# COMMENTS

## INDIGENOUS PEOPLES' COURTS: EGALITARIAN JURIDICAL PLURALISM, SELF-DETERMINATION, AND THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

CHRISTOPHER J. FROMHERZ[†]



---

[†] J.D. Candidate, 2008, University of Pennsylvania Law School; B.A., 2003, Lewis and Clark College. First, I would like to thank my wife, Veronica, and my son, Horacio, for the constant love and joy they have provided me throughout this and all my other endeavors. Many thanks are also due to Dr. Rebeca Delgado, President of the Justice Commission of the Constitutional Assembly of Bolivia, for her insight into the Bolivian constitution-writing process, and to Harry Reicher, Adjunct Professor of Law, University of Pennsylvania Law School, for his guidance. Finally, I thank the editors of the *University of Pennsylvania Law Review*, especially Julie Dohm, Erica Lai, and Nishchay Maskay, for their dedication on this piece. I am, of course, solely responsible for any remaining errors.

## INTRODUCTION

On September 13, 2007, the United Nations General Assembly (GA) overwhelmingly adopted the United Nations Declaration on the Rights of Indigenous Peoples (DRIP), which recognized, inter alia, the rights of such peoples to "self-determination," "autonomy or self-government," and the development or maintenance of "*juridical systems* or customs, in accordance with international human rights standards."[1] The Declaration is arguably the single most important development in the history of international law relating to indigenous peoples.[2] On the date of its passage in the GA, a statement issued by the office of Ban Ki-moon, Secretary-General of the UN, called it "a triumph for indigenous peoples around the world" and noted that it "mark[ed] a historic moment when UN Member States and indigenous peoples . . . reconciled with their painful histories and . . . resolved to move forward together on the path of human rights, justice and development for all."[3]

Like the 1948 Universal Declaration of Human Rights (UDHR)[4] and other GA declarations addressing specific human rights con-

---

[1] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, arts. 3, 4 & 34, U.N. Doc. A/RES/61/295 (Oct. 2, 2007) [hereinafter DRIP] (emphasis added).

[2] This assertion holds even given the nonbinding or "soft law" character of the Declaration and the parallel existence of binding multilateral treaties that deal, in greater or smaller measure, with indigenous peoples. For example, International Labor Organization Convention 169—a binding treaty—protects rights for indigenous peoples, but recognizes only very limited rights with regard to indigenous laws and customs. *See infra* notes 115-123 and accompanying text.

[3] Press Release, Office of the Spokesperson, U.N. Sec'y-Gen., Statement Attributable to the Spokesperson for the Secretary-General on the Adoption of the Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007), *available at* http://www.un.org/apps/sg/sgstats.asp?nid=2733.

[4] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

cerns,[5] the DRIP is generally considered an aspirational document that broadly declares a set of rights and morally obligates all declaring states to implement and enforce those rights.[6] And, like past human rights declarations, the DRIP lays a foundation for the creation of future binding international law, expressed primarily through multilateral treaties based on the DRIP's principles and secondarily through the development of customary international law.[7] That said, the DRIP is not, in and of itself, legally binding on states, and violations of the rights declared therein are not necessarily judicially enforceable against states in international courts.[8]

---

[5] *See, e.g.*, Declaration on the Elimination of Discrimination Against Women, G.A. Res. 2263 (XXII), U.N. Doc. A/2263 (Nov. 7, 1967) [hereinafter DEDW]; Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904 (XVIII), U.N. Doc. A/1904 (Nov. 20, 1963) [hereinafter DERD]; Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. Doc. A/1386 (Nov. 20, 1959) [hereinafter DRC].

[6] Most international lawyers and scholars take this view of such declarations. *See* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 972 (Rudolf Bernhardt ed., 1992) (noting that although they are not treaties, the UN declarations are "enunciat[ions of] important principles").

[7] Where enough states act in a certain way (i.e., state practice) with the sense that they are legally obligated to do so (i.e., opinio juris), that state practice develops into customary international law, which is binding on all states. The DRIP could advance the development of customary international law related to indigenous peoples' rights if states implement—or begin to implement—its principles through state practice supported by opinio juris.

[8] *See* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 6, at 972 ("The prevailing opinion is that [UN declarations] do not as such have binding force, since the [GA] does not have the power to make decisions of this kind binding. Such declarations can, however, be wholly or in part an expression of existing rules or principles of international law. Moreover, as evidence of emerging new convictions and as a reflection of the practice of States adopting these declarations, they can influence the development of new norms of international law, either as general principles of law or as rules of customary international law.").

While the prevailing view of such declarations is indeed that they are not legally binding per se, it is worth noting that New Zealand, one of the four states to oppose the DRIP, thought otherwise:

> The Declaration is explained by its supporters as being an aspirational document intended to inspire rather than to have legal effect. New Zealand does not, however, accept that a State can responsibly take such a stance towards a document that purports to declare the contents of the rights of indigenous people. We take the statements in the Declaration very seriously. For that reason we have felt compelled to take the position that we do.

U.N. GAOR, 61st Sess., 107th plen. mtg. at 14-15, U.N. Doc. A/61/PV.107 (Sept. 13, 2007) (statement of Ambassador Rosemary Banks, Permanent Representative of New Zealand). The apparent view of New Zealand would seem to accord with an argument advanced by some that state practice is no longer essential to the formation of customary international law, and that opinio juris, as expressed in nonbinding declarations, is enough to crystallize "instantaneously" binding customary law. Bin Cheng, *Custom:*

Because of the DRIP's presumptively nonbinding character, its enforcement is largely, if not exclusively, dependent on its voluntary acceptance and implementation by UN member states. In this sense, the overwhelming international support for the DRIP—by 143 states[9]—suggests that it may be used, in the words of Mr. Ban, "to urgently advance the work of integrating the rights of indigenous peoples into international human rights and development agendas . . . so as to ensure that the vision behind the Declaration becomes a reality."[10]

Unlike some other UN human rights declarations—but, ironically, not unlike the watershed UDHR—the DRIP did not enjoy universal support.[11] Four states voted against it: Australia, Canada, New Zea-

---

*The Future of General State Practice in a Divided World*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 513, 532 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983).

[9] The total vote count was 143 states for and 4 against, with 11 abstentions. Australia, Canada, New Zealand, and the United States opposed the passage of the DRIP, while Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa, and the Ukraine abstained. U.N. GAOR, *supra* note 8, at 18-19. A few abstaining states justified their abstentions using reasons similar to those offered by the states voting against it. For example, Russia said that the DRIP was not "a truly balanced document" and did not "enjoy consensus support," *id.* at 16, while Colombia, like New Zealand, contended that "some aspects of the Declaration [were] in direct contradiction with the Colombian internal legal system," including provisions of Articles 19, 30, and 32. *Id.* at 17-18.

While both the opposing and abstaining votes detracted from universal acceptance of the DRIP (as "universal" is defined *infra* note 11), this Comment focuses only on responding to the arguments advanced by the four states actively voting against the DRIP—in part to emphasize that the DRIP's goals can best be fulfilled if states stop actively opposing it. Nevertheless, the analysis presented here is also largely responsive to many of the concerns of abstaining states.

[10] Press Release, U.N. Sec'y-Gen., *supra* note 3.

[11] I use "universal" to mean either favorable votes by all parties eligible to vote (i.e., member states) or adoption without a vote, signaling full support of member states. Thus, the Declaration on the Elimination of Discrimination Against Women, the Declaration on the Elimination of Racial Discrimination, and the Declaration of the Rights of the Child all enjoyed universal support in the sense that they passed unanimously. *See* 1967 U.N.Y.B. 514, U.N. Sales No. E.68.I.1; 1963 U.N.Y.B. 330, U.N. Sales No. 64.I.1; 1959 U.N.Y.B. 192, U.N. Sales No. 60.I.1. Likewise, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, were adopted without vote and hence universally supported. *See* 1992 U.N.Y.B. 722, U.N. Sales No. E.93.I.1; 1981 U.N.Y.B. 879, U.N. Sales. No. E.84.I.1.

However, the Universal Declaration of Human Rights did not enjoy universal support—eight states, including the former Soviet Union and South Africa, abstained. *See* U.N. GAOR, 2d Sess., 183d plen. mtg. at 933, U.N. Doc. A/PV.183 (Dec. 10, 1948) (noting forty-eight states voting for the UDHR, and abstentions by eight: the Byelorus-

land, and the United States.[12] While Canada's long-standing support for the DRIP only waned after the rise of a new government in 2006,[13] the opposition of Australia, New Zealand, and the United States to the approved text has been more consistent.[14] In addition, Canada's stated reasons for opposing the DRIP appear to be somewhat distinct from those expressed by the latter three.[15] Noting "significant concerns with respect to the wording of the [adopted] text," Canada's Ambassador to the UN, John McNee, focused on three specific areas when speaking to the GA on September 13, 2007: "the provisions on lands, territories and resources;" the provisions on "free, prior and informed consent when used as a veto;" and "dissatisfaction with the process."[16]

---

sian Soviet Socialist Republic, Czechoslovakia, Poland, Saudi Arabia, South Africa, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, and Yugoslavia). In addition, the Declaration on the Granting of Independence for Colonial Countries and Peoples (the Colonial Peoples' Declaration), G.A. Res. 1514 (XV), U.N. Doc A/4684 (Dec. 14, 1960), was not universally supported, as nine states abstained. *See* U.N. GAOR, 15th Sess., 947th plen. mtg. at 1273-74, U.N. Doc. A/PV.947 (Dec. 14, 1960) (noting eighty-nine states voting for and abstentions by nine states: Australia, Belgium, the Dominican Republic, France, Portugal, Spain, South Africa, the United Kingdom, and the United States). Despite its lack of "universal" support, however, the UDHR is nevertheless considered the foundational document of the modern human rights system, and colonialism per se has become indefensible foreign policy and a violation of the right to external self-determination. *See infra* Part.I.B.2 (comparing external and internal self-determination).

[12] *See supra* note 9.

[13] On January 23, 2006, the Conservative Party of Canada won a plurality of the seats in Parliament, creating the proportionally smallest minority government since Confederation in 1867. *See* Elections Canada, 39th General Election: Official Results (Jan. 23, 2006), http://www.elections.ca/scripts/OVR2006/25/map.pdf. The next year, Canada's UN representative commented that although his government sought a "document that would advance indigenous rights and promote harmonious arrangements between indigenous peoples and the States in which they live," it voted against the DRIP because the final text "did not address some of [its] concerns." U.N. GAOR, *supra* note 8, at 12 (statement of Ambassador John McNee, Permanent Representative of Canada).

[14] *See infra* text accompanying notes 17-19.

[15] Note, however, that New Zealand's ultimate reasons for voting against the DRIP are more like those of Canada than those of Australia and the United States. *See infra* notes 21-22 and accompanying text.

[16] U.N. GAOR, *supra* note 8, at 12 (statement of Ambassador John McNee, Permanent Representative of Canada). In addition to those three concerns, Mr. McNee also mentioned without elaboration concerns about the provisions "on self-government without recognition of the importance of negotiations; on intellectual property; on military issues; and on the need to achieve an appropriate balance between the rights and obligations of indigenous peoples, Member States and third parties." *Id.* at 12-13.

