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Indigenous Peoples and Self Determination: Challenging State Sovereignty*

Catherine J. Iorns**

INTRODUCTION

Indigenous peoples¹ and their cultures have been attacked since their

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¹ While the adjective "indigenous" is commonly used to denote that the subject is simply native to a place, or prior to other inhabitants of the place, its use in referring to indigenous peoples in the international human rights context is narrower. While there is no fixed definition of "indigenous peoples," the definition that has been proposed, and is generally used as a working definition for the purposes of international action, is the following:

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

On an individual basis, an indigenous person is one who belongs to those indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

José R. Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, paras. 379-381, U.N. ESCOR, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1986/7/Add. 4 [hereinafter *Cobo Report*].

The Working Group on Indigenous Peoples, while not adopting any particular definition, agreed that the *Cobo Report's* definition "could be a useful working definition." *Report of the Working Group on Indigenous Populations on its Second Session*, U.N. Doc. E/CN.4/Sub.2/22 (1983) [hereinafter *Second Report of the WGIP*]. On the name of the Working Group, see *infra* note 15 and accompanying text. A definition proposed in a Conference Room Paper and agreed with by at least one government and by some indigenous organizations, while worded slightly differently, stresses substantially the same elements. *Second Report of the WGIP, supra* at 23. For an alternative defini-

"discovery" and colonization.² The treatment of indigenous peoples has been so severe that it has been referred to as "genocide" and as a "holocaust."³ While the particular histories of different indigenous peoples differ, they have in common a history of conquest by another group and subordination within their present states, even where they may not numerically be in a minority.⁴ Further, the tragedy of the treatment of indigenous peoples is not merely historical; it continues today.⁵

The present situations of different indigenous peoples covers a wide spectrum, ranging from the isolation of South American forest-dwellers to the relative integration of the Maori people of Aotearoa/New Zea-

tion, see the proposal in *Recommendations of the International Indian Treaty Council*, U.N. Doc. E/CN.4/Sub.2/AC.4/NGO/2 (1984).

Note Robert Williams' comment that "efforts at a formal definition have not been generally accepted by indigenous peoples and their advocates who participate in the international human rights standard-setting process. Generally, indigenous peoples have insisted on the right to define themselves." Robert A. Williams Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 663 n.4 (1990) (defining indigenous peoples as "those groups colonized by Western and other settler states and who have lost their sovereignty while maintaining a distinct cultural identity. Indigenous peoples usually seek to sustain their distinct cultural identity in intimate relation with their traditionally-occupied territories. The best evidence of this distinct cultural identity results from indigenous peoples identifying themselves as such"). For further discussion of the definition of "indigenous peoples," see, e.g., RODOLFO STAVENHAGEN, *THE ETHNIC QUESTION: CONFLICTS, DEVELOPMENT AND HUMAN RIGHTS* 96-100 (1990).

For the purposes of this paper, the important point to note is that an indigenous people is not merely one that lived in a place before others arrived, which distinguishes indigenous peoples from other types of minorities, but that they are also a self-identified, culturally distinct, non-dominant group within a larger state. This stresses their oppression and their need for protection and excludes, *for the purposes of devising measures for the protection of indigenous peoples*, those who are presently dominant in their 'own' state. This paper is concerned with such indigenous peoples.

² See, e.g., *Cobo Report*, *supra* note 1; JULIAN BURGER, *REPORT FROM THE FRONTIER: THE STATE OF THE WORLD'S INDIGENOUS PEOPLES* (1987); SECRETARIAT OF THE INDEPENDENT COMMISSION ON INTERNATIONAL HUMANITARIAN ISSUES, *INDIGENOUS PEOPLES: A GLOBAL QUEST FOR JUSTICE* (1987) (describing generally the plight of indigenous peoples). See also Dean E. Cycon, *When Worlds Collide: Law, Development and Indigenous People*, 25 NEW ENG. L.REV. 761 (1991) (discussing the negative effects of resource development on indigenous peoples). See also the discussion under the agenda item, *Review of Developments*, in all of the Reports of the sessions of the U.N. Working Group on Indigenous Peoples, *infra* note 51 and accompanying text (discussing the views of indigenous peoples and governments on the developments in the situations of indigenous peoples in their countries). Robert Williams comments that "indigenous peoples have convincingly demonstrated to the Working Group that the present, dominant conceptions of their rights and status in international law have failed to protect their human rights to survival." Williams, *supra* note 1, at 704.

³ See, e.g., Maureen Davies' comment that the "[i]nvasion of Indigenous territories [has] been characterized by an enduring holocaust of unparalleled proportions." Maureen Davies, *Indigenous Rights*, in *SELF-DETERMINATION IN THE COMMONWEALTH* 45 (W.J. Allan MacCartney ed., 1988). For a description of the treatment of indigenous peoples as genocide, see STAVENHAGEN, *supra* note 1, at 105, 118.

⁴ See authorities cited *supra* note 2.

⁵ *Id.*

land.⁶ Their common problems, however, are political and economic oppression as well as the loss of their lands, their cultural and ethnic traditions, and often their lives. These problems can be said to stem from the basic attitude of non-indigenous peoples that indigenous ways of life are backward and inferior and not appropriate for a "civilized" society.⁷ This attitude has manifested itself particularly in the readiness of non-indigenous peoples to attempt to assimilate indigenous peoples into the larger state without providing substantive protection for their so-called inferior, "primitive" cultures.⁸

Because of their position, referred to increasingly as the "Fourth World,"⁹ indigenous peoples have made repeated calls for the protection

⁶ "Aotearoa" is the Maori name for the land that is called New Zealand. For a comment on the political use of these names see ANDREW SHARP, *JUSTICE AND THE MAORI: MAORI CLAIMS IN NEW ZEALAND POLITICAL ARGUMENT IN THE 1980s* 12-13 (1990).

⁷ Robert Williams describes how the adoption of this distinction between civilized and uncivilized peoples formed a large part of the justification given by the various European powers for not according the "discovered" uncivilized indigenous peoples any rights of sovereignty accorded to other civilized nations. This denial of sovereignty included the non-recognition of indigenous rights to land, and in turn justified efforts in "civilizing" indigenous peoples through assimilation. See ROBERT WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

⁸ *Id.* A more contemporary illustration of the goal of assimilation is provided by the Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, I.L.O., 40th Sess., No. 107, 328 U.N.T.S. 247 (1959) [hereinafter I.L.O. Convention No. 107]. This Convention explicitly provided the aim to assimilate indigenous populations into states on an equal basis with other inhabitants. *Id.* For discussion of I.L.O. Convention No. 107 see Russel L. Barsh, *Revision of the I.L.O. Convention No. 107*, 81 AM. J. INT'L L. 756 (1987) [hereinafter *Revision*]; Gordon I. Bennet, *ILO Convention on Indigenous and Tribal Populations — the Resolution of a Problem of Vires*, 46 BRIT. Y.B. INT'L L. 382 (1972-73); Lee Sweptston & Roger Plant, *International Standards and the Protection of the Land Rights of Indigenous and Tribal Populations*, 124 INT'L LAB. REV. 91 (1985); PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 334-368 (1991). In response to claims that it was out of date (particularly with respect to its stated goal of assimilation) and did not address the needs of indigenous peoples, the International Labor Organization has recently revised I.L.O. Convention No. 107. The revised convention is Convention No. 169 concerning Indigenous and Tribal Peoples of Independent Countries (1989). For a discussion of Convention No. 169 see Russell L. Barsh, *An Advocate's Guide to the Convention on Indigenous and Tribal Peoples*, 15 OKLA. CITY U. L. REV. 209 (1990) [hereinafter *An Advocate's Guide*]; Douglas Sanders, *I.L.O. Convention 169 — Concerning Indigenous and Tribal Peoples in Independent Countries*, 1989 CAN. NATIVE L. REP. 49; Lee Sweptston, *A New Step in the International Law on Indigenous and Tribal Peoples: The I.L.O. Convention 169 of 1989*, 15 OKLA. CITY U. L. REV. 677 (1990); Sharon Venne, *The New Language of Assimilation: A Brief Analysis of ILO Convention 169*, in WITHOUT PREJUDICE 53 (1990). Howard Berman provides a commentary on the proposed revised convention, before the process was complete. Howard R. Berman, *The International Labour Organization and Indigenous Peoples: Revision of I.L.O. Convention 107 at the 75th Session of the I.L.O. Conference, 1988*, 41 INT'L COMM'N JURISTS REV. 48.

⁹ The term "the Fourth World" was coined by George Manuel, in GEORGE MANUEL & MICHAEL POSLUNS, *THE FOURTH WORLD: AN INDIAN REALITY* (1974). It is now used to refer to aboriginal peoples who are in an inferior position to the dominant society with respect to culture,

of their lives, their cultures, their lands, and, ultimately, for the recognition of their right to self-determination.¹⁰ While the plight and claims of indigenous peoples around the world have increasingly received international attention, particularly over the last ten years,¹¹ many of the claims of indigenous peoples have, to date, been rejected and denied.¹² The most prominent of these rejected claims has been the claim by indigenous peoples to self-determination.

Present, positive¹³ international law does not recognize a general right of indigenous peoples situated within states to full self-determination.¹⁴ However, the United Nations Working Group on Indigenous Peoples,¹⁵ which is currently drafting a declaration on the rights of indig-

politics, and economics. Shih-Chung Hsieh, *A New Voice of Self-Determination, in THE TERRITORIAL RIGHTS OF NATIONS AND PEOPLES* 143 n.1 (John R. Jacobson ed., 1989).

¹⁰ For a description of these claims, see *infra* Part IA.

¹¹ Most of this attention has been reflected in and attracted by the Working Group on Indigenous Peoples, which was established by the Economic and Social Council in 1982. E.S.C. Res. 1982/34, U.N. ESCOR, Supp. No. 1, at 26, U.N. Doc. E/1982/82 (1982). Part I of this paper describes the establishment and role of the Working Group. Attention has also been reflected in and attracted by the International Labour Organization's revision of I.L.O. Convention No. 107. See *supra* note 8. There has been a corresponding growth in academic comment on the rights of indigenous peoples. See, e.g., Bernadette Kelly Roy & Gudmundur Alfredsson, *Indigenous Rights: The Literature Explosion*, 13 *TRANSNAT'L PERSPECTIVES* 19 (1987). See also Williams, *supra* note 1, at 664 n.4 (commenting on the "scholarly renaissance" in indigenous rights). Further articles, in addition to those cited in this paper, include: Russel L. Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 *AM. J. INT'L L.* 369 (1986); Russel L. Barsh, *United Nations Seminar on Indigenous Peoples and States*, 83 *AM. J. INT'L L.* 599 (1989); Douglas Sanders, *Another Step: The U.N. Seminar on Relations Between Indigenous Peoples and States*, 4 *CANADIAN NATIVE L. REP.* 49, 37 (1989); Raidza Torres, *The Rights of Indigenous Populations: An Emerging International Norm*, 16 *YALE J. INT'L L.* 127 (1991). Further, the American Society of International Law has had three panel discussions concerning indigenous peoples: *Are Indigenous Populations entitled to international juridical personality?*, in *AM. SOC'Y INT'L L., PROCEEDINGS OF THE 79TH ANNUAL MEETING* 189 (1985); *International Human Rights Standards-setting: The Case for Indigenous Peoples*, in *AM. SOC'Y INT'L L., PROCEEDINGS OF THE 81ST ANNUAL MEETING* 277 (1987); *The Role of Indigenous Non-government Organizations in Developing Human Rights Standards Applicable to Indigenous Peoples*, in *AM. SOC'Y INT'L L., PROCEEDINGS OF THE 81ST ANNUAL MEETING* 282 (1987). These general writings are in addition to the many concerning specific peoples.

¹² Some of the claims made by the indigenous peoples have not met with much resistance - claims such as the right to the protection of their cultures and traditions. Others, however, have met outright rejection by most, if not all, states. See *infra* Part III.

¹³ I use the term "positive" to refer to state-recognized law as opposed to natural law. I include both textual and customary law in this category.

¹⁴ See authorities cited *infra* Part III. I occasionally use "full self-determination" or "secessionist self-determination" in this paper to make it clear that I am referring to self-determination as including independence or secession.

¹⁵ The formal name of the Working Group is that of Indigenous Populations rather than Indigenous Peoples. This use of "populations" instead of "peoples" was a choice made for political reasons, namely that states did not want to imply, by the use of "peoples," any right to self-determination for indigenous peoples. See, e.g., *infra* notes 62-63 and accompanying text. See also the discussion of the use of "peoples" in the drafting of I.L.O. Convention No. 169, *infra* notes 305-

enous peoples, appears to be considering the inclusion of such a right. Apart from any effects on indigenous peoples, such a recognition could entail a fundamental change in international law, in international relations, and in the basis of the present world system of states.

The primary aim of this paper is to expose the barriers to the legal recognition of the right of self-determination for indigenous peoples so that they can be directly addressed and thus, hopefully, overcome. I argue that it is the concept of sovereignty, as presently understood and applied by states, that poses the ultimate barrier — that no right of self-determination is recognized in international law where it clashes with the world system of state sovereignty.¹⁶ Because the principle of state sovereignty forms the basis of state identity in the present international legal and political system, and because states are desperately concerned with preserving their identity, state sovereignty is given priority over other, competing claims, even when those claims are matters of fundamental human rights. These claims cannot be met within a paradigm that assumes the present conception of state sovereignty as a given. Ultimately, we need a theory that allows for justification and argument based on the actual interests involved. Only such an approach can fairly balance the relevant interests and allow the claims to fundamental human rights — such as those made by indigenous peoples — to be as seriously considered as claims to political organization and state identity.¹⁷ Only then

316. Since the establishment of the Working Group, the Sub-Commission on Human Rights has agreed to refer to the agenda item using "peoples" rather than "populations," but the formal name of the Working Group has never been changed. As the indigenous peoples themselves are offended by being referred to as 'mere' populations and use the term "peoples" themselves, and as they satisfy the ordinary meaning of "peoples" (see *infra*, Part III, section entitled "Peoples"), I use "Working Group on Indigenous Peoples."

¹⁶ That is, self-determination, particularly where it involves any measure of international personality, is thought to violate territorial integrity; international consideration of human rights claims is thought to violate the principle of non-intervention; if the right to self-determination involves some right to assistance from other states as well as self-help, this is an even bigger violation of the principle of non-intervention; and all of these, as violations of the practices of sovereignty, amount to a violation of the principle of state sovereignty. See discussion *infra* Part II.

¹⁷ A challenge to state sovereignty on this basis could also be applicable to minorities in general. That is, if indigenous peoples' rights cannot be protected within the present paradigm, and if the fault is with the paradigm rather than indigenous peoples in particular, then that presumably also applies to other ethnic minorities within states. For example, my argument that sovereignty needs to be contested so as to enable competing interests to be assessed is a general argument that should therefore be able to be applied to interests besides those of specifically indigenous peoples. However, the arguments that I make in this paper for the extension of the right of self-determination to indigenous peoples, and why this is needed in order to protect the basic rights of indigenous peoples, are based specifically on the situation of indigenous peoples. I cannot make any claim that the situations of non-indigenous minorities have the same features or that their oppression requires the same remedies. Indeed, I suspect that there may be some differences that would alter my conclusions if I were to generalize. Minorities that are clearly identified with a territorial space presumably have more in common with indigenous peoples and thus with their claims and oppression. Others

will the human rights and interests of indigenous peoples be realized.

Part I of this paper addresses the claims made by indigenous peoples to self-determination. Part II describes the international legal principles of sovereignty and self-determination and identifies the barriers to the recognition of a legal right to self-determination for indigenous peoples. Part III comments on the law of self-determination and of sovereignty, including the principles of non-intervention in the domestic affairs of states and territorial integrity. This final section outlines some of the ways other scholars have approached the relevant issues and suggests how the situation and claims of indigenous peoples may compel one approach to be taken over another. This section finally considers possible implications for the concept of sovereignty and for international law in general.

I. THE CLAIMS

This Part begins by describing the role of the Working Group on Indigenous Peoples (hereinafter referred to as the Working Group) and the discussion, primarily in the Working Group's meetings, of the claims made by indigenous peoples, including the states' responses. This description identifies the recent developments in the discussion and demonstrates why it appears likely that some statement of the right of indigenous peoples to self-determination will be included in the draft Declaration.

Following this description of the debate, I consider what indigenous peoples are attempting to do by referring to self-determination and why (and how) the states are resisting, focusing particularly on what states believe they are protecting by objecting to indigenous peoples' claims. Finally, I identify strategies open to indigenous peoples in respect to the draft Declaration and outline the advantages and disadvantages of each.

A. *The U.N. Working Group on Indigenous Peoples*

1. Description of the Working Group

The Working Group on Indigenous Peoples was established as a response to increased attention being focused on the plight of indigenous peoples throughout the world and recognition of the need for special measures for their protection.¹⁸ The primary source of this increased

that are not so identified and are more integrated throughout a state may not; the political solutions to their oppression may not challenge sovereignty or the nation-state. This paper does not address these issues.

¹⁸ Although described neutrally, this increasing attention was the result of concerted pressure by indigenous peoples themselves, rather than any generous, unilateral undertaking on the part of states. Robert Williams describes the attention as being due to "storytelling" by indigenous peoples. Williams, *supra* note 1, at 662.

attention was a report on the situations of indigenous peoples throughout the world which was commissioned in 1970 by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Cobo Report).¹⁹ This extensive report described the various forms of oppression that indigenous peoples around the world face and made recommendations for measures to end such oppression.²⁰ In 1981, before the report had been finalized, it was clear that the report was going to call for more United Nations action on the issue of the protection of indigenous peoples.²¹

The other main sources of increased world awareness of the problems faced by indigenous peoples were two conferences, in 1977 and 1981, dedicated to examining discrimination against indigenous peoples.²²

In 1982, in anticipation of the final part of the Cobo Report, the U.N. Economic and Social Council established the Working Group on Indigenous Populations (referred to here as the Working Group on In-

¹⁹ *Cobo Report*, *supra* note 1. This document is the final volume of the reprints of the series of five reports written by Special Rapporteur Jose R. Martinez Cobo from 1981 to 1983. This volume is the most widely available and most widely cited, particularly as it summarizes the conclusions of the earlier volumes. The suggestion that the problem of indigenous peoples be given special attention was made by Special Rapporteur Francesco Capotorti in his *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, U.N. Doc. E/CN.4/Sub.2/384/Rev. 1 (1979).

²⁰ It has since provided a valuable resource for those discussing what is needed in the area of indigenous peoples rights.

²¹ The Sub-Commission examined progress reports between 1973 and 1980. In 1981, the final chapters of the report began to be produced. *See supra* note 19. Douglas Sanders, a Canadian legal scholar, comments that that the Working Group was established before the Report was finalized as it was clear that that was going to be "a major recommendation of the study" and because various people were "frustrated with the long delay" in producing the final report. Douglas Sanders, *The U.N. Working Group in Indigenous Populations*, 11 HUM. RTS. Q. 406, 408 (1989).

²² The 1977 conference was officially entitled "The International N.G.O. Conference on Discrimination Against Indigenous Populations in the Americas," and was held in Geneva on September 20-24, 1977. This Conference adopted a "Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere." The 1981 conference entitled "Indigenous Peoples and the Land," was a follow-up to the 1977 conference; it subsequently also adopted the 1977 Declaration contained in the Statement and Final Documents (1978). For a brief description of this Declaration, see Russel L. Barsh, *Indigenous North America and Contemporary International Law*, 62 OR. L. REV. 73, 99-100 (1983) [hereinafter *Indigenous North America*]. Another conference that helped to raise world awareness of indigenous peoples, even though it was not dedicated solely to that task, was the 1978 "World Conference to Combat Racism and Racial Discrimination," which endorsed some of the rights claimed by indigenous peoples. *Report of the World Conference to Combat Racism and Racial Discrimination*, U.N. Doc. A/CONF.92/40 (1979). A further conference held by indigenous peoples, but which did not gain the same publicity, is the "Eighth Inter-American Indian Conference," held in Merida, Mexico in 1980. *See also*, HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMODATION OF CONFLICTING RIGHTS* 81-83 (1990) [hereinafter *AUTONOMY*] (describing developments focusing international attention on the situation of indigenous peoples).

igenous Peoples)²³ under the supervision of the Sub-Commission.²⁴ The Working Group was given a two-fold mandate: (1) to review developments in the human rights of indigenous peoples, and (2) to develop standards to protect those rights.²⁵ While both of these aspects have been addressed at each session of the Working Group,²⁶ the major current task of the Working Group is the drafting of a declaration on the rights of indigenous peoples to be adopted by the General Assembly.

The Working Group consists of five independent experts selected from the membership of the Sub-Commission.²⁷ While the Group itself may be small, the meetings of the Group are open to any states, international organizations (both inter-governmental and non-governmental), indigenous peoples' groups, and even interested individuals, all of whom participate as observers.²⁸ Rights to speak at meetings have been granted to states, inter-governmental organizations, accredited non-governmental organizations and indigenous persons or their representatives. In addition, various individuals typically offer their opinion on legal aspects of the drafting exercise. As a result, the Working Group has become "a significant international forum"²⁹ for the discussion of the plight of indigenous peoples and of possible responses, both national and international, to help remedy their situations. The Working Group thus provides a forum for both the airing of grievances of indigenous peoples (although, because the role of Working Group does not include the hearing and judging of complaints, not all states have accepted that grievances should be heard)³⁰ and for the setting of standards.³¹

²³ See *supra* note 15 (regarding reference to the Working Group as the Working Group on Indigenous Peoples).

²⁴ E.S.C. Res. 34, *supra* note 11, at 26.

²⁵ *Id.*

²⁶ The Working Group has one session each year, either one or two weeks long. Each session is divided into meetings.

²⁷ Accordingly, each represents one of the five regions recognized by the United Nations. These regions are Africa, Asia, Eastern Europe, Latin America, and "Western Europe and Others", or W.E.O. The category of "Others" includes the U.S.A., Canada, Australia, and New Zealand.

²⁸ In practice, the numbers attending the meetings have grown, reaching approximately 500 in 1991. See Closing Statement of Ms. Erica-Irene Daes, Chairperson/Rapporteur of the WGIP, in *Report of the Working Group Indigenous Populations on its Ninth Session*, at 51, U.N. Doc. E/CN.4/Sub.2/1991/40/Rev.1 (1991) [hereinafter *Ninth Report of the WGIP*]. In 1991 attendance consisted of representatives from 30 states, 3 inter-governmental organizations, the Holy See, the Greenland Home Rule Government, the Aboriginal and Torres Strait Islander Commission of Australia, 86 indigenous nations and non-governmental organizations (10 having consultative status to ECOSOC), 57 other non-governmental organizations and groups (21 with ECOSOC consultative status); plus 117 individual scholars, experts, activists and other observers. *Id.* paras. 5-13, at 2-4.

²⁹ Sanders, *supra* note 21, at 408.

³⁰ See *id.* at 408-409.

³¹ For a description of how the discussion in the Working Group is structured see Williams, *supra* note 1, at 677-680. See generally, AUTONOMY, *supra* note 22, at 84; Hurst Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649, 661 (1988) [hereinafter *New Develop-*

The Working Group began the standard-setting exercise in 1985 at its fourth session.³² At this session, the Working Group approved seven principles for inclusion in the proposed draft declaration.³³ After discussion and comment on these principles, both before³⁴ and during the fifth session (1987)³⁵, the seven preliminary draft principles were expanded to fourteen.³⁶ Following the discussion of these fourteen principles, the Chairperson/Rapporteur,³⁷ Ms. Erica-Irene A. Daes, prepared a draft Declaration on the Rights of Indigenous Peoples to be discussed at the sixth session in 1988.³⁸ After comment and detailed discussion of this draft in 1988, a revised draft was prepared for the 1989 session.³⁹ This

ments]; Gudmundur Alfredsson, *Fourth Session of the Working Group on Indigenous Populations*, 55 NORDIC J. INT'L L. 22 (1986); *Indigenous North America*, *supra* note 22, at 100-102.

³² *Report of the Working Group On Indigenous Populations on its Fourth Session*, at para. 57, U.N. Doc. E/CN.4/Sub.2/22 (1985) [hereinafter *Fourth Report of the WGIP*].

³³ *Id.* Annex II.

³⁴ Requests for comments from interested parties are made after each session of the Working Group. These requests are made formally by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. For example, the request after the fourth session was made in its Resolution 1985/22 (August 28, 1985). The comments received are compiled in U.N. documents before the next session. *See, e.g.*, compilations of comments referred to *infra* note 40.

³⁵ The fifth session was held in 1987 as the 1986 meeting was cancelled due to the U.N. budgetary crisis at the time. Instead, a workshop was held in order to make progress on the discussion of the preliminary draft principles. The workshop was co-sponsored by the Anti-Slavery Society for the Protection of Human Rights and the World Council of Indigenous Peoples. It was held in Geneva on September 6 and 7, 1986. The Report of the Workshop is contained in *Review of Developments: Standard-Setting Activities - Material Received From Non-Governmental Organizations in Consultative Status With the Economic and Social Council*, U.N. Doc. E/CN.4/Sub.2/AC.4/WP.4/Add.1 (1987). The workshop was attended by two members of the Working Group (including the Chairperson/Rapporteur), two members of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, representatives from six states (Argentina, Australia, Canada, China, New Zealand, and the U.S.A.), from the United Nations, from non-governmental organizations, from indigenous organizations and peoples, and a number of individual experts. The specific topics discussed were: "health, medical care, other social services, and adequate housing; and the right and responsibility of indigenous peoples, as of all others, to respect universally recognized human rights and fundamental freedoms." *Id.* at para. 12.

³⁶ *Report of the Working Group on Indigenous Populations on its Fifth Session*, Annex II, at 23-24, U.N. Doc. E/CN.4/Sub.2/1987/22 (1987) [hereinafter *Fifth Report of the WGIP*].

³⁷ The Working Group elects its Chairperson/Rapporteur at the beginning of each session. Mr. Asbjorn Eide was elected for the Working Group's first two sessions; Ms. Erica-Irene A. Daes has been elected for each session since.

³⁸ The Working Group recommended to the Sub-Commission that Ms. Daes prepare such a draft. *Fifth Report of the WGIP*, *supra* note 36, Annex I at 22. This recommendation was approved by the Sub-Commission (Resolution 1987/16), by the Commission on Human Rights (Resolution 1988/49) and by the Economic and Social Council (Resolution 1988/36).

³⁹ *Report of the Working Group on Indigenous Populations on its Seventh Session*, Annex II, at 31-35, U.N. Doc. E/CN.4/Sub.2/1989/36 (1989) [hereinafter *Seventh Report of WGIP*]. The draft declaration consists of 13 preambular paragraphs and 30 articles, these articles being divided into seven parts. The first part, Articles 1 and 2, affirm the rights already recognized in existing human rights instruments. Part 2, Articles 3-11, primarily protects rights of survival, both of the individual and the group. To this latter end it protects rights related to cultural identity. Part 3, Articles 12-

was discussed at both the seventh (1989) and eighth (1990) sessions.⁴⁰

At the eighth session, three separate drafting groups were established to consider different provisions of the draft, each of which made suggestions for changes.⁴¹ From these suggestions and comments on them, the Chairperson/Rapporteur proposed a further revised draft.⁴² Some of this draft was discussed during its first reading at the ninth session of the Working Group in July 1991.⁴³ As a result of the discussion at the ninth session, the Working Group submitted a revised preamble

17, concerns rights to land and natural resources. Part 4, Articles 18-20, concerns economic rights such as rights to traditional means of subsistence, rights to State measures for the improvement of the social and economic conditions of indigenous peoples, and rights to determine and implement the social and economic programs that will affect them. Part 5, Articles 21-27, concerns political rights, including rights of equal participation in national political processes, rights of autonomy in relation to their local affairs, rights to local government, and the right to claim that States honor treaties and agreements made with indigenous peoples. Part 6 consists of one article concerning the right to fair and prompt conflict resolution procedures. Articles 29 and 30, which constitute Part 7, are general articles providing that the rights described are the minimum necessary for the survival and well-being of indigenous peoples and that none of them imply any right to destroy any of the other rights.

⁴⁰ *Id.* at 16-27; *Report of the Working Group on Indigenous Populations on its Eighth Session*, at 14-26, U.N. Doc. E/CN.4/Sub.2/1990/42 (1990) [hereinafter *Eighth Report of the WGIP*]. Note also that this discussion was facilitated by the submission of written comments by various participants before the sessions. These comments made before the seventh session are described in *Discrimination Against Indigenous Peoples: Analytical Compilation of Observations and Comments Received Pursuant to Sub-Commission Resolution 1988/18*, U.N. Doc. E/CN.4/Sub.2/1989/33/Add.1 (1989) [hereinafter *Analytical Compilation of Observations and Comments*] (written comments were received by fourteen governments, four U.N. agencies, four indigenous organizations, and three non-governmental organizations). Comments received prior to the eighth session are contained in *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Peoples — Information Received From Governments*, U.N. ESCOR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 8th Sess., U.N. Doc. E/CN.4/Sub.2/AC.4/1990/1 & Add.1-3 (1990) [hereinafter *Standard-Setting Activities: Information Received from Governments 1990*]; *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Peoples — Information Received From U.N. Organs, Specialized Agencies, and Intergovernmental Organizations*, U.N. ESCOR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 8th Sess., U.N. Doc. E/CN.4/Sub.2/AC.4/1990/2 & Add.1 (1990) [hereinafter *Standard-Setting Activities: Information Received From Intergovernmental Organizations 1990*]; *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Peoples — Information Received From Non-Governmental Organizations*, U.N. ESCOR, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 8th Sess., U.N. Doc. E/CN.4/Sub.2/AC.4/1990/3 & Add.1-2 (1990) [hereinafter *Standard-Setting Activities: Information Received From Non-Governmental Organizations 1990*].

⁴¹ The reports of these three drafting groups are contained in *Eighth Report of the WGIP*, *supra* note 40, Annex III-V respectively, at 40-54.

⁴² *Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1991/36 (1991).

⁴³ For a summary of this discussion, see *Ninth Report of the WGIP*, *supra* note 28, paras. 32-57, at 8-11. For a detailed discussion see *infra* notes 105-118 and accompanying text.

and a revision of what were operative paragraphs 1-17.⁴⁴ It is expected that the first reading of the revised draft will be completed at the tenth (1992) session and the second reading begun.⁴⁵ Whether a second reading will also be able to be completed is unclear, but it is the hope of at least a number of participants that a completed draft declaration will be able to be submitted for adoption by the U.N. bodies above the Working Group,⁴⁶ including the General Assembly, in 1993, the International Year for the World's Indigenous Peoples.⁴⁷

2. History of Discussion of Self-Determination in the Working Group

From the first session, the position of the indigenous peoples' representatives at the Working Group has been that a full legal right of indigenous peoples to self-determination must be included in any standards that the Working Group devises under its mandate.⁴⁸ The indigenous representatives have consistently maintained that a right of indigenous peoples to self-determination is the most important right that any standards could recognize and should thus be included as a fundamental element of any document.⁴⁹ The reasons given for this emphasis on the right of self-determination are twofold. First, it is argued that it is essential for their survival and development as peoples⁵⁰ and thus "the key to the implementation of solutions for [their] problems."⁵¹ Second, it is ar-

⁴⁴ See *Ninth Report of the WGIP*, *supra* note 28, Annex II, at 29-34. Operative paragraphs 18-30 were not discussed due to insufficient time.

⁴⁵ *Id.* Annex I, para. 3, at 24.

⁴⁶ These bodies are the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, the Commission of Human Rights, the Economic and Social Council (ECOSOC) and the General Assembly.

⁴⁷ *Ninth Report of the WGIP*, *supra* note 28, para. 56, at 11. The Chairperson/Rapporteur also expressed this hope in her Closing Statement at the ninth session (August 2, 1991). *Id.* Annex IV, at 51.

⁴⁸ See, e.g., *Report of the Working Group Indigenous Peoples on its First Session*, para. 82, U.N. Doc. E/CN.4/Sub.2/1982/33 (1982) [hereinafter *First Report of the WGIP*]; *Fifth Report of the WGIP*, *supra* note 36, paras. 52 & 53, at 14; *Seventh Report of the WGIP*, *supra* note 39, paras. 33 & 56, at 11 & 17-18. See also the various comments made by indigenous and non-governmental organizations in *Standard-Setting Activities: Information Received From Non-Governmental Organizations 1990*, *supra* note 40 (e.g., the comments of the Indian Law Resource Center, para. 10, at 3).

⁴⁹ See, e.g., *Report of the Working Group Indigenous Populations on its Sixth Session*, U.N. ESCOR, Sub-Comm. on Prevention of Discrimination and Protection of Minorities, 6th Sess., Agenda Item 12, at 21-22, para. 80, U.N. Doc. E/CN.4/Sub.2/1988/24 (1988) [hereinafter *Sixth Report of the WGIP*]; *Analytical Compilation of Observations and Comments*, *supra* note 40, at 33 (comments of the Indian Law Resource Center).

⁵⁰ *First Report of the WGIP*, *supra* note 48, para. 70.

⁵¹ *Id.* para 72. This was because "[s]elf-determination would allow those groups to freely decide how to solve their own problems and how to develop their own culture, their own resources and their own way of life." *Id.* See also *Study of the Problem of Discrimination Against Indigenous Peoples*, U.N. ESCOR, Sub-Comm. on the Prevention of Discrimination and Protection of Minori-

gued that self-determination is an inherent right of peoples (including indigenous peoples); this right entails inherent sovereignty that cannot be denied.⁵²

In line with this position, the indigenous representatives have proposed various draft principles for inclusion in a draft declaration on the rights of indigenous peoples recognizing a legal right to self-determination.⁵³ They have stressed that the content of this right, while including

ties, 3rd Sess., Agenda Item 10, at 13, para. 68, U.N. Doc. E/CN.4/Sub.2/1984/20 (1984) [hereinafter *The Study of Discrimination*] ("the lack of self-determination was the cause of a tragic gap between the economic, social and cultural situation of the other sectors of the population and that of the indigenous populations who lived within the territory of those countries."); *Review of Developments: Review of Developments - Consideration of the Evolution of Standards - Information Received From Non-Governmental Organizations*, at 11, U.N. Doc. E/CN.4/Sub.2/AC.4/1988/5 (1988) [hereinafter *Review of Developments*] (the Inuit Circumpolar Conference noting that the *Cobo Report* finds that "self-determination is a prerequisite and a pre-condition for the implementation and preservation of all other human rights and fundamental freedoms" and arguing that, if only for this reason (being a means to an end), the right to self-determination must be included in any declaration); *Seventh Report of the WGIP*, *supra* note 39, para. 28, at 10 ("self-determination was of great importance to indigenous peoples because it was the denial of this right which had led to their present living conditions.").

