a state party has ratified the *Optional Protocol* attached to the treaty,¹⁵⁹ while this treaty has been widely ratified, fewer states have been willing to subject themselves to the complaint procedures of the Human Rights Committee.¹⁶⁰ Second, the right of self-determination contained in article 1 cannot be the subject of an individual complaint.¹⁶¹ Third, although Indigenous peoples have used article 27 of the *ICCPR* with great effect in a wide range of cases,¹⁶² this article is patently inadequate to protect and sustain autonomous arrangements. Fourth, the argument that a government is under an obligation not to derogate from a grant of autonomy is unlikely to convince many states as, potentially, it has severe implications for their sovereignty: There is ample academic opinion that doubts whether a government is bound to maintain an autonomous regime that it has created.¹⁶³ Finally, although member states are under an obligation to ensure that the right of self-determination is satisfied through municipal structures of governance¹⁶⁴ (a requirement that can be measured by the scrutiny of country reports), the process is not strong enough to protect the precarious rights of sub-state groups in the absence of the political will on the part of the state concerned to submit frequent, comprehensive

158. See the Committee for the Elimination of Racial Discrimination, *General Recommendation XXIII (51) on the Rights of Indigenous Peoples* (1997) and Human Rights Committee, *General Comment XXIII (51) on the Rights of Minorities under Article 27*, UN Doc. CCPR/C/21/Rev.1/Add.5 (1994) [*General Comment XXIII*]. In general, see Thornberry, *Indigenous Peoples*, *supra* note 16.

159. *ICCPR Optional Protocol*, GA Res. 2200A(XXI), UN Doc. A/6316 (1966), 999 U.N.T.S. 302 (entered into force 23 March 1976).

160. At the time of writing, 101 states have ratified the *Optional Protocol*: See *supra* note 114.

161. See *General Comment XXIII*, *supra* note 158.

162. See *Lubicon Lake Band v. Canada*, Communication No.167/1984, UN Doc. CCPR/C/OP/2; *Sara v. Finland*, Communication No.511/1992, UN Doc. CCPR/C/58/D/511/1992; *Kitok v. Sweden*, Communication No.197/1985, HRC A/43/40 (1988); *Diergaardt*, *supra* note 20; and *Hopu v. France*, Communication No. 671/1995, UN Doc. CCPR/C/58/D/671/1995.

163. For instance, see Y. Dinstein, “Autonomy (International Guarantees of Autonomy)” in Skurbaty, *supra* note 138, 243 at 247.

164. See Human Rights Committee, *General Comment 12(21) on the Right of Self-Determination*, UN Doc. CCPR/C/21/Add.3 (1984) at para. 4; also see Committee for the Elimination of Racial Discrimination, *General Recommendation XXI (48) on the Right to Self-Determination* (1996).

reports.¹⁶⁵ Thus, while the ROC's pariah status is an undoubted handicap for Taiwan's Indigenous peoples, the above points illustrate that neither the attainment of statehood, UN membership nor treaty ratifications will necessarily guarantee the provision of Indigenous rights or the structural mechanisms through which they could be delivered.

In general, given the significant political commitment required to create, implement and maintain autonomous regimes, the norm manifests a high political content. Further, in light of the limited capacity of current international human rights treaty regimes to monitor the "representivity" of internal governmental structures effectively, the willingness of states to honour *municipal* autonomous arrangements appears conditional. As international law intrudes into the domestic jurisdiction claimed by states, their attitude appears to change towards it; as a consequence, international legal obligations become relative to governmental imperatives. In particular, adherence to international standards becomes reflective of the legitimacy that compliance engenders, rather than indicative of the direct authority of international law. The norm of autonomy provides a useful example in this regard. While it facilitates the right of internal self-determination, its application represents a significant limitation on the jurisdiction of central governments. However, despite these jurisdictional implications, many states appreciate the contribution that this evolving international norm can make to the delivery of self-determination and the legitimacy garnered by observing it.¹⁶⁶ Having established the pedigree of autonomy in international law, the next subsection examines its salience in the Indigenous context.

Autonomy and Indigenous Peoples in International Law

While many states have recognized the utility of the norm of autonomy, as yet, there have been relatively few instances of its application in the Indigenous situation.¹⁶⁷ Accordingly, this subsection seeks to determine the extent to which the general norm can support the development of autonomous arrangements for Indigenous peoples under the auspices of

165. See A. Byrnes, "Uses and Abuses of the Treaty Reporting Procedure: Hong Kong between Two Systems" in P. Alston & J. Crawford, eds., *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000) 287.

166. Nonetheless, the preparedness of states to recognize the validity of international standards in the domestic sphere depends on the extent to which they crave the legitimacy that adherence offers. The PRC has created autonomous regimes for Tibet, Hong Kong and Xinjiang although they were not developed by reference to the right of self-determination. For an overview of existing autonomous arrangements in the PRC, see Y. Ghai, "Autonomy Regimes in China: Coping with Ethnic and Economic Diversity" in Y. Ghai, ed., *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge: Cambridge University Press, 2000) at 77-98.

167. Notable examples include the creation of Nunavut in Canada and the arrangements made in relation to the Sami people in Scandinavia.

international law. Moreover, it explores the possibility that the norm can be enhanced in the Indigenous context. In addition, it discusses certain practical difficulties that may be encountered when devising and applying Indigenous-specific autonomous models. By providing an account of the significance of autonomy in the wider Indigenous context, it enables this paper to scrutinize the *DIAL* more effectively.