By contrast, in a joint statement made on October 16, 2006, after the adoption of the draft DRIP by the Human Rights Council, Australia, New Zealand, and the United States focused on a more fundamental concern with the DRIP: self-determination.[17] These states called the draft DRIP text "confusing, unworkable, contradictory and deeply flawed" and asserted that the right of self-determination, declared in Article 3, "could be misrepresented as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity, territorial integrity and the stability of existing UN Member States."[18] Other concerns raised in the joint statement seem to stem from this central worry that unilateral self-determination could lead to secession.[19]

The final version of the DRIP adopted by the GA contains a provision, Article 46(1), that specifically forecloses the possibility of such a broad misrepresentation of the conferred self-determination right: "Nothing in this Declaration may be . . . construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[20] Given Article 46(1) and the general disfavor with

---

[17] *See* Press Release, U.S. Mission to the UN, Statement by H.E. Ambassador Rosemary Banks, on Behalf of Australia, New Zealand and the United States, on Item 64(a) The Declaration on the Rights of the Indigenous Peoples, in the Third Committee of the 61st UN General Assembly (Oct. 16, 2006), *available at* http://www.usunnewyork.usmission.gov/press_releases/20061016_294.html.

[18] *Id.*

[19] The joint statement also addressed concerns similar to those raised by Canada—specifically regarding provisions dealing with land and resources—as well as concerns about some provisions being "potentially discriminatory" and concerns about the lack of a definition of "indigenous peoples." *See id.* Nevertheless, the overall focus of the statement was clearly the consequences of conferring a self-determination right on indigenous peoples. Indeed, the concern about leaving "indigenous peoples" undefined was explicitly rooted in the overarching self-determination worry: "The lack of definition . . . means that separatist or minority groups, with traditional connections to the territory where they live[,] . . . could seek to exploit this declaration to claim the right to self-determination . . . ." *Id.* To be clear, however, it is not the position of this Comment that the other reasons provided by the opposing states are not important to their continued opposition, or even that those reasons are entirely without merit. Rather, in arguing that the opposing states, especially the United States and Australia, cannot legitimately rely on fears about self-determination (as they have defined and used the term) in opposing the DRIP, this Comment attempts to encourage a candid debate about the real issues of discord—issues that fundamentally come down to unstated disagreements over the meaning of "internal self-determination" (the right conferred by the DRIP) to the extent that such a right implies rights to autonomous governance and control over lands and resources.

[20] DRIP, *supra* note 1, art. 46(1).

which international law views the recognition of newly formed states, any worry about the DRIP being used in an even marginally effective way to invoke "secession" rights seems extreme at best. However, other rights implied by self-determination—those short of secession and not otherwise threatening the territorial integrity or political unity of states—are arguably still unilaterally conferred on indigenous peoples.

Perhaps due to the inclusion of Article 46(1) in the final version of the DRIP, New Zealand did not invoke self-determination concerns in explaining its continued opposition to the Declaration on September 13. Rather, it stated that it "fully support[ed] the principles and aspirations" of the DRIP; noting the incompatibility of four specific provisions in the text with its constitution and laws, it also justified its "no" vote based on its view that the DRIP is more than an aspirational document and has, in itself, binding "legal effect"[21] (a view contrary to that of most states, including the United States). As such, it seemed to believe that it would be legally bound under international law to guarantee rights (e.g., land rights and informed consent rights) that it found incompatible with its domestic law.[22]

Unlike New Zealand, and despite the addition of Article 46(1), Australia and the United States continued, in explaining their votes against the DRIP, to invoke opposition to the Article 3 self-determination right. Noting that it has "long expressed its dissatisfaction with the references to self-determination in the declaration," Australia proceeded to define self-determination as limited to two scenarios, both of which it believed were inapposite to indigenous peoples: "decolonization and the break-up of States into smaller States with clearly defined population groups"; and situations "where a particular group within a defined territory is disenfranchised and is denied political or civil rights."[23] Australia further asserted that self-determination is "not a right that attaches to an undefined subgroup of a population seeking to obtain political independence."[24] Seemingly ignoring the pres-

---

[21] U.N. GAOR, *supra* note 8, at 14-15 (statement of Ambassador Rosemary Banks, Permanent Representative of New Zealand). New Zealand specifically remained opposed to "article 26 on lands and resources, article 28 on redress, and articles 19 and 32 on a right of veto over the State." *Id.* at 14. New Zealand also mentioned in passing its opposition to Article 31, which relates to intellectual property rights. *Id.*

[22] *See supra* note 8.

[23] U.N. GAOR, *supra* note 8, at 11 (statement of Ambassador Robert Hill, Permanent Representative of Australia).

[24] *Id.*

ence and function of Article 46(1), though mimicking its language, Australia concluded its discussion of self-determination by stating that it "does not support a concept that could be construed as encouraging action that would impair, even in part, the territorial and political integrity of a State with a system of democratic representative Government."[25]

For its part, the United States' analysis of Article 3 self-determination in opposing the DRIP was more subtle, though apparently just as central to its thinking. In continuing to call the DRIP "confusing" and "flawed," the United States noted that the right to self-determination is addressed in Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR)[26] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[27] where it is "understood by some to include the right to full independence under certain circumstances."[28]

While acknowledging earlier in its explanation that "[u]nder [its] domestic law, the United States government recognizes Indian tribes as political entities with *inherent powers of self-government as first peoples*" and that the "federal government has a *government-to-government relationship* with Indian tribes,"[29] the United States asserted that "[u]nder existing Common Article 1 legal obligations, indigenous peoples gen-

---

[25] *Id.*

[26] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[27] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

[28] Press Release, U.S. Mission to the UN, Explanation of Vote by Robert Hagen, U.S. Advisor, on the Declaration of the Rights of Indigenous Peoples, to the UN General Assembly (Sept. 13, 2007), *available at* http://www.usunnewyork.usmission.gov/press_releases/20070913_204.html. This characterization of the Common Article 1 right to self-determination is somewhat misleading. The understanding that the right carries with it a right to "full independence under certain circumstances" (e.g., classic colonialism) is held by more than "some." Indeed, this understanding is held by the vast majority of international legal scholars and has almost certainly crystallized into a binding customary international norm through state practice with opinio juris. *See* LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 268-69 (4th ed. 2001) (noting that self-determination has been "accepted as a principle of customary as well as treaty law" and that it was classically "understood . . . as a right of the people in non-self-governing territories (i.e., colonies) freely to determine their political status"). This "full independence" scenario presumably comports with the first of Australia's two defined scenarios. *See supra* text accompanying note 23.

[29] Press Release, U.S. Mission to the UN, *supra* note 28 (emphasis added).

erally are not entitled to independence *nor any right of self-government* within the nation-state."[30]

The United States declared that the mandate of the Working Group on the DRIP, which had been created by the Economic and Social Council (ECOSOC) in accordance with a GA resolution,[31] was not "to qualify, limit, or expand" the Common Article 1 obligations legally binding on states with regard to self-determination rights, but rather "to articulate a new concept, i.e., self-government within the nation-state."[32] Noting that this "self-government" concept is "not the same concept as the right contained in [C]ommon Article 1," the United States concluded that it was "wholly inappropriate . . . [to] reproduc[e] [C]ommon Article 1 in Article 3 of the text with no intention that Article 3 mean the same thing as [C]ommon Article 1, nor that it be considered to explain or modify the scope of existing [C]ommon Article 1 legal obligations."[33] Because the United States considered the "most significant provisions" of the DRIP, Article 3 foremost among them, "fundamental to interpreting all of the [DRIP's] provisions," it concluded that "the text as a whole is rendered *unworkable and unacceptable.*"[34]

---

[30] *Id.* (emphasis added).

[31] *See* U.N. Econ. & Soc. Council [ECOSOC] Res. 1995/32, U.N. Doc. E/RES/1995/32 (July 25, 1995).

[32] Press Release, U.S. Mission to the UN, *supra* note 28.

[33] *Id.* Note that while it may indeed be the case that the mandate (and power) of the Working Group did not extend to qualifying, limiting, or expanding self-determination rights, as that term is used in Common Article 1, this does not mean that the mandate of the Working Group did not include the articulation of aspirational self-determination rights as specifically applied to "indigenous peoples." Thus, there would be (1) self-determination as legally binding on states party to the ICCPR and ICESCR, and (2) self-determination in the specific context of indigenous peoples, as aspired to by the DRIP. The argument that the mandate of the Working Group included the articulation of self-determination rights is conclusively supported by the very wording of the mandate itself. In its Resolution 1995/32, ECOSOC specifically stated that it was creating the Working Group for "the sole purpose of elaborating a draft declaration, *considering the draft* United Nations declaration on the rights of indigenous peoples *annexed to resolution 1994/45* of 26 August 1994 of the Subcommission on Prevention of Discrimination and Protection of Minorities . . . ." ECOSOC Res. 1995/32, *supra* note 31, ¶ 2 (emphasis added). The draft referred to by ECOSOC, which was the only draft the Working Group was required to consider, contained an Article 3 self-determination right that was identical to that in the final draft of the DRIP approved by the GA on September 13. *See* E. Res. 1994/45, Annex, U.N. Doc. E/CN.4/199/2, art. 3 (Aug. 26, 1994) ("Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

[34] Press Release, U.S. Mission to the UN, *supra* note 28 (emphasis added).

This Comment makes two arguments, one broad and one narrow. Broadly, it argues that concerns of the United States and others about the "workability" of the DRIP—at least regarding self-determination—are misplaced, and that the meaning of self-determination is clearly delimited, not merely by Article 46(1), but by the substantive rights conferred in the DRIP. The Comment argues that the appropriate way to understand the DRIP's self-determination provisions involves a two-stage process, moving first from the skeletal right conferred in Article 3 to the more substantive Article 4, and then to specific features of the right conferred in subsequent provisions. This broader argument is woven through a more narrowly focused argument that examines the applicability of a single provision in the DRIP—Article 34, which confers rights to "juridical systems"—to "egalitarian juridical pluralism" (EJP), the emerging recognition of the exclusive jurisdiction of indigenous courts. On this score, the Comment argues that EJP is an appropriate exercise of the rights guaranteed by Article 34. By examining the applicability of EJP to Article 34, this Comment seeks to shed light not only on the meaning and workability of Article 34, but also on the content and functionality of the overarching right of self-determination conferred in Article 3. As the United States has asserted, this right is "fundamental" "to interpreting all of the provisions" in the DRIP.[35]

Part I of this Comment provides an overview of international law relating to self-determination, to provide context for an analysis of the rights conferred by Article 34, in conjunction with Articles 3 and 4. Part II presents an argument for a two-stage process in reading meaning into "self-determination" as the term is used in the DRIP. Part III then uses the emerging concept of EJP as a test case for fleshing out the rights conferred under the DRIP, and then more broadly assesses the workability of self-determination under the DRIP, paying particular attention to the concerns raised by Australia and the United States.

## I. INTERNATIONAL LAW, SELF-DETERMINATION, AND MINORITY RIGHTS

To better understand the meaning of "self-determination" in the DRIP and the significance of the growing movement toward EJP in states with large indigenous populations, it is first necessary to review the historical development and treatment of self-determination under

---

[35] *Id.*

international law. This Part begins by providing a general overview of international human rights law and then proceeds with a review of the concept of "self-determination," paying particular attention to its roots in concern for minority rights. It then discusses the important distinction between "internal" and "external" self-determination.