⁵² See, e.g., *Fourth Report of the WGIP*, *supra* note 32, para. 79 (the Inuit Circumpolar Conference arguing that "the fundamental rights of indigenous peoples are inherent in nature" and therefore "limit the sovereignty of national Governments" over indigenous peoples; these limits must also be recognized in any declaration). In addition, at the ninth session (1991), the Grand Council of the Crees argued that self-determination was a "fundamental, inalienable" right of indigenous peoples and could thus "not be negotiated or bargained away." Quote recorded by author at the meeting. See *Ninth Report of the WGIP*, *supra* note 28, para. 42, at 29, for a summary of the statement by the Grand Council of the Crees. See also Delia Opekokew, *International Law, International Institutions, and Indigenous Issues*, in *THE RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW: SELECTED ESSAYS ON SELF-DETERMINATION* (Ruth Thompson ed., 1987).

⁵³ See, e.g., the draft paragraph submitted by the World Council of Indigenous Peoples and six indigenous peoples' organizations: "All indigenous peoples have the right of self-determination. By virtue of this right they may freely determine their political status and freely pursue their economic, social, religious and cultural development." *Fourth Report of the WGIP*, *supra* note 32, Annex III (Declaration of principles adopted at the Fourth General Assembly of the World Council of Indigenous Peoples in Panama, September 1984). The draft declaration of principles provided by the various indigenous peoples' organizations similarly provides:

All indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine their political status, freely pursue their own economic, social, religious and cultural development, and determine their own membership and/or citizenship, without external interference.

Id. Annex IV (Draft declaration of principles proposed by the Indian Law Resource Center, Four Directions Council, National Aboriginal and Islander Legal Service, National Indian Youth Council, Inuit Circumpolar Conference, and the International Indian Treaty Council). See also *Fifth Report of the WGIP*, *supra* note 36, Annex V, at 30 (declaration of 22 principles concerning the rights of indigenous peoples adopted by indigenous peoples' representatives at a preparatory meeting to the fifth session in Geneva on 27-31 July, 1987. The right to self-determination, as expressed in the draft principles devised by the six indigenous peoples' organizations before the fourth session, was adopted, as were other principles expanding on this right) *id.* See also the draft Covenant on the

the option of full self-determination where appropriate, is flexible and does not necessarily imply separatism or secession.⁵⁴ However, it does imply that indigenous peoples themselves have the right to determine their form and extent of self-government, including the right to choose independence.⁵⁵

The government representatives do not share the enthusiasm for legal recognition of a right to self-determination for indigenous peoples. While most government representatives have agreed that indigenous peoples should be allowed "an increased degree of self-determination. . . in their relations with the respective Governments,"⁵⁶ they have also made

rights of Indigenous Peoples provided by the World Group on Indigenous Peoples in 1984, in *Consideration of the Evolution of Standards Concerning the Rights of Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/AC.4/1983/5/Add.2 (1983). This Covenant provides a strong declaration that indigenous peoples have the right to self-determination and that each indigenous people "has the right to determine the form, structure and authority of its institutions of [internal] self-determination." *Id.* at 15.

⁵⁴ For example, the indigenous peoples' representatives have "emphasized that self-determination did not necessarily equate to separatism." *First Report of the WGIP, supra* note 48, para. 72. Instead, the right to self-determination was the right "to possess in their territories whatever degree of self-government they wished to choose." *Id.* para. 82. It was commented that the implementation of self-determination would vary in different situations and could include "mere participation in decisions concerning their status in the country in which the indigenous peoples lived," "different forms of autonomy within the State," and "the establishment of an independent State." *Id.* See also *Second Report of the WGIP, supra* note 1, para. 97 ("the meaning of the right to autonomy or self-determination varied from one indigenous people to another and did not always mean sovereignty or statehood and that indigenous people should themselves be allowed to decide on the degree of autonomy or self-determination they should have"); *Analytical Compilation of Observations and Comments, supra* note 40, at 13-15 (comments of the National Indian Youth Council).

James Anaya comments that indigenous peoples "in virtually all instances deny aspirations to independent statehood." S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, 1989 HARV. INDIAN L. SYMP. 191, at 219 (1990). In support of this comment he cites a statement made at the 75th session of the International Labour Conference. *Id.* n.121.

⁵⁵ In addition to the authorities cited *supra* note 54, see, e.g., *The Study of Discrimination, supra* note 51; *Fifth Report of the WGIP, supra* note 36, para. 52, at 14 ("self-determination should mean the freedom of indigenous peoples to determine the form of institutions, their composition and their functions, also in self-governance relationships with states" and "the right to self-determination ought to encompass the possibility of choosing full independence"); *Consideration of the Evolution of Standards Concerning the Rights of Indigenous Populations - Information Received From Non-Governmental Organizations*, at 4, U.N. Doc. E/CN.4/Sub.2/AC.4/1983/5/Add. 2 (1983). See also *infra* note 130.

⁵⁶ *Consideration of the Evolution of Standards Concerning the Rights of Indigenous Populations, supra* note 55 para. 63. Such an increased degree of self-determination could include the establishment of new institutions with the participation of the indigenous peoples and/or "the assumption by the indigenous communities of responsibility for self-government and self-management of certain affairs." *Id.* para. 64. See also *Fifth Report of the WGIP, supra* note 36, para. 56, at 15-16 (describing a commitment to greater levels of autonomy with existing states); *Consideration of the Evolution of Standards Concerning the Rights of Indigenous Populations*, at 3, U.N. Doc. E/CN.4/Sub.2/AC.4/1983/2/Add. 2 (1983) (Australia thought that "indigenous aspirations and identity" as well as "autonomy" should also be discussed).

it clear that any standards must not imply any right of secession of indigenous peoples from existing independent states.⁵⁷ The government representatives have accordingly rejected any recognition of a full right of self-determination for indigenous peoples.⁵⁸ They maintain, instead, that once a state has gained independence, the appropriate concern becomes one of minority protection within that state.⁵⁹ The government representatives have consistently maintained that indigenous peoples are not entitled to self-determination under international law as the legal right of self-determination is only appropriate to the process of decolonization and liberation from foreign occupation and that, under the relevant legal criteria, indigenous peoples are not colonized nor under foreign occupation.⁶⁰ Government representatives have accordingly rejected the use of the term "peoples" and instead referred to indigenous "populations" so as to avoid any implication that indigenous peoples are thereby entitled to the right of "all peoples"⁶¹ to self-determination.⁶² Further, govern-

⁵⁷ See, e.g., *Consideration of the Evolution of Standards Concerning the Rights of Indigenous Populations*, *supra* note 56, at 3. (Australia argued that "the [Working] Group should avoid any suggestion that separate development or secession is at issue"). See also *Standard-Setting Activities: Information Received From Governments 1990*, *supra* note 40, Add.1, at 9. The International Labor Organization, presumably on behalf of its member states, has also argued that the declaration should clarify that "these rights may in no event justify segregationist policies." *Standard-Setting Activities: Information Received From Intergovernmental Organizations*, *supra* note 40, at 11. See also *infra* note 135 and accompanying text.

⁵⁸ See, e.g., the states' comments contained in *Analytical Compilation of Observations and Comments*, *supra* note 40.

⁵⁹ See, e.g., *Sixth Report of the WGIP*, *supra* note 49, at 12, para. 44.

⁶⁰ *Id.* para. 99. It was also asserted that, under the international law of self-determination, where a group has been "given the opportunity to participate in forming the life of a State" then that group "could not be said to have been denied the right to self-determination." *Id.* See also *id.* para. 65; *The Study of Discrimination* *supra* note 51, para. 74 (while "forms of self-government with the framework of the State" were possible, self-determination "did not apply in international law to enclave populations within non-colonial states"); *Fifth Report of the WGIP*, *supra* note 36, para. 56, at 15 ("Government observers pointed out that, as of today, the United Nations had applied the principle of self-determination within the context of colonial or foreign occupation. The principle should not be utilized to support secessionist or separatist moves within democratic and independent states.") *Sixth Report of the WPIG*, *supra* note 49, para. 44 ("the right to self-determination was only applicable to colonial situations or foreign occupation").

⁶¹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. I, para. 1, 993 U.N.T.S. 3, 5; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. I, para. 1, 999 U.N.T.S. 171, 173 [hereinafter *International Covenants*] (both providing that "[a]ll peoples have the right of self-determination").

⁶² See, e.g., *Analytical Compilation of Observations and Comments*, *supra* note 40, at 3. (Australia stating that the declaration must specify that the references to "peoples" and to "autonomous institutions" do not imply either the full right to self-determination "as understood in international law" or the identification of a unique set of rights for a separate group within the state); *Id.* at 4 (Canada stating that the declaration should use "populations" instead of "peoples" because the meaning of "peoples" in international law is unclear and it "may relate to the right to self-determination, which would not be acceptable to many States"); *Id.* at 9 (Sweden stating that, if "peoples" is used, the declaration must clarify that it does not imply the right to self-determination); *Fifth Report*

ment representatives have stressed that any declaration of the rights of indigenous peoples should operate within existing human rights instruments and not confer new, additional rights on indigenous peoples;⁶³ nor should any such declaration "infringe upon the sovereignty and independence of the Member States of the United Nations."⁶⁴

Because of this apparent polarization of views, the discussion of self-determination in the Working Group has been slow.⁶⁵ Yet, despite the differences in views, there has been progress toward agreement on enough aspects that the Working Group has felt able to include some references to self-determination in the draft declaration.

The inclusion of self-determination in standards to be devised by the Working Group was first considered substantively in the fourth session.⁶⁶ At the fourth session, the participants, including indigenous peoples and government representatives, agreed that existing international instruments were not sufficient to address and remedy the underlying problems of indigenous peoples; instead, new standards were needed.⁶⁷ However, they disagreed on whether a legal right to self-determination should be included. The Working Group accordingly decided to proceed to a draft declaration on the rights of indigenous peoples and, to this end, adopted seven preliminary draft principles. These principles, however, did not mention any right of self-determination.⁶⁸

At the fifth session, the Chairperson/Rapporteur agreed with the governments' position that any standards should be consistent with existing human rights law.⁶⁹ Further, at least one member of the Working

of the WGIP, supra note 36, para. 56, at 15; *Standard-Setting Activities: Information Received from Governments, supra* note 40, Add. 3, at 2 (acknowledging that any use of the term "peoples" must be accompanied by a qualification denying implication of a right to self-determination); *Seventh Report of the WGIP, supra* note 39, para. 55.

⁶³ See, e.g., Australia's comment that the declaration should "clarify" that the various rights are to be "effective within the framework of (i.e. subject to) State law and are not to be interpreted as implying separate development or statehood for indigenous peoples, or extra citizenship rights." *Standard Setting Activities: Information Received from Governments, supra* note 40, Add. 3, at 3.

⁶⁴ Observation of the Union of Myanmar in *Analytical Compilation of Observations and Comments, supra* note 40, at 4.

⁶⁵ The Working Group has consistently stated that it would proceed on the basis of the opinions expressed by both governments and indigenous organizations. See, e.g., *Fourth Report of the WGIP, supra* note 32, Annex II.

⁶⁶ At the second session the Chairperson/Rapporteur expressed caution in relation to the wide disagreement on this issue and thus the possibility of holding up the deliberations of the Group; he thus recommended not making self-determination the primary issue. *Second Report of the WGIP, supra* note 1, para. 100. In relation to the plan of future action, the Working Group recommended that the third session be devoted to the discussion of land and the definition of "indigenous peoples" but that self-determination should be a high priority for discussion at the subsequent sessions. *Id.* Annex I.

⁶⁷ *Fourth Report of the WGIP, supra* note 32, paras. 59-61.

⁶⁸ *Id.* Annex II.

⁶⁹ The Chairperson/Rapporteur drew to the meeting's attention General Assembly Resolution

Group shared the view that international law did not extend the right of self-determination to indigenous peoples within states as the concern of international law had been "decolonization and other political issues, such as foreign occupation."⁷⁰ Members of the Working Group thus suggested that the declaration should focus on rights of autonomy for indigenous peoples within states;⁷¹ self-determination in this sense would be reflected in national constitutions.⁷² Accordingly, the fourteen draft principles proposed by the Working Group at the end of the fifth session did not recognize any right of self-determination.⁷³ Instead, some of the principles recognized rights of group identity, such as the right to have the group's specific character reflected in the legal system and political institutions of its country.⁷⁴

After receiving comments on the draft principles,⁷⁵ the Chairperson/Rapporteur drafted a declaration for discussion at the sixth ses-

41/120 (4 December, 1986) entitled Setting International Standards in the Field of Human Rights. This resolution required, *inter alia*, consistency of new standards with existing human rights laws. *Fifth Report of the WGIP, supra* note 36, para. 42, at 12. Another Group member commented that "none of the group rights could be construed in such a way as to justify any violation of the universally recognized rights of individuals." *Id.* para. 49, at 13. An alternative point of view was taken by another member of the Working Group. The Report notes that this member stated that not all aspects of existing human rights instruments would be relevant to indigenous peoples as,

they had been drafted without their participation and contained certain concepts which were designed for different situations. He gave as examples of such concepts the right to life and personal security which indigenous peoples tied to the right to land, and the right to private property which was perhaps different from what indigenous peoples meant or wanted when referring to the right to land.

Id. para. 50, at 14. This view, however, does not appear to have prevailed.

⁷⁰ *Id.* para. 49, at 13.

⁷¹ *Id.* para. 54 & 55, at 15.

⁷² *Id.* para. 54.

⁷³ *Id.* Annex II, at 23-24.

⁷⁴ *See, e.g., id.* Principle 6.

⁷⁵ The government representatives maintained the rejection of the application of the full international right of self-determination to indigenous peoples. These comments are reproduced in *Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous Populations*, at 2, U.N. Doc. E/CN.4/Sub.2/AC.4/2 & Add. 1 (1988). The states that commented are Canada, the Byelorussia Soviet Socialist Republic, People's Republic of the Congo, Finland, Japan and the U.S.S.R. The reaction to the suggested compromise right of autonomy was varied. For example, Canada did not object to "the establishment of special political institutions for indigenous groups" but "would be unlikely to support a principle that went beyond this and required that national political institutions and legal systems be redesigned to reflect the character of indigenous populations." *Id.* at 5. Note that the stated reason that Canada did not object to the establishment of separate political institutions was that it already had "policies for the development of self-government by aboriginal communities and related institutions." *Id.* On the other hand, the U.S.S.R. argued that the existence of indigenous peoples within a state should not always give rise to the creation of special political institutions. It also argued that the exercise of the rights contained in the declaration "should not be prejudicial to the interests of society and the State." *Id.* at 9. More generally, the Byelorussia Soviet Socialist Republic argued that the declaration should state that "the right to the full and effective enjoyment of fundamental rights and free-

sion.⁷⁶ This draft declaration was significant in that, while there was still no declaration of the right of indigenous peoples to self-determination, it used the term "peoples" instead of "populations" when referring to indigenous peoples.⁷⁷ Further, the principles concerning political rights included: "the collective right to autonomy in matters relating to their own internal and local affairs, including education, information, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions."⁷⁸ The Chairperson/Rapporteur took this approach because she considered that the declaration should effect a compromise between the positions of states and indigenous peoples by focussing on internal self-determination or autonomy.⁷⁹

At the meeting, the individual members of the Working Group took different views of the draft declaration. In line with the arguments made by the government representatives, some members argued that the declaration should be "realistic and acceptable to all the parties involved."⁸⁰ Other members tried to compromise between the different views. For example, one member agreed that "indigenous peoples were indeed peoples and not minorities or ethnic groups",⁸¹ however, because the word "peoples" implied the right to full self-determination in international law, it was also suggested that the declaration clarify that its use did not imply "statehood or independence or any sort of secession."⁸² Another member of the Working Group stressed that "the right to autonomy should be further emphasized" as it was essential for the development of

doms is of an extremely general nature, and does not have the effect of introducing substantial changes in the legal status of indigenous populations." *Id.* at 2.

The representatives from indigenous peoples' organizations, on the other hand, again stressed and elaborated their commitment to the recognition of the full right to self-determination for indigenous peoples. See generally *Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/AC.4/1988/5 (1988).

⁷⁶ *Universal Declaration on Indigenous Rights: A Set of Draft Preambular Paragraphs and Principles*, at 2, U.N. Doc. E/CN.4/Sub.2/1988/25 (1988). It is also reproduced in *The Sixth Report of the WGIP*, *supra* note 49, Annex II.

⁷⁷ *Id.*

⁷⁸ *Id.* Principle 23.

⁷⁹ For example, she suggested that "States should consider recognizing the right of the Indigenous Peoples to internal self-determination or the right to autonomy in matters relating to their own internal and local affairs, including . . . education, information, culture, religion, economic activities, lands, natural resources administration, etc." Statement made by Ms. Daes in *The Report United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States*, at 74-75, U.N. Doc. E/CN.4/22 (1989).

⁸⁰ *Sixth Report of the WGIP*, *supra* note 49, para. 71, at 19. The implication was that it must not go against the wishes of states.

⁸¹ *Id.* para. 76, at 20.

⁸² *Id.*

indigenous peoples.⁸³

Despite the statements of some government representatives that indigenous peoples should be entitled to an increased degree of self-determination, even if not a full right of self-determination, the suggested right of autonomy proposed by the Working Group was rejected by those governments that commented in writing on the draft declaration.⁸⁴ Comments made by indigenous peoples' organizations were varied. Some organizations maintained that self-determination was essential and must be included.⁸⁵ Others attempted merely to broaden the rights of autonomy proposed by the Chairperson/Rapporteur.⁸⁶

⁸³ *Id.* para. 75. This was impliedly at the expense of a full right of self-determination.

⁸⁴ These comments are described in *Analytical Compilation of Observations and Comments*, *supra* note 40. For example, Australia did not support the creation of separate political institutions. *Id.* at 30. Romania considered that autonomy was not always appropriate in the specific situation of any particular country, so considered that it could not be included as a general right. *Id.* at 31. Along this line, Finland stated that it was not possible to grant the Sami autonomy because they "live among the rest of the population without constituting a majority in any municipality." Canada and Sweden considered that the right to autonomy was too broad and imprecise. *Id.* at 30-31.

⁸⁵ *See, e.g.*, Article 26 of the World Council of Indigenous Peoples' draft declaration: indigenous peoples have "[t]he right to achieve, free from transmigratory influence, self-determination." *Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous Populations*, at 9, U.N. Doc. E/CN.4/Sub.2/AC.4/1989/5 (1989). *See also Report of United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States*, U.N. Doc. E/CN.4/1989/22 (1989). For example:

(e) The principle of self-determination as set forth in the Charter of the United Nations and in article 1 of the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights is essential to the enjoyment of all human rights by indigenous peoples. Self-determination includes, *inter alia*, the right and power of indigenous peoples to negotiate with States on an equal basis the standards and mechanisms that will govern relationships between them.

Id. at 10. This seminar was held in Geneva on January 16-20, 1989. It was attended by experts invited from ten countries and nine indigenous organizations, three professors who prepared background papers, Ms. Daes, as well as various observers from governments, U.N. agencies, and non-governmental organizations.

⁸⁶ For example, the Indian Law Resource Center proposed that the phrase "to the greatest possible extent" be omitted after the phrase "indigenous peoples should be free to manage their own affairs" in the ninth preambular paragraph. *Analytical Compilation of Observations and Comments*, *supra*, note 40, at 18. In the part of the draft concerned with political rights, Romania proposed provisions that were more general and wide-ranging, presumably with the intent of making them applicable to a wider range of situations. *Id.* at 9. The Assembly of First Nations attempted to achieve a compromise between the demands of the states and of the indigenous peoples and proposed only minor changes to make the proposed right of autonomy more acceptable to the indigenous peoples. *See, e.g.*, the ninth preambular paragraph, which merely modifies the limiting phrase that the World Council rejected. The Assembly's proposed paragraph reads: "indigenous peoples are entitled to free and autonomous determination of their own affairs to the greatest extent under international standards consistent with this declaration, while enjoying equal rights with other citizens in the political, economic and social life of States." *Id.* at 2.

Upon her next revision of the draft declaration⁸⁷ the Chairperson/Rapporteur inserted one reference to self-determination, but not one that seriously addressed the concerns of indigenous peoples.⁸⁸

Before the eighth session of the Working Group, the Chairperson/Rapporteur, Ms. Daes, summarized the comments on the 1989 draft, separating the "provisions on which there is broad agreement" from those upon which "further consideration is needed."⁸⁹ On self-determination, Ms. Daes observed that "there may be need for further discussion of the manner and content in which this principle might be reflected in the draft declaration."⁹⁰ On the draft provisions concerning autonomy and political rights, Ms. Daes noted that the governments expressed concern that they were too extensive, primarily because they seemed to conflict with existing political organizations within their countries and seemed impossible to apply.⁹¹ On the other hand, she also noted that the indigenous peoples were concerned that the draft provisions did not go far enough and that the declaration should specifically state the right to self-determination.⁹² Ms. Daes' own opinion is that the principle of autonomy "could apply to geographically distinct indigenous communities," noting that "autonomous regimes exist already in many countries."⁹³ However,

As for the applicability of the right to self-determination, . . . she is of the view that it involves different considerations. . . . While some indigenous peoples may meet the conventional criteria for enjoyment of the right to self-determination, others may not, and it might be unnecessary as well as inappropriate to reiterate existing standards in this

⁸⁷ *First Revised Text of the Draft Declaration on the Rights of Indigenous Peoples Prepared by the Chairman-Rapporteur of the Working Group on Indigenous Populations, Mrs. Erica-Irene Daes, Pursuant to Sub-Commission Resolution 1988/18*, at 3, U.N. Doc. E/CN.4/Sub.2/1989/33 (1989) ("the small number of replies received from all parties concerned [could not] be considered as reflecting the views and proposals of a sufficient number of Governments and indigenous peoples of the international community [and] in view of the diversity of opinions [of governments and indigenous peoples,] in particular on provisions as to land and resource rights, self-government and self-autonomy, the Chairman-Rapporteur felt that these . . . , in their substance, should better stand as they are. This would facilitate later discussion . . . [and] substantial changes have to be acceptable to all parties concerned). The Chairperson/Rapporteur commented that the revised draft "constitutes a fair balance between the aspirations of indigenous peoples and the legitimate concerns of States and, for that reason, seems to be a realistic approach to the issues." *Id.*

⁸⁸ A paragraph was inserted in the preamble: "Bearing in mind that nothing in this declaration may be used as a justification for denying to any people, which otherwise satisfies the criteria generally established by human rights instruments and international law, its right to self-determination." *Id.* at 5.

⁸⁹ *Analytical Commentary on the Draft Principles Contained in the First Revised Text of the Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1990/39 (1990).

⁹⁰ *Id.* para. 20.

⁹¹ *Id.* paras. 82-84.

⁹² *Id.* para. 85.

⁹³ *Id.* para. 86.

declaration. It may be preferable simply to ensure that indigenous peoples are not discriminated against with respect to the implementation of existing standards.⁹⁴

At the eighth session of the Working Group (1990), as well as considering the draft provisions in plenary, three smaller Informal Drafting Groups were established, each chaired by a member of the Working Group.⁹⁵ Both Informal Drafting Groups I and II recommended major changes regarding the references to self-determination in the draft declaration. Informal Drafting Group II, under the chair of Danilo Türk,⁹⁶ recommended that preambular paragraph 10 should read: "*Bearing in mind that nothing in this Declaration may be used as a justification for denying to any indigenous peoples their right to self-determination*"⁹⁷ and that draft operative paragraph 1 explicitly state that "[i]ndigenous peoples have the right to self-determination."⁹⁸ Informal Drafting Group I recommended that preambular paragraph 7 read: "*Endorsing calls for the revitalization, consolidation and strengthening of indigenous societies and their traditional institutions, cultures and social structures, through respect for their inalienable right to self-determination. . .*"⁹⁹ and that preambular paragraph 9 read: "*Convinced that the right of indigenous peoples to self-determination includes their right freely to determine their present and future relationships with the political, economic and social life of States. . .*"¹⁰⁰

In the plenary discussion, Danilo Türk suggested further that, the time has now come to give fresh thought to the concept of self-determination. [He] noted that legal concepts undergo a constant process of evolution, and that it is the responsibility of the Working Group to help shape the development of those concepts which are of relevance to the continued survival and flourishing of the world's in-

⁹⁴ *Id.* para. 87.

⁹⁵ Informal Drafting Group (IDG) I was chaired by Mr. Miguel Alfonso Martinez, IDG II was chaired by Danilo Türk, WGIP and IDG III were chaired by Ms. Erica-Irene A. Daes. *Eighth Report of the WGIP, supra* note 40, at ii. Mr. Ribot Hatano, a member of the Working Group, attended IDG I. *Id.* at 40. These groups were well-attended by indigenous peoples but there was limited participation by States. Indeed, concern was expressed that this lack of participation was contrary to the spirit of the Working Group. *Id.* at 25.

⁹⁶ Professor of International Law at Ljubljana University.

⁹⁷ *Eighth Report of the WGIP, supra* note 40, at 48. The difference between this and the draft paragraph 10 is that the draft includes that qualifier concerning 'otherwise satisfying' the accepted international law criteria. See *First Revised Text of the Draft Declaration on the Rights of Indigenous Peoples, supra* note 87 and accompanying text.

⁹⁸ *Eighth Report of the WGIP, supra* note 40, at 4. The proposed paragraph reads: "Indigenous peoples have the right to self-determination, by virtue of which they may freely determine their political status, pursue their own economic, social, religious and cultural development, and determine their own institutions." *Id.* at 49.

⁹⁹ *Id.* at 41 (emphasis added).

¹⁰⁰ *Id.* (emphasis added).

digenous peoples.¹⁰¹

In June 1991, the Chairperson/Rapporteur produced a Working Paper which listed for each provision various suggestions made for their revision and her suggested revised text.¹⁰² Mrs. Daes did not adopt any of the suggestions made by Informal Drafting Groups I and II concerning the preambular paragraphs.¹⁰³ Nor did she adopt the suggestion made for draft operative paragraph 1.¹⁰⁴ In all of her suggested revisions of these provisions, Ms. Daes appears to have tried to compromise between the views of the state and indigenous representatives.

At the ninth session of the Working Group (1991), the inclusion in the draft declaration of a statement on the right of indigenous peoples to self-determination was again prominent in the discussion. The Report of the ninth session does not do this discussion justice and glosses over the positions taken and the developments made;¹⁰⁵ I thus discuss it here in some detail.¹⁰⁶

Draft operative paragraph 1 (both the draft proposed by the Chairperson/Rapporteur and that proposed by Informal Drafting Group II) was the most intensively discussed provision concerning the inclusion of a statement on self-determination. The unanimous view of the indigenous representatives was that the paragraph suggested by Informal Drafting Group II, stating the right of indigenous peoples to self-determination, should be mentioned first as it was the most important.¹⁰⁷

¹⁰¹ *Id.* para. 126. This is clearly the approach that Danilo Türk took in Informal Drafting Group II; however, recalling the makeup of the Informal Drafting Groups, that does not mean that it will be accepted by other than the indigenous peoples. Danilo Türk also noted that "the concept of self-determination would only in rare instances imply the right to independent statehood." *Id.* para. 127, citing S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 13 HUM. RTS. Q. 403 (1991) (statement delivered at the Conference of U.S.S.R.-U.S.A. Scholars' Dialogue on Human Rights and the Future, held at Moscow, June 19-21, 1990). *Id.* para. 127 n.1.

¹⁰² *Draft Declaration on the Rights of Indigenous Peoples*, *supra* note 42.

¹⁰³ *Id.* at 20, 26 & 28.

¹⁰⁴ *Id.* at 38. See *supra* note 98 and accompanying text for this suggestion.

¹⁰⁵ The Report's summary of the discussion consists of the following paragraph:

Several non-governmental representatives stated that the draft declaration should reflect the unqualified right of indigenous peoples to self-determination. However, some governmental and other non-governmental observers indicated that it may be necessary to qualify at least the application of the right in order to make the text acceptable to Governments which would have to implement it. Some Governments expressed opposition to the inclusion of a reference to self-determination.

Ninth Report of the WGIP, *supra* note 28, para. 49. I note that the lack of detail in this paragraph is not necessarily a reflection on the Working Group but more a matter of the summary nature of a report such as this.

¹⁰⁶ The following description is thus made on the basis of my observations at the ninth session. The discussion itself is not recorded in minutes; the only public record is that contained in the official *Ninth Report of the WGIP*, *id.*

¹⁰⁷ The indigenous representatives argued that the right was inherent to all peoples and could

Only after this primary group right was stated should the declaration refer to the other individual rights protected under international law.

The concern of the government representatives was that the territorial integrity of states would be violated by the secession of indigenous peoples if any general right to self-determination was recognized. While the government representatives that spoke stated that they did not object to greater levels of autonomy, or internal self-determination, they wanted to make sure that the principle would still be subject to the existing international law regarding the entitlement to external self-determination. It was this concern that was addressed most directly during the discussion. The Chairperson/Rapporteur agreed that the issue here was internal rather than external self-determination. However, two legal scholars (one of them being Professor Danilo Türk, a member of the Working Group¹⁰⁸) drew the participants' attention to the fact that there is a difference between the statement of the principle and its application. The principle of self-determination is indivisible; however, its application will differ in different circumstances. Any statement of the principle does not define the people to whom it applies nor does it say what the result of the application of self-determination for any people may be. It was thus suggested by both scholars that a statement of the general principle of self-determination could be included in the declaration without prejudicing the result of the application of the principle.¹⁰⁹ Professor Türk commented further that present international law does not guarantee all states their territorial integrity; it only upholds that right for states that respect the general principle of self-determination. He suggested that the safeguards already present in international law were enough to allay the

not be restricted in its statement of principle. As one indigenous representative commented, until it was taken from them, indigenous peoples enjoyed self-determination; now they are merely asking that it be reinstated. This comment was made by Dr. Erihapeti Murchie, Human Rights Commissioner, New Zealand Human Rights Commission.

¹⁰⁸ The other was Maivn Clech Lm, fellow at the Institute for Legal Studies, University of Wisconsin - Madison Law School.

¹⁰⁹ Maivn Clech Lm proposed that operative paragraph 1 explicitly recognize the difference between principle and application with the wording:

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

This right is available, under international law, to peoples without discrimination. At the same time, the application of the right to self-determination, in an interdependent world, where both order and justice must be respected, is contextual, and evolutionary. Proposal submitted to the Working Group, August 2, 1991 (on file with author).

For an elaboration of the suggestion that the application of self-determination is evolutionary, see Maivan Clech Lm, *Indigenous Hawaiians' Options for Self-Determination Under U.S. and International Law*, 7 L. & ANTHROPOLOGY 60 (1992) (arguing that any law of self-determination should be on the structuring of opportunities for the ongoing negotiation of relations between peoples and states rather than the delineation of a supposedly permanent status).

fears of states about giving the indigenous peoples within their countries a right of secession that they did not have previously.¹¹⁰

The indigenous representatives supported these comments, stressing that indigenous peoples are seeking the ability to make decisions on matters that affect their lives. While some envisaged that this would entail the division of political power, none argued specifically for the secession of their people or the break-up of the nation-state.

Professor Türk's comments were not challenged by any representative. While it is hard to gauge what inference should be drawn from silence on the part of the government representatives, it is interesting that the standard objections on the basis of territorial integrity were not made. Although this cannot apply to states that were not represented at the session, an optimist could be forgiven for thinking that it at least *appeared* then that Professor Türk's remarks gained general acceptance. The alternative, realist, position is that the states were merely reserving negative oral comments for negative written ones later.

The discussion of the draft declaration was not the only item on the agenda for the ninth session. Thus, at the end of the first week of the session, discussion on the draft provisions stopped, even though discussion had not taken place on draft principles 18-30. The Working Group itself then met privately to discuss the views that had been expressed and to produce another draft of the declaration up to principle 17.¹¹¹

The Working Group appears to have acted upon the suggestions that the principle of the right to self-determination be recognized in general, leaving aside any implications of its application to any particular people. The Preamble now contains three paragraphs concerning the right to self-determination:

Believing that indigenous peoples have the right freely to determine their relationships with the States in which they live, in a spirit of co-existence with other citizens,

Noting that the International Covenants on Human Rights affirm the fundamental importance of the right to self-determination, as well as the right of all human beings to pursue their material, cultural and spiritual development in conditions of freedom and dignity,

Bearing in mind that nothing in this Declaration may be used as

¹¹⁰ Professor Türk also noted that political stability is not achieved by the defence of the status quo at all costs but by peaceful change to meet changing political circumstances. He thus argued that the declaration needs to have a legal formulation that will promote change while maintaining political stability.