There are no established Indigenous-specific standards on autonomy in contemporary international law.¹⁶⁸ However, article 31 of the *Draft Declaration* provides:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry to any non-members, as well as ways and means for financing these autonomous institutions.

Article 31 is particularly interesting because it addresses autonomy through the language of rights and appears to support the emergence of a wider right to autonomy in international law. However, on closer examination, this “right” is expressly connected to the right of internal self-determination and is thus difficult to interpret as an endorsement of an independent right to autonomy. Nonetheless, the article buttresses the conceptual nexus between self-determination and autonomy, reinforcing the general doctrinal constructions advanced in the subsection on the status of autonomy in international law, above. The inclusion of a right to autonomy in the *Draft Declaration* was controversial and a number of Indigenous delegates strongly opposed its inclusion in the original text on the grounds that it detracted from the right as articulated in article 3, thereby damaging the equivalence of Indigenous self-determination.¹⁶⁹ This view is not baseless; although article 31 expressly relates to internal self-determination, states have consistently interpreted article 3 as being co-terminus with the internal aspect of the right as well.¹⁷⁰ It is unclear whether article 31 adds anything

168. Of course, Indigenous peoples would be able to rely on normative developments in general international law.

169. According to the American Indian Law Alliance,

[m]any in the [I]ndigenous caucus walked out of the WGIP in 1994 in protest at the inclusion of article 31. Those who accepted the article did so on the understanding that it was placed towards the end of the draft and constituted a political status that [I]ndigenous peoples may choose; it did not preclude other forms of self-determination.

See the *Report of the American Indian Law Alliance on the Working Group’s Tenth Session* (September 2004), online: American Indian Law Alliance <<http://www.ailanyc.org/2004wig.htm>> at 21 [*Report of the American Indian Law Alliance*].

170. See the Sessional Reports of the Working Group, *supra* note 134.

significant to article 3 in this regard and it has been argued that these articles should be conflated.¹⁷¹

Because their attention is largely focused on the issue of self-determination, Indigenous representatives do not appear to have strong views on the status of autonomy in international law, except to note that it offers less than full self-determination. Nonetheless, given the explicit connection between autonomy and (internal) self-determination in article 31, the concept of autonomy brings the content of the right of self-determination into sharp relief. As noted above, the issue of Indigenous self-determination has exercised states, but it has also led to fissures appearing within the Indigenous movement. Recent events in the inter-sessional Working Group of the UN Commission on Human Rights have revealed that some Indigenous peoples are prepared to compromise on the content of the right. Consequently, some Indigenous peoples are more willing to consider the internal manifestation of self-determination (and therefore, by implication, autonomy),¹⁷² whereas other representatives are less disposed to accept perceived inequality for Indigenous peoples in this regard.¹⁷³ Division on this issue highlights the fact that Indigenous peoples do not constitute a homogenous group; they have different aims and aspirations, a fact that often seems to be lost, especially on states. Nonetheless, different negotiating strategies concerning the *Draft Declaration* have not yet translated into different legal conceptions of self-determination. In light of the uncertainty surrounding the normative content of article 31, and given that the *Draft Declaration* has yet to be adopted, for the moment, it is prudent to regard autonomy as a norm, which derives its legal authority from the customary right of internal self-determination.

171. The USA made this proposal at the Eighth Session; see *the Report of the Eighth Session* in *ibid.* at 18.

172. For example, the Tebtebba Foundation of the Northern Philippines, in its interventions at the 61st session of the Commission on Human Rights (2005), approved of the interpretation of the Chairperson's latest reformulation of article 3, which is predicated on internal self-determination, online: Tebtebba Foundation <http://www.tebtebba.org/tebtebba_files/ipr/chr/64.html>. The Chairperson's preferred version of article 3 includes the following provisions:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine, within constitutional provision of States concerned or other positive arrangements, their political status and freely pursue their economic, social and cultural development.

In accordance with [the 1970 *Declaration*] this shall not be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principles of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind [see the Addendum to the *Tenth Session Report*, *supra* note 95 at 8].

173. For the view of the American Indian Law Alliance, see *the Report of the American Indian Law Alliance*, *supra* note 169 at 20-21.

Nevertheless, in the Indigenous context, it is arguable that the norm of autonomy is potentially much more significant than in its general manifestation. The general norm offers challenged sub-state groups exhibiting cogent territorialized identities the chance to achieve self-determination by connecting the right of internal self-determination to a regionalized notion of territoriality. However, prior to the act of creating a given autonomous regime, while the right to self-determination of the people concerned may be established, the status of the territory designated to constitute the basis of the new regime is usually unclear. Although the sub-state group will invariably possess strong cultural claims to the territory, typically they will not possess territorial rights (public rights) until the autonomous regime is established and, until then, the region will remain state territory. In contrast, in the Indigenous context, autonomy rests not only on the Indigenous entitlement to self-determination, but also on international law's growing willingness to accept that Indigenous peoples possess land/territorial rights. In particular, as noted in the above subsection on land/territorial rights of Indigenous peoples in international law, ILO *Convention 169* and the *Draft Declaration* acknowledge the validity of Indigenous land/territorial rights that provide the pre-existing rights to warrant the creation of Indigenous-specific autonomous regimes. In addition, article 31 represents a much stronger expression of entitlement than that mooted in connection with the general norm. In light of the above, it is suggested that the Indigenous-specific norm of autonomy has considerable potential to deliver Indigenous self-determination in a pragmatic and effective manner.