### A. *Overview of International Human Rights*

As mentioned in the Introduction, the passage of the UDHR in 1948 was a watershed moment in international law, signaling the beginning of the modern concept of human rights.[36] Before the UDHR—and before the Holocaust, which provided the political impetus to create and pass it[37]—international law was almost entirely state centered.[38] That is, international law only concerned itself with the actions of states in relation to other states (actions inter nations).[39] If state *A* massacred both its own citizens and the citizens of state *B*, state *A*'s offense would legally be against the sovereignty of state *B*, and the individual victims could not, by themselves, hold state *A* accountable. Only if state *B* chose to take offense at the violation of its sovereignty could state *A* potentially be held accountable under international law for its actions against *B*'s citizens.[40] The situation for *A*'s own citizens was far worse. Under traditional state-centered international law, state

---

[36] *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 138-39 (2d ed. 2000). "Despite proposals to the contrary, the [UN] Charter stopped shy of incorporating a bill of rights," prompting the establishment of a commission to draft the UDHR, which was adopted by the GA in 1948. *Id.* Between 1948 and 1976, when ICCPR and ICESCR entered into force, the UDHR was "broadly known and frequently invoked [because] . . . it was the only broad-based human rights instrument available." *Id.* For a more detailed analysis of the drafting history of the UDHR, see generally JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT (1999).

[37] *See generally* MORSINK, *supra* note 36, at 36-91.

[38] *See* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 61 (1950) (noting that "international practice did not, until recently, accept the implications of [the] view" that the individual is "a subject of international law").

[39] *See generally id.* at 67-69.

[40] In such a scenario, *B* would be exercising "diplomatic protection" on behalf of its citizens, and under the traditional system, it would base its claim not on a violation of its citizens' human rights, but on a violation of its own sovereign dignity. In any case, any satisfaction it received (e.g., an apology or money damages) would belong to the state and not to the victims. *See* Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. B) No. 3, at 7 (Aug. 30) ("By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.").

*A* could do whatever it wanted with its own citizens—from torturing them to engaging in genocide—without breaking international law.[41]

After the Holocaust and the UDHR introduced the welfare of the individual human being as an object of international concern, the state-centered concept of international law faced significant challenges. The UDHR, like the DRIP, was "only" a declaration, yet it carried with it a force that has fundamentally altered the way the world thinks about international law.[42] It stated a set of basic rights that all individuals have by virtue of being human, including rights to "life, liberty, and the security of person," a series of basic due process rights, and a series of economic rights.[43] All of these rights, with the possible exception of the right to own property "in association with others,"[44] were individual rather than collective rights. Though they were aimed in large measure at preventing atrocities like the Holocaust, which were committed against a collective group,[45] the rights themselves were conferred on individuals, not on "peoples" or other groups.

The principles in the UDHR formed the basis for the creation of two foundational human rights treaties: the ICCPR and the ICESCR. These two treaties effectively bifurcated the rights contained in the UDHR, each elaborating on and giving legal force to the rights contained within its sphere. Compliance with the rights contained in these treaties is obligatory for states that are parties to them. Enforcement, however, is still largely subject to self-monitoring by states and the realpolitik of international relations.[46] This remains true even though one of two optional protocols to the ICCPR broadens the

---

[41] *See* Louis Henkin, *International Law: Politics, Values and Functions*, in 4 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 13, 209 (1989) ("[F]or hundreds of years international law and the law governing individual life did not come together. . . . What a State did inside its borders in relation to its own nationals remained its own affair, an element of its autonomy, a matter of its 'domestic jurisdiction.'").

[42] *See* Henry J. Steiner, *Securing Human Rights: The First Half-Century of the Universal Declaration, and Beyond*, HARV. MAG., Sept.–Oct. 1998, at 45 ("[The UDHR] has retained its place of honor in the human rights movement. No other document has so caught the historical moment, achieved the same moral and rhetorical force, or exerted as much influence on the movement as a whole. . . . [It has] forever chang[ed] the discourse of international relations on issues vital to human decency and peace.").

[43] *See* UDHR, *supra* note 4, arts. 3, 5-12, 22-26.

[44] *See id.* art. 17.

[45] *See supra* note 37 and accompanying text.

[46] *See* Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT'L & COMP. L. 1, 5 (2006) (noting the "significantly limited enforcement capacity" of the international human rights system).

scope of international monitoring and enforcement of human rights violations, including the acceptance of complaints by individual victims.[47] Together with the UDHR, the ICCPR (along with its optional protocols) and the ICESCR are known collectively as the International Bill of Human Rights.[48]

### B. *Self-Determination and Minority Rights in International Law*

Like the UDHR, the ICCPR and ICESCR generally state a series of individual rights. However, there is one glaring exception in both treaties: Common Article 1, which states that "[a]ll *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."[49]

---

[47] *See* Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 2, U.N. Doc A/6316 (Dec. 16, 1966) ("[I]ndividuals who claim that any of their rights enumerated in the Covenant have been violated . . . may submit a written communication to the [Human Rights] Committee for consideration."). The Second Optional Protocol to the ICCPR, which the United States has not signed, deals with abolition of the death penalty. *See* Second Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 44/128, Annex, art. 1, U.N. Doc. A/RES/44/128/Annex (Dec. 15, 1989) ("Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.").

[48] UN Office of the High Comm'r for Human Rights, Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights (1996), http://www.unhchr.ch/html/menu6/2/fs2.htm. Note that in addition to the International Bill of Human Rights, there are a number of important topical human rights treaties, some of which are explored later in this Comment as they relate to indigenous peoples' rights. *See, e.g.*, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, Annex, U.N. Doc. A/RES/45/49 (Dec. 18, 1990); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 43; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 112; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 211.

[49] ICCPR, *supra* note 26, art. 1(1) (emphasis added); ICESCR, *supra* note 27, art. 1(1) (emphasis added). In addition to the above-quoted text, Article 1(2) also states, in paragraph 2, that

> [a]ll 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.

ICCPR, *supra* note 26, art. 1(2); ICESCR, *supra* note 27, art. 1(2). Paragraph 3 creates a binding obligation on states to promote self-determination in colonies and their ilk:

Accruing to "peoples," the right to self-determination suggests on its face a collective ("*they* freely determine") rather than an individual character. Though not included in the UDHR, the concept of self-determination also appears in the 1945 UN Charter, where it is used in connection with one of the purposes of the United Nations: "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."[50] But, to understand the use of self-determination in the UN Charter and the International Bill of Human Rights, it is worth briefly tracing the origins of self-determination in international law, noting its close relationship with concerns for the rights of ethnic, religious, and other minorities.

### 1. The Roots of Self-Determination and Minority Rights

The roots of the concept of self-determination go back to the 1776 American Declaration of Independence and the 1789 French Revolution, which directly challenged the then-prevailing notion that "individuals and peoples, as subjects of the King, were objects to be [used] . . . in accordance with the interests of the monarch."[51] The historical root of self-determination is the notion that the government of a state must be responsible to the "people."[52]

During and after the First World War, the concept of self-determination exploded onto the international scene,[53] when it was invoked most famously—to Western minds at least—by U.S. President Woodrow Wilson in connection with his Fourteen Points.[54] Wilson primarily

---

"[t]he States 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." ICCPR, *supra* note 26, art. 1(3); ICESCR, *supra* note 27, art. 1(3).

[50] U.N. Charter art. 1, para. 2.

[51] ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 11 (1995).

[52] *Id.*

[53] *See id.* at 13 (noting that for President Wilson, self-determination "was the key to lasting peace in Europe," while for V.I. Lenin, "it was a means of realizing the dream of worldwide socialism").

[54] The Fourteen Points, Wilson's general principles for building a post-war international system, are reprinted in WILSON'S IDEALS 112-15 (Saul K. Padover ed., 1942). For an excellent historical account of the formation of the League of Nations, including significant treatment of the use of the concept of self-determination, see generally MARGARET MACMILLAN, PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD (2001).

intended self-determination as a democratic principle of the right of people to choose their own government,[55] but not to secede from existing states or to decolonize, though he occasionally stated it in broader terms:

> The fundamental principle of [self-determination] is a principle . . . never acknowledged before . . . : that the countries of the world belong to the people who live in them, and that they have a right to determine their own destiny and their own form of government . . . , and that no body of statesmen, sitting anywhere, . . . has the right to assign any great people to a sovereignty under which it does not care to live.[56]

Despite rhetorical invocation by some of broad self-determination rights to secede,[57] international law—and states, as both the legislators and the subjects of international law—initially remained closed to the idea. In 1920, for instance, the Council of the League of Nations appointed a Committee of Jurists to decide if the people of the Aaland Islands had a right to secede from Finland and join Sweden.[58] The report issued by the Committee clearly decided that "Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part."[59] *Aaland Islands* went on to state that "[g]enerally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate . . . is, *exclusively*, an attribute of the sovereignty of [the] State."[60] Thus, *Aaland Islands* is generally cited for the proposition

---

[55] *See* CASSESE, *supra* note 51, at 19-21 (describing Wilson's conception of self-determination as containing four "variants": (1) the right of people to choose their "form of government"; (2) a means of "restructuring . . . the states of central Europe in accordance with national desires"; (3) a "criterion governing territorial change" (that is, taking the interests of populations into account when states divide up territory); and (4) a factor, but not a decisive one, in settling claims of colonies to independence).

[56] Woodrow Wilson, Speech at Billings, Montana (Sept. 11, 1919), *in* WILSON'S IDEALS, *supra* note 54, at 109.

[57] This view was expressed most famously by V.I. Lenin. *See supra* note 53 and accompanying text.

[58] For an in-depth historical review of the *Aaland Islands* case, see generally JAMES BARROS, THE ALAND ISLANDS QUESTION: ITS SETTLEMENT BY THE LEAGUE OF NATIONS (1968).

[59] *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, LEAGUE OF NATIONS O.J. 5 (Special Supp. No. 3, 1920) [hereinafter *Aaland Islands*].

[60] *Id.* (emphasis added). Note that despite deciding that national groups did not have a right to self-determination that outweighed state sovereignty, the *Aaland Islands* opinion did decide that the League of Nations could appropriately take action on the case without infringing state sovereignty because Finland was not a "definitely consti-

that in 1920 the right of self-determination was not guaranteed under positive international law.[61]

However, in addition to rejecting a unilateral right to secede and affirming a strong concept of state sovereignty, *Aaland Islands* did something else: it recognized a fundamental connection between the principle of self-determination and the then-emerging principle of "protection of minorities."[62] According to the Commission, "both have a common object—to assure to some national Group the maintenance and free development of its social, ethnical or religious characteristics."[63]

As such, *Aaland Islands* stated that the principle of self-determination "must be brought into line with that of the protection of minorities."[64] The Commission noted that "international legal concept[s]" and "the interests of peace" might "dictate" an "extensive grant of liberty to minorities" as a compromise where "geographical, economic and other similar considerations" may preclude the exercise of the right of self-determination in its most extreme form—secession or transfer to another state.[65] In the end, the question of independence for the Aaland Islanders was resolved in just such a fashion, though not on the basis of international legal right; rather, in a bilateral agreement between Finland and Sweden, the Aaland Islanders were given a significant measure of local autonomy.[66]

### 2. The Modern Standard: External and Internal Self-Determination

In 1945, at the United Nations Conference on International Organization (UNCIO), there was debate over the meaning of the term "self-determination" being included in the UN Charter. Arguments that in some ways mirrored those advanced by the United States and Australia in opposition to the DRIP were advanced against inclusion

---

tuted State" (having recently become independent from Russia). *Id.* at 14. This resulted in an agreement between Finland and Sweden giving the Aaland Islanders a degree of autonomous local government. *See* Minutes of the Thirteenth Session of the Council of the League of Nations, *in* 2 LEAGUE OF NATIONS O.J. 701-02 (1921) [hereinafter Aaland Islands Agreement] (providing the text of the agreement); CASSESE, *supra* note 51, at 27-33 (discussing the use of the principle of self-determination to grant autonomy to the Aaland Islanders).