¹¹¹ *Preambular Paragraphs to the Draft Declaration as Submitted by the Members of the Working Group at the First Reading*. While these draft provisions were originally contained in the Conference Room Papers distributed at the meeting, they have been reproduced in *Ninth Report of the WGIP*, *supra* note 28, Annex II, at 30-35.

an excuse for denying to any people its right to self-determination.¹¹²

Draft operative paragraph 1 then goes further than the Preamble by providing that:

Indigenous peoples have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the States in which they live, in a spirit of co-existence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.¹¹³

The indigenous representatives considered that this paragraph went substantially further than the previous drafts but also that it could still be improved. A problem is that it still does not make a statement of the general right to self-determination; instead, the use of the phrase "States in which they live"¹¹⁴ seems to narrow the right to that of solely internal self-determination. While not all indigenous peoples necessarily want to secede from the states in which they currently live, the present formulation seems to assume that it can never be appropriate.¹¹⁵ As the representative of the Inuit Circumpolar Conference put it, the right of co-existence with other citizens of the State is only one aspect of self-determination; they do not want that formulation to preclude the exercise of any other aspects that the application of the right of self-determination might entail.

That this right of self-determination is intended to be limited to internal self-determination is reinforced by Ms. Daes' published views on this matter. Ms. Daes has expressed the opinion that the right of secession is specifically excluded from the application of self-determination "in the cases of indigenous peoples,"¹¹⁶ instead, " 'internal self-determination' seems to be suited for application in states where indigenous peoples live."¹¹⁷

The government representatives who commented on the revised provisions agreed that they were an improvement over the previous texts, yet they also thought that there was room for further clarification of the various ambiguities. A primary ambiguity was said to concern the statements on self-determination described above, although no representative specified precisely how that ambiguity should be resolved. The Chilean

¹¹² *Id.* at 31.

¹¹³ *Id.* at 32.

¹¹⁴ *Id.*

¹¹⁵ While it will not pose barriers to any indigenous people that does fulfil the international law criteria for full internal and external self-determination, the issue raised by the indigenous peoples' arguments is whether the international legal criteria should even be relevant.

¹¹⁶ Erica-Irene E. Daes, *On the Relations Between Indigenous Peoples and States*, in 2:2 WITHOUT PREJUDICE 41, 48 (1990).

¹¹⁷ *Id.*

representative came the closest of any to specifying a solution when he stated that the elaboration of paragraph 1 was required in order to obtain a "politically viable" document. The implication was that the right to self-determination in a document such as this had to be narrowed further in order to be acceptable to states.

With respect to the interpretation of the provisions, including those on self-determination, it was commented that the declaration will be interpreted in its entirety; that is, the general provisions in the declaration will also be interpreted by reference to the more specific provisions elsewhere.¹¹⁸ The provisions on political rights in Part V of the declaration will affect the interpretation of self-determination given to paragraph 1. For this reason, it was suggested that it would be premature to propose wording to clarify paragraph 1, as it may be clarified by the overall context of the declaration.

At that point, the discussion on the revised provisions ended. It is expected that the discussion on these provisions, as well as on the provisions not yet further revised, will take place at the tenth session of the Working Group. In the meantime, participants will consider the provisions and make written comments to the Working Group to assist it with its drafting. It is too early to tell what the reactions will be to the various suggestions made for the inclusion of some statement of a right to self-determination. Professor Türk's arguments for the inclusion of a general statement appear to have already been rejected by Ms. Daes as her suggested paragraph includes only a limited statement on this point. If Ms. Daes is correct in her assessment that this is most likely to be acceptable to participants — or, more importantly, that Professor Türk's proposal is likely to be rejected outright by states — then the outlook for the inclusion of a right of self-determination for indigenous peoples is bleak. On the other hand, it is impossible to predict how international opinion (and thus law and practice) on self-determination will be affected by the various current struggles for self-determination through secession. If there is less resistance than might be expected to the proposed formulation, it may be possible that the more general formulation — on the basis of Professor Türk's arguments — could be adopted in the future.¹¹⁹

¹¹⁸ Both the representative of the Indian Law Resource Center and Professor Danilo Türk of the Working Group made this point.

¹¹⁹ For example, the current Eastern European and Soviet struggles and achievements could encourage a wider acceptance of the need to recognize claims to self-determination both in principle (e.g., that self-government is a fundamental moral right of all peoples) and on practical grounds (that denial will lead to civil strife). It could also lead to a change in the present international law of self-determination in that requirements relating to who is entitled to exercise the right could be loosened. On the other hand, it could also encourage the prevailing view that the exercise of self-determination entails secession; this will discourage the inclusion of any general statement of such a right for indigenous peoples. It is not the purpose of this paper to assess how the developments since mid-1991

B. Analysis of the Debate

The debate in the Working Group over the claims by indigenous peoples to self-determination has remained substantially the same throughout the various sessions. From the beginning, the indigenous representatives have claimed that, as peoples they have the right to self-determination because it is an inherent right of peoples, and that this right must be recognized in the draft declaration, both because it is inherent and because it is essential for the realization of their fundamental human rights.¹²⁰ The state representatives, on the other hand, have consistently denied that indigenous peoples have the right to self-determination, because international law only accords that right to colonized states. Further, state representatives deny that indigenous peoples can be accorded the right, because implementation of the right would violate other hallowed principles of international law, such as non-intervention in domestic affairs and territorial integrity.¹²¹ For these reasons, state representatives have rejected inclusion of a right of self-determination in the draft declaration. While there are clearly more arguments and subtle variations than this brief description provides, this is the essence of the positions taken.

While it is clear that the state representatives are adopting a positivist view of international law, there are three ways in which one can view the claim of indigenous peoples that they have a right to self-determination. One view is that adopted by states: the positive view of international law. Under the positive view of international law, states decide what they want to recognize or incorporate in international law. They may thus accept or reject the indigenous peoples' claims. Under this view, indigenous peoples cannot be taken as making a claim that the right of self-determination for indigenous peoples is currently recognized in international law. Such claims must instead be seen as a reason to support their argument that the right *should* be so recognized (in positive law) and that the draft declaration should thus include a statement of the right.

An alternative approach is that provided by the natural law tradition.¹²² This approach focuses on the claim that indigenous peoples have an inherent right of self-determination and argues that it is a right that need not be recognized or conferred by states for it to exist. This approach argues, instead, that natural law takes precedence over the posi-

have affected the international law of self-determination, therefore, I will not speculate its effect on international law. For further comments see *infra* notes 324-325 and accompanying text.

¹²⁰ See *supra* notes 48-53 and accompanying text.

¹²¹ See *supra* notes 57-64 and accompanying text.

¹²² For a concise, clear description of the claims of indigenous peoples as being situated within the natural law tradition, and its place in legal thought on indigenous peoples, see generally Anaya, *supra*, note 54.

tive law recognized by states and that the dictates of natural law compel the recognition of the right of indigenous peoples to self-determination in positive law because such recognition is not solely up to the discretion of states.

A third way of viewing the claims that indigenous peoples have a right of self-determination is as a reference to present positive international law. One argument made by indigenous representatives is that international law currently provides for a right of self-determination for indigenous peoples *if* the present rules are consistently applied.¹²³ While the indigenous representatives acknowledge that the rules have not been applied to indigenous peoples, their argument is couched merely in terms of consistency in application rather than of recognizing new rules. Even under positivist terms, this argument is not focusing on what the law should be but what it is.

Breaking down the different possible approaches of indigenous peoples in this way makes it clear that the states and indigenous peoples are talking past each other rather than directly addressing the issues involved. The differences in these approaches and their implications need to be made more explicit in order for the parties — particularly the state representatives — to realize what it is that the other is saying and address it directly.

The claim by indigenous peoples for self-determination is a reference to the idea of freedom from oppressors and the right to determine their future, their own form of government, as well as the extent of self-government. As one scholar puts it, the claim to the right of self-determination "is an expression, in succinct form, of the aspiration to rule one's self and not to be ruled by others."¹²⁴ Thus, the aspiration is not just to be "free", but to be "free from" what they perceive as 'others.'¹²⁵ The content or application of this asserted right to self-determination will thus vary according to the oppression that the different indigenous peoples suffer and what is needed in order to determine their future. Seen in this light, any particular claim to self-determination does not *necessarily* imply anything about territoriality or the disintegration of the state system. It instead implies a system of government where indigenous peoples will be free from oppression by others. This can range from complete independence and full statehood to autonomy in some areas of competence within a state system.¹²⁶ Whether or not this can be

¹²³ See, e.g., Opinion by Professor Ian Brownlie, *infra* note 471-474 and accompanying text. See also Indigenous Peoples Preparatory Meeting, *Threat of Quebec Secession From Canada*, *infra* note 524.

¹²⁴ DOV RONEN, *THE QUEST FOR SELF-DETERMINATION* 7 (1979).

¹²⁵ *Id.*

¹²⁶ Hannum gives the examples of full control solely over land and natural resources. HANNUM, *supra* note 22, at 95.

achieved within the existing state system is not a function of the nature of self-government but of what may be necessary to achieve it. This may be more a matter of political circumstances and the nature of discrimination and oppression than of the simple ideal of self-government.

The statements made in the various reports of the sessions of the Working Group show that this is indeed how the issues are perceived.¹²⁷ The claims have not explicitly defined "self-determination" and, in addition to calls for the recognition of a right to secession, have at the same time called for the recognition of rights to "internal self-government" and "autonomy."¹²⁸ While it is not always clear in a particular context, it becomes clear when they are taken together that these terms are intended as various ways of referring to the same idea, and are not meant to be mutually exclusive. In some cases it is made explicit that "self-determination" is not being used with any pre-conceived ideas as to the outcome. It is recognized that different outcomes will be appropriate for different indigenous peoples, although it is also stressed that, should complete independence be considered appropriate (as judged by indigenous peoples, not by states), indigenous peoples should be free to choose that option.¹²⁹ What is important is that it be recognized that indigenous peoples have the right to determine their own political organization and future.¹³⁰

Despite these flexible claims — claims that often emphasize the remedying of a particular situation rather than a blanket demand of secession or statehood — the reaction of the states to "self-determination" has still been negative.¹³¹ As described above, self-determination is rejected on the basis that positive international law does not presently accord indige-

¹²⁷ See *supra* note 53 and accompanying text.

¹²⁸ See, e.g., *The Study of Discrimination*, *supra* note 51, paras. 68 & 70, at 13.

¹²⁹ See, e.g., *supra* note 54 and accompanying text.

¹³⁰ See, e.g., authorities cited *supra* note 54. Other examples of statements made include: It was pointed out [by indigenous peoples' representatives] that the meaning of the right to autonomy or self-determination varied from one indigenous people to another and did not always mean sovereignty or statehood and that indigenous people should themselves be allowed to decide on the degree of autonomy or self-determination they should have.

Second Report of the WGIP, *supra* note 1, para. 52, at 19. Another example:

It was asserted by some speakers that the right to self-determination ought to encompass the possibility of choosing full independence, but various other forms of the right, such as autonomy, self-government, self-management, and participation in the political processes of States, were frequently mentioned. It was maintained that self-determination should mean the freedom of indigenous peoples to determine the form of institutions, their composition and their functions, also in self-governance relationships with States. It was underlined that the free and informed consent of indigenous peoples constituted an essential element of any and all self-determination exercises.

Fifth Report of the WGIP, *supra* note 36, at 14. Another example is provided in *Analytical Compilation of Observations and Comments*, *supra* note 40, at 13-15.

¹³¹ See *supra* notes 56-64 and accompanying text.

nous peoples this right, unless they are being ruled by a colonial or foreign power.¹³² This is because such a right would violate other more hallowed principles of non-intervention in states' domestic affairs, territorial integrity, and thus state sovereignty. When one looks at the rhetoric employed, it is not entirely clear why these reasons are given for the blanket rejection of the claims since many indigenous peoples do not claim secession, but merely autonomy or other forms of self-government within states. The satisfaction of such claims does not appear to violate the aspects of state sovereignty that is so complained of. This view, however, is too simplistic. While a particular people may only specifically claim measures of autonomy within a state, the rhetoric employed implies much more than that. Quite apart from the indigenous representatives' claims that independence should be an available option, the right of self-determination in international law refers to the option of complete independence, even if it is only achieved in graduated stages. Thus, even where partial independence is initially chosen, total independence continues to exist as a future option. Accordingly, whether secession is specifically claimed or not, "governments tend to equate all demands for self-determination with independence and secession."¹³³ This is why "negative government reactions to indigenous demands for self-determination are not surprising."¹³⁴

Some states do admit that they would not object to greater measures of autonomy, but only as long as the principles of sovereignty and territorial integrity are not violated.¹³⁵ However, while some states recognize that some measures of autonomy short of independence may be appropriate, there are three problems with even this recognition. First, even states that appear willing to accept measures of autonomy have insisted that they be phrased narrowly.¹³⁶ Second, this will not address the cases where indigenous people want more independence than mere autonomy

¹³² See *supra* note 60 and accompanying text.

¹³³ HANNUM, *supra* note 22, at 672.

¹³⁴ *Id.*

¹³⁵ Perhaps the most direct example is: "One governmental observer made it clear that the term [self-determination] could be acceptable if it were made clearer that the right to self-determination did not imply the right to independent statehood." *Eighth Report of the WGIP, supra* note 40, at 23. For another example, one government observer, while rejecting the application to indigenous peoples of the right to self-determination contained in the International Covenants, "said that his government remained fully committed to the realization of the objective of self-government and greater levels of autonomy over local affairs for aboriginal peoples. . .". *Fifth Report of the WGIP, supra* note 36, para. 56, at 15. Others, while agreeing with the principle of autonomy, "could not support this principle [draft principle 25] if it could be seen as sanctioning legal pluralism, i.e. as referring [to] a system of separate laws for indigenous peoples." *Seventh Report of the WGIP, supra* note 39, para. 90. See also *supra* notes 55-56 and accompanying text. On the rejection of autonomy, see *supra* note 83 and accompanying text.

¹³⁶ See, e.g., *supra* note 75. See also *supra* notes 55, 56 & 135 and accompanying text.

within a state.¹³⁷ Third, this denies that self-determination is a right of peoples to themselves determine their own future. It merely lets them do that which the states think is appropriate and does not address the indigenous peoples' arguments that it is an inherent right.¹³⁸

So where does this leave the two sides? I suggest that the rhetoric and the formal legal labels that are being used disguise the real interests involved on both sides. On the part of the indigenous peoples, their stated claim to exercise their "right of self-determination" implies that they are not referring to the right as it is presently understood in positive international law. Instead, they may be adopting a natural law view of human rights whereby having a right of self-determination does not depend on whether it has been legally recognized in positive international law. In the language of the positivist conception of international law — i.e., that used particularly by states — the proper concern is not what rights international law presently recognizes, but what rights international law should recognize. The rhetoric of indigenous and government representatives has blurred this distinction, even while they employ it. On the part of states, their use of the rhetoric of international law obscures the interests and principles that are behind that law, which they (presumably) feel to be at stake. Instead, "what the law is" is provided as a reason for denying claims to "what the law should be." This does not address the justifications for the present law or why it cannot be changed. For example, issues such as why the principle of territorial integrity is so important — what it is protecting — are left undebated. Further, they have thereby completely avoided discussion of natural law or of the consistency of application of present international law to indigenous peoples.

It appears that states are trying to maintain as much as possible of the legal status quo — to only recognize rights of indigenous peoples insofar as they do not defeat, or perhaps even diminish, the powers that states currently enjoy. Whether the lack of discussion of real interests is a mere oversight or a deliberate obfuscation of the issues is not important. What is important is that the underlying issues should be discussed in the open. Only then can the relative merits of the various interests be compared — for example, whether and in what circumstances the preservation of territorial integrity is more important than the preservation of the human rights of indigenous peoples. Only by such assessments can the real concerns be addressed and resolved.

C. *Strategies: Principle v. Pragmatism*

The debate over the strategy or approach to drafting the declaration

¹³⁷ See *supra* note 54 and accompanying text.

¹³⁸ See *supra* note 52 and accompanying text.

has paralleled the debate over the substance of the provisions and has thus been subject to the same kinds of difficulties. In setting the agenda in the early sessions, for example, the debate reflected the participants' views on the importance of self-determination.¹³⁹ The process for adoption of the declaration has been similarly debated. For example, government representatives have often argued that the declaration must obtain universal support and must be adopted by consensus.¹⁴⁰ This argument is typically made in tandem with an argument based on General Assembly Resolution 41/120¹⁴¹ that the draft declaration must not go further than existing international human rights instruments. The conclusion of these arguments is that the draft declaration must not make any references to the right of indigenous peoples to self-determination.¹⁴²

At the ninth session of the Working Group, the International Labor Organization's representative offered an alternative view. He suggested that, while the declaration should be compatible with existing human rights instruments, it can go further than existing instruments because it is a declaration rather than a convention,¹⁴³ and as such can be an aspirational document.¹⁴⁴ The declaration could, therefore, include rights such as that of self-determination. While it may not yet be possible to implement such rights, that should not be of concern because that was not the function of a declaration.¹⁴⁵

Also at the ninth session, the indigenous peoples' representatives presented a third approach. The Treaty-6 organization (Canada) considered that there was no need to make this declaration compatible with existing instruments because such instruments had not been drafted with the participation of indigenous peoples. The organization stressed that

¹³⁹ At the second session, for example, it was clear that there were very different views on what emphasis to place on self-determination in the work of future sessions of the Working Group. One view was that, "given its importance, [the right to self-determination] should be put at the top of the list of priorities." *Second Report of the WGIP, supra* note 1, para. 27. Another was that "self-determination should be viewed in the light of the discussion of all other issues and should therefore be put at the end of the list." *Id.* The view of the indigenous peoples, however, was that self-determination underpinned the implementation of all other rights, so "it should be discussed in connection with all rights." *Id.*

¹⁴⁰ See, e.g., *Ninth Report of the WGIP, supra* note 28, para. 39.

¹⁴¹ G.A. Res. 4/120, U.N. GAOR, Supp. No. 53, U.N. Doc. A/41/53 (1987) (adopted 4 December 1986). The first "guideline in developing international instruments in the field of human rights" is that "such instruments should . . . [b]e consistent with the existing body of international human rights law." The fifth such guideline provides that such instruments should "[a]tract broad international support." *Id.*

¹⁴² For a summary of some of these arguments see the *Ninth Report of the WGIP, supra* note 28, para. 37-39 & 46.

¹⁴³ *Id.* para. 41

¹⁴⁴ *Id.*

¹⁴⁵ This part of the statement is not recorded in the Report. See *supra* note 105.

the reason that the declaration is even being drafted is because existing instruments fail to protect all the human rights of indigenous peoples.

The Grand Council of the Crees criticized the states' argument that the declaration needs to be the result of consensus and negotiation on the basis that what is at issue are "fundamental, inalienable rights of indigenous peoples."¹⁴⁶ Indigenous peoples could not give up some rights in order to obtain others because they are all too important to be bargained away.¹⁴⁷ The Crees insisted that the right of self-determination is an inherent right of all peoples, and that the declaration must state this right clearly and unequivocally.¹⁴⁸

These different views have made it difficult to get agreement on the substance of the draft declaration, which has drawn out the drafting process. This caused some indigenous peoples' representatives to argue in earlier sessions that a compromise between the two positions should be taken — that indigenous peoples should not insist on the inclusion of a right of self-determination but should instead focus on the inclusion of a comprehensive right to autonomy within states.¹⁴⁹

The choice of strategies and approaches to drafting still faces the participants and the members of the Working Group. The consequences of these choices, however, affect the various participants differently. Under the present positive view of international law it is up to the states to decide what laws they want to be bound by. Accordingly, states will ultimately adopt or reject any draft declaration that the Working Group submits to the Sub-Commission (which it will, in turn, submit to the U.N. bodies above it).¹⁵⁰ While there will be numerous political pressures affecting the choice of adoption or rejection of any draft declaration, ultimately, if the states do not want to legally recognize a right of self-determination for indigenous peoples, they are not likely to do so. Indigenous peoples, on the other hand, have more to lose if the draft declaration is rejected, with or without a right of self-determination in-

¹⁴⁶ *Ninth Report of the WGIP, supra* note 28, para. 42. Note that the Report only contains a summary of the statement by the Crees, not the precise language used, which I have recorded.

¹⁴⁷ *Id.* The Cree Regional Youth Council of Quebec stated further that they could not agree to negotiation with parties that were prejudiced against indigenous peoples merely in order to obtain a consensus.

¹⁴⁸ *Id.*

¹⁴⁹ The Four Directions Council (an indigenous North American organization) proposed that a right to autonomy within states would be a compromise between the principles of self-determination and territorial integrity which would be better than the outright rejection of self-determination as an applicable principle. *Written Statement Submitted by the Four Directions Council, A Non-Governmental Organization in Consultative Status (Category II)*, U.N. Doc. E/CN.4/Sub.2/NGO/9 (1985). The Council argued that the draft declaration must at least recognize that indigenous peoples have a "continuing collective right to a negotiated degree of autonomy in today's world of plural States." *Id.* at 3.

¹⁵⁰ See *infra* notes 158-159 and accompanying text for comment on this process.

cluded.¹⁵¹ Indigenous peoples thus have an interest in both getting a declaration adopted and getting recognition of the rights necessary for their survival and development.

The members of the Working Group similarly have a strong interest in getting a declaration adopted and, moreover, in getting one that will best protect the rights of indigenous peoples.¹⁵² They therefore have the same range of options for choice of strategy as indigenous peoples do. That is, a choice between a principled and a pragmatic approach: either arguing for a declaration that will best recognize the rights of indigenous peoples (one that recognizes a full right of self-determination for indigenous peoples) or for one that is more likely to be adopted as positive international law (perhaps by recognizing a right of autonomy within states for indigenous peoples rather than a full right of self-determination). The Chairperson/Rapporteur, while stressing that the Working Group is not responsible to states and that its function is to produce a document that the Group is satisfied with, nevertheless stated in the ninth session that the Group's task is to produce a declaration that will be accepted as an international instrument.¹⁵³ Taking this in conjunction with her earlier comments,¹⁵⁴ it appears that she has chosen the pragmatic approach over the principled.

From the indigenous peoples' point of view, there are advantages and disadvantages to taking both the pragmatic and principled approaches. An advantage of taking the pragmatic approach is that an agreement on the draft declaration on the rights of indigenous peoples might be more forthcoming. While such a declaration would not include all the rights and principles that indigenous peoples feel are necessary to ensure their full self-determination, it might include enough to improve their current situation and thus ensure their survival and possibly even their development. In addition, over time, as the ideas espoused by the declaration became more accepted, the declaration might be able to be extended. Further, it could also be argued that the pragmatic approach would give more power to indigenous peoples in their daily lives. It would give them a strong legal, as well as moral, footing to argue with the states in which they live on ways to improve the internal recognition and protection of their human rights. The principled approach would provide them with strong moral grounds for arguing that more fundamental changes be undertaken. It would not, however, provide any legal

¹⁵¹ That is, the declaration is designed for the benefit of indigenous peoples and is thus seen to be against the interest of states.

¹⁵² That is, so their efforts will not be to no avail.

¹⁵³ While this particular statement is unreported, see Ms. Daes' closing statement, in which she noted her hope that "the Working Group will have a draft declaration which will be a workable, balanced and consensus text." *Ninth Report of the WGIP, supra* note 28, at 53.

¹⁵⁴ See, e.g., *supra* note 87.

grounds to force the states to make changes.¹⁵⁵

Disadvantages of taking the pragmatic approach are that such a slow, gradual improvement in the position of indigenous peoples may not be enough to ensure respect for their human rights or to end their oppression, and that it does not respect the inherent dignity of indigenous peoples because it denies them their (claimed) inherent right to determine their future. On the other hand, the disadvantages of insisting on the inclusion of a full right to self-determination are that, first, it would be harder to obtain and therefore take longer to conclude the drafting of the declaration. Second, it may cause the document to be rejected by states at the various later stages of consideration of the declaration such that either it would never be adopted by the General Assembly or would be adopted with amendments. The latter result could defeat the extra efforts made in gaining inclusion of the principle in the declaration submitted by the Working Group.

The hard-line positions taken by states on the issue of indigenous peoples and self-determination shows that the apparent progress recently made in the drafting of the declaration by the Working Group may not amount to as much as it presently appears. Indigenous peoples have already criticized the Working Group's proposed draft operative paragraph 1 on the ground that it does not go far enough: it does not recognize a full right of self-determination for indigenous peoples but limits the right of self-determination to internal autonomy only.¹⁵⁶ On the other hand, while there was much state silence during the discussion of including such a provision, the past positions of states expressed in the Working Group meetings suggest that draft operative paragraph 1, even with its limited scope, will be criticized by state representatives for going too far and may be rejected altogether. While it is hard to gauge the effect of the lack of participation by many states (of which the United States is one), it appears that these states are even less interested in the rights of indigenous peoples than the participant states.¹⁵⁷ They are thus even more likely to resist extensions of the rights presently accepted in international law and to reject inclusion of any right of self-determination for indigenous peoples at the stages of (political) consideration and approval of the draft declaration by the other U.N. bodies: the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights, the Economic and Social Council

¹⁵⁵ Although, if nothing were done under either scenario, issues such as the use of force to further their claims would then arise.

¹⁵⁶ See *supra* notes 112-117 and accompanying text.

¹⁵⁷ On the issue of the low level of government involvement, the Chairperson/Rapporteur commented at the ninth session that the silence was because the governments trust and support the Working Group and did not feel the need to comment.

(ECOSOC), and the General Assembly.¹⁵⁸ Further, states that have not yet contributed to the drafting process are likely to want to be substantively involved at the stage of formally adopting any instrument that is intended to have legal status in international law. As a result, it is very likely that at least one of these other U.N. bodies will consider redrafting at least some of the provisions in order to obtain wider agreement, whatever statement on self-determination is eventually included in the draft.¹⁵⁹ All of these factors indicate that, despite the appearance of progress in the Working Group, if states maintain their positions of hostility to legal recognition of a right of self-determination for indigenous peoples, they are unlikely to adopt as an international instrument any draft declaration that includes such a right.

The obvious strategy for achieving the legal recognition of a right of self-determination for indigenous peoples is to address the reasons why states are so hostile to the proposal and attempt to persuade them to change their minds. However, if that fails, indigenous peoples must still decide how they want to approach the drafting of the declaration in the Working Group: should they argue for the pragmatic or the principled solution?

One way of looking at the draft declaration is not as a likely candidate for adoption by the General Assembly but as a statement of what rights for indigenous peoples positive international law *should* recognize. That is, perhaps indigenous peoples should not be too concerned at this stage about the reactions of states to the proposals, but should instead attempt to get a comprehensive statement of the rights that would be necessary and sufficient to ensure their survival and development and/or reflect the claimed inherent nature of the right to self-determination. At the various later stages of consideration by states, the indigenous peoples would thus have the best "weapon" with which to negotiate a legal docu-

¹⁵⁸ At all of these stages it is possible that states on the various bodies will attempt to change the draft declaration submitted by the Working Group. As the Commission on Human Rights is fairly representative of the wide range of views held in ECOSOC and in the General Assembly, it may be that this stage will prove to be the hardest to pass. I suggest that most of the battles over the contents of the draft declaration are likely to be fought here and that the declaration that is approved by the Commission therefore may not undergo further changes by either ECOSOC or the General Assembly. Only if there are strong opinions that are not fully represented in the Commission is it likely that they will be aired in the General Assembly.

An alternative scenario is that a provision such as draft operative paragraph 1 is accepted by states, but on the understanding that the result of its application will differ in different situations. That is, states will still fiercely resist its application to the indigenous peoples within their territory and/or will insist that they are applying it and thereby reject any outside interference or attempts to oversee the "internal decolonization" process.

¹⁵⁹ See *supra* note 158 for comments on the bodies likely to change the content of a draft declaration.

ment.¹⁶⁰ Further, this weapon is augmented by the fact that the declaration would be the creation of the independent legal experts of the Working Group.¹⁶¹

An advantage of this approach is that, because indigenous peoples are unlikely to be directly involved in this process, such an aspirational document may be the primary way that indigenous peoples get their views presented in that forum. It seems appropriate that they use their present power of participation to argue for rights that they consider to be necessary, rather than to weaken their future position by arguing now for a declaration which they predict will be acceptable to states. This is related to the consideration that future goals should not be limited to merely what is presently considered to be possible. A disadvantage of *not* taking an aspirational approach is that limitations imposed by what is presently practicable will restrict conceptions of a possible future. This will necessarily restrict what can actually be achieved.¹⁶²

A further advantage of taking the aspirational approach is that it would, in the language of positivism, more clearly delineate the difference between what international law is and what it should be. As suggested above, a problem with the current debates is that the states' rhetoric takes a concern for what the international law of self-determination *is* at present and makes that the basis for arguments against what the international law of self-determination in respect to indigenous peoples *should be* in the future. Even under their own positivist conception of law, these two aspects should not be linked when goals are being set. Instead, present circumstances should only be relevant to devising a strategy for achieving already agreed-upon goals. The separation of these aspects would clarify the states' real positions and interests and thereby encourage the kind of detailed debate that is necessary in order to decide which interests should prevail at either stage.

Perhaps the least obvious advantage of taking the aspirational approach is related to the content of the other rights in the declaration. The right of self-determination is a general right and its implementation

¹⁶⁰ This point was made by the representative of the Mikmaq Grand Council.

¹⁶¹ The draft declaration can be upheld as an impartial view of what a declaration on the rights of indigenous peoples should include, rather than as a (partial) creation by those intended to benefit from its adoption. That this may not be an accurate characterization is not the point; it is an argument to be used solely in order to make it easier to obtain (by making it harder for states to object to) adoption of a comprehensive draft declaration. Further, I do not mean to suggest that the expert members of the Working Group either will or should have the definitive say on what an aspirational declaration should include, nor to deny the importance of all those that participated in its creation. I merely suggest that the status of the members of the Working Group can be capitalized on as a matter of strategy.

¹⁶² See, e.g., Richard Falk, *The Struggle of Indigenous People and the Promise of Natural Political Communities*, in *THE RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW: SELECTED ESSAYS ON SELF-DETERMINATION*, *supra* note 52, at 59.

entails the recognition of a wide variety of other, more specific rights. The effect of including a general statement of a right of self-determination for indigenous peoples in the draft declaration would be twofold. First, it is likely to affect what other, specific rights are actually included in the declaration. Second, by affecting the tenor and purpose of the document as a whole, it is likely to affect the interpretation of these other rights. If the right of self-determination were not included, the other rights in the document may be less comprehensive than if it were included; the document as a whole would thus be of less benefit to indigenous peoples than might be expected. The inclusion of a right of self-determination may thus have a wider effect than might at first be envisaged.

In summary, there are advantages and disadvantages to taking the various different possible courses of action for indigenous peoples. Overall, the principled strategy — that of argument for the legal recognition of a right of self-determination — may be more than just a matter of principle; it may, in balance, also be the practical course of action to take, whether or not such a right is actually recognized in any resulting international instrument. However, it is clearly the more difficult course of action to take because arguments must be addressed to the Working Group as well as to states in order to persuade them to include a right of self-determination in the draft declaration. This will require the identification of all the barriers to the inclusion of such a right. The expressed view of states is that these barriers lie in the provisions of present international law. It will thus be necessary to examine precisely what those barriers consist of and how they might be overcome. This paper suggests that the ability of all the parties to the debate to actually address these issues will be a function of how willing they are to challenge some of the fundamental, constitutive aspects of our statist world system.

II. INTERNATIONAL LAW: THE BARRIERS TO THE CLAIMS

This part describes the international law of sovereignty and of self-determination and the barriers that the law poses for the legal recognition of a right of self-determination for indigenous peoples. While the description of sovereignty is brief, that of self-determination is much more detailed. In relation to self-determination, the aspects addressed include the development of the right, with a particular focus on the “self” that is considered to be entitled to exercise self-determination, and the exercise of the right. The discussion on the exercise of the right addresses internal and external substantive aspects of the legitimate aim of self-determination as well as procedural aspects, including the use of force. The final aspect considered is the right to freely pursue economic development. This part shows that the concern in international law with

the territorial integrity of states and with non-intervention with states' internal affairs has excluded indigenous peoples (and other minorities within such states) from entitlement under positive international law to separate, secessionist self-determination.

A. *The Concept of Sovereignty*

Sovereignty is the cornerstone of international rhetoric about state independence and freedom of action, and the most common response to initiatives which seek to limit a state's action in any way is that such initiatives constitute an impermissible limitation on that state's sovereignty.¹⁶³

There are two primary aspects of sovereignty: external and internal. External sovereignty is concerned with relationships between international personalities. It has been defined as "the rights of the state freely to determine its relations with other states or other entities without the restraint or control of another state. This aspect of sovereignty is also known as independence."¹⁶⁴ The internal aspect of sovereignty is concerned with internal self-government: the state's right to devise its own constitutional and political institutions, enact and enforce its own laws, and to make decisions concerning citizens and residents of the state, without the interference of another state. Both aspects also entail the concept of territoriality, which is the ability of a state to govern all matters within its territory.¹⁶⁵ Note that it is traditionally regarded that external sovereignty presupposes internal sovereignty.¹⁶⁶

The concept of sovereignty provides two types of barriers to claims by groups to self-determination. These barriers are based on the substance of the concept of sovereignty as well as the definition of the entities that international law recognizes as being sovereign. Such barriers are in addition to those raised with respect to the nature of the right to self-determination recognized in international law.¹⁶⁷

1. Substantive Barrier

Despite repeated appeals to the principles of sovereignty, the con-

¹⁶³ HANNUM, *supra* note 22, at 14.

¹⁶⁴ Nkambo Mugerwa, *Subjects of International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 247, 253 (Max Sorenson ed., 1978).