It should be conceded that autonomy also has practical drawbacks for Indigenous peoples. The flexibility that inheres in autonomy can serve to disadvantage Indigenous peoples in their efforts to secure self-determination. The content of autonomous models varies considerably, and this gives rise to a need for scrutiny in respect of particular autonomous arrangements in order to assess whether they actually deliver self-determination for the peoples concerned.¹⁷⁴ Moreover, another problem for Indigenous peoples is their current marginalization and the risk that territorialized autonomous regimes would intensify their exclusion from the wider society. Therefore, it is crucial that the rights of Indigenous peoples do not solely relate to their autonomous units. They are entitled to participatory rights in the national society pursuant to the general right of internal self-determination, and any

174. Proponents of "limited autonomy" models often seek to promote arrangements that do not satisfy this standard: See D. Hawkins, "Indigenous Rights and the Promise of a Limited Autonomy Model" in Skubarty, *supra* note 138, 337 at 344-347. Hawkins examines the Organization of American States' attempts to include provisions relating to autonomy within its draft *Inter-American Declaration on Rights of Indigenous Peoples*. It is notable that he limits the resonance of his model to the western hemisphere.

proposed autonomous models would need to make provisions to ensure that these rights could be exercised effectively.¹⁷⁵ Having noted the increasing salience of autonomy in the Indigenous context, the next subsection considers its significance for Taiwan's Indigenous peoples.

The Significance of Autonomy for Taiwan's Indigenous Peoples

The development of an Indigenous-specific norm of autonomy has major implications for those Indigenous peoples who are actively seeking to establish autonomous regimes within municipal domains. And, despite existing beyond the reach of formal international law, this advance is particularly valuable to Taiwan's Indigenous peoples. As noted earlier, international standards constitute an important source of legitimacy and thus manifest powerful persuasive authority irrespective of questions as to whether they have direct binding force. Specifically, in those states/polities where strong civil societies have emerged, such standards can bring significant pressure to bear on their respective governments to initiate reform. However, in the present context, before the normative value of evolving international standards can be appraised through the lens of the *DIAL*, this subsection discusses the increasing salience of autonomous regimes for the island's Indigenous peoples, thereby seeking to locate the subsequent critique of *DIAL* in context.

The subsection on the Indigenous land rights regime on Taiwan (above), discussed how the failure of the ROC government to respect Indigenous realty rights fuelled demands for public structures—territorialized autonomous regimes—that can protect and promote the fragile territorial identities of the island's Indigenous peoples. From the inception of the Indigenous movement on Taiwan, there have been calls for the creation of such autonomous areas. As early as 1988, the ATA demanded in its *Manifesto of the Rights of Taiwan Aborigines*:

The right to practice regional autonomy in the area in which [A]borigines have traditionally lived. To upgrade authorities of autonomy and the competent administrative authorities to the central class. The State shall guarantee to the [A]borigines the right to exercise autonomy.¹⁷⁶

The concept of territorial autonomy was developed further through a series of political events, including the ATA's attempt to establish the Taiwan Indigenous Autonomous Areas Assembly (1991) and the PCT's Indigenous

175. See art. 6 of *Convention 169*, *supra* note 2; and arts. 4, 19 and 20 of *Draft Declaration*, *supra* note 1.

176. Stainton, *supra* note 70 at 423 (trans. by Stainton).

Self-Government Conference (1992).¹⁷⁷ Indeed, political support for the creation of autonomous areas for Taiwan's Indigenous peoples has been growing since the mid-1990s, a policy that was endorsed by the fledgling DPP, which also backed the *Draft Declaration*.¹⁷⁸ However, the issue has been complicated by substantial patterns of encroachment onto Indigenous territories by Han Chinese people. In the event of Indigenous autonomous regimes being created, it is improbable that the ROC government would put in place a compulsory purchase program to reclaim encroached lands for the Indigenous peoples concerned. Therefore, it is anticipated that significant Chinese populations could find themselves subject to the jurisdiction of Indigenous governmental structures.¹⁷⁹ Consequently, the question of boundaries has become increasingly politically charged for the island's wider population.

The issue of encroachment raises a practical dilemma for the exercise of the right of internal self-determination in the contemporary context. While traditional cases of external self-determination could be resolved by letting the people of a defined territory decide their own political destiny through plebiscites,¹⁸⁰ the jurisprudence of internal self-determination now endorses the view that distinct peoples should coexist within the same state. As such, the right of self-determination belonging to a given people cannot be exercised in isolation; rights of other people living within the same state must counterbalance it. Accordingly, although the decision to found an autonomous regime, as the product of one people's right to self-determination, can be legitimately restricted to the inhabitants of the affected region, other people living within that area cannot be excluded from the decision-making process; to hold otherwise would be to contradict the democratic essence of internal self-determination. In this respect, the requirement that a given people must constitute a numerical majority in the proposed territorial unit in order to establish its mandate to govern demonstrates the limits of territorial autonomy.¹⁸¹ Nevertheless, the rise of Indigenous consciousness and the momentum gained from the global

177. Although the ATA's assembly proposal did not generate sufficient Indigenous support at the time, the PCT's Conference involved more than 60 Indigenous intellectuals and Presbyterian clergy. It proposed the aims of Indigenous self-government and establishing a national Indigenous assembly within five years: *ibid.* at 424-425.