[61] CASSESE, *supra* note 51, at 29-30.

[62] *Id.*

[63] *Aaland Islands*, *supra* note 59, at 6.

[64] *Id.*

[65] *Id.*

[66] *See* Aaland Islands Agreement, *supra* note 60, at 701-02.

of the term.[67] In response to arguments that a right of self-determination would encourage secession by national minorities and lead to "international anarchy," the Committee charged with drafting Article 1(2) of the Charter—which dealt with the purposes of the United Nations—confirmed that the right "implied the right of *self-government* of peoples and not the right of secession."[68] However, while states were clear that self-determination, as used in Article 1(2) of the UN Charter, did not imply minority secession rights or, indeed, the right of colonies to complete independence, they were less clear on what exactly it did mean.[69] In any case, the immediate legal obligations placed on states with regard to self-determination under the Charter were minimal and thus palatable.[70]

During the years after passage of the UN Charter, self-determination took on a meaning that was entirely unexpected for some: in direct contradiction to the understanding expressed by the UNCIO Committee, many countries, mostly socialist or developing nations, began to strongly advocate a view of self-determination as a right to colonial independence.[71] The focus of these countries was on the right to "external" self-determination, or the right to secede and form a new state or join a different state.[72] Western states, including the United States, responded by arguing that the UN Charter clearly contemplated only "internal" self-determination: the U.S. delegate to

---

[67] For example, the Belgian representative to the UNCIO argued that Article 1(2) of the draft UN Charter, which dealt with "self-determination," was based on "confusion." He further averred that it was "dangerous" and might lead to its invocation by national minorities for secessionist purposes. *Belgian Delegation Amendment to Paragraph 2 of Chapter I, in* 6 U.N. INFO. ORG., DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION IN SAN FRANCISCO 300 (1945).

[68] *Id.* at 296 (emphasis added).

[69] *See* CASSESE, *supra* note 51, at 42 ("States were unable positively to define self-determination.").

[70] *See* U.N. Charter arts. 55, 56 (generally requiring states to take "joint and separate action" to advance the purposes of the UN with regard to economic development, human rights, and other concerns); CASSESE, *supra* note 51, at 43 ("[T]he Charter *did not impose direct and immediate legal obligations on Member States* . . . .").

[71] *See* CASSESE, *supra* note 51, at 44 (claiming that these groups were the predominant advocates of the anticolonial theory). This view of self-determination had previously been articulated by V.I. Lenin, around the same time that President Wilson articulated his views of the concept. *See supra* note 53 and accompanying text; *see also* G. STARUSHENKO, THE PRINCIPLE OF NATIONAL SELF-DETERMINATION IN SOVIET FOREIGN POLICY 6-10 (Ivanov Mumjiev trans. 1964).

[72] *See* CASSESE, *supra* note 51, at 45-46 (discussing the rhetorical battle between states advocating for external self-determination and those advocating for internal self-determination).

ECOSOC argued that self-determination simply meant the "promot[ion] of self-government" and was granted universally, not merely to colonial peoples.[73]

In 1966, the ICCPR and ICESCR were opened for signature. Included among their conferred rights, as discussed earlier, was the Article 1 collective "right of self-determination" for "[a]ll peoples."[74] During drafting, Western countries fought the inclusion of the collective right to self-determination in both the ICCPR and the ICESCR, arguing that these foundational human rights treaties were focused on individual and not collective rights.[75] Meanwhile, the Soviet Union, along with many developing countries, strongly supported including the right on anticolonialist principles.[76] The right contained in Common Article 1 has been interpreted as containing rights to both "internal" and "external" self-determination, though the focus of the UN Human Rights Committee, which is charged with monitoring states' compliance with international human rights norms,[77] has historically been on the latter.[78]

---

[73] Isador Lubin, *U.S. Views on Self-Determination*, 27 DEP'T ST. BULL. 269, 269, 271 (1952) (reprinting the statement of the U.S. representative to the UN Economic and Social Council).

[74] ICCPR, *supra* note 26, art. 1(1); ICESCR, *supra* note 27, art. 1(1); *see also supra* note 50 and accompanying text (reproducing the relevant text of Article 1).

[75] CASSESE, *supra* note 51, at 47.

[76] *Id.*; *see also* Antonio Cassese, *The Self-Determination of Peoples*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 92, 92 (Louis Henkin ed., 1981).

[77] *See* DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 247-50 (1991).

[78] The emphasis on external self-determination is probably rooted in the international law principle of noninterference in the domestic affairs of states that is embodied in Article 2(7) of the UN Charter. *See* U.N. Charter art. 2, para. 7 (withholding authority from the UN "to intervene in matters which are essentially within the domestic jurisdiction of any state"). The Human Rights Committee emphasized this point in a 1984 report specifically addressing Common Article 1. *See* U.N. Human Rights Comm., *Report of the Human Rights Committee* 143, U.N. Doc. A/39/40 (1984) ("[A]ll States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. . . . [However,] States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination."); *see also* CASSESE, *supra* note 51, at 62-63 (noting that historically, the Committee has "primarily emphasized the *external* dimension of self-determination . . . [and] that contracting States were debarred by the principle of non-interference from inquiring as to whether internal self-determination was being implemented in other States").

The concept of external self-determination has always been tied to the movement for colonial independence. Heavily influenced by the 1960 UN Declaration on Granting Independence to Colonial Countries and Peoples (the Colonial Peoples' Declaration), which, like the DRIP, reproduced Common Article 1(1) verbatim,[79] the International Court of Justice (ICJ) authoritatively laid down the rule of external self-determination for colonial peoples in two opinions: the Advisory Opinion on *Namibia*[80] and the Advisory Opinion on *Western Sahara*.[81]

The *Namibia* and *Western Sahara* cases clearly affirmed the right of colonial peoples to self-determination, as declared in the Colonial Peoples' Declaration.[82] More interesting for our purposes, however, is what these cases (and international practice) confirm about the scope of the right to self-determination as it is applied to colonies. Despite using language identical to that of Common Article 1(1) of the ICCPR and ICESCR, the right declared in the Colonial Peoples' Declaration concerns only "external self-determination" and expires once it has been exercised, either by the choice to form a new state or to associate or integrate with an existing state.[83]

---

[79] Colonial Peoples' Declaration, *supra* note 11. In both the Colonial Peoples' Declaration and the DRIP, reproduction of Common Article 1 extends only to its first paragraph, which declares the right of self-determination for all peoples. The second paragraph—declaring the right of all peoples to "freely dispose of their natural wealth and resources"—is not included. *Compare id. and* DRIP, *supra* note 1, *with* ICCPR, *supra* note 26, art. 1(1), *and* ICESCR, *supra* note 27, art. 1(1).

[80] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (*Namibia*), Advisory Opinion, 1971 I.C.J. 16 (June 21).

[81] Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16).

[82] *See id.* at 32 (declaring that paragraph 2 of the Colonial Peoples' Declaration "confirm[s] and emphasize[s] that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned"); *Namibia*, 1971 I.C.J. at 31 ("[T]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them.").

[83] *See Western Sahara*, 1975 I.C.J. at 31, 30 (declaring that "[t]he principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in [the Colonial Peoples' Declaration]," and that the Declaration was "a system of decolonization based on the [principle of] self-determination"); *Namibia*, 1971 I.C.J. at 31 (noting that there is "little doubt that the ultimate objective . . . was the self-determination and independence of the peoples concerned"); CASSESE, *supra* note 51, at 72-73 (noting that the right of self-determination as applied to colonial peoples "only concerns external self-determination, that is, the choice of the international status of the people and the territory where it lives," and that "once a people has exercised its right to external self-determination, the right expires").

The contours of the Article 1 right to internal self-determination —the right to self-government rooted in the Wilsonian conception— have been defined with reference to the specific political rights conferred by other substantive provisions of the ICCPR.[84] In other words, internal self-determination has generally been interpreted as the right to have the essential political rights conferred by the ICCPR protected, as a proxy for the existence of genuine self-government. In sharp contrast to the right to external self-determination for colonial peoples, the right to internal self-determination is a continuous right.[85] The right can be conceptualized as applying to three demographics within a state: (1) the whole population; (2) racial or religious minorities suffering gross discrimination; and (3) ethnic groups, indigenous peoples, and other minorities.[86]

The first scenario—the right of self-government for the whole population of a state—has traditionally been underdeveloped in international law due to the strong emphasis on noninterference in states' domestic affairs.[87] The third scenario, which will form an essential aspect of our inquiry below, has also been historically disfa-

---

[84] For example, the United Kingdom has declared to the GA that internal self-determination

> requires that [peoples] should be enabled to exercise other rights [conferred in the ICCPR and ICESR] . . ., such as the rights to freedom of thought and expression; the right of peaceful assembly and freedom of association; the right to take part in the conduct of public affairs, either directly or through freely chosen representatives; and the right to vote and be elected at genuine periodic elections.

55 BRIT. Y.B. INT'L L. 432 (1984). The United States has similarly declared that "[f]reedom of choice is indispensable to the exercise of the right of self-determination. For this freedom of choice to be meaningful, there must be corresponding freedom of thought, conscience, expression, movement and association." Subjects of International Law, 1974 DIGEST § 5, at 48 (internal quotation marks omitted); *see also* CASSESE, *supra* note 51, at 53 ("[I]n order to understand the exact parameters of internal self-determination one must refer to the other provisions of the [ICCPR].").

[85] *See* CASSESE, *supra* note 51, at 101 ("[T]he right to internal self-determination is neither destroyed nor diminished by its having already once been invoked and put into effect.").

[86] *Id.* at 102.

[87] *See supra* note 78 and accompanying text. However, some scholars have argued that recent practice suggests an emerging customary right to internal self-determination—or a right to democracy—for states' entire populations. *See, e.g.*, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 511 (1995).

vored, generally because of concerns about unfettered secession rights.[88]

In contrast, the second scenario has been more explicitly developed. In the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, the GA set forth a series of governing principles, one of which was entitled the "principle of equal rights and self-determination of peoples."[89] The strong relationship between minority rights and self-determination—highlighted in the *Aaland Islands* case[90]—is again apparent in the Declaration's title. The Declaration stated that "subjection of peoples to . . . exploitation constitutes a violation of the principle,"[91] and, while focused primarily on external self-determination, it included a savings clause that looks somewhat like Article 46(1) of the DRIP:[92]

> Nothing in the [Declaration] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[93]

---

[88] *See generally* LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 27-31 (1978).

[89] G.A. Res. 2625 (XXV), Annex, U.N. Doc. A/8082/Annex (Oct. 24, 1970) [hereinafter Declaration on Friendly Relations].

[90] *See supra* notes 59-67 and accompanying text.

[91] Declaration on Friendly Relations, *supra* note 89, at 124.

[92] For the text of Article 46(1) of the DRIP, see *supra* text accompanying note 20.