¹⁶⁵ Although some writers regard this as a separate aspect of sovereignty. *See, e.g., id.*

¹⁶⁶ *See, e.g., id.* Note that not every state will appear to have full internal and external sovereignty. For example, while the federal United States possesses full external sovereignty and international personality, the federal government does not possess full internal sovereignty; the individual states that make up the federation are still sovereign over the affairs that they have jurisdiction over. Similar comments can be made in respect of other composite states. However, these internal aspects do not affect the accordance of full international personality if external sovereignty is asserted. *Id.*

¹⁶⁷ *See generally infra* Part II(B), *The International Law of Self-Determination*.

cept of sovereignty is not clear.¹⁶⁸ This is due largely to its historical origin in the concept of a sovereign ruler of a state, who theoretically had absolute power.¹⁶⁹ In international law, however, no state has absolute power: all states must respect each other's integrity and are considered legally equal, even if not equal in fact.¹⁷⁰ The essential aspect of sovereignty, therefore, is "constitutional independence,"¹⁷¹ which implies the authority of a state to exercise its powers without deference to any outside authority, and the ability to "determine its relationship with outside powers."¹⁷²

This conception of constitutional independence is recognized most basically in the Charter of the United Nations.¹⁷³ Article 2(4) provides that states have an obligation to respect the "territorial integrity" and "political independence" of other states.¹⁷⁴ Article 2(7) provides that "matters which are essentially within the domestic jurisdiction of any state" are excluded from United Nations jurisdiction of intervention.¹⁷⁵ It is clear that international law holds that a state's domestic matters are generally matters for resolution by that state itself, and not for interference by other states.¹⁷⁶ The only stated exception to that general rule is intervention for the application of enforcement measures undertaken by the Security Council under Chapter 7 of the U.N. Charter.¹⁷⁷

¹⁶⁸ Oppenheim comments: "[T]here exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon." L.F.E. OPPENHEIM, 1 INTERNATIONAL LAW (2 vols. 1905, 1906) at 103, *quoted in* HANNUM, *supra* note 22, at 14. Crawford comments that "the term 'sovereignty' has a long and troubled history, and a variety of meanings." JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 26 (1979).

¹⁶⁹ Such origins include: JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH (1576); THOMAS HOBBS, LEVIATHAN (1651).

¹⁷⁰ In addition to these factors, international law in fact recognizes many limitations on states' powers. *See, e.g.*, HANNUM, *supra* note 22, at 19-23 and sources cited therein. *See also id.* at 15 (commenting that "[f]ew, if any" experts or theorists would support the view that states possess absolute sovereignty).

¹⁷¹ *Id.* at 15 (citing generally ALAN JAMES, SOVEREIGN STATEHOOD (1986)). *See also* CRAWFORD, *supra* note 168, at 27, 71. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 78 (4th ed. 1990) (stating that "[t]he term sovereignty may be used as a synonym for independence.").

¹⁷² BROWNLIE, *supra* note 171, at 78. The reservation in respect of the many actual restrictions on states' powers is also relevant here.

¹⁷³ Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (entered into force on October 24 1945) [hereinafter U.N. CHARTER].

¹⁷⁴ *Id.* at 1037.

¹⁷⁵ *Id.*

¹⁷⁶ *See generally infra* section entitled Non-Intervention in States' Domestic Affairs.

¹⁷⁷ U.N. CHARTER, *supra* note 173, at 1043-1045. Although it is increasingly the case that the interpretation of what is necessary for international peace and security — and thus what is held to

Such conceptions of independence constitute substantive barriers to many claims to self-determination. That is, a state within whose territory is located a group that is asserting a right of self-determination will protest any pressures from other states to accord the group self-determination. The affected state can first claim that such pressures violate its rights to govern within its own territory. Second, the state can object to self-determination of indigenous peoples on the basis that, as self-determination implies independence and thus the possibility of secession, it would violate the state's territorial integrity.

2. Definitional Barrier

"[S]overeignty is an attribute of statehood, and . . . only states can be sovereign."¹⁷⁸ The accepted definition of "state" is: a person of international law which possesses the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other states.¹⁷⁹

One way that this definition helps deny claims of self-determination is by its application to the entity making the claim. If the entity does not satisfy the above criteria then it cannot be recognized as a state and therefore cannot be recognized as having any attributes of sovereignty. Because self-determination constitutes an element of state sovereignty, any entity not satisfying the criteria cannot be entitled to exercise self-determination. In this respect, states today typically point to the lack of the last two elements in order to deny such claims. This, however, is despite the fact that measures of independence and international personality are granted to other entities besides those accorded full statehood. For example, international law recognizes limited independence and the international personality of limited forms of "state", such as associated states, protected states, vassal states, non-self-governing territories, and colonial protectorates.¹⁸⁰ International law also gives some international status and recognition to entities that are not "states", such as various

warrant intervention by the international community — includes more and more human rights matters. See *infra* section on Non-Intervention.

¹⁷⁸ HANNUM, *supra* note 22, at 15.

¹⁷⁹ Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 165 L.N.T.S. 19, 25. See generally CRAWFORD, *supra* note 168, (discussing these criteria as well as other legal and non-legal factors involved in the recognition of statehood). For a discussion of situations where African nations have been accorded statehood by the international community even where they arguably do not possess in substance all of the supposedly required characteristics, see Robert H. Jackson & Carl Rosberg, *Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis*, 24 THE J. MOD. AFR. STUD. 1 (1986).

¹⁸⁰ See, e.g., CRAWFORD, *supra* note 168, at 186-214. See also HANNUM, *supra* note 22, at 16-18 (summarizing the different types of governmental entities).

types of autonomous regions.¹⁸¹ What can additionally hamper the claims to self-determination made by many indigenous peoples is the lack of a defined territory, which is often tied to the lack of self-government.

In addition to the application of the definition to individual cases, the mere creation and use of a definition in order to recognize the sovereignty of a particular entity poses a barrier to the recognition of claims of self-determination by indigenous peoples. The creation of a definition implies that international law does more than simply recognize sovereignty; it implies that it is the role of international law to *accord* sovereignty and that, where it does not do so, there is no such attribute. This assumes a positivist view of international law and rejects the arguments made by indigenous peoples that sovereignty is inherent in peoples.¹⁸² Further, in elevating statehood to the position of the only legitimate expression of sovereignty, it assumes that statehood is the only legitimate expression of self-determination. This positivist view of international law thus poses a barrier to the recognition of sovereignty in indigenous peoples unless those who create international law consider that indigenous peoples can become states. This works in tandem with the substantive barriers to the recognition of a right of self-determination for groups within states, and all of these barriers are part of the international law of self-determination.

B. *The International Law of Self-Determination*

1. History of the Right, With a Focus on the "Self"

While different writers stress different aspects about the origins of the concept of self-determination,¹⁸³ almost all are of the opinion that the idea of self-determination did not become a political or constitutional principle until the late 1700's — the time of the American and French revolutions.¹⁸⁴ Both the American and French revolutions were based on Enlightenment philosophies stressing the freedom of the individual and their consequent right to self-government and freedom from the tyr-

¹⁸¹ See generally Hurst Hannum & Richard B. Lillich, *The Concept of Autonomy in International Law*, 74 AM. J. INT'L. L. 858 (1980).

¹⁸² See generally *supra* Part I.

¹⁸³ See, e.g., the different theories described in: Gebre Hiwet Tesfagiorgis, *Self-determination: Its Evolution and Practice by the United Nations and its Application to the Case of Eritrea* 6 WIS. INT'L L. J. 75, at 78-79; W. OFUATEY-KODJOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* 198 n.1 (1977).

¹⁸⁴ See, e.g., BROWNLIE, *supra* note 171, at 4-5; M.K. Nawaz, *The Meaning and Range of the Principle of Self-Determination*, 1965 DUKE L.J. 82 (1965); A. RIGO SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION* 17 (1973); RONEN, *supra* note 124, at 1, 3, & 6; SARAH WAMBAUGH, *PLEBISCITES SINCE THE WORLD WAR 3* (1933); Tesfagiorgis, *supra* note 183, at 80; OFUATEY-KODJOE, *supra* note 183, at 198-99 n.1 (stating that the description of the origin of the term or concept of self-determination depends on the writer's definition of the term. "Therefore, the validity of such descriptions depend on the validity of their definitions of self-determination.").

anny of the state.¹⁸⁵ Self-determination in this sense was not a right of the group or nation but of the individuals themselves. In stressing democracy the term was primarily concerned with internal self-determination.¹⁸⁶

The suggestion that the right of self-determination resided in the group emerged in the mid-1800s.¹⁸⁷ The turning point is generally considered to be 1848, when the Polish, Italian, Magyar and German peoples claimed self-determination based on the concept of a right of a people to nationhood.¹⁸⁸ This was a claim that nations had a right to sovereign independence — to not be ruled by a foreign power.¹⁸⁹ This sense of self-determination was external, in that it was concerned with territory and the boundaries of state power.

It was this notion of self-determination — a right to chose one's own form of government and to not be ruled by a foreign power — that was used in the First World War. This war was referred to as the war of self-determination,¹⁹⁰ because the stated aim of the allies was the liberation of

¹⁸⁵ The philosophical concept espoused was that of Immanuel Kant (1724-1804). See, e.g., Edward M. Morgan, *The Imagery and Meaning of Self-Determination*, 20 N.Y.U.J. INT'L L. & POL. 355, 357 (1988); RONEN, *supra* note 124, at 24-25. Kant's concern was not political, but his concept of the individual as a rational and self-determining being provided a basis for the political goals related to respect for the freedom and rights of the individual. Similarly, it was the idea that man had a right to be free that provided the basis for Rousseau's attempt to liberate the nation from the tyranny of the state. J.J. ROUSSEAU, *THE SOCIAL CONTRACT* (M. Cranston trans., Penguin Books 1968)(1762). See, e.g. RONEN, *supra* note 124, at 24-25. Locke similarly "emphasized that the individual man, not the national group, was the repository of all rights; popular sovereignty could be linked to any aggregation of individuals." *Id.* at 24 (emphasis original). Rigo Sureda comments that the concept of self-determination "in the context of the French Revolution is a democratic ideal . . . It is an assertion of the rights of man against the tyranny of the 'ancien régime.'" RIGO SUREDA, *supra* note 184, at 17.

¹⁸⁶ Although clearly the American revolution, while declaring America's independence from Britain, also rested on a claim to external self-determination.

¹⁸⁷ For description and comment on this philosophical transition, see Richard T. De George, *The Myth of the Right of Collective Self-determination*, in *ISSUES OF SELF-DETERMINATION*, *infra* note 317, at 1, 4-6. Efrén Rivera-Ramos, *Self-determination and Decolonisation in the Society of the Modern Colonial Welfare State*, in *ISSUES OF SELF-DETERMINATION*, *infra* note 317, at 115, 123 n.20 and accompanying text.

¹⁸⁸ See, e.g., RIGO SUREDA, *supra* note 184, at 18-19; RONEN, *supra* note 124, at 2-3 & 9. The word 'self-determination' is derived from the German *selbstbestimmung* or *selbstbestimmungsrecht* that was used by German philosophers from 1840 (i.e. when Germany was occupied) to argue for self-rule. UMOZURIKE OJI UMOZURIKE, *SELF-DETERMINATION IN INTERNATIONAL LAW 1* (1972). See also OFUATEY-KODJOE, *supra* note 183, at 21.

¹⁸⁹ See authorities cited *supra* note 188.

¹⁹⁰ Umozurike describes President Woodrow Wilson as "championing the cause of the oppressed nationalities" in Europe and fighting for their liberation from tyranny. UMOZURIKE, *supra* note 188, at 13. Wilson himself stated: "We are fighting for the liberty, the self-government, and the undictated development of all peoples. . . . No people must be forced under sovereignty under which it does not wish to live." Message from President Wilson to Russia, June 9, 1917, cited in ALFRED COBBAN, *THE NATION STATE AND NATIONAL SELF-DETERMINATION* 104-5 (1970). While Presi-

all people then governed by the "foreign powers" of the Austro-Hungarian, Ottoman and Russian Empires.¹⁹¹

Before World War I, President Wilson focused on internal self-determination. By equating self-determination with self-government — "the consent of the governed" — he equated it with democracy.¹⁹² In the context of the war, "consent of the governed" also came to mean external self-determination: "the right of every people to 'choose the sovereignty under which they shall live,' to be free of alien masters, and not to be handed 'about from sovereignty to sovereignty as if they were property.'"¹⁹³ After the war, however, in the process of applying these principles in order to redraw the various boundaries of Europe, the scope of the principle of self-determination was restricted. This restriction was caused by the difficulties in applying self-determination to all the differ-

dent Woodrow Wilson is considered to be the architect of this policy, the allies also adopted it. Ofuatey-Kodjoe notes that "[s]oon after the beginning of the war, allied propaganda started to make tentative attempts to convince many people that one of the most important reasons why they had entered the war was to liberate small nations." OFUATEY-KODJOE, *supra* note 183, at 72. Further,

[t]he dramatic breakthrough in the development of self-determination as the leading principle of the allied policy came with the collapse of the Russian Empire and the subsequent institution of a new Russian government avowedly committed to the principle of national self-determination. . . . The final catalyst in this development was the entry of the United States into the war,

whereby President Wilson pressured "the allied powers into an official policy endorsing the principle of national self-determination." *Id.* at 73-4. See also UMOZURIKE, *supra* note 188, at 11 n.28 (noting that Mr. Asquith referred to the war as the war of self-determination in a speech given on 5 February 1920). See also WAMBAUGH, *supra* note 184, at 10-12. Cassese states that the principle of self-determination "was first proclaimed at an international level by the U.S.S.R. in 1917." ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 131 (1986). Cassese further describes the sense in which it was used by Lenin and how that differed from Wilson's use. *Id.* at 131-32.

¹⁹¹ The Allies demanded (inter alia) the restoration of Belgium, Serbia, and Montenegro; the evacuation of France, Russia, and Roumania; the restitution of territories torn from the Allies by force; the "liberation of Italians, Slavs, Roumanians, Czechs, and Slovaks from foreign domination"; the liberation of non-Turks from the Ottoman Empire; and the emancipation of Poland. See the note from the Allies to President Woodrow Wilson of 10 January 1916, cited in DAVID L. GEORGE, *MEMOIRS OF THE PEACE CONFERENCE 27-28* (1939); UMOZURIKE, *supra* note 188, at 16-17.

¹⁹² See, e.g., MICHLA POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE* 1 (1982); COBBAN, *supra* note 190, at 63; OFAUTEY-KODJOE, *supra* note 183, at 79.

¹⁹³ POMERANCE, *supra* note 192, at 1 (quoting 3 *THE PUBLIC PAPERS OF WOODROW WILSON* 187, 389, 411 & 414 (Baker & Dodd eds., 1925-1927)). See, e.g., Wilson's famous comment, made after the war, that encompassed both aspects: "[N]o peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right exists to hand people about from sovereignty to sovereignty as if they were property." Reprinted in OFUATEY-KODJOE, *supra* note 183, at 79 (quoting 54 *CONG. REC.* 1742); On Wilson's concept of self-determination, see generally Michla Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 *AM. J. INT'L L.* 1, 2 (1976); WAMBAUGH, *supra* note 184, at 5. OFUATEY-KODJOE, *supra* note 183, at 75-80.

ent minorities that existed in Europe.¹⁹⁴ Because of these difficulties, instead of creating states out of each minority, the allies and associated powers that negotiated the peace treaty agreed upon larger states that invariably encompassed different minorities.¹⁹⁵ As J.L. Kunz has commented, “[i]t was recognized that no matter how frontiers would be drawn, there will always be groups in Europe who will have to live in a state the majority of whose inhabitants are ethnically, linguistically, or religiously different.”¹⁹⁶ Thus, while self-determination was proclaimed as the principle by which to re-draw national boundaries, the result instead confirmed the sovereignty of the previously-dominated states, with very few changes in their boundaries. The only limitations imposed on the constitutional regimes of the various new states were the guarantees of minority rights agreed to in the various treaties between the associated and allied powers and the various new states¹⁹⁷ — “the states created in 1919 undertook no specific obligations to ensure a democratic govern-

¹⁹⁴ Buchheit comments that, “[o]n the practical side, the task of redrawing the demographic map of Europe in strict conformity with the principle of self-determination was found to be quite impossible.” LEE C. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* 64 (1978). The difficulty was that, in solving some minority problems, numerous others were created. Buchheit further comments that the result was that “[t]he overriding question became how to affirm something of the underlying premise of self-determination (consent of the governed) without allowing the wholesale dismemberment of independent States into impossibly small parochial entities.” *Id.* at 6.

¹⁹⁵ For a brief list of some of the minorities included within the states created and commentary on Wilson’s “double standard,” see POMERANCE, *supra* note 192, at 4-8. For a more detailed description of the events and the expressions of attitudes concerning self-determination at the Peace Conference, see UMOZURIKE, *supra* note 188, at 20-26. Umozurike comments that, while self-determination was proclaimed, there were many cases where it was ignored or misapplied. *Id.* at 23. Rigo Sureda comments that, despite the intentions, “the difficulties of applying self-determination, and the limitations to which such a principle must be subject, became apparent.” RIGO SUREDA, *supra* note 184, at 21. “Historical claims, economic needs and military and strategic arguments prevailed.” *Id.* Hannum goes further, commenting that “self-determination . . . had little to do with the demands of the peoples concerned, unless those demands were consistent with the geopolitical and strategic interests of the Great Powers.” HANNUM, *supra* note 22, at 28. See also OFUATEY-KODJOE, *supra* note 183, at 80-84. Another difficulty in the application is described by international legal scholar Ofuatey-Kodjoe, who notes that there was no agreed definition of the concept of self-determination at the time. He describes three different theories that were advanced at the time. OFUATEY-KODJOE, *supra* note 183, at 21-38.

¹⁹⁶ JOSEF L. KUNZ, *The Present Status of International Law for the Protection of Minorities*, 48 AM. J. INT’L L. 282 (1954). Also cited in UMOZURIKE, *supra* note 188, at 21.

¹⁹⁷ These guarantees encompassed basic rights to life, liberty, and religious freedom, rights to nationality, and rights of racial, religious, or national minorities (such as equality before the law, employment, and education). Address by President Wilson, U.S. Senate, Jan. 22, 1917, in 54 CONG. REC. 1741, 1742 (1917). See also OFUATEY-KODJOE, *supra* note 183, at 84-87.

Kunz comments that the international law for the protection of minorities grew as “a substitute in cases where the application of the principles of self-determination of nations was . . . not possible or not wanted.” Kunz, *supra* note 196, at 21.

ment."¹⁹⁸ This illustrates how the concept of self-determination was tied to territory and to the nationality of the government more than to participatory forms of government chosen by the people. It was considered to apply only to nationalities — to whole (potential) nations — and not to minorities within "nations". Minorities were not entitled to "self-determination" in their own right.¹⁹⁹

Therefore, the principle of self-determination that existed after the end of World War I was no more specific than an aspiration that the peoples of one country not be ruled by another. Other important aspects are that the principle of self-determination was no more than a principle; it had not yet attained the status of a right that any peoples could assert under international law.²⁰⁰ Further, it was assumed to be only applicable to the European nations that had been liberated by the war and to the territories that had been colonized by the defeated powers.²⁰¹

The Covenant of the League of Nations²⁰² reflected this position. While the League Covenant did not expressly provide for self-determination,²⁰³ the mandate system established in the Covenant was based upon that concept.²⁰⁴ The mandate system provided that the Allies were to administer "those colonies and territories which, as a consequence of the late war, have ceased to be under the sovereignty of the States which formerly governed them."²⁰⁵ These colonies and territories were to be helped until they could themselves exercise self-government. However, while these colonies and territories were considered to be entitled to exercise self-determination, the position of other colonies around the world and of indigenous peoples remained largely unchanged. Chen, an international legal scholar, comments that, while "the wishes of the populations" for self-government and thus self-determination were supposed to

¹⁹⁸ HANNUM, *supra* note 22, at 30.

¹⁹⁹ Thornberry, an international legal scholar, comments that "[t]he rights of minorities under the League system fell far short of self-determination." Patrick Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, 38 INT'L & COMP. L. Q. 867, 871-72 (1989). Wambaugh also comments that President Wilson's comments "did not endorse the right of secession." WAMBAUGH, *supra* note 184, at 4.

²⁰⁰ See, e.g., OFUATEY-KODJOE, *supra* note 183, at 96; Thornberry, *supra* note 199, at 871. See also authorities cited *infra* note 260 (arguing that self-determination was not considered a right before 1960).

²⁰¹ See, e.g., RIGO SUREDA, *supra* note 184, at 96.

²⁰² Covenant of the League of Nations, June 28, 1919, 225 Consol. T.S. 195 [hereinafter Covenant of the League of Nations].

²⁰³ President Wilson's suggestion that "the principle of self-determination be recognized in the Covenant of the League of Nations" was rejected by the other nations. See HANNUM, *supra* note 22, at 32; POMERANCE, *supra* note 192, at 7.

²⁰⁴ See, e.g., UMOZURIKE, *supra* note 188, at 27.

²⁰⁵ Covenant of the League of Nations, *supra* note 202, art. 22, at 203. For an extensive discussion of the mandate system, see DUNCAN HALL, *MANDATES, DEPENDENCIES AND TRUSTEESHIP* (1948). See also UMOZURIKE, *supra* note 188, at 27-43.

be the primary considerations in choosing the mandated territories, "in practice, this provision was virtually ignored."²⁰⁶

Despite the reluctance of the larger powers to consider other dependent territories and peoples as candidates for self-determination, nationalism and anti-colonialism grew among the dependent territories and was fueled during World War II.²⁰⁷ Umozurike comments that, during the war, nationalists in dependent territories "sought to take advantage of the war by demanding a promise for political advancement as a condition for maximizing their war effort."²⁰⁸ The most significant statement concerning self-determination made during the war was probably the Atlantic Charter agreed upon by President Roosevelt and Prime Minister Churchill on August 14, 1941 and accepted in the Declaration of the United Nations in January 1942.²⁰⁹ This Charter affirmed the right of peoples to form their own government and the restoration of sovereignty and self-government to those peoples from whom it had been forcibly denied.²¹⁰ The United States proclaimed that "[t]he age of imperialism is ended" and that "[t]he principles of the Atlantic Charter must be guaranteed to the world as a whole — in all oceans and in all countries."²¹¹ Churchill, however, maintained that this only applied to the nations occupied by the Germans and vehemently denied that it was of general application; for example, that it might apply to the colonies of the British Empire.²¹² The other colonial powers supported Britain's objections.²¹³

²⁰⁶ Lung-Chu Chen, *Self-Determination as a Human Right*, in TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES MCDUGAL 198, 214 (W. Michael Reisman & Burns H. Weston eds., 1976).

²⁰⁷ UMOZURIKE, *supra* note 188 at 59.

²⁰⁸ *Id.* at 60.

²⁰⁹ The full text of the Atlantic Charter is contained in 35 AM. J. INT'L L., Supp. 191.

²¹⁰ The Atlantic Charter included the following principles:

First, their countries seek no aggrandizement, territorial or other; Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned; Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them.

Id. at 192. Ofuately-Kodjoe comments that "the cosignatories of the Atlantic Charter consciously modeled their principle [of self-determination] on the Wilsonian concept of self-determination." OFUATEY-KODJOE, *supra* note 183, at 98.

²¹¹ UMOZURIKE, *supra* note 188, at 61 (quoting a 1942 statement by undersecretary Welles). This statement was later watered down so as only to apply the Atlantic Charter principles to peoples "prepared and willing to accept the responsibilities of liberty." *Id.* For a description of the subsequent U.S. proposals for a Draft Declaration concerning self-government for all dependent territories, see *id.* at 61-62. See also, OFUATEY-KODJOE, *supra* note 183, at 99-102. Ofuately-Kodjoe notes that the Soviet Union and China were willing to go further than the United States' proposals and grant immediate independence to colonial peoples, but the colonial powers were resistant to even the idea of trusteeship. *Id.* at 101.

²¹² UMOZURIKE, *supra* note 188, at 61.

²¹³ See, e.g., OFUATEY-KODJOE, *supra* note 183, at 101.

The Dumbarton Oaks Proposals for the Establishment of a General International Organization did not contain any expression of the principle of self-determination.²¹⁴ At the 1945 San Francisco conference, when the U.N. Charter was drafted and the United Nations regime was established, the fate and status of the various colonies or territories that had been governed by the powers defeated in the war were discussed. The result of this discussion was similar to that after World War I. A system to enable these and other non-self-governing territories to achieve self-government was established, but only limited reference to the general principle of self-determination was made.²¹⁵

Articles 1 and 55 of the U.N. Charter both refer to the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."²¹⁶ What this principle might mean, however, is not specified in the Charter. It must therefore be deduced from the *travaux préparatoires*, the other provisions of the Charter, and the practices of states in implementing them.

The *travaux préparatoires* show that there was severe disagreement over the meaning of self-determination.²¹⁷ While there seemed to be general agreement on the idea that self-determination entailed government through consent of the people,²¹⁸ the differences between the various uses

²¹⁴ The Proposals did not refer in its chapter on principles to the principles expressed in the Atlantic Charter, such as the right of peoples to choose their form of government, nor to how to treat the colonies and territories that had been governed by the powers defeated in the war. Dumbarton Oaks Proposals for the Establishment of a General International Organization, contained in DUMBARTON OAKS DOCUMENTS ON INTERNATIONAL ORGANIZATION, U.S. DEPT OF STATE, PUB. NO. 2257, 5-16 (1945), reprinted in RUTH RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, at 1019-1028 (1958). For a detailed description of the discussion leading up to and including the Dumbarton Oaks Conference see *id.* at 166-476.

²¹⁵ U.N. CHARTER art. 73.

²¹⁶ *Id.* arts. 1 & 55. Article 1 states that this development is one of the purposes of the United Nations. *Id.* See UMOZURIKE, *supra* note 188, at 44-46; RUSSELL, *supra* note 214, at 810-813 for a history of the discussion of self-determination during the drafting of the U.N. Charter.

²¹⁷ Russell notes that there were two conflicting views: "(1) that the principle 'correspond closely to the will and desires of peoples everywhere,' and should therefore be clearly stated in the Charter; and (2) that it conformed to the purposes of the Charter 'only insofar as it implied the right of self-government of peoples and not the right of secession.'" RUSSELL, *supra* note 214, at 811 (citing 6 U.N.C.I.O. Doc. 296).

²¹⁸ The *rapporteur* who had headed the drafting committee commented,

. . . that the principle of equal rights of people and of self-determination are two component elements of one norm.

That the respect of the norm is a basis for the development of friendly relations, and is in effect, one of the appropriate measures to strengthen universal peace. . . .

That an essential element . . . is a free and genuine expression of the will of the people; and thus to avoid cases like those alleged by Germany and Italy. That the principle as one whole extends . . . to a possible amalgamation of nationalities if they so freely chose.

of "states", "nations" and "peoples" were deliberately left unresolved.²¹⁹ The use of these different terms was expressly considered during the drafting process.²²⁰ It was considered that "state" referred to "a definite political entity," that "nation" is broad and general enough to include colonies, mandates, protectorates, and quasi-states as well as states," and that "'peoples' is used in connexion with the phrase 'self-determination of peoples'. This phrase is in such common usage that no other word seems appropriate."²²¹ In relation to Articles 1(2) and 55, the conclusion was that "'nations' is used in the sense of all political entities, states and non-states, whereas 'peoples' refers to groups of human beings who may, or may not, comprise states or nations."²²² Despite this apparent breadth in the scope of the definition of "peoples,"²²³ however, many of the participating states still expressed the view that the right of self-determination could never be held where its application entailed secession from an independent state.²²⁴ Aureliu Cristescu, the Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his study on the right to self-determination, commented that:

The documents of the San Francisco Conference suggest that the authors of the Charter conceived of the principle of equal rights and self-determination of peoples as a single norm applicable to States, nations and peoples. . . . However, the term "peoples" applies not only to States, but also to other entities such as nations. . . . Consequently, States are bound to apply the principle in their relations both with other States and with peoples which have not yet constituted themselves independent States.²²⁵

Summary Report of the [Drafting] Committee I/I, Doc. I/I/I, 16 May 1945, 6 U.N.C.I.O. Docs., at 296 cited in UMOZURIKE, *supra* note 188, at 46.

Chen comments that the meeting "formally recognized this principle [of self-determination] as essential to peace and security, as well as to human rights, and upheld its application to all 'peoples,' regardless of geographical or racial factors." Chen, *supra* note 206, at 215. Chen does not say, however, whether the principle would also apply to minorities within states such that they would be entitled to secede. He also notes that the Soviet Union proposed that the principle of self-determination of all peoples be included among the purposes of the U.N. *Id.* at 251 n.66. The Soviet Union's proposal was subsequently rejected, however.

²¹⁹ RUSSELL, *supra* note 214, at 813.

²²⁰ The Secretariat was prepared a memorandum listing all the occasions of use of the three terms and came to conclusions about what they were intended to mean. See, e.g., *infra* note 221.

²²¹ 12 U.N.C.I.O. Docs. 657-658, cited in Aureliu Cristescu, *The Right to Self-Determination: Historical and Current Developments on the Basis of United Nations Instruments*, para. 262, U.N. Doc. E/CN.4/Sub.2/404/Rev.1 (1981); RIGO SUREDA, *supra* note 184, at 99-100.

²²² Cristescu, *supra* note 221, para. 262.

²²³ Rigo Sureda comments, "The Secretariat's memorandum thus gave the word 'peoples' the widest meaning." RIGO SUREDA, *supra* note 184, at 100.

²²⁴ See, e.g., Cristescu, *supra* note 221, para. 17.

²²⁵ *Id.* para. 266.

While this statement could be interpreted widely, as including peoples within independent states, it can also be interpreted narrowly, as referring only to peoples that can constitute themselves as independent states without contravening the prohibition on secession. Other comments of the Special Rapporteur's indicate that he intended the latter.²²⁶ That this was probably also intended by the states drafting the Charter is indicated by the Charter provisions designed to implement the principle of self-determination.

The implementation of the principle of self-determination is provided for in the Charter through the system established to promote a transition to self-government of certain non-self-governing territories.²²⁷ The negotiating states agreed relatively easily upon the system for managing the territories previously governed by the defeated powers.²²⁸ This system is provided for in Chapter XII of the Charter, the International Trusteeship System, and Chapter XIII, the Trusteeship Council.²²⁹ However, the discussion on these territories entailed much debate again over the scope of the principle of self-determination. This debate included discussion of other dependent or non-self-governing territories in the world — i.e., colonies of other Western and European powers. The argument was made that since the principle of self-determination applied equally to all such non-self-governing territories, colonies should also be defined as trust territories. However, this extension of the Trusteeship system to all colonies was rejected.²³⁰ Instead, Chapter XI, the Declaration Regarding Non-Self-Governing Territories, was devised as a com-

²²⁶ See, e.g., *id.* paras. 275 & 279. See also discussion *supra* section entitled "Peoples."

²²⁷ See, e.g., the statement expressed at the San Francisco Conference that:

There is explicitly affirmed — in providing rules of general application for the transition from a colony to a mandate and from a mandate to a sovereign state — the principle that the goal which should be sought is that of obtaining the universal application of the principle of self-determination.

3 U.N.C.I.O. DOCS. 146, *cited in* Cristescu, *supra* note 221, para. 24.

²²⁸ For a detailed description of the negotiation and emergence of the Trusteeship system and the Declaration Regarding Non-Self-Governing Territories, see RUSSELL, *supra* note 214, at 75-91, 330-48, 573-89, & 808-42.

²²⁹ Article 77 of the Charter (Chapter XII) specifies that the mandate territories of the previous League of Nations are to be included as trust territories, as well as those "detached from enemy states as a result of the Second World War" and others that states voluntarily placed under the system. U.N. CHARTER art. 76. Article 76 provides that the basic objectives of the trusteeship system are:

b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned.

U.N. CHARTER art. 76. The Trusteeship system is discussed in CRAWFORD, *supra* note 168, at 335-55; OFUATEY-KODJOE, *supra* note 183, at 104-113. For a more detailed discussion, see CHAIRMAN EDWARDS TOUSSAINT, TRUSTEESHIP SYSTEM OF THE UNITED NATIONS (1956).

²³⁰ CRAWFORD, *supra* note 168, at 92-93.

promise.²³¹ The obligations in respect of these territories were very similar to those for trust territories,²³² but there was "a much more attenuated form of international accountability" for achieving the aims.²³³

The difficulty with the application of this Declaration Regarding Non-Self-Governing Territories was that there were no criteria in the Charter for determining what were non-self-governing territories, other than "territories whose peoples have not yet attained a full measure of self-government. . . ." ²³⁴ This made it difficult to hold that particular territories, such as colonies of member states, must become self-governing.²³⁵ Despite this imprecision about the extent of the territories that must be listed, however, the debate was clearly limited to discussion of recognized, geographically separate territories. It was not argued that the definition of self-governing territory should be extended to include minorities or indigenous peoples within member states.²³⁶

Therefore, while the U.N. Charter clearly upheld self-determination as a principle to respect, neither its content nor the "peoples" to which it applied was defined with any precision, nor did it have the status of a right under international law.²³⁷ Thus began the debate over the definition of territories entitled under the Charter to exercise self-government or independence and thereby to achieve self-determination.²³⁸

²³¹ *Id.*

²³² Article 73(b) provides that the states are under a duty "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions." U.N. CHARTER art. 73.

²³³ CRAWFORD, *supra* note 168, at 92-93.

²³⁴ U.N. CHARTER art. 73. Criteria have since been elaborated by the General Assembly. *See infra* note 264 and accompanying text.

²³⁵ For example, while eight member states initially listed 74 territories, G.A. Res. 66, Dec. 13, 1946 (27-7-13), listing of their colonies was resisted by Spain and Portugal when they joined the U.N. in 1955. Their objection was that, despite the voluntary practice of the various nations that had listed non-self-governing territories, the Charter did not require the listing of such territories other than those 'freed' as a result of the World Wars (i.e., those to be placed under trusteeship). This argument was based on the ground that these territories were not colonies or separate territories but an integral part of the relevant state itself. While Spain agreed to comply comparatively quickly, even upon General Assembly Resolutions designating nine Portuguese territories as non-self-governing, G.A. Res. 1542 (XV), Dec. 15, 1960 (68-6-17), Portugal refused to comply until 1974 (a change in policy due to a change of government). For details on the Portuguese arguments, see FRANCO NOGUEIRA, *THE UNITED NATIONS AND PORTUGAL: A STUDY OF ANTICOLONIALISM* (1963).