178. However, as the DPP moved towards the political mainstream, the issue of Indigenous land rights slipped off its agenda: See *ibid.* at 431-432.

179. *Ibid.* at 433.

180. And even this was problematic: See A. Whelan, "Wilsonian Self-Determination and the Versailles Settlement" (1994) 43 I.C.L.Q. 99.

181. Nonetheless, if a continuing territorial connection cannot be established, corporate forms of autonomy may deliver the right to self-determination to affected Indigenous communities. Corporate forms may be particularly useful for the *Ping-pu* people whose territorial identity has been largely destroyed as a result of Chinese and Japanese colonialism. On the various forms of autonomy, see generally, G. Gilbert, "Autonomy and Minority Groups: A Right in International Law?" (2002) 35 Cornell Int'l L.J. 307; and Skurbaty, *supra* note 138.

Indigenous movement have coalesced into demands for the recasting of Indigenous territoriality on Taiwan, demands that can only be satisfied through the creation of autonomous regimes designed to protect and promote their fragile territorial identities.

In their struggle for autonomy, Taiwan's Indigenous peoples can rely on customary international law regardless of the ROC's international status and can, therefore, claim a right to internal self-determination that can be satisfied by the grant of territorialized autonomous regimes. However, a major challenge is how to invoke such a claim without having access to the mechanisms of international adjudication. In this respect, it appears that their rights under international law are only theoretical and cannot be realized in practice. Moreover, even when a state is recognized, if challenged, it could point to internal governmental arrangements that ostensibly satisfy the conditions of customary international law regarding self-determination and autonomy on paper, without meeting them in practice. Against this background, it is submitted that the current value of emerging international standards on autonomy and Indigenous rights for Taiwan's Indigenous peoples lies in their capacity to act as a political catalyst for the development of municipal legal programs that seek to emulate the normative content of international law. There are persuasive precedents in this respect. For instance, although *Convention 169* has been ratified by a small number of states,¹⁸² some governments have used it as a template for their own municipal reforms, while others have used it as the basis for political dialogue.¹⁸³ Therefore, the persuasive influence of international standards should not be underestimated irrespective of questions of legal obligation and enforcement.

In the present context, the ROC government manifests a willingness to be seen to be incorporating nascent Indigenous norms into municipal law. In part, this policy appears to be motivated by an eagerness to demonstrate the strength of Taiwan's civil society to domestic and international audiences—in contrast to the position adopted by the PRC on Indigenous issues. Further, it is also influenced by the particular brand of identity politics promoted by the incumbent DPP government. Moreover, from the Indigenous perspective, if the ROC regime is amenable to the task, Taiwan's Indigenous

182. At the time of writing, 17 states have ratified *Convention 169*. See online: ILO <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

183. For example, the government of the Philippines developed its *Indigenous Peoples' Rights Act* (1997) by reference to the provisions of *Convention 169*: Xanthaki, *supra* note 106 at 468. The Sami people have used this *Convention* to facilitate discussions with Norway concerning the development of municipal legal standards: See J.A. Velin, "Making the ILO Convention on Indigenous Peoples Work, Sami People Seek Their Due" *The World of Work, The Magazine of the ILO* 21 (1997) 11. For a theoretical account of the way in which international law can shape developments in the political sphere, see C. Reus-Smit, ed., *The Politics of International Law* (Cambridge: Cambridge University Press, 2004).

peoples have much to gain from the transposition of international norms into domestic law. The impetus for the realization of Indigenous rights on Taiwan may flow from a number of sources, but its crystallization at this moment in time has been inspired by evolving international law, endorsed by the ostensible political good will of the ROC government. Another attraction of autonomy for Taiwan's Indigenous peoples is the prospect of establishing autonomous regimes while the ROC is in a position to validate them. If negotiations concerning reunification commence, the PRC may accept the continuity of pre-existing Indigenous autonomous units despite its hostility to the idea of Indigenousness as part of a wider bargaining package on governmental structures.

This paper assumes that a meaningful critique of the current *DIAL* cannot be undertaken without first embarking on a thorough analysis of the status and content of the norm of autonomy in international law leading to an assessment of its resonance for Indigenous peoples. Accordingly, this section examined the extent to which international law is prepared to validate the creation and maintenance of autonomous regimes in general, and for Indigenous peoples in particular. It found that a general right to territorial autonomy has not crystallized in international law as yet; nevertheless, the norm constitutes an important manifestation of the right to international self-determination. However, the norm has much greater potential in the Indigenous context. The "right" to autonomy contained in article 31 of the *Draft Declaration* derives its primary authority from the Indigenous right to self-determination as developed in article 3. Moreover, it is reinforced by international law's growing willingness to accept that Indigenous peoples already hold land/territorial rights, rights that could provide the basis for autonomous regimes. Consequently, the right of internal self-determination and land/territorial rights coalesce in the Indigenous-specific norm of autonomy to produce a far stronger case for the realization of territorialized structures of governance than that advanced by the general norm.