[93] Declaration on Friendly Relations, *supra* note 89, at 124. Note that the United States initially proposed a different text, which would have read, "The existence of a sovereign and independent State possessing a representative Government, effectively functioning as such to *all distinct peoples* within its territory, is presumed to satisfy the principle of equal rights and self-determination as regards these peoples." CASSESE, *supra* note 51, at 115 (emphasis added) (citation omitted). The U.S. proposal thus would have gone much further than does the adopted text by explicitly recognizing the self-determination rights (as embodied in effectively functioning representative government) of ethnic groups—"distinct peoples"—within a state's territory. However, the U.S. proposal was vehemently opposed by many developing countries, which argued that it could be used to support secession by ethnic groups. *See id.* at 115-18.

During the drafting process leading up to the adoption of the savings clause, a suggestion by Lebanon led to a compromise proposal that—in addition to including a savings clause—would have read, in relevant part, "States enjoying full sovereignty and independence, and possessed of a government representing the whole of their population, shall be considered to be conducting themselves in conformity with the principle of equal rights and self-determination of peoples as regards that population including

This clause is important for two reasons. First, it has been interpreted as conferring on racial and religious minorities a right to invoke self-determination as relief from gross discrimination and disenfranchisement.[94] It is widely agreed that the right to internal self-determination exists for such groups as a matter of customary international law,[95] especially given extensive state practice with regard to the institutionalized racism of Southern Rhodesia and South Africa.[96] The modes of exercising internal self-determination in this area center on the need to create access to government where it has been denied, and, among other solutions, they contemplate the granting of extensive autonomy and regional self-government.[97]

Second, the savings clause is important in the sense that it suggests a right (albeit as a last resort) to exercise external self-determination in the form of secession by making its prohibition on "dismember[ing] or impair[ing] . . . the territorial integrity or political unity" of states contingent upon states' "compliance with the principle of equal rights and self-determination of peoples . . . without distinction as to race, creed or colour."[98] Where states do not comply with the principle, all bets are off, at least as far as the plain language of the

---

the *indigenous population*" "and without distinction as to race, creed or colour." *Id.* at 117 (citations and internal quotation marks omitted) (emphasis added). Unfortunately, no records are available that conclusively explain why Lebanon or the Drafting Committee used language regarding "race, creed or colour" but left out any reference to indigenous populations. *Id.* Nevertheless, two tentative conclusions can be drawn. First, the proposal was designed to narrow the broad array of self-determination rights for individual groups inherent in the U.S. proposal. *See id.* Second, the singling out of "indigenous population" (in response to the "distinct peoples" language of the U.S. proposal) suggests that indigenous peoples were conceived of as having a right to self-determination that would be fulfilled by representative government.

[94] *See* CASSESE, *supra* note 51, at 120-21.

[95] *See id.* at 120 ("State practice in the UN from the 1970s to the present evidences that the provision granting *internal* self-determination to *racial groups* persecuted by central government has become part of customary international law.").

[96] *See id.* at 120-21 (citing G.A. Res. 41/101, U.N. Doc. A/RES/41/101 (Dec. 4, 1986) (condemning generally the apartheid in South Africa); G.A. Res. 31/154 A, U.N. Doc. A/RES/31/154/A (Dec. 20, 1976) ("[c]ondemning the illegal racist minority regime" in Zimbabwe); S.C. Res. 460, U.N. Doc. S/RES/460 (Dec. 21, 1979) (declaring that the people of Zimbabwe have an "inalienable right . . . to self-determination, freedom and independence"); S.C. Res. 417, U.N. Doc. S/RES/417 (Oct. 31, 1977) ("[r]eaffirming . . . the legitimacy of the struggle of the South African people for the elimination of *apartheid* and racial discrimination")).

[97] *See id.* at 124.

[98] Declaration on Friendly Relations, *supra* note 89, at 124.

savings clause is concerned.[99] This is in sharp contrast to Article 46(1) of the DRIP, which makes the protection of "territorial integrity" and "political unity" of states absolute and unconditional.[100]

## II. INTERPRETING INDIGENOUS PEOPLES' RIGHTS UNDER THE DRIP

As explained in the Introduction, Article 3 of the DRIP explicitly recognizes—for the first time in international law—the right of indigenous peoples to "self-determination." While the DRIP passed by an overwhelming margin, objections to this particular provision and its implications were at the heart of both the "no" votes entered by the United States and Australia and the countries' conclusion that the DRIP was "unworkable."[101] This Part begins by briefly reviewing the pre-DRIP treatment of indigenous peoples' rights under international law. It then presents a method for reading the rights conferred in the DRIP in a way that accords with natural language and also takes account of the historical development of the concepts of self-determination and indigenous rights.

### A. *The Fall and Rise of Indigenous Peoples' Rights Under International Law*

The first treatment of indigenous peoples under international law coincided, unsurprisingly, with the sixteenth-century European conquest of the Western Hemisphere and followed then-dominant natural law principles. In a series of published lectures, Francisco Vitoria, a widely recognized founder of international law, concluded that the indigenous peoples in America had "dominion in both public and private matters" and thus held legal title over their lands.[102] He further claimed that discovery alone was insufficient to confer title on the

---

[99] Note, however, that given state practice and extensive opinio juris, the existence of customary law supporting even an extremely limited right of oppressed groups to secede is doubtful. *See* CASSESE, *supra* note 51, at 122 ("States have been adamant in rejecting even the possibility that nations, groups and minorities be granted a right to secede from the territory in which they live."). *But see* BUCHHEIT, *supra* note 88, at 46 (considering possible "'grounds' for the right of separatist self-determination within international law").

[100] DRIP, *supra* note 1, art. 46(1).

[101] *See supra* notes 9-34 and accompanying text.

[102] *See generally* FRANCISCO DE VITORIA, THE FIRST REFLECTO ON THE INDIANS LATELY DISCOVERED (John Pawley Bate trans., 1917) (1696), *reprinted in* JAMES BROWN SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS app. A, at xiii (1934).

Europeans "any more than if it had been they who had discovered us."[103] In determining that the indigenous peoples had "the use of reason"—a requirement for the possession of rights under natural law—Vitoria noted "method in their affairs," including "polities which are orderly arranged, . . . and *magistrates*, overlords, *laws*, . . . and a system of exchange."[104] Nevertheless, Vitoria concluded that indigenous peoples were "unfit to found or administer a lawful State up to the standard required by human and civil claims" because, among other failures, they had "*no proper laws nor magistrates*" and Europeans therefore might legitimately "undertake the administration of their country . . . , so long as this was clearly for their benefit."[105] This theory of administration for the benefit of indigenous peoples developed into the nineteenth-century "trusteeship doctrine," which justified the forced imposition of full jurisdiction over indigenous peoples for the purpose of civilizing them.[106]

U.S. domestic jurisprudence, particularly as developed in two Supreme Court cases, was highly influential in the formation of the trusteeship doctrine. In *Johnson v. M'Intosh*, Chief Justice John Marshall called the Indians "fierce savages, whose occupation was war," noting that "[t]o leave them in possession of their country, was to leave the country a wilderness."[107] Reasoning in part on justiciability grounds, the Court further concluded that U.S. title to Indian lands could be obtained by discovery alone—even though the rule of discovery "may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, . . . [it] certainly cannot be rejected by Courts of justice."[108]

---

[103] *Id.* app. A, at xxv.

[104] *Id.* app. A, at xiii (emphasis added).

[105] *Id.* app. A, at xlv-xlvi (emphasis added). The distinction between those laws that were "proper" and those that were not seems to be determined by the extent to which social organization mirrored the European system. *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 18 (2d ed. 2004) (noting that "the Indians could be characterized as 'unfit' because they failed to conform to the European forms of civilization with which Vitoria was familiar").

[106] As U.S. Indian Commissioner Nathaniel Taylor wrote in 1868, the United States, "as the guardian of all the Indians under [its] jurisdiction," had the "most solemn duty to protect and care for, to elevate and civilize them." NATHANIEL G. TAYLOR, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1868), *reprinted in part in* DOCUMENTS OF UNITED STATES INDIAN POLICY 123, 126 (Francis Paul Prucha ed., 2d ed. 1990).

[107] 21 U.S. (8 Wheat.) 543, 590 (1823).

[108] *Id.* at 590-92. Later, in *Worcester v. Georgia*, Justice Marshall seemed to revise his early views on the discovery doctrine, holding that it "regulated the right given by dis-

Shortly after *Johnson*, the Supreme Court decided *Cherokee Nation v. Georgia*. Writing for a plurality of the Court, Justice Marshall developed what came to be known as the "domestic dependent nations" doctrine, which views the relationship between tribes and the United States as "that of a ward to his guardian."[109]

While the civilizing mission of the trusteeship doctrine held sway over the attitude in international law toward indigenous peoples for all of the nineteenth century and much of the twentieth, the modern human rights movement has forced a rethinking of indigenous peoples' rights in international law. In addition to developing the relationship between self-determination rights and minority rights in general terms,[110] international law has specifically incorporated indigenous rights into two binding treaties.

The first, the International Labour Organization (ILO) Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, Convention No. 107, was promulgated in 1957 to protect indigenous people's human rights. Among other provisions, it included "special measures . . . for the protection of the institutions, persons, property and labour of these populations."[111] However, after being severely criticized as "assimilationist" and "anachronistic," the ILO convened a "Meeting of Experts" in 1986 to review the continued viability of Convention No. 107.[112] This group decided that the "integrationist language of Convention No. 107 is outdated, and that the application of this principle is destructive in the modern world."[113] Instead, they determined that "policies of pluralism, self-sufficiency, self-management and ethnodevelopment . . . would give indigenous populations the

---

covery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man." 31 U.S. (6 Pet.) 515, 554 (1832). Thus, in *Worcester*, the Court seemed to recognize the continued possession of the tribes' inherent natural right to their lands.

[109] 30 U.S. (5 Pet.) 1, 17 (1831).

[110] *See supra* Part I.B (discussing the historical link between minority rights and self-determination).

[111] ILO, Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, International Labour Conference, art. 3, June 26, 1957, No. 107, 328 U.N.T.S. 247 [hereinafter ILO Convention No. 107].

[112] *See* ANAYA, *supra* note 105, at 55-58.

[113] *Id.* at 58 (internal quotation marks omitted).

best possibilities and means of participating directly in the formulation and implementation of official policies."[114]

Out of this meeting and subsequent work at the ILO, a new binding treaty, Convention No. 169, was created to replace Convention No. 107.[115] The preamble to Convention No. 169 recognizes the "aspirations of [indigenous] peoples to exercise control over their own institutions . . . within the framework of the States in which they live," noting that "their laws, values, [and] customs . . . have often been eroded."[116] The definition of "indigenous peoples" in Article 1 of the Convention, however, notes that the term "peoples" should "not be construed as having any implications as regards the rights which may attach to the term under international law."[117] By including this language, the ILO made clear that although the Convention's text is compatible with indigenous self-determination, it does not, and cannot, recognize self-determination rights for indigenous peoples.[118]

The Convention does, however, aim to create the conditions necessary for "self-management" by indigenous peoples, defined with reference to the preamble's call for "control over their own institutions," which is apparently synonymous with at least some degree of "self-government."[119] In particular, Articles 8 and 9 provide significant recognition of indigenous laws, with particular focus on judicial institutions. Article 8 provides that "due regard shall be had to . . . [indigenous] customary laws" when applying national laws and regulations to

---

[114] *Id.* (internal quotation marks omitted).

[115] ILO, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, No. 169, 1650 U.N.T.S. 383 [hereinafter ILO Convention No. 169].

[116] *Id.* pmbl.

[117] *Id.* art. 1(3).