²³⁶ *See supra* note 217. For a brief discussion of the inclusion of minorities, see CRAWFORD, *supra* note 168, at 359-60.

²³⁷ *See, e.g.*, HANNUM, *supra* note 22, at 33 & n.101; RIGO SUREDA, *supra* note 184, at 26. For a description of the law and practice concerning Chapter XI, see CRAWFORD, *supra* note 168, at 356-84.

²³⁸ One of the goals of the Declaration regarding Non-Self-Governing Territories was the development of self-government. U.N. CHARTER art. 73(b). One of the goals of the Trusteeship system was "progressive development towards self-government or independence." *Id.* Achievement of

During the debate over the drafting of the U.N. Charter various delegates argued that it should specify and guarantee human rights.²³⁹ While this was not done in the Charter itself, the U.N. established a Commission on Human Rights to draft what was envisaged would be an international bill of rights.²⁴⁰ This effort culminated in the adoption by the General Assembly, in 1948, of the Universal Declaration of Human Rights.²⁴¹ As the parties drafting the Declaration could not agree on a general statement of the right of self-determination, one was not included.²⁴²

The next stage was the development, by the Economic and Social Council, of legal measures to implement the Declaration. While the draft Covenant produced in 1950 did not include any mention of a right of self-determination, the claim was again made that it should.²⁴³ It is important to note, however, that the states supporting a right of self-determination still focused on the non-self-governing territories administered by other states (i.e., those colonies not addressed by the post-war agreements). It was not argued that it had any wider application, such as to minorities or indigenous peoples within states.

The General Assembly resolved in 1952 to include a proposed arti-

these goals amounted to achievement of self-determination. See, e.g., Cristescu, *supra* note 221, para. 23-25.

²³⁹ See, e.g., Peter Meyer, *The International Bill: A Brief History*, in *THE INTERNATIONAL BILL OF HUMAN RIGHTS* (Paul Williams ed., 1987).

²⁴⁰ Article 68 of the U.N. Charter provides: "the Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions." U.N. CHARTER art. 68. The Preparatory Commission of the United Nations (created on 26 June 1945, the day on which the U.N. Charter was signed) recommended to the Economic and Social Council that it create a Commission on Human Rights and defined the "[f]ormulation of an international bill of rights" as one of the functions of the proposed Commission. *Report of the Preparatory Commission*, at 36 U.N. Doc. P.C./20 (1945). The Economic and Social Council established the Commission on Human Rights in Resolution 1/5 of 16 February 1946. ECOSOC, OFFICIAL RECORDS, FIRST SESSION 163. The submission of "proposals, recommendations and reports to [ECOSOC] regarding . . . [a]n international bill of rights" was to be the primary work of the Commission. *Id.* See also *The United Nations and Human Rights: Competence Organs and Activities*, 1947 Y.B. on H.R. 415, 420-23.

²⁴¹ G.A. Res. 217 (III A), U.N. Doc. A/810 (1948) (endorsed by 48-0-8).

²⁴² Some states — for example, Russia — argued that the right to self-determination should be included, but this was rejected. The closest that the Declaration came was the statement that "the will of the people shall be the basis of authority of government" and that this should be expressed in periodic and genuine elections, (Article 21) and that "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be realized." (Article 28). For a more detailed discussion of the drafting, see UMOZURIKE, *supra* note 188, at 46-48.

²⁴³ For example, by the Afro-Asian group of states. See UMOZURIKE, *supra* note 188, at 28 (listing the supporters of this claim and of those states rejecting it). See also Sally Morphet, *Article 1 of the Human Rights Covenants: Its Development and Significance*, in *HUMAN RIGHTS AND FOREIGN POLICY: PRINCIPLES AND PRACTICE 67* (Dilys Hill ed., 1989) (detailing the history of the drafting and debate over the inclusion of the general right to self-determination in Article 1 of the Covenants). See also Cristescu, *supra* note 221, para. 44-47.

cle on the right of peoples to self-determination,²⁴⁴ which it asked the Commission on Human Rights to prepare.²⁴⁵ In 1955, this proposed article was considered by the Third Committee of the General Assembly. The Committee, after appointing a Working Group to consider it and to make recommendations,²⁴⁶ adopted a revised version of the article which eventually became the general right declared in the present Article 1 of the Covenants.²⁴⁷ The mere statement that "all peoples have the right to self-determination," however, did not resolve the debate over the scope of the application of the right. A large part of the debate now concerned not only whether other colonial territories (besides the European territories) should be entitled to self-determination, but also whether it applied to nations and ethnic groups within states and, even more specifically, whether it applied to indigenous peoples within states.

Cassese comments that some national and ethnic groups were considered by various states to be "peoples" and thus entitled to self-determination, but only where the relevant state consisted of "different national groups of comparable dimensions" and where that group was "recognized constitutionally."²⁴⁸ Examples given of states that contain such national groups are the U.S.S.R. and Yugoslavia.²⁴⁹ On the other hand, Cassese also concludes that "[t]he draftsmen, and the participating states generally, intended to rule out the right of self-determination for minorities out of a fear that this could disrupt and dismember sovereign

²⁴⁴ G.A. Resolution 545(VI).

²⁴⁵ The Commission's draft article and resolutions for consideration by ECOSOC is contained in *Official Records of the Economic and Social Council*, 14th Sess. Supp. 4 (E/2256), para. 91. See *The United Nations and Human Rights*, 1952 Y.B. ON H.R. 419, 423, also cited in Cristescu, *supra* note 221, para. 45.

²⁴⁶ The Working Party was approved by vote at the 655th meeting of the Third Committee on November 7, 1955. U.N. GAOR, SUMMARY RECORDS OF THE MEETINGS OF THE THIRD COMMITTEE, TENTH SESSION 155-56 (1955). For a description of the Third Committee's debate on the proposed article 1 of the Covenant on Civil and Political Rights leading up to the approval of the Working Party (i.e. because of the large difference in views on the inclusion of self-determination in the Covenant) see *id.* at 85-156. The inclusion of self-determination in the Preamble to the Covenant is discussed *id.* at 63-84.

²⁴⁷ See *infra* note 271 and accompanying text; Cristescu, *supra* note 221, para. 46-47 (discussing the texts considered and adopted).

²⁴⁸ Antonio Cassese, *The Self-Determination of Peoples*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 92, 95 (Louis Henkin ed., 1981). Apparently, these conditions are based on the rationale that "an 'ethnic group' is entitled to self-determination only when it achieves the dimension and importance of other components of the state, both in fact and in constitutional conception." *Id.*

²⁴⁹ *Id.* With respect to the U.S.S.R., Cassese notes that during the debate, the U.S.S.R. did not repudiate the application of the principle of self-determination to the Soviet republics on the basis that they were part of a sovereign state. Instead, it merely asserted that the republics did then enjoy self-determination. *Id.* at 94-95. Further, the U.S.S.R. representative stressed that "he had voted for the Article 'because it had been clear from the debate that the word 'peoples' included nations and ethnic groups.'" *Id.* at 95.

states.”²⁵⁰

The proposal that self-determination applied to indigenous peoples within states was known as the “Belgian thesis.”²⁵¹ It was based on the arguments that, first, the Charter does not refer to colonialism, but to non-self-governing territories, and second, that the treatment of indigenous communities was comparable to the treatment of colonized territories overseas.²⁵² This thesis, however, encountered vigorous opposition. The fear expressed by various delegates — particularly the delegates from Latin American states — was that the Belgian thesis would destroy territorial integrity and thus state sovereignty.²⁵³ Ultimately, the thesis

²⁵⁰ *Id.* at 96.

²⁵¹ This is because it was proposed by the Belgian delegates. See *infra* note 252.

²⁵² For example, a Belgium delegate at the UN stated that, he had a great deal of documentation to prove that a number of States were administering within their own borders territories which were not governed by the ordinary law; territories with well-defined limits, inhabited by homogeneous peoples differing from the rest of the population in race, language and culture. These populations were disenfranchised; they took no part in national life; they did not enjoy self-government in any sense of the word.

RIGO SUREDA, *supra* note 184, at 103. See also THORNBERRY, *supra* note 8, at 16-17; Edwards Toussaint, *The Colonial Controversy in the United Nations*, in 1956 YEARBOOK OF WORLD AFFAIRS 177-180 (1956); Josef L. Kunz, *Chapter XI of the United Nations Charter in Action*, 48 AM. J. INT'L L. 103, 108-109 (1954).

Note that the Belgian thesis was not necessarily motivated by any altruistic concern for the welfare and rights of indigenous peoples. Belgium was at the time an industrial, colonial power in Belgian Congo, and was exploiting Congo's resources (primarily copper from the province of Katanga) for its own use. Van Langenhove, one of the authors of the thesis, admits that promulgation of the thesis was a Belgian tactic used in response to the criticism by the developing states of the policies of the colonizer states in relation to the non-self-governing territories; such criticism encompassed Belgium's activities in Congo. VAN LANGENHOVE, *THE QUESTION OF ABORIGINES BEFORE THE UNITED NATIONS: THE BELGIAN THESIS* (1954), cited in Thornberry, *supra* note 199, at 874. Further, because Congo was a non-self-governing territory under the Charter, it was envisaged that it would eventually become independent, which it did in 1960. With the hindsight afforded by the Belgian practice in encouraging Katanga's secession upon Congo's independence, it can be argued that Belgium argued for the right of self-determination of indigenous peoples at least partly in order to enable Katanga to secede from Congo so that Belgium could continue to exploit the copper in Katanga. This conclusion is arguably reinforced by the fact that, during the early discussion on the inclusion of a statement concerning self-determination in the Charter, Belgium “[led] the attempt to narrow the application of the principle [of self-determination] to freedom of self-government within the sovereignty of member states.” RUSSELL, *supra* note 214, at 812. For further information on Katanga's attempted secession, see *infra* notes 422-426, authorities cited therein, and accompanying text.

²⁵³ The Latin American states, for example, argued that the problems of the indigenous peoples were economic and not the result of colonialism. U.N. Doc. A/C.4/SR.420, para. 40, cited in Thornberry, *supra* note 199, at 873 (delegate of Peru to the Fourth Committee). They argued, further, that “their” “populations” had been fully integrated politically, so the application of the Belgian thesis would entail the disintegration of the present states. U.N. GAOR, OFFICIAL RECORDS OF THE GENERAL ASSEMBLY, 7th Sess., 4th Comm., at 55. See also GORDON BENNETT, *ABORIGINAL RIGHTS IN INTERNATIONAL LAW* 13 (1978) (discussing further criticism of the Belgian thesis).

was rejected.²⁵⁴ Indigenous peoples were thereby legally considered no different from minorities within states. The effect of the application of self-determination to indigenous peoples and minorities on the states in which they lived was the same — it violated the territorial integrity of the states.

It was this debate over the application of the principle of self-determination, including the debate over the Belgian thesis, that led to attempts by the General Assembly to clarify the application of the principle of self-determination to non-self-governing territories under the Charter, and thus to clarify the definition of “non-self-governing territory”.²⁵⁵ In 1953 the General Assembly passed Resolution 742 (VIII), Factors Which Should be Taken Into Account in Deciding Whether a Territory is or is not a Territory Whose People Have not Yet Attained a Full Measure of Self-Government. This resolution provides a list of factors that are indicative of the attainment of independence, free association, or “other separate systems of self-government.” The intention of this resolution was to assist in the carrying out of the duties under Chapter XI of the Charter, whereby governing states were under an obligation to help their colonial territories toward self-government.²⁵⁶ However, while this Resolution focussed on the duties of states toward the territories already identified and accepted as non-self-governing, it did not address the issue of what other territories should be added to the list of non-self-governing territories.²⁵⁷

²⁵⁴ Bennett comments that “[v]iews akin to the Belgian thesis had been previously expressed by Britain, France and the United States, but none were prepared to air them in the face of the vigorous opposition encountered by the Belgian delegation. . . .” BENNETT, *supra* note 253, at 13. Cristescu, in describing the debate leading to the adoption of the International Covenant, comments that:

The opinion was expressed that the right to self-determination should not be confused with the rights of minorities, since the authors of the Charter had not intended to give that right to minorities. The right to self-determination should not be exercised to destroy the unity of a nation or to impede the creation of that unity, in violation of national sovereignty.

Cristescu, *supra* note 221, para. 32 (citations omitted).

²⁵⁵ Another factor leading to clarification of the scope of application was the refusal of Portugal to classify its colonies as non-self-governing territories under the Charter. See *supra* note 235 and accompanying text.

²⁵⁶ See, e.g., Cristescu’s comment that the resolution was passed “for the purpose of determining whether the administering authority should continue or cease to transmit information provided for in Chapter XI of the Charter.” Cristescu, *supra* note 221, para. 35.

²⁵⁷ In 1957, another resolution was passed on self-determination, but it, too, did not address the issue of what territories were considered to be non-self-governing. In this resolution states agreed to “give due respect to the right of self-determination” and “promote the realization and facilitate the exercise of this right in non-self-governing territories.” G.A. Res. 1188 (XII) (11 Dec. 1957, 65-0-13). Similarly, G.A. Resolution 637 (VII), The Right of Peoples and Nations to Self-Determination (16 Dec., 1952) affirmed the application of self-determination to non-self-governing territories, but was not more specific about its application. This resolution stressed the link between self-determination and non-self-governing territories under the Charter, recommending that the wishes of peoples in such territories in relation to political aspirations be ascertained, and that the

In 1960, the General Assembly adopted Resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples.²⁵⁸ This Declaration was the first international instrument to formally state that “[a]ll peoples have a right to self-determination”²⁵⁹ and most scholars take it as the point at which the principle of self-determination became a recognized right in international law.²⁶⁰ Despite this general statement, however, the Declaration did not expand the scope of the right of self-determination to include minorities or indigenous peo-

administering states prepare such peoples for self-government or independence. *Id.* This resolution did not specify further what territories were to be regarded as non-self-governing; it merely requested the Commission on Human Rights to continue preparation of recommendations on “steps which might be taken” by U.N. organs “to develop international respect for the right of peoples to self-determination.” *Id.*

²⁵⁸ 1960 U.N.Y.B. 44-50 [hereinafter Declaration on Colonialism]. The principles of the Declaration read [excluding the Preamble]:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and security.
2. All 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.
3. Inadequacy of political, economic, social, or educational preparedness should never serve as a pretext for delaying independence.
4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.
5. Immediate steps shall be taken, in the Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.
6. Any attempt aimed at the total or partial disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and the principles of the United Nations.
7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights, and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

Id.

²⁵⁹ *Id.* art. 2.

²⁶⁰ In 1960, before this resolution was adopted, Schwarzenberger stated that “[t]he principle of national self-determination is a formative principle of great potency, but not yet part and parcel of international customary law.” GEORGE SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW 59 (6th ed., Professional Books 1976) (1947). After this resolution, many scholars consider that the principle became recognized as a right. *See, e.g.,* HANNUM *supra* note 22, at 33-34 (commenting that the evolution of the principle into the right to self-determination “culminated in the adoption . . . in 1960 of the Declaration on the Granting of Independence to Colonial Countries and Peoples”). *See also* Cristescu, *supra* note 221, para. 95; POMERANCE, *supra* note 192, at 1; WILSON, *infra* note 388, at 69. Significantly, the Declaration was adopted by 89-0-9, with those who could not subscribe to it merely abstaining rather than voting against it. These states

ples within states. As the title of the Declaration indicates, its purpose is to obtain the independence and self-government of colonies.²⁶¹ It adopts the view of the majority of states which were merely dissatisfied with the speed and process of decolonization that had been conducted after the war, despite the Charter provisions. It can also be seen as a compromise between those states that wanted to restrict the right of self-determination to the European colonies and those that subscribed to the Belgian thesis. In taking such a compromise position, it could be considered to deny the extension of the right of self-determination to indigenous peoples.

Yet the definition of the peoples having rights to self-determination as those under "alien subjugation, domination and exploitation"²⁶² is ambiguous. Either indigenous peoples could fit the definition through being under subjugation (etc.) by a dominant, alien culture from within their states, or "alien" could be limited to meaning that the subjugation originates from outside the state. The subsequent Resolution 1541 suggests that the latter is intended, although the ambiguity is not completely resolved.²⁶³ Resolution 1541 provides that the use of "colonial countries" in the Declaration refers to non-self-governing territories. The Resolution defines a "non-self-governing territory" is one which is "geographically separate and is distinct ethnically and/or culturally from the country administering it" and is arbitrarily placed "in a position or status of subordination" to the administering state.²⁶⁴ The crucial element is

were Australia, Belgium, Dominican Republic, France, Portugal, South Africa, Spain, U.K., and U.S.A..

For further discussion of the status of the 'right' to self-determination, see UMOZURIKE, *supra* note 188, at 177-180, 189-203. See also POMERANCE, *supra* note 192, at 63-72 (noting that while it may be regarded as *ius*, there is still disagreement over whether it has acquired the status of *ius cogens*). Pomerance argues that, whether we think it should have or not, it has not yet attained this more fundamental status. *Id.* Other scholars who argue that the right has attained the status of *ius cogens* include: LYNN BERAT & WALVIS BAY: DECOLONIZATION AND INTERNATIONAL LAW 146-150 (1990); BROWNLIE, *supra* note 171, at 513; HECTOR GROS ESPIELL, THE RIGHT TO SELF-DETERMINATION: IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS, para. 50, U.N. Doc. E/CN.4/Sub.2/405/Rev.1 (1980).

²⁶¹ In order to encourage compliance with the resolutions concerning the criteria for a non-self-governing territory, the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples was established in 1961 to examine the implementation of the Declaration (also referred to as the Committee of 24, or the Committee on Decolonization). One of the functions of the Committee was the making of recommendations to the General Assembly on whether a territory was non-self-governing. The Committee was created under G.A. Res. 1654, U.N. GAOR, 16th Sess., Supp. 17, at 65, U.N. Doc. A/5100. (It was expanded from 17 to 24 members in 1962, under G.A. Res. 1810(XVII)).

²⁶² Declaration on Colonialism, *supra* note 258, principle 1.

²⁶³ Resolution 1541 was passed the day after Resolution 1514.

²⁶⁴ Principle V of Resolution 1541 states:

Once it has been established that such a *prima facie* case of geographical and ethnic or cultural distinctiveness of a territory exists, other elements may be brought into considera-

the requirement of geographical separateness from the administering state, but even this can be interpreted in two ways. "Separate" could mean areas separate from the state in the sense of being completely outside it, or it could include partitioned lands within international state borders, such as states within a national federation. The latter interpretation could recognize the right of self-determination for indigenous peoples with recognized reserved lands; for example, those in North America. Either interpretation would not enable the category of indigenous peoples as a (worldwide) whole to be entitled to self-determination because, while all indigenous peoples are ethnically and/or culturally distinct from the dominant culture in their state and are in a position of subordination to the state,²⁶⁵ not all can be considered to be geographically separate in either sense. But the wider interpretation would enable those indigenous peoples that were recognized within their states as separate from the rest of the state to be entitled to self-determination in international law.

Despite this apparent "foot in the door" for indigenous peoples, the principle of territorial integrity, which is upheld in paragraphs 6 and 7 of the 1960 Declaration on Colonialism, creates a barrier to the wider interpretation of the scope of the peoples entitled to exercise self-determination under the Declaration. Paragraph 6 provides: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."²⁶⁶ Paragraph 7 calls on states to observe the various relevant documents "on the basis of. . . respect for the

tion. These additional elements may be *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73e of the Charter.

The requirement of geographical separateness is often referred to as the "blue water", or "salt water" theory, in order to refer to the need to have a sea in between a colonizer and a colonized state for the latter to be considered non-self-governing. *See, e.g.*, RIGO SUREDA, *supra* note 184, at 102-11 & 215-16. This term is now both misleading and inaccurate. It is misleading because it suggests that any body of water will do, whereas coastal islands are not generally considered sufficiently far away. For example, the Torres Strait Islands, off Australia, are considered to be part of Australia even though the Torres Strait Islanders are a separate people. *See, e.g.*, INTERNATIONAL LAW AND ABORIGINAL HUMAN RIGHTS 80 n.5 (Barbara Hocking ed., 1988). It is inaccurate because it does not allow for the possibility that solely land may separate the two states, such as in the case of Pakistan and Bangladesh, nor does it allow for the possibility that the two states may share a common border, such as in the case of Namibia and South Africa.

More recently it has been suggested that, because of the artificiality of the geographical test, self-determination should be based on racial difference: "pigmentational self-determination." *See* BUCHHEIT, *supra* note 194, at 18 n.28 (referencing the primary proponent and opponent of this approach).

²⁶⁵ *See, e.g.*, authorities cited *supra* note 2.

²⁶⁶ Declaration on Colonialism, *supra* note 258, principles 6 & 7.

sovereign rights of peoples and their territorial integrity.”²⁶⁷ While neither of these statements stipulate precisely how a clash between the principles of self-determination and territorial integrity is to be resolved, they indicate that the borders that states are concerned about are their present, external borders rather than internal ones.²⁶⁸ The references to alien subjugation and to geographical separateness, if they are to be interpreted consistently with Paragraphs 6 and 7, can only refer to territories outside the international boundary of the state in question.²⁶⁹ This takes the narrow view of both phrases. The Declaration therefore does not recognize the right of either minorities or indigenous peoples within states to self-determination because any extension of the right of self-determination to indigenous peoples within a state would violate the sanctity of the state’s borders, which is prohibited.²⁷⁰ The Declaration can thus be regarded as being a compromise between those states that wanted to restrict the right of self-determination to the European colonies and those that subscribed to the Belgian thesis.

In 1966, the International Covenants on Human Rights were finally adopted.²⁷¹ They, too, recognize the right of “all peoples” to self-determination. This recognition is contained in the first Article of each Covenant, which provide that: “[a]ll 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 develop-

²⁶⁷ *Id.* principle 7.

²⁶⁸ See Thomas M. Franck & Paul Hoffman, *The Right of Self-Determination in Very Small Places*, 8 N.Y.U. J. INT’L L. & POL. 331, 370 (1976).

²⁶⁹ Despite arguments of some colonial powers, such as France, this has been interpreted as not treating colonies as being within the borders of the colonial regime, thus rejecting arguments that the colonial state as a whole is entitled to territorial integrity. This is made explicit in the sixth paragraph of the Principle of Equal Rights and Self-Determination of Peoples of the 1970 Declaration on Friendly Relations (*infra* note 276) which reads:

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right to self-determination in accordance with the Charter.

Declaration on Friendly Relations, *infra* note 276.

²⁷⁰ For example, Cristescu states:

[P]aragraph 6 of the Declaration . . . makes it clear that the principle of self-determination is not to be applied to parts of the territory of a sovereign State. Such a provision is needed in order to prevent the principle from being applied in favour of secessionist movements in independent States.

Cristescu, *supra* note 221, para. 174. See also, *id.* para. 172-73. In addition, the debates in the General Assembly on the drafting of Resolution 1514 indicate that states envisaged that Paragraph 6 guarded against creation of a right of secession. See also, Franck *supra* note 268, at 370.

²⁷¹ International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, *supra* note 61.

ment."²⁷² The difficulty with the right as stated in Article 1 is that it does not give any guidance on the priority of the principle of territorial integrity as stated, for example, in the 1960 Declaration on Colonialism. If "all peoples" is to be interpreted as including minorities or indigenous peoples within states, then it would provoke a direct clash with the principle of territorial integrity upheld by the 1960 Declaration on Colonialism.²⁷³ Such an interpretation would clearly import a fundamental change in international law. The difficulty with imputing such a change by the adoption of the Covenants is that the *travaux préparatoires* do not reveal any intention that international law be changed in this way.²⁷⁴ It thus appears that, despite the agreement that the right of self-determination should be seen as the basis for all other rights,²⁷⁵ it was limited to geographically separate, non-self-governing territories, and excluded minorities or peoples within independent states, whether subjugated or not. These statements in the Covenants thus did not add anything to the right of self-determination that did not exist in 1960. The practice of the U.N. in adopting resolutions to implement the 1960 Declaration in the ensuing years confirms the emphasis placed on colonialism and alien (often specifically external²⁷⁶) domination.²⁷⁷

The issues of the definition of "peoples" that the principle applied

²⁷² *Id.*

²⁷³ See discussion *infra*, section entitled "Peoples".

²⁷⁴ See, e.g., *supra* notes 246-254 and accompanying text (concerning the discussion in the Third Committee and the Belgian thesis). See also, Cristescu, *supra* note 221, paras. 44-47, 27-33. Nor did the inclusion of provisions on minority rights (such as Article 27 of the Covenant on Civil and Political Rights, *supra* note 61). The discussion of the Human Rights Commission on the rights of minorities reinforces this point. The majority of the Commission held that the reference to minority rights,

should be understood to cover well-defined and long-established minorities; and that the rights of persons belonging to minorities should not be interpreted as entitling any group settled within the territory of a State . . . to form within that State separate communities which might impair its national unity or security.

U.N. GAOR, 16th Sess., Supp. No. 8, U.N. Doc. E/2447 (1953), para. 54, cited in BUCHHEIT, *supra* note 194, at 85 n.171. The majority thus did not envisage anything that might be construed as internal or external self-determination being applicable to minorities within states.

²⁷⁵ Note that the U.N. General Assembly declared, in 1952, that "the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights." G.A. Res. 637 (VII), passed 40-14-6. Scholars have also argued that this is the case. See, e.g., UMOZURIKE, *supra* note 188, at 58. See *infra* section entitled "Basis for the Right of Self-Determination" for more detail on this aspect.

²⁷⁶ See, e.g., Resolution 2734 (XXV) of 24 Oct. 1970, linking "oppressed peoples" with "colonialism or any other form of external domination."

²⁷⁷ For example, Resolutions 2189 (XXI) of 13 Dec. 1966, 2326 (XXII) of 16 Dec. 1967, 2465 (XXIII) of 20 Dec. 1968, 2548 (XXIV) of 11 Dec. 1969, 2708 (XXV) of 14 Dec. 1970, 2878 (XXVI) of 20 Dec. 1971, 2908 (XXVII) of 2 Nov. 1972, 3163 (XXVIII) of 14 Dec. 1973, and 3328 (XXIX) of 16 Dec. 1974, cited in Cristescu, *supra* note 221, para. 48, n.40. See also the resolutions referred to, *id.*, para. 104, n.57 & paras. 105-117; Resolution 2627 (XXV) of 24 Oct. 1970; and resolutions cited in WILSON, *infra* note 388, at 70 n. 67. Wilson comments that "the reaffirmation of the right

to, and whether it applied to situations other than geographically separate, non-self-governing territories, were addressed 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.²⁷⁸ Relevant paragraphs of that Declaration are:

Every State has the duty to promote . . . the realization of the principle of equal rights and self-determination of peoples . . . in order:

(a) To promote friendly relations and co-operation among States; and

(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

. . .

Nothing in the foregoing paragraphs 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 as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

. . .

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.²⁷⁹

This Declaration shows that the principle was still expected to apply only to colonial situations and to peoples subject to "alien subjugation."²⁸⁰ The explicit concern for the respect of territorial integrity and national unity confirms that, "[w]here the territorial integrity of the State is involved, the right to self-determination does not in principle apply."²⁸¹ Because of these provisions it has been stated that the intended

to . . . self-determination of particular peoples still subject to colonial authority became almost an annual ritual for the General Assembly." *Id.* at 70.

²⁷⁸ G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121 (1971) *reprinted in* 9 I.L.M. 1292 (1970) [hereinafter Declaration on Friendly Relations] (adopted without a vote).

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ ESPIELL, *supra* note 260, para. 89 n.72, referring to the declaration of Judge Nagendra Singh in the Western Sahara Case, 1975 I.C.J. at 80. In this case the I.C.J. referred to Paragraph 6 of the 1960 Declaration on Colonialism, *supra* note 258, supporting the respect for territorial integrity. *Id.* The only exception to the respect for territorial integrity is where the state concerned does not conduct itself in compliance with "equal rights and self-determination," and thus where it is not "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." Unfortunately for minorities within states, in practice, the require-

application of the principle of self-determination by decolonization, and thus the definition of "peoples" for its purposes, is limited to "non-European inhabitants of former colonies, without further regard for ethnicity, language, religion, or other objective characteristics of such colonized peoples (apart from the fact of colonization itself). Territory, not 'nationhood,' [is] the determining factor."²⁸² The other implication of this statement is that the other types of "peoples" entitled to self-determination are also defined territorially; they are the presently independent states (with representative forms of government) that are entitled to retain their sovereignty and territorial integrity.

The 1970 Declaration on Friendly Relations does evidence an extension of the application of the right of self-determination beyond colonialism. Principle 7 of the Declaration (concerning the use of force) refers to "peoples under colonial or racist regimes or other forms of alien domination." This extension of the concept of colonialism to racist regimes is supported by other General Assembly resolutions implementing the 1960 Declaration on Colonialism and the 1970 Declaration on Friendly Relations.²⁸³ For example, G.A. Resolution 3103 (XXVIII), is entitled Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes.²⁸⁴ Principle 1 of this resolution proclaims that: "The struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law."²⁸⁵

ment of representative government is very easily satisfied. The focus here is on the whole people of the state, not various distinct peoples. This reference to representative government is thus not available to argue that indigenous peoples or other minorities that are not "represented" in their government are thereby entitled to exercise a right of self-determination. *See, e.g.*, LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 357 (1988). *See also* Rupert Emerson, *Self-Determination* 65 AM. J. INT'L L. 459, 468 & n.19 (1971) (discussing the *travaux preparatoires*). Emerson notes that, during the deliberation of the Declaration both the U.S.A. and U.K. proposed that "representative government" should be required to be "effectively functioning as such to all distinct peoples within its territory." *Id.* This was rejected, presumably because of the wide scope it gave for interference by judgment whether a state's system of government met as-yet-unspecified criteria for representativeness. In relation to the views of different scholars on this point, *see, e.g.*, Thornberry, *supra* note 199, at 876-77. The concept of representative government is discussed in more detail *infra*, notes 343-375 and accompanying text.

²⁸² HANNUM, *supra* note 22, at 36. *See also* RIGO SUREDA, *supra* note 184, at 106-111. In relation to respecting boundaries, it is interesting to note that, in the case of Africa, the boundaries that have been respected (by agreement) are those devised by the colonial states themselves. The only exceptions to the keeping of such boundaries have been where it is absolutely necessary to preserve the peace and where it is agreed to by all the relevant different groups. *Id.* at 217-18.

²⁸³ Resolution 1514, *supra* note 258, and Resolution 2625, *supra* note 278, respectively.

²⁸⁴ Adopted Dec. 12, 1973.

²⁸⁵ *Id.*

The use of these options suggests, for example, that a racist regime *within* an independent state, where an immigrant people dominate the original inhabitants by racism, would be enough to trigger the right of self-determination for the oppressed people, even where it was not "colonial" in the traditional sense of requiring rule and subjugation by an overseas European power, and whether the oppressed people was a minority or a majority. However, a difficulty with this interpretation is that states, in drafting the Declaration on Friendly Relations, deliberately chose the phrase "whole people" instead of "all distinct peoples" in delineating the unit entitled to self-determination.²⁸⁶ This suggests that, even though the whole people may have a right of self-determination under the Declaration, a part of that whole may not have any separate right.²⁸⁷ Rigo Sureda, an international legal scholar, supports this latter view in his comment that the alternative use of "foreign domination" was a synonym for "colonial domination."²⁸⁸ The only stretching of the concept of "alien subjugation" has been "to include those countries where European settlers maintain a dominant position, in spite of their relatively small numbers, based on racial discrimination."²⁸⁹ In practice it has been reserved as a category for severely exclusionary regimes of racist minority rule, such as those that implement apartheid.²⁹⁰ The justifi-

²⁸⁶ Thornberry, *supra* note 199, at 876.

²⁸⁷ As international legal scholar Patrick Thornberry puts it: "Whether one discusses 'internal' or 'external' self-determination, the point is that 'whole' territories or peoples are the focus of rights, rather than ethnic groups." *Id.* at 877.

²⁸⁸ RIGO SUREDA, *supra* note 184, at 106. Rigo Sureda further comments that "alien rule" "depends not on whether the ruler is alien, but on whether in being alien it is also European," and thus that "self-determination is restricted to mean independence from 'European' colonial rule." *Id.* at 237. Cf. Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713 (1971) (suggesting that self-determination means independence from any administering authorities).

²⁸⁹ RIGO SUREDA, *supra* note 184, at 106. Patrick Thornberry supports this view in his comment that "only pariah States like South Africa, which oppress its majority on racial grounds, are likely to be affected." Thornberry, *supra* note 199, at 877.

²⁹⁰ See, e.g., the Declaration on the Deepening and Consolidation of International Detente, specifying the determination of Member States: "To ensure the free exercise of the right of self-determination and to promote majority rule, especially where racial oppression, in particular apartheid, has deprived peoples from exercising their inalienable rights." Resolution 32/155 of 19 December 1977. States that have been considered to be 'non-self-governing' territories under this category include South Africa, Rhodesia, and Bangladesh. For a list of the G.A. Resolutions from 1966-1971 relating to South Africa, condemning apartheid and calling for the respect of the South African people's right of self-determination, see Cristescu, *supra* note 221, para. 115 n.71. The relevant Security Council Resolutions are 182 (1963) and 191 (1964). The General Assembly Resolution finding Southern Rhodesia to be a non-self-governing territory is Resolution 1747 (XVI). For a concise description of treatment by the United Nations of Southern Rhodesia, see RIGO SUREDA, *supra* note 184, at 84-92 & 238-243. The General Assembly Resolutions on Palestinian refugees also treat them as a colonized people, "driven away from their homeland and subject to the alien domination of Israel." *Id.* at 107. See also *id.* at 340-346. For discussion on Bangladesh, see, e.g., SUB-

cation for this is that racial discrimination and apartheid have been described as being "[l]inked with colonial domination."²⁹¹ In summary, Cristescu describes the goal of the international law of self-determination as part of the "fight against the unequal relations and domination deriving from colonialism and *related* forms of domination."²⁹²

Therefore, while the Declaration appears to deny the protection of a state's territorial integrity in cases where that state denies the self-determination of the people within it, the narrow reading of the peoples that are entitled to exercise self-determination has meant that, in practice, the Declaration has not provided any right of secession for any particular group within a state. Instead, in situations of severely exclusionary, racist minority rule, it is the people of the state as a whole who are entitled to external self-determination rather than any minority within that state. Oppressed minorities within a state are merely entitled "not to be oppressed by a discriminatory government"²⁹³ (i.e. internal self-determination).²⁹⁴

RATA R. CHOWDHURY, *THE GENESIS OF BANGLADESH* (1972); BUCHHEIT, *supra* note 194, at 198-214.