The ROC's Indigenous land rights regime does not currently satisfy contemporary international standards on land/territorial rights; Taiwan's Indigenous peoples' right to self-determination remains largely unacknowledged by official government sources and previous attempts to promote Indigenous autonomous regimes have proved unsuccessful. Nonetheless, the *DIAL* has reinvigorated demands for the creation of Indigenous-specific autonomous regimes on Taiwan. And it is clear that evolving international standards on self-determination, land/territorial rights and autonomy can inform and strengthen these demands. In particular, they can be used to critique the current *DIAL* and to direct the process of negotiated revision. Devising and implementing autonomous regimes that deliver the right of self-determination to Indigenous peoples in a situation

that is located beyond the reach of formal international law represents a considerable challenge. Nonetheless, international standards have the capacity to bring about municipal reform regardless of questions concerning their binding force as a consequence of legitimacy that compliance engenders. Moreover, given the restrictions imposed by the Taiwan Question, it appears that the ROC is particularly sensitive to this evolving feature of international law. Bearing in mind these conclusions, the paper now critiques the provisions of the *DIAL*.

V THE DRAFT INDIGENOUS AUTONOMY LAW

While the discrete peoplehood of Taiwan's Indigenous communities has been recognized in the ROC constitution, the consequences of their peoplehood—the right of self-determination—was largely ignored until it was connected to the concept of autonomy and championed by the Council of Indigenous Peoples (“CIP”) pursuant to article 10(12) of the *Additional Articles of the Constitution*.¹⁸⁴ To this end, the CIP was responsible for the preparation and promotion of the initial version of the *Draft Indigenous Autonomy Law*.¹⁸⁵ Although only one of the seven-member drafting team was Indigenous, the CIP conducted a three-year consultation process in connection with the draft legislation, a process that included a series of meetings with the 11 Indigenous peoples recognized at the time. While, as it will be seen, the initial draft contained serious flaws, it was generally considered a workable piece of legislation.¹⁸⁶ Subsequently, the draft legislation was submitted to the central government for scrutiny and was approved in June 2003. But, during this scrutiny process, the CIP's draft (which extended to 104 sections) was significantly pared down. The *DIAL* presented to the ROC Legislature included only 15 sections and was roundly criticized by Indigenous legislative representatives and experts who argue that it provides only the barest framework for the realization of Indigenous autonomous regimes.¹⁸⁷ Against this background and the above-discussed international standards, this section examines the content of the final *DIAL*.

184. The recent enactment of the *Basic Law of Indigenous Peoples* ostensibly gives impetus to this development.

185. See the CIP draft, online: <<http://www.abo.org.tw/maychin/epaper/maychin027.htm>> (Chinese version).

186. See the comments of Lin Cheng Er, an Indigenous member of the Legislature, online: 4 November 2003 <http://www.ly.gov.tw/ly/01_introduce/0103_leg/leg_main/interrogate/interrogate_02.jsp?ItemNO=01030600&ly1500_number=3271&stage=5&lgn=00049>; and those made by the non-aligned National Policy Foundation, online: National Policy Foundation (9 June 2003) <<http://www.npf.org.tw/PUBLICATION/IA/092/IA-C-092-103.htm>> (both in Chinese).

187. See the ROC government's final version of the *DIAL*, online: ROC Government <<http://www.ey.gov.tw/web92/Wc5c8bd1f77dab.htm>> (Chinese version).

Given its skeletal nature, with significant omissions and interpretative ambiguities, the CIP draft is also considered in an attempt to critique the final *DIAL* effectively.

The *DIAL* allows for the creation of Self-Administration Districts (“SADs”) as a means of achieving self-determination for Taiwan’s Indigenous peoples in recognition of their equal status and entitlement to democracy.¹⁸⁸ To this end, all (recognized) Indigenous peoples can jointly or separately establish a SAD, which will be endowed with public legal personality.¹⁸⁹ However, section 8 provides that they are required to form SAD preparatory groups and to submit their policies regarding the content and structure of their proposed SADs to the CIP for approval. Once approved, the CIP will liaise with such groups to formulate joint policies concerning the realization of SAD projects. According to section 9, it will also negotiate with the central government, other SADs and preparatory groups as well as the wider population via public hearings regarding the creation of particular SADs. In very broad terms, section 10 prescribes the constitutional elements of SAD structures; these include the requirement of provisions concerning its formation, amendment and abolition; structures of governance; the powers and functions of its various branches of government; and relations with the central government and other SADs. Section 12 provides that SAD laws shall govern public finances.¹⁹⁰ In addition, section 5 states that SADs should be organized on the principles of fairness, democracy and the traditions of the Indigenous people(s) concerned.

While it is debatable whether the bare bones of SAD constitutions can be ascertained from the above, it is unclear how such structures can be developed without detailed legislative guidance. Specifically, how can such complex interrelated structures be devised in isolation, and who is responsible for their formulation and realization? If such matters are left to the Indigenous peoples themselves, although this would demonstrate Indigenous participation and empowerment, the central government might block their attempts to establish SADs using an array of institutional stalling devices. Alternatively, if the responsibility for driving the process forward rests with the CIP, the hollowing out of its draft legislation suggests that its authority is susceptible to central government pressure; therefore, vesting authority in the CIP is no guarantee of the widespread success of Indigenous autonomous regimes.