[118] *See* ILO, ILO CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES, 1989 (NO. 169): A MANUAL 9 (2003) [hereinafter ILO MANUAL], *available at* http://www.ilo.org/public/libdoc/ilo/2003/103B09_345_engl.pdf ("Convention No. 169 does not place any limitations on the right to self-determination. It is compatible with any future international instruments which may establish or define such a right.").

[119] *See id.* at 10 (noting that an "important aim of Convention No. 169 is to set up the conditions for self-management" and discussing examples of "indigenous self-management" as indicative of "self-government"). Note that the contours of "self-government" have the potential to be significantly varied, such that a limited municipal self-government, like the one being offered to the First Nations in southern Canada, and a highly autonomous regime, like the one described in the proposed Bolivian constitution, are arguably both examples of "self-government." *See infra* Part III. Given Convention No. 169's cautionary note about self-determination and its interpretive materials, the concept of "self-management" would appear to fall on the limited side of the "self-government" spectrum.

indigenous peoples, and guarantees indigenous peoples' "right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights."[120] It also requires states to establish procedures for resolving jurisdictional and other conflicts that may arise in implementing this right.[121] Article 9 provides that "the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected," subject to compliance with fundamental national and international human rights norms.[122] Therefore, while the ILO Convention explicitly disavows any recognition of the right to self-determination for indigenous peoples, it also unmistakably recognizes the idea of "self-government," especially the development of judicial institutions.[123] With this in mind, let us now turn back to the DRIP.

### B. *A Method for Interpreting the Rights Conferred Under the DRIP*

Like most UN resolutions and declarations relating to human rights, the DRIP is divided into a preambular section and an operative section. Though it confers no substantive rights, the preamble is useful for determining the motivations for the Declaration.[124] Three central ideas stand out from the preamble: (1) concerns about the preservation of culture and the "right of all peoples to be different"[125] (echoing the policies of "pluralism, self-sufficiency, self-management and ethnodevelopment" found in ILO Convention No. 169[126]); (2) concerns about advancing equal rights and ending discrimination (echoing the historical principle of protecting minorities);[127] and (3) a desire to advance these rights, including the right to self-determinat-

---

[120] *See* ILO Convention No. 169, *supra* note 115, art. 8.

[121] *Id.* art. 8(2).

[122] *Id.* art. 9(1).

[123] For a thorough treatment of disparity between the the letter and spirit of ILO Convention No. 169, see LUIS RODRÍGUEZ-PIÑERO, INDIGENOUS PEOPLES, POSTCOLONIALISM, AND INTERNATIONAL LAW: THE ILO REGIME (1919–1989) 320-31 (2005).

[124] The preamble contains a series of clauses beginning with present or past participles—such as "[g]uided by," "[c]oncerned," and "[r]ecognizing"—that are indicative of motivation. *See* DRIP, *supra* note 1, pmbl.

[125] *See* DRIP, *supra* note 1, pmbl.

[126] *See* ANAYA, *supra* note 105, at 58. For further discussion of the principles developed in ILO Convention No. 169, see *supra* notes 111-123 and accompanying text.

[127] *See* DRIP, *supra* note 1, pmbl. For a review of the historical link between minority rights and self-determination, see *supra* Part I.B.

ion, through a "partnership between indigenous peoples and States."[128]

The operative section of the DRIP contains forty-six articles, most of which confer substantive rights on indigenous peoples (positive rights) or place restrictions on state action (negative rights).[129] However, before analyzing those substantive rights, it is important to note that there are a series of articles that do not confer rights, but rather serve solely interpretive or implementation-oriented functions. Articles 38 and 41 through 46 fall within these latter two categories.[130] In the context of self-determination, the most important provision is Article 46(1), prohibiting anything in the DRIP from being "construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[131]

As noted in Part I.B.2, this savings clause resembles the savings clause of the Declaration on Friendly Relations, but with one important distinction: whereas the latter makes its prohibition contingent upon states' continued fulfillment of a nondiscriminatory representative government, the prohibition in Article 46(1) is absolute.[132] It explicitly states that both external self-determination (i.e., secession) and any form of internal self-determination that threatens the "territorial integrity or political unity" of states (e.g., autonomy, self-government, or other special measures) are unauthorized by the DRIP. The substantive rights conferred in the DRIP must be interpreted with these prohibitions in mind.

---

[128] *See* DRIP, *supra* note 1, pmbl.

[129] For a discussion of the difference between positive and negative rights in the constitutional setting, see David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986), which compares the German constitutional framework, based largely on positive rights, with the U.S. framework, based largely on negative rights.

[130] *See* DRIP, *supra* note 1, arts. 38, 41-46. Article 38 requires states, "in consultation and cooperation with indigenous peoples," to take "appropriate measures . . . to achieve the ends" of the DRIP. *Id.* art. 38. In one sense, it is clearly implementation oriented, in that it explains how (i.e., in "cooperation") states should implement the DRIP. It may also be interpretation oriented—by calling on states to achieve the ends of the DRIP in cooperation with indigenous peoples, it could be read to suggest that the rights in the DRIP are not conferred unilaterally on indigenous peoples.

[131] *Id.* art. 46(1).

[132] *Compare id. with* Declaration on Friendly Relations, *supra* note 89, at 124.

### 1. A Trinity of Rights

Unlike the ICCPR and the ICESCR, the DRIP does not place the right to self-determination in its first article.[133] Rather, Article 1 of the DRIP confirms indigenous peoples' "right to the full enjoyment, as a collective or as individuals, of all human rights" recognized under international law.[134] Similarly, Article 2 guarantees the "right to be free from any kind of discrimination."[135] The right to self-determination is not declared until Article 3. This is not to suggest that the subsequent placement of the self-determination right in any way diminishes its importance or its force, but only to note that the first three articles—distinct from the declared substantive rights that follow—together address the three central ideas of the preamble:[136] Article 1 explicitly recognizes "collective" human rights, advances the "right of all peoples to be different," and addresses the preamble's "ethnodevelopment" concerns by recognizing group rights; Article 2 addresses the discrimination concerns; and Article 3, when considered in light of the interpretation-oriented elements of Articles 38 and 46, implicitly addresses the preamble's "partnership" dimensions.[137] Positioning self-determination immediately after Articles 1 and 2—two articles directed at the protection of minorities—also reminds the reader of the historical "common object" of self-determination and minority rights first declared in the *Aaland Islands* case.[138]

Articles 1 through 3 should thus be read together as a trinity of broad rights focused on the three overarching purposes of the Declaration, whose specifics are elaborated and demarcated in the remaining substantive provisions of the DRIP. In regards to Article 3 self-determination, reference to the specific rights subsequently conferred would follow the interpretation of internal self-determination in the

---

[133] *Compare* ICCPR, *supra* note 28, art. 1, *and* ICESCR, *supra* note 29, art. 1, *with* DRIP, *supra* note 1, art. 1.

[134] DRIP, *supra* note 1, art. 1.

[135] *Id.* art. 2.

[136] *See supra* text accompanying notes 124-128.

[137] A suggested partnership between indigenous peoples and states is not necessarily apparent from the text of Article 3, nor is it implied by Article 46 standing alone. If Article 38 is considered an interpretation-oriented provision, *see supra* note 130, then perhaps the spirit of "cooperation" and "partnership" is implied in Article 3 self-determination. However, reading Article 3 by itself suggests a unilaterally conferred right: "Indigenous peoples have the right to . . . *freely determine* their political status . . . ." DRIP, *supra* note 1, art. 3 (emphasis added).

[138] *See supra* text accompanying note 63.

ICCPR.[139] Given that Article 46(1) conclusively forecloses external self-determination, the Article 3 right is necessarily a right to internal self-determination. Interpreting its specifics using a method similar to the one used to interpret the ICCPR seems quite "workable" at first blush.

### 2. Fleshing Out Article 3

Using the proposed method, in which Article 3 is used as a skeletal foundation that is fleshed out by subsequent Articles, the first and most important Article to address self-determination is Article 4, which provides that "[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[140] As a matter of pure logic, nothing in Article 4 necessarily limits the right of self-determination to "autonomy or self-government"; rather, these arrangements are presented as examples of the legitimate exercise of internal self-determination.[141] However, in keeping with the development of internal self-determination,[142] on one hand, and indigenous peoples' rights under ILO Convention No. 169,[143] on the other, the right to "autonomy or self-government" is rightly considered to be

---

[139] *See supra* notes 77-78 and accompanying text.

[140] DRIP, *supra* note 1, art. 4.

[141] In explaining its opposition to the DRIP, the United States conceded that Article 4 "limit[s] the scope" of Article 3, but concluded that it nevertheless could not support the DRIP. Press Release, U.S. Mission to the UN, *supra* note 28. This assertion is odd for two reasons. First, if Article 4 did indeed limit the scope of Article 3 to "autonomy or self-government," then the U.S. position that Article 3 could support a concept of "self-government" would seem to require the United States to drop its objections to self-determination (because self-determination would mean nothing more than "self-government"). Second, the assertion mistakenly seems to rest on the maxim *expressio unius est exclusio alterius* (the express mention of one thing excludes all others). However, that maxim of statutory construction seems inappropriate for Article 4, where the language "in exercising their right" suggests a broader availability of options. In any case, *expressio unius* has been heavily criticized by scholars as a logical and practical fallacy. *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 282 (1985) (arguing that the canon is "based on the assumption of legislative omniscience, because it would make sense only if all omissions in legislative drafting were deliberate"). It has also been rejected by a unanimous Supreme Court at least once. *See* Herman & MacLean v. Huddleston, 459 U.S. 375, 387 n.23 (1983) ("We . . . reject application of the maxim of statutory construction, *expressio unius* . . . .").

[142] *See supra* Part.I.B.

[143] *See supra* text accompanying notes 115-123.

at the core of an indigenous right to self-determination.[144] The right to self-determination thus takes on a distinct and somewhat elaborate meaning as applied to indigenous peoples when read in conjunction with subsequent rights elaborating the key features of "autonomy or self-government"[145]—most of which focus on the right to develop and maintain various indigenous institutions. For example, Article 34 provides that "[i]ndigenous peoples have the right to promote, develop and maintain their *institutional structures* and their distinctive customs, spirituality, traditions, *procedures*, practices and, in the cases where they exist, *juridical systems* or customs, in accordance with international human rights standards."[146] Thus, while the plain language of Article 4 does not necessarily restrict the scope of the right conferred in Article 3, the provisions relating to self-determination, especially those relating to indigenous institutions, together suggest a limiting force.

In summary, the Article 3 right of self-determination, a right to internal self-determination, should be interpreted in the same way internal self-determination has been interpreted in the ICCPR—as defined and delimited by the specific rights to which it most closely relates.[147] Under the DRIP, this argues for a two-stage process, moving

---

[144] In addition to "autonomy or self-government" and the particular rights that accompany it, the exercise of internal self-determination could include, for example, an extensive affirmative action program to increase the representation of indigenous populations that have been historically discriminated against. This kind of a program would accord with the application of internal self-determination to racial and religious groups under the Declaration on Friendly Relations. *See supra* notes 89-100 and accompanying text.