²⁹¹ Cristescu, *supra* note 221, para. 683. Cristescu goes further:

Racial discrimination and apartheid, being doctrines of exclusion based on grounds of racial difference or ethnic or religious inferiority, all or which are scientifically false, morally reprehensible and socially unjust, constitute an affront to human conscience and dignity, a total negation of the purposes and principles of the Charter of the United Nations and a crime against humanity.

Id. para. 249.

²⁹² *Id.* para. 690 (emphasis added).

²⁹³ CASSESE, *supra* note 190, at 134.

²⁹⁴ For example, even in the two clear cases of internal racism that were held to violate self-determination, that of Southern Rhodesia and of South Africa, it was never argued that the oppressed people (the majority of the people of the state) had a right to secede from the oppressor state. Instead, it was envisaged that the appropriate remedies were internal: that the respective (then minority) governments must be made more representative of the whole people of the state. It is therefore not any minority of the state that was seen as the self-determination unit as such, but the majority and thus the people of the state as a whole. This is consistent with the emphasis on internal protection for minorities within states rather than external independence.

The only case in which it can be argued that a racist regime did entail recognition of a right for the oppressed part of the state to secede from its oppressors is that of Bangladesh. However, even those that do argue that that case justifies insistence of the existence of the right of secession, recognize that it is an extreme case. *See, e.g.,* Robin C.A. White, *Self-Determination: A Time for a Reassessment?*, 28 NETH. INT'L L. REV. 147, 160 & 166 (1981). Further, the more common view is that, because of the unique factors in this case (including the fact that East and West Pakistan were physically divided into two halves, 1000 miles apart, and had not been historically joined) it can be considered more as an example of colonialism and less as one of secession. It is for such reasons that Bangladesh is considered to be the unique exception that proves the rule that international law has not recognized a right of secession for a part of a metropolitan state. *See, e.g.,* CRAWFORD, *supra* note 168, at 115-18 & 258-66. Bangladesh is considered to have been a non-self-governing territory under Resolution 1541 and therefore entitled to independence just as other non-self-governing territories and colonies were; but there is still no right of secession of a part of a metropolitan state.

A further international instrument that specifically addresses the right of self-determination is the Final Act of the Conference on Security and Cooperation in Europe, commonly known as the Helsinki Declaration or Helsinki Accord, of August 1975.²⁹⁵ The Helsinki Declaration includes a declaration of ten principles guiding relations between participating states, one of which requires states to respect the human rights and fundamental freedoms of national minorities within the states.²⁹⁶ Another principle requires states to respect the right of peoples to self-determination, "acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States."²⁹⁷ Because of this explicit reference to the priority of territorial integrity, it appears that these principles were not intended to expand the category of peoples entitled to self-determination beyond those already recognized as consistent with the norms of international law.²⁹⁸ The solution to discrimination and oppression against minorities and indigenous peoples within states is instead considered to lie in the respect of traditional human rights and freedoms rather than in the exercise of self-determination.

The 1981 African Charter on Human and Peoples' Rights²⁹⁹ accords rights to peoples, including the right of self-determination, but does not define the term.³⁰⁰ It does, however, also stress the duty to "preserve and strengthen the national independence and the territorial integrity" of their country.³⁰¹ Thornberry comments that "[t]here is little to suggest that 'peoples' are other than the 'whole peoples' of the States, and not ethnic or other groups."³⁰² He notes that "[t]his conclusion is strongly supported"³⁰³ by comments of the African leaders themselves and by the

Crawford notes that, if a part of a metropolitan state does *in fact* secede, it may be recognized as a separate state if it has "a stable and effective government over a reasonably well defined territory, to the exclusion of the metropolitan State, in such circumstances that independence is either in fact undisputed, or manifestly indisputable." This, however, does not establish a *right* of secession, only a right of recognition after a *de facto* secession. *Id.*

²⁹⁵ Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292 [hereinafter Helsinki Declaration]. Harris comments that the Helsinki Declaration is still not considered binding in international law. D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 601 n.15 (4th ed. 1991).

²⁹⁶ *Id.* at 1295.

²⁹⁷ *Id.*

²⁹⁸ Thornberry comments that the *travaux préparatoires* support this interpretation. Thornberry, *supra* note 199, at 886.

²⁹⁹ 21 I.L.M. 59 (1982).

³⁰⁰ *Id.* See e.g., art. 20(1) which reads: "All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination." *Id.* at 62.

³⁰¹ *Id.* art. 29, at 63.

³⁰² Thornberry, *supra* note 199, at 887.

³⁰³ *Id.*

domestic constitutions of many African states.³⁰⁴

The most recent consideration of the right of self-determination for indigenous peoples, in the development of international instruments, has been in connection with the revision of ILO Convention 107³⁰⁵ which lead to the adoption of ILO Convention 169.³⁰⁶ During the revision process, indigenous peoples argued that the revised convention should refer to indigenous peoples as "peoples" rather than "populations" and should include the right of indigenous peoples to self-determination.³⁰⁷ The inclusion of a right of self-determination for indigenous peoples was flatly rejected by the member states revising the convention because they considered that indigenous peoples were not entitled to that right under international law.³⁰⁸ Moreover, the member states rejected the use of the term "peoples" because it might *imply* that indigenous peoples were entitled to the right of "all peoples. . .to self-determination" under the International Covenants.³⁰⁹ The states clearly considered that indigenous peoples were not legal peoples in international law and did not have the international legal right of self-determination.

Despite this resistance, however, the indigenous peoples were persistent in their demands that they were peoples and that the word "peoples" be used in the revised convention.³¹⁰ The states eventually agreed to use the term "peoples" but under one important condition: that its meaning in the convention be clarified to exclude any implication of recognizing the right to self-determination for indigenous peoples.³¹¹ The result is that ILO Convention 169 refers throughout to indigenous "peoples." Moreover, it recognizes their aspirations "to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions."³¹² The Convention also recognizes that "in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live."³¹³ However, in order to destroy any implication concerning entitlement to self-determination, it also provides that "[t]he use of the term 'peoples' in this Convention shall not be construed as having any implications as regards

³⁰⁴ *Id.*

³⁰⁵ *Supra* note 8.

³⁰⁶ *Id.*

³⁰⁷ *See, e.g., Anaya, supra* note 54, at 218. "Indigenous groups insist on being identified as 'peoples' rather than 'populations' so as not to be reduced to simple aggregations of individuals." *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Supra* note 61, Art. 1. *See also, Barsh, supra* note 8, at 231; Venne, *supra* note 8, at 55.

³¹⁰ *See e.g., Anaya, supra* note 54, at 218 n.120.

³¹¹ *Id.* *See also, Barsh, supra* note 8, at 233.

³¹² I.L.O. Convention No. 169, *supra* note 8, preambular paragraph 5.

³¹³ *Id.* preambular paragraph 6.

the rights which may attach to the term under international law.”³¹⁴ Because of the history of the dispute concerning the use of the term “peoples”, this is taken as a statement by states that indigenous peoples are not recognized as having the international legal right of self-determination.³¹⁵ The Convention instead considers that the appropriate locus for achievement of indigenous peoples’ aspirations and appropriate remedies for the abuses of indigenous peoples’ human rights are all internal to the states in which they live.³¹⁶

The conclusion from the international instruments and the state practice under them is that the category of peoples entitled to self-determination under international law (i.e. including a right of secession) is limited to those subjugated under colonialism and (related) forms of foreign or racial domination, where the application of the right will not violate the principle of territorial integrity of present states. This does not include indigenous peoples within states.³¹⁷

³¹⁴ *Id.* Art. 1(3).

³¹⁵ *See, e.g.*, Venne, *supra* note 8, at 56. Despite this negative conclusion, one commentator has focused on the positive side and noted optimistically that, by not explicitly stating that indigenous peoples do not have the right of self-determination, the provision “[leaves] the door open for the future evolution of international standards.” Barsh, *supra* note 8, at 233.

³¹⁶ *See, e.g.*, *supra* note 8, preambular paragraph 5. The aspirations of indigenous peoples are to control the aspects mentioned solely “within the framework of the States in which they live.” The whole Convention is premised on the inapplicability of the full right of self-determination to indigenous peoples. *Id.*

³¹⁷ This conclusion is also reached by most scholars who have considered this issue specifically in respect of indigenous peoples. *See, e.g.*, Williams, *supra* note 1, at 665; HANNUM, *supra* note 22, at 48-49; Falk, *infra* note 458, at 26; Gundmundur Alfredsson, *International Law, International Organizations, and Indigenous Peoples*, 36 J. INT’L AFF. 113, 116 (1982); Eyassu Gayim, *The United Nations Law on Self-Determination and Indigenous Peoples*, 51 NORDISK TIDSSKRIFT FOR INT’L RET. 53 (1982); Crawford, *Self Determination Outside the Colonial Context*, in SELF-EXPRESSION AND SELF-DETERMINATION IN THE COMMONWEALTH 1 (A. Macartney ed., 1987); John T. Paxman, Note, *Minority Indigenous Populations and Their Claims for Self-Determination*, 21 CASE W. RES. J. INT’L L. 185 (1989). It is also reached by those scholars that have not considered indigenous peoples separate from minorities within states and who thus imply that indigenous peoples are not entitled to self-determination because minorities within sovereign states are not entitled to secession. *See, e.g.*, Cristescu, *supra* note 221, paras. 173-74, 209, 279; HANNAKAINEN, *supra* note 281, at 373; HARRIS, *supra* note 295, at 124-25; ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963); Anna Michalska, *Rights of Peoples to Self-Determination in International Law*, in ISSUES OF SELF DETERMINATION 71, 81 (William Twining ed., 1991); Alexandre Kiss, *The Peoples’ Right to Self-Determination*, 7 HUM. RTS. J. 165, 173 (1986); Morphet, *supra* note 243, at 86; Thornberry, *supra* note 199, at 874-82.

Note that the opinion that indigenous peoples are not recognized as having a right of secession and nor, therefore, the international right of self-determination, does not mean that the principle or right of self-determination is not at all applicable to indigenous peoples. Many of the same commentators have argued that the principle and even the right of self-determination is universally applicable, including to indigenous peoples. Even while there is no right of secession and while its application differs for different peoples, a (albeit, narrower) right of self-determination nonetheless exists to protect other specific rights in various situations, including indigenous peoples’ human

The conclusion that indigenous peoples within states are not entitled to the international right of self-determination is reinforced by the negative decision of the only international body to explicitly consider whether an indigenous people had the right to self-determination. The Inter-American Commission on Human Rights of the Organization of American States, in respect of the Miskito Indians, decided that:

The present status of international law does recognize observance of the principle of self-determination of peoples, which it considers to be the right of a people to independently choose their form of political organization and to freely establish the means it deems appropriate to bring about their economic, social, and cultural development. This does not mean, however, that it recognizes the right to self-determination of any ethnic group as such.³¹⁸

The Commission accordingly denied that the Miskito Indians were entitled to exercise separate self-determination. The primary reason of the Inter-American Commission for denying a right of self-determination for other such "peoples" appears to be that it would violate the territorial integrity of a sovereign state, such territorial integrity clearly taking priority.³¹⁹

This conclusion is further reinforced by the rejection of recent arguments in the international sphere that particular minorities within states or other "generally accepted" and geographically distinct "political units"³²⁰ are entitled to any self-determination claimed. For example, while the Kuwaitis invaded by the Iraqis were considered to be entitled to their right of self-determination, and to assistance from other states to achieve that end, the minority Kurds, arguably at least as oppressed by Iraq as the Kuwaitis,³²¹ were — and still are — considered to be not so

rights. See, e.g., Gayim, *supra*; Kiss, *supra*; Thornberry, *supra* note 199, at 874-82. Cf. *infra* notes 469-474 and accompanying text.

³¹⁸ Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OAS Doc., OEA/Ser.L/V/II.62, Doc. 26, at 78-79 (1984). Although the Inter-American Commission on Human Rights (I.A.C.H.R.) is not a legal body, its members are typically legal experts and its decisions — particularly in this instance — are typically based on international law.

³¹⁹ The I.A.C.H.R. instead noted that ethnic groups such as the Miskito are accorded "special legal protection" for their language, religion, and all other "aspects related to the preservation of their cultural identity." *Id.* at 81. An interesting feature of the decision is that the I.A.C.H.R. then commented that the preservation of these aspects "entails the need to establish an adequate institutional order as part of the structure of the Nicaraguan state." *Id.* at 82. This indicates that the Committee recognized that, even if self-determination were not a right accorded them under international law, some special protection — presumably some degree of autonomy — was required in practice if the rights of the Miskito Indians were to be preserved.

³²⁰ Rosalyn Higgins has generalized that the right to self-determination is merely "the right of the majority within a generally accepted political unit to the exercise of power." HIGGINS, *supra* note 317, at 104.

³²¹ On the human rights violations by Iraq of the Kurds of Iraq, see, e.g., MIDDLE EAST

entitled.³²² The international focus has instead been on the protection of their human rights within the states in which they live, with particular emphasis on Iraq.³²³

Other recent developments in the international law of self-determination include the break-up of the U.S.S.R. and of Yugoslavia into their component parts and the constitutional negotiations presently being undertaken in Canada in response to Quebec's claimed right of secession. However, it is not the purpose of this section to evaluate developments since the last meeting of the Working Group in July 1991.³²⁴ Further, it appears that various positions can be taken on their possible implications,³²⁵ the proper discussion of which warrants much more attention

WATCH, HUMAN RIGHTS IN IRAQ 69-96 (1990); *Interim Report of the Special Rapporteur on the Situation of Human Rights in Iraq*, U.N. Doc. A/46/647 (1991).

³²² See, e.g., BUCHHEIT, *supra* note 194, at 153-62.

³²³ See, e.g., the various U.N. resolutions on the protection of the Kurds in Iraq.

³²⁴ The purpose of this historical description of the right of self-determination is to identify the barriers to recognizing a right to self-determination. This is intended to illuminate the discussion described in Part I that has been undertaken in the context of the Working Group on Indigenous Peoples. This discussion took place before these recent developments.

³²⁵ For example, there are two possible ways that the developments in Eastern Europe may be viewed. The first way is that suggested in Part I, *supra* note 119, that the current Eastern European and Soviet struggles and achievements could encourage a wider acceptance of the need to recognize claims to self-determination both in principle (e.g., on the basis that self-government is a fundamental moral right of all peoples) and on practical grounds (that denial will lead to civil strife). It could also lead to a change in the present international law of self-determination in that requirements relating to who is entitled to exercise the right could be loosened. This is because, in these cases, constituent elements of member states were recognized as entitled to independent statehood via secession. This could lead to extension of the right to minorities or indigenous peoples within states or other political units. For an argument supporting a right of secession, based not on ethical but political reasons, and which focuses on the case of the Baltic States, see Igor Grazin, *The International Recognition of National Rights: The Baltic States' Case*, 66 NOTRE DAME L. REV. 1385 (1991).

The alternative view is that it will merely reinforce the traditional view that minorities and indigenous peoples within states are not entitled to secede and therefore not entitled to self-determination because it necessarily entails secession. This view is supported by the argument that the Baltic and Yugoslav cases merely reinforce the concern with alien domination. This argument can be made on three bases. First, even though the right of secession has been generally rejected in international law, the original conception of the scope of Article 1 of the Covenants was that *politically separate, constitutionally recognized* nationalities are entitled to self-determination, including the right of secession under international law. See *supra* notes 247-249 and accompanying text. While it is also arguable that this conception has not been followed with state practice since then, this lack of state practice could be justified on the basis that the right occasion had not yet arisen. The principle could then be invoked as a mere continuation of old law, not the creation of any new right. It is significant that the U.S.S.R. and Yugoslavia were both considered at that time to be the paradigm examples of states of which the constituent constitutional elements were entitled to separate self-determination, even as minorities within such units were not so entitled. See *supra* note 249. Second, at least in the case of the Baltic states, they fit the criteria of existing geographical separation from the 'parent' state and the criteria concerning colonization (they had originally been forcibly colonized and could still be considered colonized and oppressed). In the case of Yugoslavia,

than I could give within this paper. I will thus refrain from considering these developments here.

In conclusion, with respect to the definition of the "self" that is entitled to self-determination, it appears that people subjugated under a (generally, geographically separate) colonial, alien, or even racist rule are entitled to self-determination. However, where a people that comprises a minority within a state is not under such clear foreign domination, the traditional view is that the (by definition, non-colonial) state is assumed to be the relevant "self" and thus must be entitled to its national unity, territorial integrity, and sovereignty.³²⁶ Further, what appears to be the primary factor in deciding whether a people is under the appropriate degree of foreign domination is whether the application of the right of self-determination would entail the violation of territorial integrity. Despite arguments that the right of self-determination and independence, and thus the right to secession, should apply to indigenous peoples (and/or minorities) within existing states, it appears that no such right exists in positive international law. Further, it is clear that the barrier to the recognition of such a right is the priority given to the principles of territorial integrity, national unity and sovereignty of present states.

the creation of that state can be viewed merely as due to strategic convenience rather than the joining of peoples desiring to be unified. Third, in the case of the U.S.S.R., it is important that the 'parent' state acquiesced in the secession of the various constituent states. *See, e.g., HANNIKAINEN, supra* note 281, at 375 (stating, "The prohibition of secession from existing states is *not peremptory*. A State may lawfully consent to the secession of a part of its territory."). Therefore, while these examples might be thought of as expanding the right to self-determination, it is clearly formally arguable that they do not take it as far as extending it to minorities or other peoples within generally accepted political units.

Without further study on the validity of either of these approaches, I cannot suggest which one is more consistent with precedent, nor which one will be taken. I do suggest, however, that if the latter view is taken, it be closely examined for consistency in its application. It is arguable that application to these cases but not to the case of indigenous peoples is a distinction based as much on racism as it is on considerations of sovereignty and fears of disintegration of member states. Such a racist application does not mean that it will not become positive law, but it does mean that every attempt should be made to expose the true rationale and to avoid such a result.

The argument relating to consistent application of the law is even more relevant in the case of Canada and the proposed secession of Quebec. If Quebec is allowed to secede from Canada without objection from the international community then an argument can be made that consistent application demands that at least the indigenous peoples within Canada similarly be entitled to secede. This argument is stronger than in the Eastern European examples, particularly because of the lack of history of oppression of Quebec by Canada (it thereby does not fit the existing criteria for colonial or racist domination) or of imposed union with the other Canadian states, and because of the satisfaction of these criteria by the indigenous peoples.

³²⁶ Various scholars use this notion of competing selves. For example, this notion forms the basis of Pomerance's analysis in her Chapter III. POMERANCE, *supra* note 192, at 14-23. *See also* Gayim, *supra* note 317.

2. The Exercise of the Right of Self-Determination

In describing the history of the right of self-determination this paper has focused primarily on who is regarded as the "self" entitled of "determination." Another important aspect of the right to self-determination is the *exercise* of the right — both the substantive and procedural aspects of such exercise. This section describes these aspects and the problems created by their lack of precision. This description shows that, while the actual result of self-determination is flexible, this imprecision may provide an additional barrier to according the present right of self-determination to indigenous peoples.

a. Substance.³²⁷ Internal and External

The substantive aspect of the exercise of self-determination is important because it determines both what a legitimate aim of self-determination is and when a claim of self-determination can be refuted by the encompassing state, both of which are closely interconnected.

As with sovereignty, there are internal and external elements of the substantive result of self-determination. The external element is thought of as the determination of the people's future status vis-a-vis other peoples and states. In relation to non-self-governing territories, this is thought of as the act of liberation from "alien" rule. The internal element is the selection of the form of government within the relevant territory.³²⁸

i. External status

In relation to the exercise of self-determination by *states*, the external component is simply the maintenance of the status quo — territorial integrity and full independence as a state.³²⁹

In relation to the exercise of self-determination by *non-self-governing territories*, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples clearly states that the "legitimate" goal of

³²⁷ Note that the categories of "substance" and "procedure" are not as neatly divided as I have made it appear. For example, in this section I also describe the procedure for choosing the substantive status. In addition, the next section on "procedure" includes reference to the substantive result of self-determination in determining the legitimacy of the use of force. However, these categories have been labelled in this way for ease of handling.

³²⁸ Pomerance suggests a third element: the substantive nature of the regime selected (for example, whether it is democratic or socialist). POMERANCE, *supra* note 192, at 37. While she considers that all three are distinguishable, she recognizes that, "[i]n practice, they are closely interconnected." *Id.* Because of their interconnection, I shall include discussion of this third element with the discussion of the other two.

³²⁹ Although, of course, a state is free to *choose* not to keep its territorial integrity. See, e.g., comment of HANNAKAINEN, *supra* note 281. The important aspect is that the territorial integrity of the state not be violated against its wishes.

self-determination is complete independence.³³⁰ Despite this stated goal, the U.N. General Assembly Resolutions concerning self-determination clearly envisage that the exercise of self-determination is not limited to complete independence. Instead, it is recognized that there are a range of possible courses of action and outcomes, ranging from integration with a state to independence, and including federalism and various forms of autonomy.

Principle VI of Resolution 1541³³¹ provides that a non-self-governing territory can achieve "a full measure of self-government" through its own sovereign independence, free association with an independent state, or integration with an independent state. Independence is clearly the preferred outcome of self-determination, apparently because of a fear that any other result may not be the free choice of the peoples concerned or that it could easily be imposed by the independent, administering state. To guard against this, Principles VII-IX provide detailed requirements to ensure that the form of self-government is chosen with complete freedom.³³²

³³⁰ See *supra* note 258, for the text of these paragraphs. Cristescu notes that "[t]he principal meaning of self-determination is the establishment of a sovereign and independent state—the right to independence of peoples which aspire to it but do not possess it." Cristescu, *supra* note 221, para. 307.

³³¹ See *supra* note 264. It appears that the set of principles in Resolution 1541 supersedes those in Resolution 742. See, e.g., POMERANCE, *supra* note 192, at 25 (stating that Resolution 1541 is the "more definitive resolution on the subject").

³³² *Principle VII:*

(a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.

(b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.

Principle VIII:

Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental freedoms without distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.

Principle IX:

Integration should have come about in the following circumstances: (a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;

As described above, the general statements in the International Covenants on Human Rights merely provide: "All 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."³³³ This definition is compatible with a wide conception of self-determination; for example, simply the right to determine one's own form of government, the right to independence of colonial territories.

The 1970 Declaration on Friendly Relations³³⁴ explicitly goes further in allowing for forms of government other than those referred to in Resolution 1541: "The establishment of a sovereign and independent State, the free association or integration with an independent state or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people."³³⁵

This wide range of possible outcomes is reinforced in Part I of the Helsinki Declaration.³³⁶ Principle VIII provides that the principle of self-determination entails that "all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, and social and cultural development."³³⁷

In addition to these United Nations resolutions and the Helsinki Declaration, the international bodies that have considered individual claims of self-determination have also defined it as being more flexible than solely the achievement of full independence. For example, the International Court of Justice (I.C.J.) in the *Western Sahara* case defined self-determination as "the need to pay regard to the freely expressed will of peoples."³³⁸ In addition, the Inter-American Commission on Human Rights, in considering the case of the Miskito Indians,³³⁹ defined "the principle of self-determination of peoples" as "the right of a people to independently choose their form of political organization and to freely establish the means it deems appropriate to bring about their economic,

(b) The integration should be the result of the freely expressed wishes of the Territory's peoples acting with the full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems necessary, supervise these processes.

³³³ *Supra* note 61.

³³⁴ *Supra* note 278. See *supra* notes 279-280 and accompanying text for the text of this Declaration.

³³⁵ *Id.* (emphasis added).

³³⁶ *Supra* note 295.

³³⁷ *Id.*

³³⁸ *Western Sahara Advisory Opinion*, 1975 I.C.J. 12 (Oct. 16).

³³⁹ *Supra* note 318.

social, and cultural development."³⁴⁰

These various statements suggest, first, that self-determination is a process of choice rather than just a result. Second, the range of forms of self-government that are acceptable under the international right of self-determination for non-self-governing territories is extremely wide. This implies that the right of self-determination, and thus to various forms of international personality, can be exercised by entities other than those that aspire to become fully independent states. The corollary of this is that smaller entities that do not yet aspire to complete independence can exercise the right of self-determination because they would not be violating the principles of territorial integrity or sovereignty. If this is the case, it may be that various indigenous peoples could exercise that right in order to satisfy some of their demands.

The problem with this conclusion is that, despite arguments that self-determination is a process rather than a result,³⁴¹ self-determination appears to be viewed by states solely in result-oriented terms. The difficulty is that the range of possible outcomes encompassed by self-determination includes complete independence. As the primary element of the exercise of self-determination is the exercise of free choice, and there are no guidelines for the restriction of that free choice, it would not be possible under the present law of self-determination to guarantee that an indigenous people, if they were to exercise the present right of self-determination, would not choose a result that violated the territorial integrity of a state. Further, even where an option other than independence may be chosen by a people, independence is still seen as an option that may be chosen in the future. Therefore, despite the flexibility of the result of self-determination, it is still perceived as a "nation-wrecker" and as having the ability to violate a state's territorial integrity. Instead of the nature of the right being modified, its absolute character is maintained but the category of peoples that may exercise it is restricted.³⁴² It is thus vehemently rejected by states as being applicable to indigenous peoples within states.

ii. Internal Status

The internal aspect of the legitimate aim of self-determination is the form of government chosen. Its legitimacy is intimately connected with the process of exercising that choice. The provisions cited on the meth-

³⁴⁰ *Id.* at 78-79.

³⁴¹ See e.g., Chen, *supra* note 206, at 237.

³⁴² Pomerance concludes that "self-determination has become, not a continuum of rights, nor a universal principle applicable to 'all peoples', but an 'all or nothing' proposition: maximal rights, including independence, to the meritorious 'selves'; no rights at all to those whose claims to self-determination are rejected as unworthy." POMERANCE, *supra* note 192, at 74.

ods of choosing the form of independence make it clear that the methods must entail (representative) self-government. Where there is no self-government, the presumption is that there has been no valid exercise of self-determination.

The history of the development of the principle and right of self-determination shows that the principle traditionally encompassed the (internal) concept that the legitimacy of government derives from the consent of the governed. This was the impetus for the American and French revolutions.³⁴³ It was expressly continued by President Woodrow Wilson,³⁴⁴ and is expressed in varying degrees in the various international instruments described above. For example, the idea that the legitimacy of government derives from the consent of the governed is specified in the Universal Declaration on Human Rights.³⁴⁵ During the drafting of the references in the Covenants to the right of self-determination there was in fact much debate over the scope of its application.³⁴⁶ This debate, however, did not focus on the internal aspect;³⁴⁷ all states agreed that self-determination entailed the right of the people within states to choose their own democratic institutions.³⁴⁸ Further, while there was considerable debate over what (democratic) electoral rights should be included in the International Covenant on Civil and Political Rights, this does not appear to have been explicitly linked to a satisfaction of self-determination. Thus, while these provisions constitute political rights standards

³⁴³ See *supra* notes 185-186 and accompanying text.

³⁴⁴ See *supra* notes 192-193 and accompanying text.

³⁴⁵ See, e.g., note 241 and accompanying text. Article 21 of the Declaration reads:

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right to equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

³⁴⁶ See, e.g., *supra* notes 244-254 and accompanying text.

³⁴⁷ Recall that the disagreement was over whether the right also entailed the ability of minorities within states to choose their own autonomous forms of government or to secede from that state. *Id.* See also *supra* notes 224-236 and accompanying text.

³⁴⁸ The democratic ideal embodied in Article 21 of the Universal Declaration of Human Rights, *supra* note 241, is implemented in Article 25 of the International Covenant on Civil and Political Rights. Article 25 reads:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) to have access, on general terms of equality, to public service in his country. International Covenant on Civil and Political Rights, *supra* note 241, art. 25.

that all states should not deny to their citizens, there is no general agreement that any violation of these individual human rights necessarily entails that a people as a whole has been denied self-determination.³⁴⁹

The most explicit link between self-determination and (internal) requirements of the form of a people's government is in the 1970 Declaration on Friendly Relations.³⁵⁰ This Declaration provides that the principle of self-determination of non-self-governing territories shall not authorize or encourage,

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.³⁵¹

This passage continues the idea that legitimate government is derived from the consent of the governed. It goes further than previous international instruments by defining the self-determination of states as a continuing right which is realized through representative government. While it does not define what constitutes "government representing the people," it at least makes clear that it must not discriminate in its representation among the different races, creeds, and colors within the state, and that it must uphold the principle of equal rights for all.

It is arguable that, particularly once this link was clearly made between representative government and self-determination, the existing requirements concerning civil and political rights should be included as requirements for self-determination. For example, Article 25 of the Covenant on Civil and Political Rights³⁵² and Article 21 of the Universal Declaration of Human Rights³⁵³ arguably provide requirements that any representative government must satisfy. Any violation of these requirements could be argued to be a violation of a people's right to internal self-determination. However, fundamental disagreement among states over the concept of a democracy and of representative government, and a reluctance to interfere with the internal affairs of states, has meant that a violation of these provisions will not cause the government in question to be rejected by other states as not representative of the people of its state. As one scholar comments, the content of the internal aspect of self-determination is "not stated with precision in international norms because a

³⁴⁹ See *infra* notes 370-376 and accompanying text. For a discussion of the emerging right to democratic governance, see *infra* notes 363-369 and accompanying text, and *infra* Part III A(4) entitled "Internal Self-Government."

³⁵⁰ *Supra* note 278.

³⁵¹ *Id.* (emphasis added).

³⁵² *Supra* note 61.

³⁵³ *Supra* note 241.

settlement of this aspect is not feasible and the matter is therefore left to the domestic law and practice of particular states."³⁵⁴

In the opinion of some states, there is a very narrow range of legitimate forms of government that can be chosen. For example, President Wilson could accept that only a Western-style democracy was truly representative government.³⁵⁵ Pomerance comments that the Western nations thought of democracy as being "a continuing right of self-determination."³⁵⁶ President Johnson thought similarly, and held that the adoption of a communist form of government could not be a valid exercise of self-determination.³⁵⁷ On the other hand, the Soviet view was that true self-determination "was only possible in a classless society."³⁵⁸ The exercise of self-determination thus could not result in anything other than a communist form of government, because anything else must involve the subjection of the masses to the choices of the ruling minority.³⁵⁹ These Soviet views directly link the internal and external aspects of legitimacy of self-determination in that, externally, "legitimacy rests with those seeking freedom from imperialism," whereas, internally, legitimacy rests with "those striving to vest State sovereignty in the 'people' rather than in the exploitative ruling classes."³⁶⁰ The view of African governments is said to be that a representative government need not be a democratic one.³⁶¹

Recently it has been argued that a definition and standard of "representative government" is emerging in international law.³⁶² This standard is that of a western-style, liberal democracy,³⁶³ the trademarks being freedom of speech³⁶⁴ and free and fair elections,³⁶⁵ with additional implied commitments to liberal individualism and respect for the rule of law.³⁶⁶ Because even the proponents of this emerging norm do not argue

³⁵⁴ Michalska, *supra* note 317, at 88.

³⁵⁵ See, e.g., POMERANCE, *supra* note 192, at 38.

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 39.

³⁵⁸ *Id.* at 40.

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ Issa G. Shivji, *The Right of Peoples to Self-Determination: An African Perspective*, in ISSUES OF SELF-DETERMINATION, *supra* note 317, 33, at 40.

³⁶² See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992). See also Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 359 (1992).

³⁶³ See, e.g., Franck, *supra* note 362, at 49 (making reference to a "western-style parliamentary, multiparty democratic process"). References to "liberal democracy" are scattered throughout Franck's article. See, e.g., *id.* at 88.

³⁶⁴ *Id.* at 61-63.

³⁶⁵ *Id.* at 63-77, 80-85.

³⁶⁶ A suggested further element of respect for fundamental human rights is more controversial and is not as easily implied. *Id.* at 79-80.

that it is yet international law,³⁶⁷ discussion of the subject will be postponed until Part III.³⁶⁸

Therefore, while the requirement of representative government may appear effective, especially when supplemented by the provisions on electoral rights in the International Covenant on Civil and Political Rights,³⁶⁹ in practice, because of the difference in views, the representativeness of different governments has not been assessed critically. Instead, states' claims to representativeness are often taken at face value in order to uphold the principle of non-intervention with domestic affairs.³⁷⁰ Dictatorships are still recognized as legitimate governments for the purposes of representing the people of their state in the international sphere. Even where particular forms of government are criticized, this is not considered enough of a reason to justify intervention by other states in order to uphold the whole people's right to self-determination.³⁷¹ The only real restriction in international law on the internal government of a state is that the regime established must not be "based on racial discrimination or feudalism."³⁷² This requirement, however, is interpreted very narrowly to refer solely to situations such as South Africa and Rhodesia, where a (typically European) minority clearly subjugates a (typically non-European) majority.³⁷³ The overall result is that it has been ex-

³⁶⁷ See *id.* at 46, 50. But see Fox, *supra* note 362, at 543 (arguing that "the essential elements of a 'free and fair' election can now be described as a matter of law," and that there is a right to political participation in international law).

³⁶⁸ I do suggest, however, that the emerging standard does not meet the concerns of indigenous peoples. See discussion *infra* Part III(A)(4) entitled "Internal Self-Government."