In contrast, the CIP draft envisaged that SADs would confer a high degree of autonomy on Indigenous peoples. In particular, a SAD government would have substantial powers in relation to finance, education,

188. Sections 1 and 7.

189. Sections 2 and 3.

190. S. 11 states that the central government will pledge assistance to support basic facilities in those SADs that are not financially viable.

transport, public utilities, healthcare, environment, social welfare, corporate enterprise, employment and administration.¹⁹¹ A SAD legislative assembly would be empowered to enact secondary legislation on matters concerning the district.¹⁹² Further, the judicial branch would be required to respect Indigenous customary law when dealing with Indigenous disputes; the CIP draft also allowed for the creation of specific tribunals for the administration of Indigenous laws.¹⁹³ However, a grave failing in both the CIP draft and the final *DIAL* is the lack of special status for SADs within the ROC legislative regime. There is nothing in either version to indicate that these autonomous regimes would be entrenched against the vagaries of ordinary law-making processes. While Indigenous peoples may have garnered constitutional recognition, it appears that their institutions will not be protected in the same manner.

Given the extent of Han Chinese encroachment on Indigenous lands and the perceived threat that Indigenous autonomous regimes pose to dominant society, the process of creating a SAD is inherently controversial. As noted above, the final *DIAL* says very little about the procedures by which a SAD can be established and, although it mentions institutional consultation and public hearings, it expressly refers to the application of democratic electoral processes with regard to the process of SAD creation. In contrast, the CIP's draft is more specific; it anticipated that if 200 members of a given Indigenous people endorsed a proposal to create a SAD, a preparatory group would be established and registered with the CIP.¹⁹⁴ In order to create a SAD, the *DIAL* simply provides that an election must be held involving all the inhabitants living within the area that would be subject to its jurisdiction; a simple majority in favour would be sufficient to establish such a regime.¹⁹⁵ Consequently, Han Chinese individuals who have already encroached onto Indigenous reservations would be eligible to participate in this democratic process. Given that such elections are bound to generate conflict between Han Chinese and Indigenous peoples, and could be politically damaging to the DPP government, it appears that the DPP has quietly chosen to forsake the cause of constructing autonomous regimes by denying Indigenous peoples the opportunity to develop them by democratic means, an apparent entitlement that pervades the final *DIAL*.¹⁹⁶

191. Sections 20-22. This point is made in V.W. Wang, "Analysis of the *Draft Indigenous Autonomy Law*" (2003), online: National Policy Foundation, Taiwan <<http://www.npf.org.tw/PUBLICATION/IA/092/IA-B-092-010.htm>> (in Chinese) [Wang, "Analysis"].

192. S. 28.

193. S. 5.

194. S. 3(8); see Wang, "Analysis", *supra* note 191.

195. Wang, "Analysis", *ibid*; and ss. 10-13.

196. See ss. 1, 5 and 6.

Although it ostensibly concerns Indigenous peoples, the final *DIAL* focuses on the mechanics of creating SADs rather than on the Indigenous peoples themselves. Section 1 of the *Status Act for Indigenous Peoples* (2001) recognizes the status of Taiwan's Indigenous peoples and pledges its commitment to protecting their rights, but neither the CIP draft nor the final *DIAL* refers to the 2001 *Act* or the precise status of Indigenous peoples vis-à-vis the proposed autonomous regimes.¹⁹⁷ Further, it is apparent that unless an Indigenous community has been officially recognized pursuant to the *Regulations for Identifying Indigenous People's Ethnicity* (2002), it cannot apply for SAD status.

Section 4 provides that SADs shall reflect the historical, cultural relationship between Indigenous peoples and their traditional lands. While Section 13 provides that territorial autonomy will be vested in the SAD, which will possess the authority to regulate land within its sphere of governance, the ramifications of this authority for Indigenous territories are far less certain. As the final *DIAL* does not tie the creation of SADs to Indigenous status, it fails to tackle issues that particularly affect Indigenous peoples, including the question of Indigenous land rights.¹⁹⁸ Although SADs are conceptually predicated on the existence of Indigenous homelands, the final *DIAL* is silent on the precise status of SAD territory. In the event of a SAD being created, there is nothing in the draft legislation to displace the presumption that the central government will retain ownership of Indigenous lands and that the transfer of territorial authority to SADs would be nothing more than a nominal, bureaucratic affair.¹⁹⁹ Accordingly, there appears to be no commitment to enhancing Indigenous land rights in keeping with contemporary international standards, an omission that severely undermines the credibility of the draft legislation.

The final *DIAL* confers participation rights for all inhabitants on the basis of equality in keeping with international human rights norms.²⁰⁰ Section 7 introduces the question of the right of self-determination; it holds that each SAD has the capacity to decide its own political, economic, social and cultural goals in accordance with the right of self-determination. Nonetheless, while expressly acknowledging recent international developments concerning self-determination, the explanatory notes appended to the final *DIAL* are careful to limit the scope of the right; it must be interpreted in the light of the ROC *Constitution*, the final *DIAL* itself and the enabling provisions of the SAD concerned. Given the (statist) preference

197. Sections 75-79; see Wang, "Analysis", *supra* note 191.

198. See Wang, *ibid.* While the *Basic Law* promises future reform of the Indigenous land rights system, it is submitted that questions of territory and realty cannot be divorced, and should be tackled together.

199. *Ibid.*

200. S. 6.

for internal self-determination, this formulation is unsurprising and although Taiwan's Indigenous peoples have never expressly qualified their right to self-determination,²⁰¹ as noted above, their proposals have centred on the internal manifestation of the right through the development of proposals on autonomy.