[145] The most important self-determination rights fleshed out by the DRIP include the rights to "maintain and strengthen . . . distinct political, legal, economic, social and cultural institutions" (Article 5); "establish and control their educational systems and institutions" (Article 14); "participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions" (Article 18); "maintain and develop their political, economic and social systems or institutions" (Article 20); control "the lands, territories and resources which they have traditionally owned" (Article 26); "determine and develop priorities and strategies for the development or use of their lands" (Article 32); "determine their own identity or membership in accordance with their customs and traditions" (Article 33); and "promote, develop and maintain their institutional structures . . . and, in cases where they exist, juridical systems or customs, in accordance with international human rights standards" (Article 34). DRIP, *supra* note 1, arts. 5, 14, 18, 20, 26 & 32-34.

[146] *Id.* art. 34 (emphasis added).

[147] In the case of the ICCPR, the specific rights giving meaning to internal self-determination are those that assure the exercise of "authentic self-government" for the whole population of a state. *See* CASSESE, *supra* note 51, at 101. Likewise, in the case of

first from Article 3 to Article 4 for the core meaning of self-determination ("autonomy or self-government"), and then from Article 4 to the specific provisions of the DRIP that elaborate the right of self-government in the form of indigenous institutions. As in the ICCPR, a state's compliance with these specific provisions serves as a proxy for determining its compliance with the overarching self-determination norm.[148] This interpretive method has two principal advantages over a method that instead attempts to read self-determination as a right broader than the specific provisions that give it life. First, the proposed method makes it much easier for states to evaluate their compliance with the self-determination right. They can, in a sense, use the specific provisions as a kind of checklist; if they have complied with all of the specific requirements, they can be confident that they have complied with the overall right. Second, the method also benefits indigenous peoples seeking to claim violations of their self-determination rights by giving them specific frames of reference in which to raise claims of rights violations.

However, while this process moves the reader from generality to specifics, in some ways it merely shifts the fundamental inquiry onto the specific provision at issue. The task still remains of applying a particular case or scenario (that is, a proposed or actual exercise of self-determination) to the most relevant specific provision. As with the application of any particular case to a general principle, difficult, fact-intensive questions will remain. However, the argument here is that the resolution of the particular case will be easier within the confines of the specific provision. Under such an approach, one that accords with a natural reading of the DRIP in the context of international legal history, the DRIP should be "workable," despite the concerns of the United States and Australia.[149]

To test this thesis, we now examine Article 34 as a specific elaboration of Article 3, and the application of Article 34 to an emerging concept of EJP that has appeared in the new draft constitution of Bolivia.

---

the DRIP, the specific rights that give meaning to self-determination are those that assure such self-government for the indigenous peoples within a state. However, because the means of securing self-government for a whole population differ from the means of securing self-government for a subnational group, *see id.* at 102-08, the particular contours of the right to internal self-determination look different under the ICCPR and the DRIP.

[148] *See supra* note 84 and accompanying text (noting that internal self-determination in the ICCPR has historically been measured with reference to other substantive rights conferred in the treaty).

[149] *See supra* notes 18, 34, and accompanying text.

## III. EGALITARIAN JURIDICAL PLURALISM: A TEST CASE

While international law regarding indigenous peoples has slowly developed over the last half century,[150] regional and national indigenous movements have gained significant sway in various parts of the world.[151] Perhaps the most notable example in current international affairs is Bolivia, where sixty-two percent of people aged fifteen years and older identify themselves as indigenous.[152] The country elected its first indigenous president in 2005 and is currently rewriting its constitution, in which one of the most important and contentious goals is redress for the subjugation of the indigenous majority.[153] In particular, the Bolivian Constitutional Assembly has redesigned the justice system to include not just one judiciary but two—that is, in addition to traditional "ordinary justice" based on the civil law, the proposed constitution contemplates a "community justice" system, or indigenous judiciary, which would apply indigenous law and custom.[154] On November 24, 2007, the Constitutional Assembly approved the entire draft text of the new constitution,[155] though final approval and enactment are still forthcoming.

### A. *Egalitarian Juridical Pluralism in Context*

The constitutionalization of an indigenous judiciary is part of a larger movement for greater self-government among the indigenous peoples of Bolivia, a movement that is fundamentally interconnected

---

[150] *See supra* Part II.A.

[151] *See generally* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995).

[152] Instituto Nacional de Estadística, República de Bolivia [National Statistical Institute of Bolivia], 2001 Censo de Población y Vivienda [2001 Census of Population and Housing], http://www.ine.gov.bo/cgi-bin/Redatam/RG4WebEngine.exe/Dictionary?&BASE=TallCreac&ITEM=DEMOG26&MAIN=WebServerMain.inl.

[153] *See Bolivia Opposition Calls Strike*, BBC NEWS, Nov. 27, 2007, http://news.bbc.co.uk/2/hi/americas/7114506.stm ("The president has made rewriting the constitution a key part of his reform agenda to give the indigenous majority greater political power but the issue has deepened regional and ethnic divisions in the country.").

[154] *See* COMISIÓN JUDICIAL, ASAMBLEA CONSTITUYENTE DE BOLIVIA [JUDICIAL COMMISSION, CONSTITUTIONAL ASSEMBLY OF BOLIVIA], INFORME DE LA SUBCOMISIÓN DE JUSTICIA COMUNITARIA [REPORT OF THE SUBCOMMISSION FOR COMMUNITY JUSTICE] 9 (2007) [hereinafter SUBCOMMISSION REPORT] (on file with author) (describing the community justice system).

[155] ASAMBLEA CONSTITUYENTE DE BOLIVIA [CONSTITUTIONAL ASSEMBLY OF BOLIVIA], NUEVA CONSTITUCIÓN POLÍTICA DEL ESTADO [NEW POLITICAL CONSTITUTION OF THE STATE] (Dec. 2007) [hereinafter DRAFT CONSTITUTION], *available at* http://www.laconstituyente.org/files/Libros/nuevacpebolivia.pdf.

with the development of democracy in Bolivia's history. After living under conditions of forced labor from the Spanish conquest in the sixteenth century and through the latifundio system of the first 120-plus years of republicanism,[156] a 1952 revolution included agrarian reform that gave some land back to indigenous peasants.[157] However, this reform was not comprehensive, geographically or substantively:[158] huge portions of the country's indigenous population were unaffected and the beneficiaries remained subject to deeply rooted political and economic discrimination.[159]

In 1994, after decades of more or less organized pressure from indigenous peoples and nongovernmental organizations, the government instituted a number of important constitutional and legislative reforms with respect to indigenous peoples. In addition to broader changes—including the recognition of Bolivia as a multiethnic and pluricultural state,[160] the inclusion of indigenous peoples in newly decentralized municipal development decisions,[161] and the recognition of collective ownership of some lands[162]—the 1994 constitutional reforms included a limited recognition of indigenous laws and customs

---

[156] The latifundio system involved the expropriation of indigenous lands and the creation of large estates on which the indigenous population served as feudal labor for white or mestizo landowners. *See* HERBERT S. KLEIN, A CONCISE HISTORY OF BOLIVIA 209-10 (2003) (noting that "[t]hrough the constant expansion of the [latifundio] system, land distribution [in Bolivia] had become one of the most unjust in Latin America," with six percent of landowners controlling ninety-two percent of the cultivated land by the time of the 1952 revolution).

[157] *See id.* at 214-15 (explaining how peasant mobilization forced the regime to create the Agrarian Reform Commission).

[158] In particular, the agrarian reform was focused on the altiplano in the west and left intact the old system in Santa Cruz and other lowlands regions to the east. *See id.* at 215 (noting that Santa Cruz and some other medium-sized hacienda regions were excepted from the reform).

[159] NANCY GREY POSTERO, NOW WE ARE CITIZENS: INDIGENOUS POLITICS IN POST-MULTICULTURAL BOLIVIA 4 (2007).

[160] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE BOLIVIA DE 1967 CON REFORMAS DE 1994 Y TEXTO CONCORDADO DE 1995 [CONSTITUTION OF BOLIVIA OF 1967 WITH 1994 REFORMS AND 1995 AGREED TEXT] art. 1.

[161] Participación Popular [Popular Participation], Ley No. 1551 (Apr. 20, 1994) (Bol.), *available at* http://www2.minedu.gov.bo/pre/ley/ley1551.pdf.

[162] Servicio Nacional de Reforma Agraria [National Service for Agrarian Reform], Ley No. 1715 (Oct. 18, 1996) (Bol.), *available at* http://www.inra.gov.bo/portalv2/Uploads/Normas/ley1715.pdf.

as alternative dispute resolution mechanisms, so long as those laws and customs were not contrary to the constitution or other laws.[163]

Thus, while the 1994 constitution recognizes the possibility of functioning indigenous courts applying indigenous law, it grants no significant jurisdictional authority to such courts, whose processes may only be used in the "alternative" (assuming full consent of all parties) and whose decisions may be appealed and overturned by any court of ordinary jurisdiction.[164] This model is mirrored, in large part, in the constitutions of a number of other Latin American states with large indigenous populations.[165]

By contrast, the new constitution contemplates a system of EJP where the indigenous judiciary will be on equal footing with the ordinary civil law judiciary, with exclusive and authoritative jurisdiction granted to the courts of each in their respective territories.[166] Jurisdictional conflicts (as well as alleged violations by indigenous courts of fundamental rights) will be resolved by a Plurinational Constitutional Tribunal—the court of last instance for constitutional questions—composed of both indigenous and civil law judges interpreting fundamental rights.[167] Such an extensive grant of judicial autonomy for indigenous peoples is unprecedented anywhere in the world.[168] Taking note of its essential characteristics, EJP can be roughly defined in the indigenous context as a system of two exclusive and hierarchically equal judicial organs (one indigenous and one nonindigenous) that

---

[163] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE BOLIVIA DE 1967 CON REFORMAS DE 1994 Y TEXTO CONCORDADO DE 1995 [CONSTITUTION OF BOLIVIA OF 1967 WITH 1994 REFORMS AND 1995 AGREED TEXT] art. 171.

[164] *Id.*

[165] *See* Elva Terceros Cuéllar, *Derecho Indígena en la Legislación* [*Indigenous Law in Legislation*], *in* SISTEMA JURÍDICO INDÍGENA [INDIGENOUS JURIDICAL SYSTEM] 35, 44-46 (Centro de Estudios Jurídicos e Investigación Social ed., 2003) (comparing the existing Bolivian system to the constitutional systems of Colombia, Ecuador, Peru, Paraguay, and Venezuela).

[166] *See* DRAFT CONSTITUTION, *supra* note 155, pt. 2, tit. III (defining as separate and exclusive jurisdictional authorities the courts of ordinary justice and those of indigenous justice).

[167] *Id.* arts. 203, 206, 212.

[168] To contrast with just one example, tribal courts in the U.S. system are not constitutionally mandated; rather, they are created under the auspices of Congress's Article I powers and are thus akin to administrative courts. Any decisions by U.S. tribal courts can be overturned by a simple act of Congress. *See* Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 137 (2004) ("[T]he Supreme Court has stripped tribes of many of the positive aspects of governmental authority[, including] key aspects of legislative and adjudicative authority . . . ."); *id.* at 145 (discussing "Congress's plenary power over Indian tribes").

together cover the entire jurisdiction of a state, with jurisdictional conflicts subject to review only by a court of last instance employing an affirmative action program that mandates the presence of authorities representing each organ.