³⁶⁹ See *supra* notes 345 & 348.

³⁷⁰ I use "claim" here because states must claim that they are representative in order to achieve at least formal international legitimacy. These different interpretations have meant that states can claim to have implemented the provisions even where their laws appear to go against either their language or intent. Another effect of the vagueness of the provisions is that states have accorded formal rights in law in order to satisfy the international requirements but not accorded them in substance. See *infra* notes 561-65 (Cobo Report findings on this point with respect to indigenous peoples' electoral participation).

³⁷¹ For example, the government of Myanmar has been criticized by the United Nations Human Rights Commission. Paul Lewis, *U.N. Group Condemns Burmese on Rights Record*, N.Y. TIMES, March 7, 1991, at A14. While Franck comments that this condemnation shows that "undemocratic electoral processes . . . are now almost universally regarded as . . . not beyond the purview of the international community," Franck, *supra* note 362, at 83, there has not been any further action taken to achieve a democratic electoral process.

³⁷² RIGO SUREDA, *supra* note 184, at 262.

³⁷³ HANNIKAINEN, *supra* note 281. Hannikainen summarizes the position as:

the international community of States has not really required the realization of *internal* self-determination within *existing* States. There are many States in which the government is not representative of the people, but rules by dictatorial means. It has been sufficient for the international community of States to see to it that a people has been able to realize its *external* self-determination by establishing an independent State. Only the apartheid system of South Africa . . . has been the object of a resolute condemnation by the international

tremely difficult to hold that the people of a state have been denied their self-determination through being denied representative self-government.³⁷⁴ Further, even where it has been thought that a people has been denied representative government, the focus of the achievement of the people's self-determination has been internal, because it is the people as a whole that is considered to be the unit of "self" and not any particular part of the whole people.³⁷⁵

While the form of government that may be chosen is imprecise and clearly depends on political opinion, this in itself does not deny the principle of self-determination by indigenous peoples. However, the legitimacy of a claim of self-determination is directly linked to the ability of a state to refute claims to self-determination by a people within its borders. If the legitimate *external* aim of self-determination is independence, and a state has achieved independence, then any other minorities within its borders³⁷⁶ are not considered to be legitimately able to exercise any rights of self-determination.³⁷⁷ Similarly, as the legitimate internal result of self-determination is representative government, if a state has one form of government that it considers representative, then it can deny that minority populations have any right of self-determination.

The lack of agreement on what constitutes representative government is hindering the attainment of self-determination for indigenous peoples in two ways. First, even where the interests of indigenous peoples are not actually represented in the political structure, the relevant state can object to claims of self-determination by saying that they provide protection for human rights and that they have a representative government that does not discriminate on the basis of race, creed, or color. The state may thus easily claim that it has achieved self-determination for all peoples within the state. The principle of non-interference with internal affairs of states prevents serious challenges to such choices of forms of government by other states. The political status of indigenous peoples (and any other minority) is thus a matter to be resolved inter-

community of States for violation, in an existing State, of the right of *internal* self-determination.

Id. at 357-58 (emphasis in original; citation omitted).

³⁷⁴ The same conclusion can be drawn for the internal aspect of the right to self-determination of non-self-governing territories (as opposed to states). That is, the content is not specified; instead, it is left up to the relevant people to choose. And the legitimacy of the form of representative government chosen does not depend on an assessment by other states as to its desirability other than by reference to the principle of non-discrimination and to the process used for arriving at that result.

³⁷⁵ See *supra* notes 285-294 and accompanying text.

³⁷⁶ This assumes that the state is not acting as an external colonizing power, subjugating alien peoples, as such peoples are by definition not within the state's borders.

³⁷⁷ Pomerance refers to this as the "inherent non-universalizability of the principle of self-determination." POMERANCE, *supra* 192, at 41.

nally, presumably by recourse to constitutional law.³⁷⁸ Second, because this concept of representative government is more controversial than that of the external aspect, and because of the principle of non-interference, the rhetoric in the international sphere typically falls back on the external aspect of the attainment of some form of independence. As we have seen, this legitimacy depends directly on the perception of who is entitled to form a state and thus on the principle of territorial integrity of states. Therefore, instead of providing an opportunity for indigenous peoples to criticize the non-representativeness of the government of their state, the internal requirement of the substantive aspect of self-determination provides a further barrier to their claims.

b. Procedure

As the discussion on the external element of the substance of self-determination revealed, the process for choosing the external status of an entity in the exercise of self-determination is intimately connected with the legitimacy of the aim itself. Therefore, the requirements of such processes must be part of any assessment of the validity of such an exercise.

i. Determining the Will of the People

While self-determination may only be effected by the people in the territory concerned,³⁷⁹ the method of ascertaining the will of the people has been subject to substantial debate, particularly in the United Nations. As with the debate over the definition of "representative government," various states have argued that the method of achieving self-determination within their borders, or within those of their non-self-governing territories, is a domestic matter and should not be subject to outside interference.³⁸⁰ As a result, the General Assembly has appeared to agree that, in line with the deliberate vagueness of "representative government," procedures for achieving it within *states* should not be devised. Such arguments, however, were rejected by the majority of the General Assembly with respect to *non-self-governing territories*.³⁸¹ General Assembly Resolution 637A(VII) provides that "the wishes of the people [be] ascertained through plebiscites or other recognized democratic means."³⁸² Resolution 1541³⁸³ is more specific as to the procedural re-

³⁷⁸ Although this is subject to growing reservations made in cases of the abuse of universal human rights. See *infra* Part III(C) entitled "Non-intervention in States' Domestic Affairs."

³⁷⁹ According to Article 1(1) of the International Covenant, self-determination involves a people freely determining its own political status. *Supra* note 272 and accompanying text.

³⁸⁰ See, e.g., Chen, *supra* note 206, at 229.

³⁸¹ *Id.*

³⁸² U.N. G.A. Res. 637A(VII), Dec. 16, 1952, passed 40-14-40-14-6.

³⁸³ *Supra* note 263.

quirements in respect of achieving self-determination for non-self-governing territories. Principles VII-IX of Resolution 1541 provide that free association must be achieved through a "free and voluntary choice" and "through informed and democratic processes."³⁸⁴ In addition, it must also be able to be modified unilaterally by the peoples of the territory concerned. Integration with another state may only be chosen where the territory has "an advanced stage of self-government with free political institutions," and if the choice is made with "full knowledge" and through democratic processes "impartially conducted and based on universal adult suffrage."³⁸⁵ While these still appear to be vague, practice has since shown that the most accepted method of determining the will of the people has become the referendum, or plebiscite.³⁸⁶ Thus, even though the United Nations generally relies on the statements of state representatives that the people within their state have achieved self-determination through "representative government", the U.N. does not rely on the judgements of the state administering a non-self-governing territory as to what the preferences of the people in that territory are.³⁸⁷

Despite the apparent simplicity of such a procedure, there are difficulties with determining the will of the people. Determining who is entitled to have a say in any plebiscite raises problems where there are different peoples within the same territory, such as where nationals from a colonizing state have populated the territory in question. The options and issues to be voted on are typically controversial, and education about such options may be incomplete. These difficulties are compounded in the case of indigenous peoples. The less an indigenous people is territorially defined within the state in which it lives, the harder it is to get agreement on who the relevant people are who should vote on the options for self-determination. The view of states is that the choice of people is intimately connected with the options being voted on. For example, if it is suggested that an area become autonomous, either fully or in part, the people living in that area might be considered entitled to exercise the right of choice, even where it clashes with the self-determination of the indigenous peoples themselves. Similarly, the options available, and thus the appropriate education about the options, would be controversial. Thus, the present lack of any more specificity in international law about the consequences of the exercise of the right of self-determination hinders the recognition of a right of self-determination for indigenous peoples —

³⁸⁴ *Id.*

³⁸⁵ *Id.* While there is no mention of this, it appears that, once chosen, integration cannot be rejected unilaterally.

³⁸⁶ For a detailed description of how and where plebiscites have been used see WAMBAUGH, *supra* note 184; Chen, *supra* note 206, at 229-235. For suggestions for the better future use of plebiscites, see LAURACE FARLEY, *PLEBISCITES AND SOVEREIGNTY* (1986).

³⁸⁷ Chen, *supra* note 206, at 229.

states assume the worst (apparently, for them, the loss of territory though secession) and fear the unknown.

ii. The Use of Force

Where accepted methods of choice and exercise of the will of the people (such as the plebiscite) are not used in good faith by the administering power, the issue of resort to other strategies to achieve self-determination arises. The use of force may be the only such option open to oppressed peoples. Further, it appears that the right to use force to achieve self-determination is not limited to use by the oppressed people themselves; other states may also have a right of intervention by force in order to assist them.

Before the principle of self-determination achieved the status of a right, it was seen purely as a right of revolution and thus of self-help, without other states having the right to assist.³⁸⁸ Since the principle has become a right, various scholars suggest that this right to self-determination has evolved a new "just war" doctrine; that is, the use of force to achieve a legitimate end is itself legitimized.³⁸⁹

The first linkage of the right to self-determination and the prohibition on the use of force was in 1966, which held that any "forcible action . . . which deprives peoples under foreign domination of their right to self-determination [external and internal] . . . constitutes a violation of the Charter."³⁹⁰ While there is no mention of the legitimacy of using force to repel such forcible action, the inference is that force may be used in self-defence of such action. This suggestion, that the use of force can be legitimized by its use to achieve a legitimate end, was made more clearly in the 1970 Declaration on Friendly Relations.³⁹¹

In 1973, the legitimacy of using force to achieve self-determination of a people subject to colonial or alien domination was made explicit; it

³⁸⁸ The most detailed discussion of the various provisions of the international laws of armed force in the context of struggles for self-determination is provided by HEATHER A. WILSON, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS* (1988). Pomerance also provides a discussion of the use of force. POMERANCE, *supra* note 192, at 48-62. Rigo Sureda provides a more detailed discussion than Pomerance, including various illustrations of state practice. RIGO SUREDA, *supra* note 184, at 324-351.

³⁸⁹ See, e.g., WILSON, *supra* note 388. See also POMERANCE, *supra* note 192, at 48-62; RIGO SUREDA, *supra* note 184, at 324-351.

³⁹⁰ U.N. G.A. Res. 2160 (XXI), Nov. 30, 1966, 98-2-8.

³⁹¹ Declaration on Friendly Relations, *supra* note 278. The Declaration provides that: Every State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.

Id. para. 5, The Principle of Equal Rights and Self-determination of Peoples (emphasis added).

was expressly approved in G.A. Resolution 3103 (XXVIII), entitled Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes.³⁹² Further, the Definition of Aggression, adopted by the General Assembly in 1974,³⁹³ expressly approves the right of "peoples under colonial and racist regimes or other forms of alien domination. . . to struggle to [achieve "self-determination, freedom and independence"] and to seek and receive support, in accordance with the principles of the Charter and in conformity with the [Declaration on Friendly Relations]."³⁹⁴ This right of struggle and support is affirmed in Article 1, paragraph 4, of Protocol I to the Geneva Conventions of 1949.³⁹⁵ It thus appears from these international instruments that such armed struggles and their "support" are legitimate.³⁹⁶

At least the Third World states have interpreted these provisions, particularly the statements on "support,"³⁹⁷ as attributing to states the right to provide armed force to help those engaged in legitimate struggles of self-determination.³⁹⁸ Rigo Sureda comments that, while the First World states argue against the Third World position, in practice they have at least acquiesced in such courses of action, even if they have not actively supported them.³⁹⁹ Pomerance thus argues that a new "just war" doctrine has emerged in relation to self-determination which "has entailed a complete negation of both the traditional norms governing revolution and neutrality, as well as the new U.N. anti-force norms."⁴⁰⁰

The difficulty with this new just war doctrine is that its use depends on the entirely subjective opinion of whose cause is deemed to be "just" — that is, who is attempting to exercise a "legitimate" claim of self-determination. This is not clear, for example, where legitimacy depends on

³⁹² 12 Dec. 1973; 82-13-19. This Resolution states that the struggle of such peoples for the implementation of their right to self-determination is legitimate and has the status in international law of an international armed conflict "in the sense of the 1949 Geneva Conventions." *Id.* Principle 3. Attempts to suppress such struggles, including the use of mercenaries against national liberation movements, are illegal and a threat to international peace and security.

³⁹³ G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, Annex (1974).

³⁹⁴ *Id.* Art. 7.

³⁹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, Dec. 7, 1978, 1125 U.N.T.S. 609. Protocols I & II were approved in July 1977 by the Diplomatic Conference on the Reaffirmation of International Humanitarian Law Applicable in Armed Conflicts. They entered into force in 1978 and can be found at 16 I.L.M. 1391. The four Geneva Conventions for the Protection of War Victims (Red Cross) are found at 75 U.N.T.S. 3.

³⁹⁶ See generally ESPIELL, *supra* note 260, paras. 91-105.

³⁹⁷ See e.g., *supra* notes 392, 395 & 396 and accompanying text.

³⁹⁸ POMERANCE, *supra* note 192, at 60.

³⁹⁹ RIGO SUREDA, *supra* note 184, at 348. Buchheit supports this conclusion. BUCHHEIT, *supra* note 194, at 34-38.

⁴⁰⁰ POMERANCE, *supra* note 192, at 61.

subjective opinions on forms of self-government. This makes the exercise of the right of self-determination more, rather than less, problematic because it involves even clearer violations of a state's sovereignty but on less clear bases. That is, physical intrusion may be based on political opinions about the desirability of the form of a country's government.⁴⁰¹ The right to use force to achieve self-determination thus fuels the problems created by the lack of agreement on the definition of "representative government." The hindrance to the self-determination of indigenous peoples is thereby exacerbated.

3. Other Substantive Aspects of the Right of Self-Determination

The discussion on achieving self-determination has focused on the political aspects of the right, both internal and external. In addition to the right of a people to "freely determine their political status,"⁴⁰² the right of self-determination entails the right of a people to "freely pursue their economic, social and cultural development."⁴⁰³ These aspects are not typically examined as they are thought to derive from, and thus be considered after, the free exercise of political self-determination.

The rights of peoples to social development⁴⁰⁴ and to cultural development⁴⁰⁵ do not pose barriers to the achievement of political self-determination for indigenous peoples in the way that the right to economic development does. For example, the denial of a right of self-determination for a people has not been justified on the basis of cultural or social development, whereas it has been denied on the basis of the right to economic development.⁴⁰⁶ For this reason, despite the interdependence of the various aspects,⁴⁰⁷ this section will focus on economic development.⁴⁰⁸

The right to economic development has two aspects: the use of nat-

⁴⁰¹ As an illustration, Pomerance comments that a right of revolution is never recognized by states as valid against themselves; instead, it has been recognized "when directed against others, and particularly against others with whom one did not especially sympathize or share common values." *Id.*

⁴⁰² *International Covenants*, *supra* note 61, art. 1(1).

⁴⁰³ *Id.*

⁴⁰⁴ The Declaration on Social Progress and Development, G.A. Res. 2542 (XXIV), of 11 Dec. 1969, in Cristescu, *supra* note 221, para. 81 (stating that the Declaration "is the chief instrument adopted by the United Nations to promote the right of peoples to social development."). For further detail, see *id.* paras. 548-583.

⁴⁰⁵ The UNESCO Declaration of the Principles of International Cultural Co-operation, Nov. 4, 1966, UNESCO, *Records of the General Conference*, 14 Sess. 86-89 (1966), and G.A. Resolution 3148 (XXVII) of 14 Dec. 1973, entitled "Preservation and further development of cultural values," are the two primary instruments promoting the right to cultural development. For further detail, see Cristescu, *supra* note 221, paras. 584-678.

⁴⁰⁶ See, e.g., discussion *infra* notes 419-426 and accompanying text.

⁴⁰⁷ See, e.g., Cristescu, *supra* note 221, paras. 550-55.

⁴⁰⁸ For a discussion of all the relevant aspects of economic development, see *id.* paras. 329-547.

ural resources and economic growth. While they are clearly intertwined, it is particularly the first of these that poses a further obstacle to granting the right of self-determination to indigenous peoples within states.

The link between the entitlement to the natural resources within one's territory and the self-determination of the people of that territory was most clearly made during the the discussion in the 1950s of the inclusion of a right to self-determination in the International Covenants.⁴⁰⁹ This led to the establishment of a Commission on Permanent Sovereignty over Natural Resources to study the status of such sovereignty and to make recommendations for its strengthening.⁴¹⁰ The principle of a people's sovereignty over the natural resources within its territory was subsequently affirmed in numerous General Assembly resolutions⁴¹¹ and explicitly included in Article 1 of the International Covenants.⁴¹² While the Charter provides a general, authoritative statement of this right,⁴¹³ the two primary international instruments today concerning sovereignty over natural resources are the U.N. General Assembly Resolution, on Permanent Sovereignty Over Natural Resources,⁴¹⁴ and Resolution 3281 (XXIX), containing the Charter of Economic Rights and Duties of

⁴⁰⁹ See, e.g., G.A. Res. 626 (VII), U.N. Doc. E/CN.4/L.24 (1952) ("the right of peoples freely to use and exploit their natural resources is inherent in their sovereignty") and G.A. Res. 1314 (XIII) of 12 Dec. 1958 ("the right of peoples and nations to self-determination . . . includes 'permanent sovereignty over their natural wealth and resources'"). These are described briefly in Cristescu, *supra* note 221, paras. 442-43.

⁴¹⁰ G.A. Resolution 1314 (XIII) of 12 Dec. 1958.

⁴¹¹ See, e.g., the Preamble to resolution 1514 (XV), The 1960 Declaration on Colonialism, *supra* note 258, preamble. The General Assembly recommended "that the sovereign right of every State to dispose of its wealth and its natural resources should be respected, in conformity with the rights and duties of States under international law." G.A. Res. 1720 (XVI) of 19 December, 1961; *Permanent Sovereignty over Natural Resources*, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217 (1962); G.A. Res. 2158 (XXI) of 25 Nov. 1966; G.A. Res. 2386 (XXIII) of 19 Nov. 1968 (the General Assembly considered that the permanent sovereignty of each nation over its natural wealth and resources as a prerequisite to social progress and development); G.A. Res. 2692 (XXV) (1970), cited in SCHACHTER, *SHARING THE WORLD'S RESOURCES* 124-34 (1977); G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030 (1973) (the exercise of sovereignty over natural resources included all resources, whether found on or under land or in or under the sea); Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. GAOR, Supp. No. 1, U.N. Doc. A/9559 (1974). See also Security Council Resolution 330 (1973) of 21 March 1973. See also Cristescu, *supra* note 221, paras. 432-482 (discussing permanent sovereignty over natural resources), particularly paras. 438-461 (describing the various international instruments).

⁴¹² "All peoples may, for their own ends, freely dispose of their natural wealth and resources. . . . In no case may a people be deprived of its own means of subsistence." International Covenants, *supra* note 61, art. 1(2).

⁴¹³ *Id.*

⁴¹⁴ G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962). See Cristescu, *supra* note 221, at para. 447 for a summary of the drafting proposals in respect of this resolution.

States.⁴¹⁵

Resolution 1803 declares, *inter alia*, that the “[v]iolation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.”⁴¹⁶ Article 2(1) of the Charter of Economic Rights and Duties of States provides that “[e]very State has permanent sovereignty over its natural wealth and resources and has the inalienable right fully and freely to dispose of them.”⁴¹⁷ Article 1(1) provides that “[e]very State has and shall freely exercise full and permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.”⁴¹⁸

The various resolutions make it clear that sovereignty over resources is one aspect of the overall sovereignty of a state. The barriers that this poses to the self-determination of indigenous peoples are of two types. The first, more general, barrier is the fact that it defines the peoples that are the relevant unit of self-determination territorially. This has two consequences. One of these is that it encourages the equation of peoples with *existing*, territorially-defined political units. Because of the principle of territorial integrity, this makes it very difficult for indigenous peoples within such units to be considered as separately entitled to self-determination. The second of these is that it encourages the assumption that the only legitimate goal of self-determination can be defined territorially. When linked with the principle that a people has inherent sovereignty over the resources in its territory, this implies that the ultimate goal of self-determination for a people that only comprises part of an existing state is secession. Thus, for example, even where an indigenous people is not seeking secession but is seeking more autonomy within an existing state, because secession is regarded as an option for the future, their claim to self-determination may still be *treated* as a claim of ultimate secession and thereby denied. If it is not treated as a claim of full self-determination, and some attempt is made to accord more autonomy within the state, even if the use of some resources may be negotiated, *sovereignty* over natural resources is accordingly denied to the part and retained by the whole.⁴¹⁹ The strict interpretation of property rights over

⁴¹⁵ Charter of Economic Rights and Duties of States, Jan. 15, 1975, 14 I.L.M. 251.

⁴¹⁶ *Supra* note 414.

⁴¹⁷ *Supra* note 415.

⁴¹⁸ *Id.*

⁴¹⁹ See, e.g., the agreement reached between the Inuit and the Canadian government concerning Nunavut. John F. Burns, *Accord to Give the Eskimos Control of a Fifth of Canada*, N.Y. TIMES, December 17, 1991, at A1; Tim Harper, *Were Natives Pawns in a Government Experiment?*, TORONTO STAR, Dec. 22, 1991, at B1; William Claiborne, *Canada, Eskimos to Create Vast Arctic Treaty*, WASH. POST, Dec. 17, 1991, at A1.

natural resources thus encourages and is encouraged by the strict territorial interpretation of "peoples" and thus also of the right of self-determination.

The second barrier that that concept of sovereignty over resources poses to the self-determination of indigenous peoples is that, because a (territorially defined) people is entitled to sovereignty over the resources within its territory, it denies the right of any particular part of the whole to exercise self-determination. This is because that would entail claiming part of those resources for its sole benefit, whereas it is the people as a territorially-defined whole that has the right to the use of the resources of the territory.⁴²⁰ Further, the right of the whole people to not be deprived of their means of subsistence⁴²¹ means that, where the resources in question are necessary for the economic development of the whole people, it is even clearer that a part of the whole people is unable to claim those resources for its sole benefit.

An example of where the issue of sovereignty over resources played a large role in the denial of a part of a state to exercise self-determination is the case of Katanga's attempted secession from the (Belgian) Congo.⁴²² A factor in prompting the claim for separate self-determination was precisely that Katanga had large amounts of natural mineral resources that the Katanga people wanted to exploit.⁴²³ This, plus the fact that these resources were the primary natural resources of the whole Congo, were the very factors that operated to deny the Katanga people an entitlement to secede and take the resources with them.⁴²⁴ It is because of the Katanga example that scholars attempting to develop theories of secession give as a factor going against a right of secession in a particular instance, any resulting economic non-viability of the remaining part of the state.⁴²⁵ Further, where it is the *intent* of the resource-rich part of the state to benefit from the exploitation of those resources and to deprive the rest of the state of such benefits (rather than it just being a consequential result), there is even more reason to deny a right of secession to the part.⁴²⁶

In conclusion, in stemming from the principle of territorial integrity, the barriers posed by the territorial definition of a people and by their

⁴²⁰ See International Covenants, *supra* note 61, art. 1(2).

⁴²¹ *Id.*

⁴²² For discussion of this case, see e.g., BUCHHEIT, *supra* note 194, at 141-53. See also CRAWFORD YOUNG, POLITICS IN THE CONGO: DECOLONIZATION AND INDEPENDENCE (1965); JULES GERARD-LIBOIS, KATANGA SECESSION (Rebecca Young trans., 1966); CRAWFORD, *supra* note 168, at 263-65, and authorities cited therein.

⁴²³ See, e.g., BUCHHEIT, *supra* note 194, at 152.

⁴²⁴ *Id.*

⁴²⁵ See section *infra* entitled Secession.

⁴²⁶ *Id.*

sovereignty over the resources of that territory can be regarded as part of the overall barrier that the concept of sovereignty poses to the self-determination of indigenous peoples currently situated within states and other accepted political units.

4. Conclusion on the Law of Self-Determination

While self-determination may be considered the fundamental basis for all other human rights,⁴²⁷ it does not actually mean that all peoples are entitled to a form of government of their choice where that is different from the form of government of the state in which they live. In the case of indigenous peoples within states (or other accepted political units), a right of separate self-determination is not currently recognized in positive international law because the ultimate goal of self-determination is independence, and includes the possibility of secession. These goals are considered to be inappropriate for indigenous peoples, who are consequently deemed to not fit either of the requisite definitions of "self." Indigenous peoples are thus considered to be entitled to exercise self-determination only as part of the state as a whole. Their rights are trumped by the state's right to territorial integrity and to non-intervention with its internal affairs, and to other attributes of sovereignty such as sovereignty over natural resources. In conclusion, the international law of self-determination may be an attempt to achieve human rights for peoples, but only within the existing system of state sovereignty. No right of self-determination is recognized where it clashes with the rules of the system.

III. THE INADEQUACY OF THE PRESENT INTERNATIONAL LAW

Part II deliberately described the more traditional, accepted view of the laws of sovereignty and self-determination in order to illuminate the barriers that indigenous peoples face when arguing (particularly with those who hold this more accepted view) for the recognition of a full right of self-determination. As the description in Part I shows, the barriers to the recognition of a full right of self-determination for indigenous peoples are proving to be very difficult to overcome. The issue for those interested in the human rights of indigenous peoples is what that implies for the strategy in relation to the drafting of the declaration on the rights of indigenous peoples currently being prepared by the Working Group. Part I, section 3, discussed what appear to be the options available, the primary choices being between insisting on the inclusion of a full right of self-determination in the draft declaration and settling for a statement that does not include the right to full independence or secession.

⁴²⁷ See, e.g., *infra* notes 502-505 and accompanying text.

The argument that self-determination should be redefined so as to focus on internal more than external aspects has been addressed by other scholars.⁴²⁸ It is also clearly the less difficult path to follow in terms of reaching agreement on the draft declaration presently being prepared. For these reasons, and because indigenous peoples' representatives at the Working Group still argue that a right of self-determination that includes the option of independence and secession must be included in the draft declaration,⁴²⁹ I will instead address the issue of how these barriers may be overcome. I am not stipulating a preference for choosing this approach over the other; I am merely identifying issues that must be addressed if this approach is to be taken. To this end, the remainder of this paper will focus on the inadequacies for indigenous peoples of the accepted law and the issues raised by them which need to be addressed if these barriers are to be overcome.

This Part first comments on aspects of the law of self-determination described in Part II. It considers issues concerning the definition of "peoples," colonialism, the basis of the right of self-determination, the legal requirements in respect of internal self-determination, and secession. It outlines some approaches of other scholars, including some alternative interpretations of what the present law on self-determination actually is, and suggests how the situation and claims of indigenous peoples may compel one approach being taken over another. This Part next comments on the rules of non-intervention in the domestic affairs of states and of territorial integrity, questioning their primacy in international law and again suggesting that the situation and claims of indigenous peoples indicate that a different status may be appropriate. Finally, the implications of the various arguments for the principle of sovereignty are considered.

A. *The Law of Self-Determination*

The claims by indigenous peoples of self-determination raise a number of issues relating to all the aspects of the law of self-determina-

⁴²⁸ For example, Hurst Hannum argues for the development of a right of autonomy. HANNUM, *supra* note 22. James Anaya argues that, despite the prohibition on secession, international customary law has emerged "from self-determination's jurisprudential core" to recognize a right to cultural integrity (or cultural self-determination): "indigenous peoples have the right to exist as distinct cultural communities and develop freely as such in all spheres of life, to live within a governing institutional order that reflects their specific characteristics, and genuinely to be associated with all decisions affecting them." Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1 (1991). See also Anaya, *supra* note 54 (noting that some scholars do say that indigenous peoples have a right to self-determination, even if that is not full, secessionist self-determination). Because the focus in this paper is on the full right of self-determination, including the option of independence and secession, I am ignoring this other use in order not to confuse what I mean when I refer to the "right of self-determination."

⁴²⁹ See *supra* Part I.

tion discussed above. The primary issue, however, is the focus of the debate. This section will illustrate how that focus is wrong and will suggest what it should be. The definitions of "peoples" and of "colonialism" are relevant to who is entitled to the right of self-determination; indigenous peoples argue that they satisfy both of these requirements while states deny it. I suggest that, in respect to both of these aspects, instead of focusing on definitions, the focus should be on the overriding goals of the participants, that is, the important interests that the parties want protected in international law. Only by reference to what we think the law should protect and provide for can we decide what the law should be.

Following from this, the underlying purpose or basis of the law is then addressed. The discussion examines the relationship between the different claimed bases for the right of self-determination, showing that only after clarifying the purpose of the right can we decide when it has been fulfilled. Next the substantive elements of the right of self-determination — both internal and external — are addressed. I propose that criteria must be devised in order to determine when a people has achieved their self-determination, and I outline various suggestions made by other scholars for such criteria.

1. "Peoples"

The issue of the definition of "peoples" is made relevant by two factors: first, its use in Article 1 of the Covenants and other international instruments proclaiming that all peoples have the right to self-determination;⁴³⁰ and, second, the claims made by states that indigenous peoples are not "peoples" and therefore do not have the right to self-determination.⁴³¹

Despite the reference in the Covenants, and other repeated references in international law to various different rights of peoples,⁴³² there is no definition of "peoples" or "people" in international law.⁴³³ The rea-

⁴³⁰ See *supra* note 272 and accompanying text.

⁴³¹ See *supra* notes 60-62 & 308-315 and accompanying text.

⁴³² For a discussion of various aspects of the rights of peoples, see *THE RIGHTS OF PEOPLES* (James Crawford ed., 1988).

⁴³³ See, e.g., Cristescu, *supra* note 221, para. 269. "It will be found that there is no accepted definition of the word 'peoples' and no way of defining it with certainty. . . . There is no text or recognized definition from which to determine what is a 'people' possessing the right in question." *Id.* See also, Ian Brownlie, *The Rights of Peoples in Modern International Law*, in *THE RIGHTS OF PEOPLES*, *supra* note 432, at 1. Brownlie does not put it too strongly when he criticizes that "it is characteristic of the appallingly abstract nature of such exercises that those of us who are engaged in the practical solution of problems relating to group rights can find no assistance in their provisions. In particular, no attempt is made to define peoples. . . . The very problems which stand in need of careful study are left blandly on one side." *Id.* at 12. See also STAVENHAGEN, *supra* note 1 (stating that "there is no legal definition of a people. The United Nations has carefully avoided [trying] to define 'people,' even as it has conceded all peoples [have] the right to self-determination.").

son given is typically that "peoples" is too vague and imprecise and thus too difficult to define.⁴³⁴

The English language ascribes different meanings to "people" in different contexts.⁴³⁵ Both general and international law similarly ascribe different meanings to "peoples" in different legal contexts.⁴³⁶ In the context of self-determination, the ordinary meaning of "people" relates to "a specific type of human community sharing a common desire to establish an entity [in order] to ensure a common future."⁴³⁷ In ordinary usage, the types of human community that are relevant are thus those that are "united by a common culture, tradition, or sense of kinship, that typically have a common language, institutions, and beliefs."⁴³⁸ This definition is indeed broad enough to encompass a tribe, race, nation or state.⁴³⁹

Scholarly approaches to the definition of "peoples" stress that two types of requirements must be met before a group of individuals may be considered a "people" in the context of self-determination: objective and subjective requirements.⁴⁴⁰ The objective requirements encompass such factors as common language, culture, religion, race or ethnicity, territory, and history.⁴⁴¹ The subjective requirements concern the collective state of mind: the way the relevant ethnic and other identities have been

⁴³⁴ See, e.g., ESPIELL, *supra* note 260, para. 56; Cristescu, *supra* note 221, paras. 275, 276 & 278. It is for this reason that United Nations bodies have "on various occasions" recommended that the definition of "peoples" be studied. *Id.* para. 278. See also Brownlie, *supra* note 433, at 16.

⁴³⁵ See, e.g., the variety of different meanings given in WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1983). For additional illustrations of different uses see WEBSTER'S NEW COLLEGIATE DICTIONARY (1959) (including "the peoples of Europe," "all sorts of people," "the people of New York," "my people were English.").

⁴³⁶ See BLACK'S LAW DICTIONARY 1135 (6th ed. 1990) "People" is defined as, A state; [a]s in the people of the state of New York. A nation in its collective and political capacity. The aggregate or mass of the individuals who constitute the state. . . . In a more restricted sense, and as generally used in constitutional law, the entire body of those citizens of a state or nation who are invested with political power for political purposes. See also "Citizen" and "Person."

Id. In relation to international law, see, e.g., Crawford, *The Rights of Peoples: Some Conclusions, in THE RIGHTS OF PEOPLES, supra* note 432, 159-175, at 169-170. "Peoples" is defined differently for different types of peoples' rights. For example, the right not to be subjected to genocide and the right not to be deprived of one's existence are "plainly applicable to a very broad category of groups, considerably more so than the principle of self-determination." *Id.*

⁴³⁷ ESPIELL, *supra* note 260, para. 56.

⁴³⁸ WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, *supra* note 435.

⁴³⁹ WEBSTER'S NEW COLLEGIATE DICTIONARY, *supra* note 435.

⁴⁴⁰ See, e.g., Joxerramon Bengoetxea, *Nationalism and Self-Determination: The Basque Case, in ISSUES OF SELF-DETERMINATION, supra* note 317, at 133, 139; Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102, 104 (1976); Secretariat of the Int'l Comm'n of Jurists, *East Pakistan Staff Study*, 8 INT'L COMM'N. OF JURISTS REV. 47.