However, it is submitted that this provision does not recognize Indigenous self-determination at all; it simply modifies the classical interpretation of self-determination: The right is conferred on the SAD rather than on the Indigenous people(s) living within its jurisdiction. As SAD populations would comprise both Indigenous and non-Indigenous communities, the extent to which Indigenous peoples are capable of owning this right remains unclear. Further, the principle of self-determination empowers a people to decide their own political destiny; to this end, the extent to which section 7 of the final *DIAL* embodies the wishes of Taiwan's Indigenous peoples can be seriously doubted. In addition, if the government-sponsored SAD system fails to deliver Indigenous self-determination, it seems very unlikely that Taiwan's Indigenous peoples could reject it, replacing it with institutions and processes of their own choice. In this regard, it is difficult to reconcile this provision with the right of self-determination as understood in contemporary international law. Even if Indigenous peoples manage to entrench genuine democratic processes within SAD constitutions by their own volition, allowing them to influence the exercise of the right in practice, the combined provisions of the final *DIAL* have rendered self-determination meaningless. This state of affairs enables the government to reap the political benefits from its espoused commitment to Indigenous rights proclaimed in the final *DIAL* and the *Basic Law of Indigenous Peoples* without having to face the political consequences that would follow from their realization.

As autonomous regimes are deeply rooted in the right of self-determination, the impotence of section 7 warrants further discussion of the issue of Indigenous involvement in the development of legislative proposals on Indigenous rights. In light of the shortcomings noted thus far, the ROC should substantially revise its draft legislation; however, in contrast to the minimal level of consultation undertaken in relation to the present *DIAL*, it is suggested that they draw on international institutional approaches in order to procure meaningful Indigenous participation in this respect. This could be achieved by establishing a Working Group, similar in form to the inter-

201. As stated above, the ATA endorsed the *Declaration of the Rights of Asian Indigenous Peoples*, which set out the meaning of Indigenous self-determination in the Asian context: See AIPP, "Declaration", *supra* note 106 at 166-167. Also see the *Taipei Declaration on the Rights of Indigenous Peoples*, (International Conference on the Rights of Indigenous Peoples, National Taiwan University, Taipei, 18-20 June 1999), online: Taiwan First Nations <<http://www.taiwanfirstnations.org/Taipeidec.htm>>.

sessional Working Group of the Commission on Human Rights, comprising all Taiwan's Indigenous peoples and representatives of the ROC government and charged with the task of developing fresh *DIAL* proposals. By setting up such an institution, the ROC government would be demonstrating its unequivocal political commitment to the provision of Indigenous rights. Further, if the institution proved to be successful by both sides, it could be extended to cover other areas targeted by the *Basic Law* as being amenable for the provision of Indigenous rights.

In the event of a dispute between a SAD and the central government, section 14 of the final *DIAL* holds that the Legislature shall call a meeting to resolve the dispute. Although this section nods in the direction of the separation of powers, given the close political affiliation between Executive and Legislature, it fails to appreciate the true value of independent adjudication to the process of dispute resolution and to the viability of autonomous regimes in general. In contrast, the CIP draft recognized the need for consultation in situations in which the central government adopted a policy or sought to legislate in a manner that would affect a SAD's authority.²⁰² While it acknowledged the authority of the central government by authorizing it to issue an order demanding the amendment or invalidation of SAD legislation if it contradicted the ROC *Constitution* or the primary legislation of the ROC Legislature, it allowed that, if the SAD in question refused to obey such an order, the ensuing dispute would be resolved by judicial proceedings.²⁰³ Moreover, in a dispute concerning jurisdiction, the CIP draft envisaged that the matter would also be resolved by recourse to judicial process.²⁰⁴

In cases of dispute between SADs, or between a SAD and another public authority, the central government shall be empowered to resolve the dispute.²⁰⁵ By enabling the central government to preside over inter-SAD disputes, the draft legislation not only gives it the authority to influence relations between Indigenous peoples, it also represents a denial of the need for a national Indigenous body to resolve such disputes in their own best interests. Such a body could coordinate and represent the common interests of Indigenous peoples vis-à-vis the central government. It should comprise Indigenous delegates from each SAD, thereby connecting these distinct regimes, and could foster a vibrant political network leading to the creation of a federal arrangement that would significantly strengthen Indigenous political authority on Taiwan. Although, in reference to previous legislative proposals, it has been suggested that the CIP could act in such a representative capacity since it constitutes a branch of the central

202. S. 4.

203. Sections 99-100.

204. S. 101.

205. S. 14 of the final *DIAL* and s. 101 of the CIP draft share the same view in this regard.

government, it is not sufficiently independent to assume such a function.²⁰⁶ In the absence of legislative support, it is critical that Indigenous peoples militate for the creation of an independent Indigenous body that can combine Indigenous voices for maximum political effect.