### B. *Is Egalitarian Juridical Pluralism an "Appropriate" Exercise of Article 34?*

Despite their handicaps under the 1994 constitution, there is strong evidence that Bolivian indigenous communities and their members heavily utilize and rely on indigenous laws and courts.[169] In describing their preference for taking cases to indigenous courts rather than ordinary courts, indigenous representatives cite several reasons: (1) cultural acceptance—indigenous law is "based on ancestral values"; (2) transparency—it is "public justice in the presence of the people"; (3) accessibility—it is "oral and free of cost, . . . an act of service [by judges]"; (4) efficiency—it is "speedy and free from corruption"; and (5) theory of justice—it is "preventative and restorative," as opposed to retributive.[170]

The relative inaccessibility of the ordinary justice system also explains why indigenous authorities are asked to resolve disputes among their members. Of Bolivia's 326 municipalities, the ordinary justice system only has courts to cover 130, or less than forty percent; rural areas, and thus indigenous peoples, are the hardest hit by this dearth of civil law judges.[171] As a result, indigenous law is often the only realistic option for indigenous persons seeking judicial relief. Because indigenous judges do not accept payment for their services,[172] the fortification and institutionalization of indigenous courts present a relatively low-cost solution to the problem of inadequate access to justice—a solution that is more broadly understood and embraced by the population served.[173]

---

[169] *See generally* SISTEMA JURÍDICA INDÍGENA, *supra* note 165 (studying the practice of indigenous justice in the western Amazon region of the country); MARCELO FERNÁNDEZ OSCO, LA LEY DEL AYULLU [THE LAW OF THE AYULLU] (2000) (studying the practice of indigenous justice in the eastern altiplano region).

[170] SUBCOMMISSION REPORT, *supra* note 154, at 24.

[171] Comisión Judicial, Asamblea Constituyente de Bolivia [Judicial Commission, Constitutional Assembly of Bolivia], Diagnóstico de la Justicia Ordinaria [Diagnosis of Ordinary Justice], at slide 9 (2007) (on file with author).

[172] SUBCOMMISSION REPORT, *supra* note 154, at 24.

[173] *See, e.g.*, Elba Flores Gonzales, *Chiquitanos: Monte Verde y Lomerío*, *in* SISTEMA JURÍDICA INDÍGENA, *supra* note 165, at 57, 143 (noting that indigenous communities in

However, is a strengthened indigenous judiciary in the form of EJP an appropriate exercise of the Article 34 "right to promote, develop and maintain . . . juridical systems" and, therefore, of the Article 3 right to self-determination? First, it should be noted that Bolivia is in the process of voluntarily developing its indigenous courts within the framework of a constitutional assembly. No international organization, let alone tribunal, is requiring this process, and because the concept is in its nascent stage, it would be extremely hard to argue that EJP is a binding rule of customary international law.[174] However, its implementation in Bolivia would count as state practice with opinio juris for the formation of a future binding customary rule.[175]

It is likewise difficult to argue that EJP, as defined in Part III.A, is required under Article 34. Article 34 gives the right to develop and maintain "juridical systems," but nowhere does it suggest that such systems must be of an equivalent rank with ordinary state courts. While it is possible to argue that a right to EJP exists under Article 34 when considered in conjunction with the Article 4 "right to autonomy or self-government in matters relating to their internal and local affairs,"[176] EJP as defined and elaborated in the draft constitution gives indigenous courts exclusive jurisdiction over all matters arising within their territory. It would perhaps be a stretch to suggest that a dispute between a multinational corporation accused of dumping oil on indigenous lands and an indigenous people is an "internal or local affair[]."[177]

---

the Chiquitos region of Bolivia have traditionally resolved disputes internally because of custom, unfamiliarity with civil justice systems, and hostility from civil authorities).

[174] One could possibly argue, however, that the general Article 34 right to develop juridical systems—though not requiring EJP per se—has crystallized as instant customary international law given the opinio juris of 144 states who voted for the DRIP. *See* Cheng, *supra* note 8, at 532 ("*[O]pinio juris* can arise or change instantaneously.").

[175] In developing EJP, the Constitutional Assembly has made specific reference to its existing international legal obligations under ILO Convention No. 169; while EJP probably is not required by Convention No. 169, Bolivia's *belief* that it is required counts as opinio juris. *See* SUBCOMMISSION REPORT, *supra* note 154, at 11-12 (noting the international law foundation for EJP).

[176] DRIP, *supra* note 1, art. 4.

[177] *Id.* The grant of jurisdiction under the draft Bolivian constitution is exclusive and territorial, and thus—absent constitutional jurisprudence to the contrary—seems to contemplate a grant of exclusive jurisdiction over such a case to indigenous courts. *See* DRAFT CONSTITUTION, *supra* note 155, art. 192 (giving indigenous courts expansive subject-matter jurisdiction over legal relationships and violations of rights within their territory); *id.* (allowing indigenous courts to make nonreviewable decisions regarding which cases they will hear).

However, that Article 34 does not require all the features of EJP does not mean that EJP is an inappropriate exercise of Article 34. Article 43 declares that the rights it recognizes "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."[178] Given the process of the constitutional assembly, which involved extensive representatives of indigenous peoples,[179] Bolivia appears to be acting in accordance with its Article 38 obligations to "achieve the ends of [the DRIP],"[180] including the Article 43 development of rights beyond the "minimum standards" through "consultation and cooperation with indigenous peoples."[181] In this sense, the Declaration appears to contemplate a kind of "states as laboratories" approach in international law to further the development of indigenous rights.[182] There is nothing inherently inappropriate in, and indeed much to be gained from, a state implementing a novel constitutional system that serves as an experiment to be adopted by other states if successful.

### C. *Indigenous Courts, Egalitarian Juridical Pluralism, and the Objections Registered by the Opposing States*

The method of interpreting the DRIP proposed herein accords with the historical development of the rights and the structure of the Declaration, but how does it respond to the objections registered by the United States and Australia in opposing the DRIP? First, on the specific question of indigenous courts, Australia stated in its voting explanation that it was "concerned that the declaration places indigenous customary law in a superior position to national law. Customary law is not law in the sense that modern democracies use the term; it is based on culture and tradition."[183] Given the foregoing analysis of Article 34, this objection can be dispatched with relative ease: Article 34

---

[178] DRIP, *supra* note 1, art. 43.

[179] *See* POSTERO, *supra* note 159, at 2-3, 17 (noting extensive interest of indigenous groups in participating in the constitutional assembly).

[180] DRIP, *supra* note 1, art. 38.

[181] *Id.* art. 43.

[182] For an explanation of this approach in U.S. domestic law, see Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) ("One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that a single courageous State may, if its citizens choose, serve as a laboratory; and try *novel social and economic experiments* without risk to the rest of the country." (emphasis added) (internal quotation marks omitted)).

[183] U.N. GAOR, *supra* note 8, at 12 (statement of Ambassador Robert Hill, Permanent Representative of Australia).

does not require states to accord indigenous customary law and courts a level of jurisdictional hierarchy even *equivalent* to that of national law, let alone *superior* to it.[184]

Turning to the more central objection to the right of self-determination, it is worth briefly reviewing changes to the stated position of the United States vis-à-vis the DRIP during the last two years. Recall that the U.S. voting explanation on September 13, 2007, declared that it was the mandate of the Working Group to "articulate a new concept, i.e. self-government within the nation state" and not to expand on the right of self-determination contained in Article 1 of the ICCPR.[185] As a matter of pure fact, it was explicitly within the mandate of the Working Group to use the concept of "self-determination," albeit not to expand the right under Article 1.[186]

In any event, while its September 13 position embraced "self-government" but rejected "self-determination," the United States took a different tack in a statement made to the UN Permanent Forum on Indigenous Issues on May 17, 2004. At that time, it stated, "Over one hundred years ago the United States was in conflict with the Native Peoples of America. In the hundred years since, the United States has adopted various policies—from assimilation to the termination of tribal status to the *current era of self-determination.*"[187] In describing the "current era of self-determination," the United States noted that it had a "government-to-government relationship" with tribes[188] and specifically addressed its hopes for the DRIP:

> The Declaration should recognize that local authorities should be free to make their own decisions on a range of issues from taxation to education to land resources management to membership. These are the *powers of a government.* This is the *essence of a federal system* with which we are quite comfortable.[189]

---

[184] *See supra* notes 180-181 and accompanying text. In addition, the contention that "customary law is not law," whether true or not, is not only somewhat irrelevant, but also reminiscent of Francisco Vitoria's questionable conclusion that while the Indians had "laws" and "magistrates," they had "no proper laws nor magistrates." *See supra* notes 104-105 and accompanying text.

[185] *See supra* notes 32-34 and accompanying text.

[186] *See supra* note 33.

[187] Press Release, U.S. Mission to the U.N., Statement on Indigenous Issues Agenda Item on Human Rights, to the Third Session of the Permanent Forum (May 17, 2004) (emphasis added), *available at* http://www.usunnewyork.usmission.gov/press_releases/20040517_083.html.

[188] *Id.*

[189] *Id.* (emphasis added).

The United States used the term "self-determination" but was clearly referring to only one component of that term: internal self-determination. In a 2001 position on indigenous peoples, the U.S. National Security Council authorized U.S. representatives to promote "internal self-determination" as the concept to be articulated in the DRIP,[190] and that continued to be the U.S. position during the first half of the decade.

The reasons for the decision to move away from supporting self-determination are unclear, but the change in U.S. position illustrates its use of three different terms to describe the right to be conferred in the DRIP: "self-government," "internal self-determination," and "self-determination." While Australia and the United States made much of the distinction between "self-government" and "self-determination" on September 13, 2007, the U.S. statement to the UN on May 17, 2004, seems to use these two concepts interchangeably. And, indeed, under the DRIP, all three terms should be considered virtually synonymous. Self-determination under the DRIP means "internal self-determination" when read in conjunction with Article 46, and "self-government," articulated in Article 4, is the core of the "self-determination."

This is not to suggest that the United States and Australia might not have at least colorable arguments for opposing the DRIP's grant of internal self-determination. After all, given the interpretive method suggested here, "internal self-determination" includes a concept of "self-government" that—while not supporting secession—guarantees substantive control over "lands, territories and resources,"[191] in addition to the power to create and manage a number of political and legal institutions. Even if those institutions are not entirely, or even significantly, removed from the supervision of the state, the grant of land rights, including compensation for stolen lands, certainly presents a real cost (to the extent the aspirational principles are implemented) to states who sign the DRIP. However, by resting on an untenable opposition to self-determination qua self-determination—and without distinguishing between the external and internal varieties—the United States and Australia avoid the important debate about the precise contours of the "internal self-determination" granted by the DRIP.

---

[190] U.S. Nat'l Sec. Council, Position on Indigenous Peoples (Jan. 18, 2001), *available at* http://www1.umn.edu/humanrts/usdocs/indigenousdoc.html.

[191] DRIP, *supra* note 1, art. 26(3).

## CONCLUSION

The objections to the "workability" of the DRIP registered by the United States and Australia out of concerns about self-determination are mistaken and should be withdrawn. While there may be other legitimate reasons for opposing the DRIP, any opposition should not be based on an avoidable misreading of the concept. The method proposed here accords with both the historical development of self-determination and the structural design of the DRIP. It provides a workable framework for both states and indigenous peoples seeking to advance their collective rights, especially in developing and maintaining key institutions of self-government, courts foremost among them. Though individual states like Bolivia are free to experiment and develop indigenous courts and other institutions as they see fit, a general agreement, currently impeded principally by the opposition of four states, would make the DRIP an effective instrument and truly "a triumph for indigenous peoples around the world."[192]

[192] *See* Press Release, U.N. Sec'y-Gen., *supra* note 3.