Although, as noted above, there have been previous attempts to establish such a body, past efforts have been hindered by the political structures imposed on Taiwan's Indigenous peoples by the ROC government. While Indigenous peoples have been allocated eight seats in both the National Assembly and the Legislature in a token attempt at consociationalism, these seats have been divided equally between two artificial constituencies corresponding to inaccurate and pejorative ethnic classifications (*sundee-sunbaus* and *pingdee-sunbaus*), which bear no relation to the distinct identities of the island's Indigenous peoples. Further, the minimal level of Indigenous representation engendered by the current system ensured that Indigenous peoples have been incapable of making an impact through the representative institutions of the political mainstream. Accordingly, there is an urgent need to reconstitute the Legislature so that it accurately reflects the ethnic cleavages that exist between Taiwan's Indigenous peoples. The ROC's present consociational arrangements must be remodelled to ensure that Indigenous peoples can secure meaningful participation within its central political institutions in keeping with the evolving international standards contained in *Convention 169* and the *UN Draft Declaration*.²⁰⁷

Regardless of the credibility of the final *DIAL*, a fundamental difficulty affecting the viability of any Indigenous autonomous regime created on Taiwan stems from the ROC's indeterminate international status. The UN recognizes the PRC's jurisdiction over the island of Taiwan, and the ongoing cross-Strait dispute has ensured that its inhabitants have no representation at the UN. Thus although the WGIP's relatively informal standing procedures have allowed the ATA and the *Taroko (Truku)* to report on their experiences, Taiwan's Indigenous peoples are denied direct access to the General Assembly, ECOSOC, and the inter-sessional Working Group of the Commission of Human Rights. Further, it is improbable that the newly constituted UN Permanent Forum on Indigenous Issues will accept supervisory jurisdiction in relation to an enacted *DIAL* or Taiwan's

206. Shiu made this suggestion in the context of the *Local System Law* (1999), a previous legislative attempt to found autonomous regimes for Taiwan's Indigenous peoples; see *supra* note 80.

207. For an interesting account of political arrangements that can secure Indigenous self-determination in legislative assemblies, see C.J. Iorns, "Dedicated Parliamentary Seats for Indigenous Peoples: Political Representation as an Element of Indigenous Self-Determination" (2003) 10:4 *Murdoch University Electronic Journal of Law*, online: Murdoch University <<http://www.murdoch.edu.au/elaw/issues/v10n4/iorns104.html>>.

Indigenous peoples in general.²⁰⁸ Therefore, for the moment, the cross-Strait dispute continues to prevent direct engagement in the formal institutions and processes of international society; nonetheless, the actions of Taiwan's Indigenous peoples demonstrate that existing and evolving international standards can provoke reform within municipal legal regimes in absence of direct involvement. And while acknowledging that the current situation is far from ideal, these indirect processes of normative cross-fertilization reveal much about the persuasive authority of international law and the legitimacy that complying with international standards engenders.

VI CONCLUSION

The main aim of this paper has been to determine whether the *DIAL* is capable of delivering viable autonomous regimes for Taiwan's Indigenous peoples. In order to offer an effective critique of its provisions, it sought to rely on evolving international standards, which provide useful benchmarks for the purpose of analysis and can assist in the process of revising this important piece of draft legislation. The paper concludes that the final *DIAL* has failed to satisfy the requirements of Indigenous autonomy envisaged by both established customary international law and that emerging pursuant to the *Draft Declaration*. Nonetheless, given the ROC government's efforts to derive credibility from its ostensible adherence to existing and emerging international standards as indicated by the new *Basic Law*, Taiwan's Indigenous peoples must agitate for their effective transposition into domestic law. To this end, they must not content themselves with the current version of the *DIAL*. First, the CIP's initial draft should be reintroduced to form the basis of a fresh process of consultation with Indigenous representatives; its provisions must be strengthened and extended (especially with regard to the issue of Indigenous territoriality) to ensure that viable autonomous regimes can be created under its auspices. Second, the right of self-determination must underpin the remodelled draft legislation; it must be reformulated to reflect contemporary developments in international law including article 3 of the UN *Draft Declaration*. Third, an independent Indigenous body needs to be founded to represent and coordinate the interests of Indigenous peoples at a national level. Fourth, appropriate consociational arrangements need to be put in place to ensure that Taiwan's Indigenous peoples can participate in the central political processes of the dominant society on an equal footing with the island's other peoples. Finally, Indigenous autonomous regimes must be afforded constitutional

208. While the *Permanent Forum on Indigenous Issues* performs an important advisory function in relation to Indigenous peoples, it is unlikely to materially assist the Indigenous peoples of Taiwan, especially since a current member is a PRC representative.

protection in order to guarantee their status, thereby substantially increasing the chances of their success. Clearly, unless these changes are made and enshrined in legislation, the Indigenous legal regime proclaimed in the *Basic Law of Indigenous Peoples* will remain a chimera for Taiwan's Indigenous peoples.

From a broader perspective, this paper endeavoured to locate the *DIAL* in the wider context of the development of municipal rights for Taiwan's Indigenous peoples. In this respect, it has viewed the *DIAL* as a specific example of the way in which these Indigenous peoples have utilized international law and advances within the international sphere to provoke municipal reform. To this end, the paper highlighted the manner in which they have capitalized on international formulations of Indigenousness and evolving international standards to establish their Indigenous status, secure constitutional recognition and trigger a major government-sponsored program for the realization of Indigenous rights. Given that the dynamics of the Taiwan Question have denied the island's Indigenous peoples direct access to benefits of major international human rights regimes and the prospect of participating in the development of Indigenous standards in key UN fora, these attempts at normative cross-fertilization represent a significant achievement (especially when viewed in the Asian context). Moreover, in this regard, the actions of Taiwan's Indigenous peoples can be viewed as a useful strategic precedent for other Indigenous peoples in their struggle for domestic status and rights.