⁴⁴¹ Not all of these factors must be present in any one case, nor are they exhaustive. But these are typically the factors from which individuals construct the identity of their group.

created,⁴⁴² consciousness as a distinct people, and a political will to exist as a distinct people.⁴⁴³ In reality, the subjective and objective elements are related, as “[p]eople will construct and negotiate their national identity by drawing on certain elements: language, culture, religion, history, etc. . . .”⁴⁴⁴

Such criteria imply that a people is distinct from a state or other political entity. Under such criteria, indigenous peoples are indeed peoples⁴⁴⁵ and would therefore appear to be entitled to the international legal right of self-determination. However, positive international law has not accorded that right to indigenous peoples; instead it treats them as simple minority populations within states.⁴⁴⁶ Further, international law considers that states are peoples for the purposes of self-determination.⁴⁴⁷ The important issues for those applying the right of self-determination is thus how the definition of “peoples” in international law is arrived at and why it excludes groups that satisfy the ordinary meaning of the word.

As the description in Part I shows, states ostensibly reject the application of self-determination to indigenous peoples on two grounds: (i) that indigenous peoples are not peoples for the purposes of self-determination, and (ii) that the consequences of application would lead to the violation of the principles of territorial integrity and non-intervention in states’ domestic affairs. However, these are not two separate reasons because, as the history of the development of the right to self-determination described in Part II shows, the argument that indigenous peoples are not peoples is not a deduction from independent arguments about what a

⁴⁴² Bengoetxea, *supra* note 440, at 139.

⁴⁴³ See, e.g., *East Pakistan Staff Study* *supra* note 440, at 47. “[A] people begins to exist only when it becomes conscious of its own identity and asserts its will to exist.” See also Dinstein, *supra* note 440, at 104. “It is essential to have a present ethos or state of mind. A people is both entitled and required to identify itself as such.” *Id.*

⁴⁴⁴ Bengoetxea, *supra* note 440, at 139. Further, “[t]he expression of national identity is, therefore, both a reflection of and a logical outcome of the expression of individual identity.” Huw Thomas, *Perestroika in the Western Wing - Nationalism and National Rights Within the European Community*, in *ISSUES OF SELF-DETERMINATION*, *supra* note 317, at 149, 154.

⁴⁴⁵ By definition, an indigenous people is one whose members share a common culture, history, ethnic identity and territory, and which remains distinct from the dominant society of the state in which they live. See *supra* note 1. Further, indigenous peoples have shown by their claims to self-determination that they identify as separate peoples and have the necessary political will for self-government. See, e.g., *GRAND COUNCIL OF THE CREES (OF QUEBEC), STATUS AND RIGHTS OF THE JAMES BAY CREES IN THE CONTEXT OF QUEBEC’S SECESSION FROM CANADA*, Submission to the Commission on Human Rights on its Forty-Eighth Session (Ottawa, February 1992) (unpublished document, on file with author) (qualifying the James Bay Cree as a people under these criteria).

⁴⁴⁶ *Supra* note 317 and accompanying text. Recall also the debate over the use of “peoples” or “populations,” *supra* notes 15 & 307-315 and accompanying text. “Populations” implies an arbitrary collection of individuals. “Peoples” implies an internal cohesiveness to the group.

⁴⁴⁷ See *supra* Part II. See also, Cristescu, *supra* note 221, para. 266. “States in the international meaning of the word are obviously ‘peoples.’” *Id.*

“people” is, but it, too, is a conclusion from the consequences of application of the right. The drafters of the various international instruments that refer to the right of peoples to self-determination avoided clarifying “peoples”,⁴⁴⁸ both because it was thought too difficult⁴⁴⁹ and because it was not needed.⁴⁵⁰ However, both of these apparently separate reasons stem from the same cause: the fear of the consequence of according the right to self-determination to groups other than those agreed to be peoples for the purposes of the right in international law. The consequence of adopting a wider interpretation is that it would “turn the right of peoples to self-determination into a weapon for use against the territorial integrity and political unity of states.”⁴⁵¹ Therefore, despite the professed “vital importance” of defining “peoples” in order to identify the holder of the right to self-determination,⁴⁵² the answer is arrived at completely independently of any consideration of the meaning of “peoples.” The meaning of “peoples” is, in practice therefore, irrelevant. Instead, the answer is arrived at in reverse, by excluding those peoples for whom application of the right to self-determination could entail secession.⁴⁵³ There is thus in fact only one reason why the right to self-determination for indigenous peoples is rejected: the consequences of its application, namely the violation of state sovereignty.

Both the technique used for arriving at this result and the result itself can be criticized for obscuring the barriers to according a right of self-determination to indigenous peoples and thus making them difficult to address and overcome. The technique has been to proclaim a general right, that “all peoples have the right to self-determination,”⁴⁵⁴ but to restrict it, not by an explicit, restricted definition of “peoples” or by an exception clause, but instead by separate documents that prohibit the disruption of national unity or territorial integrity.⁴⁵⁵ David Makinson, a logician, describes this as a logical inconsistency or “‘semantic blockage’ - a situation where it is logically impossible to give any meanings to the

⁴⁴⁸ See, e.g., Cristescu, *supra* note 221, paras. 260-63. See generally *supra* Part II.

⁴⁴⁹ See *supra* note 434 and accompanying text.

⁴⁵⁰ See, e.g., David Makinson, *Rights of Peoples: Point of View of a Logician*, in THE RIGHTS OF PEOPLES, *supra* note 432, 69, at 74 (referring to Article 1(1) of the International Covenants: “The political needs of the time did not require such clarification. All that was needed was a tacit agreement that inhabitants included within the borders of European colonies in Africa and other regions of the world did constitute peoples”). See also, description of the drafting of the Charter and the International Covenant in Part II, *supra*.

⁴⁵¹ Cristescu, *supra* note 221, para. 275.

⁴⁵² *Id.* para. 260.

⁴⁵³ In addition to the authorities cited in Part II, *supra*, see e.g., Cristescu, *supra* note 221, paras. 268 & 275.

⁴⁵⁴ International Covenant, *supra* note 61, art. 1(1).

⁴⁵⁵ These separate documents include the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 258, and the U.N. Declaration on Friendly Relations, *supra* note 278.

operative terms involved that at one and the same time leave the texts mutually consistent and still have some resemblance to ordinary usage."⁴⁵⁶

A further criticism of the technique can be made of the states' arguments used to justify the result. While they do explicitly state that there can be no self-determination where it will violate the sovereignty of states, they focus as often on "peoples," denying that this concept extends to indigenous "populations."⁴⁵⁷ This implies that they have arrived at an objective definition of "peoples," applied the relevant criteria, and thereby come to the conclusion that indigenous peoples do not have the right of self-determination. In fact, the conclusion is reached first and the definition constructed accordingly. Indigenous peoples are thus deemed to not be under colonial or foreign occupation and to have achieved self-determination through the state in which they live. By their semantics, states have avoided debate on these issues and thus on the real barriers.

The result obscures the barriers to a right of self-determination for indigenous peoples by the creation and use of a legal fiction. This fiction is best described by Falk, an international legal scholar, who describes the result as "an affirmation of the rights of peoples, but as qualified by the fiction that a state and a people are virtually interchangeable ideas."⁴⁵⁸ This fiction is a "statist view of self-determination"⁴⁵⁹ that, in perpetuating a statist conception of the international legal and political system, has made the promises of self-determination largely irrelevant to indigenous peoples.⁴⁶⁰ In conclusion, this fiction is a "semantic confusion that . . . has been used to avoid confronting . . . the various lamentable situations of indigenous peoples."⁴⁶¹

This discussion makes it clear that, in arguing for recognition of a positive legal right of indigenous peoples to self-determination, there are two primary issues that must be addressed. The first concerns the barrier that states currently uphold: why national unity and territorial integrity

⁴⁵⁶ Makinson, *supra* note 450, at 75-76.

⁴⁵⁷ *Supra* notes 60-62 & 308-314.

⁴⁵⁸ Richard A. Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in *THE RIGHTS OF PEOPLES*, *supra* note 432, 17, at 26. As Makinson notes, "[t]his is a category mistake; the two concepts are different kinds of abstraction. A people is a kind of collectivity, or group of human beings; a State is a kind of governing and administering apparatus. Even when a State serves as a representative or spokesman for a people, the two are never identical." Makinson, *supra* note 450, at 73.

⁴⁵⁹ Falk, *supra* note 458.

⁴⁶⁰ *Id.* at 27. This is because it assumes that self-determination of the state achieves self-determination for all the people(s) within it; it does not assess it critically for each, culturally (etc.) defined people. For discussion of problems with treating the whole state as one self-determining unit, see *infra* section entitled Representative Self-Government.

⁴⁶¹ *Id.*

are absolute rights that cannot be violated. The second is why a right of self-determination should be recognized.

In addressing the ultimate barrier to expansion of the right of self-determination, the focus needs to be on its justification: why the overarching principle of state sovereignty exists in present international law and why it should continue to exist as an inviolable, absolute right. While the various state interests in upholding sovereignty are presently assumed, and others that come into conflict with them are summarily rejected, this needs re-evaluation. Argument needs to focus on the situations in which these interests should be upheld over the interests of indigenous peoples in their self-determination. This will in turn require a deliberate focus on the actual interests of indigenous peoples in the context of self-determination, a focus that has been avoided by the rhetoric to date.

The issue why indigenous peoples should have a right of self-determination in international law cannot be addressed without first focusing on what the nature of the right of self-determination is and what it is designed to achieve. There have been two propositions put forward about the nature of the right of self-determination: that it is an inherent right of peoples and that it is an instrumental right designed to secure the attainment of other human rights.⁴⁶² Under the first proposition, that it is an inherent right of peoples, the primary focus would be on peoples and what a right of self-determination is thought to entail for a people. The definition of "peoples" in this case, while it would clearly be dependent on the context of the right of self-determination as opposed to other rights of people, would be more likely to accord with the ordinary meaning and less likely to be a constructed legal term of art. The content of the right would be assessed by consideration of inherent aspects of such peoples; for example, what recognition of the dignity of the human person might entail, and what is necessary in order to ensure that the people are able to determine their own future. While such considerations would be subject to evaluation against competing considerations in the application of a right of self-determination, the definition of the holders of the right would necessarily be prior to such evaluations.

If an instrumental view of the right of self-determination is taken — that self-determination is recognized solely in order to achieve other recognized, fundamental human rights of individuals and peoples — then the primary focus would be on situations where human rights are being abused. One would then work backwards from there and determine what is necessary to achieve the recognition and attainment of the relevant human rights and whether self-determination is applicable in any given situation. The category of holders of the right would follow from

⁴⁶² See, e.g., *supra* notes 50-52 and accompanying text.

this determination. The resulting definition of "peoples" would depend less on ordinary meaning and more on the meaning necessary for the legal purpose it would be designed to achieve. As an instrumental construction, it would be a legal term of art.

The issue whether the right of self-determination is conceived of as an inherent right of peoples or an instrumental right is addressed below.⁴⁶³ The previous discussion is merely meant to identify the proper focus of discussions on the recognition of a right to self-determination for any particular group. In fact it is clear that indigenous peoples have attempted to focus on such issues⁴⁶⁴ but that the rhetoric employed by states in defending the present law has drawn attention away from them. This section has shown that the present rhetoric must be changed if the barriers to the recognition of a right of self-determination for indigenous peoples in international law are to be overcome. These barriers must be overcome in order to properly address what rights should be recognized in a draft declaration of the rights of indigenous peoples.

2. Colonialism and Foreign Subjugation

The treatment of the issues of colonialism and foreign subjugation has been similar to that of the definition of "peoples." Because the international law of self-determination uses definitions of colonialism and foreign subjugation for the purposes of deciding which peoples are entitled to self-determination, these definitions have been used to claim that indigenous peoples are not colonized or subjugated within the definition and are *therefore* not entitled to self-determination. While I will concentrate in this section on the category of colonialism, the following comments apply similarly to foreign subjugation.

The definition of colonialism in international law restricts the category of colonies, or non-self-governing territories, to those under alien subjugation which are also politically and geographically separate from, ethnically or culturally distinct from, and arbitrarily subordinated by the state in question.⁴⁶⁵ States which are not colonial powers are entitled to have their territorial integrity respected.⁴⁶⁶ There are two types of criticism that may be made of this definition. The first is that it is not being applied consistently by states — there are some indigenous peoples that presently satisfy these requirements. The second is that this definition is too restrictive to solve the problems that it was said to be designed to solve. Both types of criticism give rise to the criticism that state interests

⁴⁶³ See section *supra*, entitled "Nature of the Right of Self-Determination."

⁴⁶⁴ See the description *supra* notes 49-55 and analysis *supra* Part I(B) of the claims of indigenous peoples to self-determination.

⁴⁶⁵ See *supra*, notes 262, 264 and accompanying text.

⁴⁶⁶ See, e.g., *supra*, note 279 and accompanying text.

are trumping those of indigenous peoples without any direct evaluation of the interests involved.

The first criticism argues that, even taking narrow interpretations of the requirements, there are some indigenous peoples currently within present states that satisfy the definition in Resolution 1541 of a "non-self-governing" territory.⁴⁶⁷ That is, these indigenous peoples are geographically separate from the rest of the state, they are culturally and ethnically distinct, and are arbitrarily subordinated within that state. As a non-self-governing territory, the state in question is not entitled to its territorial integrity if that is taken to include the indigenous peoples' territory. Instead, the non-self-governing territory must be excluded from the original state's boundaries and given the option of achieving its separate independence.⁴⁶⁸

An example of where this argument has been made is in respect of the Dene and Inuit peoples of the Canadian Northwest Territories. Ian Brownlie, a respected professor of international law whose views on international law are widely accepted, expressly considered this example and came to the conclusion that the Dene and Inuit people living in the Northwestern Territories were non-self-governing within the terms of Resolution 1541 and were thus a "unit of self-determination" within international law.⁴⁶⁹ In response to the traditional argument that it only applies in cases of "salt-water" colonialism,⁴⁷⁰ Brownlie makes three arguments:

In the first place, as a matter of interpretation, the phrase "geographically separate" in Resolution 1541 (XV) may readily include areas such as N.W.T., or Lapland, which *are* in a real sense geographically distinct from other neighbouring areas. Such areas are distinct in character and are *separate*. It is to be remembered that the discussion is about geographically separate *peoples*, in opposition to scattered groups, lacking a *land* focus: for example, Ukrainians or Jews within the Canadian population in general.

Secondly, the application of the principle of self-determination in the practice of the organs of the United Nations has not been prevented by the claim by the colonial power that the territory concerned was a *part* of France, Portugal or Spain. The status of Algeria as a part of France made no difference to the general assessment of Algeria as a unit of self-determination.

Thirdly, and most importantly, the wording of the key resolution,

⁴⁶⁷ See *supra*, note 264 and accompanying text.

⁴⁶⁸ See *supra* note 269 and accompanying text.

⁴⁶⁹ Opinion of Professor Ian Brownlie, D.C.L., November 3, 1977 (unpublished legal opinion, on file with author) [hereinafter Opinion].

⁴⁷⁰ See *supra* note 264. This theory posited that only overseas colonies, distant from the metropolitan colonizer, could become units of self-determination.

General Assembly Resolution 1514 of 1960 [the Declaration on Colonialism], the normative and legal source of self-determination in modern international law, by no means restricts the principle to overseas possessions. The Declaration . . . refers to "all peoples" (writers emphasis), and the preambular part (second *considerandum*) also refers to "all peoples." Paragraph 5 of the Declaration refers to "Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence" (writer's emphasis).⁴⁷¹

As further support, Brownlie notes that United Nations practice since 1965 has involved "the clear application of self-determination outside the colonial agenda"⁴⁷² — i.e., in situations of exclusionary, racist regimes.⁴⁷³ He concludes:

The conclusion which is inescapable is that the practice of States (the source of customary international law) subsequent to Resolution 1514 of 1960 serves to confirm the view that the Resolution, and the principle which it embodies, is not limited to the self-determination of overseas possessions, i.e., extra-regional domination.⁴⁷⁴

Brownlie's opinion was written in 1977. While states have consistently denied that such peoples are self-determination units, which can be seen in itself as evidence of state practice and thus customary law, it is arguable that the later cases of Namibia and Yugoslavia support his arguments.⁴⁷⁵ Brownlie's opinion thus shows how the law actually devised by states could be used to enable the self-determination of at least some indigenous peoples, ostensibly without challenging the territorial integrity of states. That is, international law is applicable; it is just a matter of the states concerned having the will to apply it in these situations.

The reason given why states have not applied the law in these situations is the inviolability of territorial integrity. This, however, is not a sufficient reason in itself because claimed territorial integrity is not protected in situations where part of the claimed state contains a non-self-governing territory. There are thus other reasons behind why states claim and protect territorial integrity in the first place.⁴⁷⁶ These reasons,

⁴⁷¹ Opinion, *supra* note 469, paras. 16-18 (emphasis in original).

⁴⁷² *Id.* para. 19.

⁴⁷³ *Id.* paras. 19-21. In support, he cites the U.N. resolutions made in such cases as (then) Rhodesia, Palestine, and Bangladesh. *Id.* para. 20.

⁴⁷⁴ *Id.* para. 21. Note that all of Brownlie's arguments are based on international law. For additional, policy reasons why his conclusion should be reached, see *infra* remainder of this section.

⁴⁷⁵ The case of Namibia, while slightly different, is arguably relevant nonetheless. Its relevance lies in its retention of its entitlement to separate self-determination despite neighbouring South Africa's claims to the contrary. For a detailed description and analysis of the claims involved, see BERAT, *supra* note 260. For different possible interpretations of the case of Yugoslavia see *supra* note 325.

⁴⁷⁶ Barsh, in arguing that the denial of self-determination to indigenous peoples "is a form of racism and discrimination" in itself, implies that one such reason is simple racism. Russel L. Barsh,

however, are not brought into the discussion to justify the application (or rejection) of the right of self-determination and/or of territorial integrity in the different circumstances. I suggest that, because it is these reasons or interests that are overriding the reasons and interests of indigenous peoples in application of the law, these reasons and interests must be directly evaluated. With such an evaluation it may turn out to be possible to satisfy more of the interests concerned rather than satisfying all of one and none of the other. That is, at present it is treated as a zero-sum game, when in fact, if it were approached differently, it may turn out to enable a positive-sum outcome.

The second criticism is more far-reaching than the first as it argues for an even wider scope of application of the laws on colonialism and non-self-governing territories. This criticism starts from the premise that the definition of colonial (and racist) subjugation is derived from the conclusion of a set of arguments concerning the appropriate treatment of peoples. As the Preamble of the Declaration on the Granting of Independence to Colonial Countries and Peoples⁴⁷⁷ shows, the impetus for the recognition of a right to self-determination for colonized peoples was that it denied the colonized peoples their freedom and independence, it exploited them and their resources, denied them equal human rights, and impeded their social, economic and cultural development.⁴⁷⁸ Further, these denials and impediments created conflicts and threats to the international peace.⁴⁷⁹ Finally, the Declaration stresses that the General Assembly is "Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory."⁴⁸⁰ It was the effects of colonialism that were the key to its prohibition. It is therefore these characteristics that should be used to determine whether or not any other practices, whether currently labelled colonialism or not, should also be prohibited. If the effects are equally heinous then there should at least be a *presumption* that the causes be treated equally. This presumption should be outweighed only by other interests that are held, after open comparison, to be clearly more important.

The situations of indigenous peoples today should be re-evaluated in the light of such characteristics and such a comparison should be undertaken here. Moreover, the interests of indigenous peoples should not be automatically outweighed by the (to date, implied) interests of states, and indigenous peoples should be accorded the same legal status as colonized

Indigenous Peoples and the Right to Self-Determination in International Law, in, INTERNATIONAL LAW AND ABORIGINAL HUMAN RIGHTS 73 (Barbara Hocking ed., 1988).

⁴⁷⁷ *Supra* note 258.

⁴⁷⁸ *Id.* third, fourth, seventh and eighth preambular paragraphs.

⁴⁷⁹ *Id.* fourth and seventh preambular paragraphs.

⁴⁸⁰ *Id.* eleventh preambular paragraph.

peoples presently enjoy. The reasons for this are that indigenous peoples have actually been colonized and subjugated by foreign peoples, both in the traditional sense (externally) as well as in a not-so-traditional sense (internally).⁴⁸¹

Most indigenous peoples have been subjected to the traditional form of external, alien colonization.⁴⁸² They are in their present position because of colonialism of exactly the sort that the right to self-determination is designed to remedy. For example, the indigenous peoples of the Americas and various parts of the Pacific were colonized in this way.⁴⁸³ Today we would regard such colonialism as contrary to notions of human dignity and to international law because of the breach of fundamental human rights that it entails.⁴⁸⁴ Further, it is arguable that the abuses of human rights and even the taking of land that occurred at the earlier time of colonization were considered contrary to international law at that time.⁴⁸⁵ Yet we also consider that, if it happened much before the present right was declared, the relevant indigenous peoples who never had such a right should not be granted one now (nor should they be compensated for practices that would not be tolerated today). While the characteristics of the various colonial practices are the same, and while those characteristics continue today, in many instances, the mere fact that one set of practices occurred prior to an arbitrarily-defined date is considered (by states) reason enough to ignore the realities and the causes of the present situations of indigenous peoples. It is a case of might, by passage of time, being made right. Past colonialism and the suffering that it has created is not considered worthy of a remedy.

This issue is not properly addressed in that a remedy is not even considered. The rights of present states to their territorial integrity and

⁴⁸¹ See material cited *supra* note 2.

⁴⁸² *Id.*

⁴⁸³ *Id.* See also WILLIAMS, *supra* note 7.

⁴⁸⁴ Recall President Wilson's comments on self-government: "Every people has a right to choose the sovereignty under which they shall live." 53 U.S. CONG. REC. pt. 9, at 8854, cited in WAMBAUGH, *supra* note 184, at 4; POMERANCE, *supra* note 192, at 1. It is Wilson's conception of self-determination that supposedly forms the basis of the international law of self-determination today, yet this is clearly not being applied to indigenous peoples, who have been forced to live under foreign sovereignties. See *supra*, note 192.

⁴⁸⁵ See, e.g., WILLIAMS, *supra* note 7 (describing the natural law position taken by the legal scholars of the time, such as Vitoria, Grotius and Pufendorf). For a shorter summary of these positions, see Maureen Davies, *Aspects of Aboriginal Rights in International Law in ABORIGINAL PEOPLES AND THE LAW* 16, 19-24 (Bradford W. Morse ed., 1989). While both Vitoria and Grotius believed that the Spaniards were entitled to travel and reside among the American Indians, "[t]he Hispanic peoples did not carry with them . . . any right to take possession of the lands to which they sailed." *Id.* at 23. Pufendorf went further and criticized them "for failing to recognize that indigenous nations might not be obligated to accept the visiting Spaniards." According to Pufendorf, "no nation is required to admit visiting foreign peoples." *Id.* at 22-23.

non-intervention in their domestic affairs are held to trump any other interests that might jeopardize the states' assumed interests.

In addition to being externally colonized and subjugated in the traditional sense, by overseas, European powers ("salt-water" colonialism), indigenous peoples have also been subject to external colonialism by neighboring states. While this has not been considered to warrant the same remedy, I suggest that it should.

The independent, unified State, whose territorial integrity is so jealously guarded by this restrictive approach to self-determination, may itself be the result of historical, military, and diplomatic fortuities quite unrelated to any cohesive desire of groups making up its population. International law is thus asked to perceive a distinction between the historical subjugation of an alien population living in a different part of the globe and the historical subjugation of an alien population living on a piece of land abutting that of its oppressors. The former can apparently never be legitimated by the mere passage of time, whereas the latter is eventually transformed into a protected status quo.⁴⁸⁶

This inconsistency should not exist for two reasons. First, colonization results in oppression at the time, no matter whether the colonizer is a neighboring state or is from another continent; any distinctions in law based on the difference in the sources of oppression are thus artificial. Second, the present oppression faced by peoples that have been colonized in the past by neighboring states do as much damage to the oppressed peoples as that presently faced by peoples once colonized by an overseas state.⁴⁸⁷ As I suggest that the one should be afforded a remedy, there should at least be a presumption that the other should be afforded a similar remedy. Any reasons for treating the latter differently must be debated and explicitly weighed against the reasons for recognizing a remedy. This debate does not take place for the same reasons that it does not in the situations of historical colonialism: the assumed interests of states in territorial integrity and non-intervention automatically trump those of indigenous peoples.

The third type of colonialism that indigenous peoples have been subject to is what is referred to as "internal colonialism."⁴⁸⁸ The theory of

⁴⁸⁶ BUCHHEIT, *supra* note 194, at 18. Note that his statement that the former can never be legitimated by the passage of time must be qualified because the experience of indigenous peoples shows that external, overseas colonization can be legitimated by the passage of time; the qualification is that it appears to be legitimate where the relevant colony is populated by the colonizers and later becomes an independent state. *Id.*

⁴⁸⁷ As Jose Cobo and the other authors cited *supra* note 2, have described, the present positions of all indigenous peoples need remedying; how their subjugation arose has made little discernable difference in the oppression that they face today.

⁴⁸⁸ This concept is best described by Michael Hechter, in MICHAEL HECHTER, *INTERNAL COLONIALISM* (1975). In this book Hechter outlines the theory of internal colonialism and applies it to many different cultures, describing the indigenous population as being subject to such colonialism.

internal colonialism points out that the characteristics of the more-typical external colonialism also exist within independent states, even states that have not been subject to such external colonialism.⁴⁸⁹ While the concept is admittedly controversial, it has been referred to as internal colonialism because the features and methods of exploitation are so similar to those of external colonialism.

The basic features and elements of this model are that the more-developed core of a country dominates the periphery politically and exploits it materially.⁴⁹⁰ This process of domination condemns the peoples of the periphery "to an instrumental role," which is maintained by force, "to maintain political stability," and by "a complex of racial or cultural stereotypes, to legitimate metropolitan superordination."⁴⁹¹ Michael Hechter, the primary architect of the theory, describes a number of features of such cultures, including the cultural division of labor, with the high-status occupations being reserved for the metropolitan colonizers, and the consequent lower material standard of living for the periphery.⁴⁹² Particularly in the case of indigenous peoples that were once externally colonized, such people are often forced further into the periphery by being forced onto less productive lands and exploited further.⁴⁹³

Internal colonialism, as another form of colonialism, should be rejected just as external colonialism is now rejected. This is linked to the argument that we should try to remedy the injustices done by past external colonialism, because the internal colonialism that currently exists is often one of the injustices identical to these that have arisen from the past external colonialism. In the particular case of indigenous peoples, external and internal colonialism tend to merge, as the original source of the

The theory is described at 15-43. See also Maureen Sornarajah, *Internal Colonialism and Humanitarian Intervention*, 11 GA. J. INT'L & COMP. L. 45 (1981). For works of other scholars that have used this concept in relation to North American situations, see works cited *id.* at 46 n.5.

⁴⁸⁹ Hechter, *supra* note 488.

⁴⁹⁰ *Id.* at 9.

⁴⁹¹ *Id.* The internal colonialism model accordingly rejects the traditional theories of political development and modernization that suggest that, upon industrialization, the core and peripheral regions of a country will culturally, economically and politically converge. Internal colonialism denies that such processes of national development occur "except under exceptional circumstances." *Id.* "National development" is defined as:

[A] process which may be said to occur when the separate cultural identities of regions begin to lose social significance, and become blurred. In this process, the several local and regional cultures are gradually replaced by the establishment of one *national* culture which cuts across the previous distinctions. The core and peripheral cultures must ultimately merge into one all-encompassing cultural system to which all members of the society have primary identification and loyalty.

Id. at 5 (emphasis in original).

⁴⁹² *Id.* at 9, 30 & 39. Other features include economic dependence of the periphery on the core and "national discrimination on the basis of language, religion or other cultural forms." *Id.* at 33.

⁴⁹³ *Id.* at 32.

present, internal domination of many indigenous peoples was external.⁴⁹⁴

Internal colonialism, however, is also different from external colonialism, because those objecting to internal colonialism object to it no matter how it resulted: whether it resulted from exogenous forces, such as a foreign invasion, or from forces endogenous to the society in question.⁴⁹⁵ Indigenous peoples who were not clearly externally colonized (that is, whose colonizers do not fit the accepted international law definition) typically still suffer from internal colonialism.⁴⁹⁶ For them, the lack of historical external colonization does not make any lighter the oppression they suffer today. Indeed, even though it may not fit as neatly into the definition of external colonialism, internal colonialism can be seen as a form of foreign subjugation, because the group dominating the indigenous peoples are of a culture alien or foreign to the indigenous peoples and the domination is based on racism.⁴⁹⁷ As a form of racist subjugation, the present law of self-determination should be applicable in these situations. While the present law would not entitle all such subjugated peoples to secession or independence,⁴⁹⁸ it would entitle them to other modes of self-determination, which is more than states appear willing to recognize in the draft declaration. As with the first argument, it is the lack of will of states to consistently apply the law that they devised which keeps them from recognizing internal colonialism as a form of alien subjugation.

If we take the claims that internal colonialism has resulted in exploitation, suffering, and violations of human rights, particularly violation of the claimed, inherent right of self-determination through self-government, of indigenous peoples; the question must again be posed: why is such exploitation and suffering that is presently being imposed by present internal colonization not afforded a remedy in international law? More specifically, why is the self-determination accorded to externally colonized peoples considered not applicable in this case?⁴⁹⁹ As with the answer suggested above in relation to the first criticism, the answer given to these questions by states have been simply that it violates the principles of territorial integrity of present states and non-intervention in domestic affairs. This answer is insufficient, given the interests of

⁴⁹⁴ Hechter comments that a typical source of present-day internal colonialism is the original colonization and "domination by a 'racially' and culturally different foreign conquering group, imposed in the name of a dogmatically asserted racial, ethnic, or cultural superiority, on a materially inferior indigenous people." *Id.* at 30.

⁴⁹⁵ See authorities cited *supra* note 2.

⁴⁹⁶ *Id.* See also STAVENHAGEN, *supra* note 1, at 86 & 118.

⁴⁹⁷ See *supra* notes 262 & 264 and accompanying text; HECHTER, *supra* note 488, at 39-42.

⁴⁹⁸ See *supra* notes 266-267, 279 & 281 and accompanying text.

⁴⁹⁹ Sornarajah similarly argues that the limitation of the right of self-determination to situations of external colonialism is "artificial when the broad objective of the principle is to end the dominance of one group by another." Sornarajah, *supra* note 488, at 52.

indigenous peoples that are at stake, and illustrates, again, that the focus of the debate is wrong. Debate on the inclusion in the draft declaration of a full right of self-determination for indigenous peoples must focus on the various competing principles and directly compare the interests that they protect. Only such a debate can produce a remedy to the present situations of indigenous peoples and only through such a debate can any positive-sum outcome be devised, both of which should be the goals of all parties to the present so-called debate.

3. Basis of the Right of Self-Determination

The debate in the Working Group suggests that there are two possible bases for the right of self-determination without suggesting whether, or how, they might be linked. The basis first stressed by indigenous peoples was instrumental: that the (group) right of self-determination was necessary in order to achieve other fundamental (individual) human rights. This justification was made through the linkage of the present denial of human rights to indigenous peoples and their lack of self-government, and therefore of their freedom from oppression and their self-determination.⁵⁰⁰ As the debate progressed, the arguments began to also stress an apparently separate justification: that it was an inherent right of all peoples that could not be taken away.⁵⁰¹

This second justification can be conceived in three ways. First, it can be thought of as being inherent purely because its function is to guarantee inherent and inalienable individual rights. This conception makes the justification of inherency dependent on that of instrumentality. Second, self-determination can be seen as being directly derived from the inherent dignity of the human person — i.e., not dependent on the instrumental justification. Third, the right of self-determination can be seen to be related to the claims that sovereignty is inherent in the group and thus cannot be denied. It is not specified whether this third conception of an inherent group right is also linked with the instrumental protection of inherent individual rights, or whether it is a wholly independent ground. It is also not clear whether this is separate from the

⁵⁰⁰ For example, this is perhaps most directly put in the statement: “[T]hat self-determination was of great importance to indigenous peoples because it was the denial of this right which had led to their present living conditions.” *Seventh Report of the WGIP, supra* note 39, para. 28. And:

Some of [the observers from indigenous peoples organizations] stated that the lack of self-determination was the cause of a tragic gap between the economic, social and cultural situation of the other sectors of the population and that of the indigenous populations who lived within the territory of those countries.

The Study of Discrimination, supra note 51. As a further example, it was commented that there is an “inevitable link between self-determination and ownership of land, including natural resources.” *Sixth Report of the WGIP, supra* note 49, at 22-23, para. 84. See also *supra* notes 50-51 and accompanying text.

⁵⁰¹ *Supra* note 52 and accompanying text.

second conception; that is, it may be that the right of sovereignty of the people is thought to be inherent because it derives from the inherent dignity of the person. I suggest that these different conceptions are linked and that a clarification of the way in which they are linked will in turn clarify the requirements of the right of self-determination.

The view of states is clearly that there is a relationship between the respect for self-determination and for other fundamental rights and freedoms.⁵⁰² This view has been taken since the adoption of the U.N. Charter, which is illustrated by the provisions of the Charter itself.⁵⁰³ Precisely what is the relationship referred to in the Charter, however, is not explicit. Subsequent discussion of the right of self-determination in the General Assembly shows that it has been regarded as instrumental — as a necessary prerequisite for the enjoyment of fundamental individual human rights.⁵⁰⁴ A good expression of this view is that:

the effective exercise of a people's right to self-determination is an essential condition or prerequisite, although not necessarily excluding other conditions, for the genuine existence of other human rights and freedoms. Only when self-determination has been achieved can a people take the measures necessary to ensure human dignity, the full enjoyment of all rights, and the political, economic, social and cultural progress of all human beings, without any form of discrimination. Consequently, human rights and fundamental freedoms can only exist truly and fully when self-determination also exists.⁵⁰⁵

⁵⁰² For example, Article 55 of the U.N. Charter, reads:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all. . . .

U.N. CHARTER, *supra* note 173, at 1045-1046.

⁵⁰³ U.N. CHARTER, *supra* note 173.

⁵⁰⁴ For example, this instrumental basis is stated in G.A. Res. 637 (VII), *supra* note 257. The first paragraph of the Preamble reads: "Whereas the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights." The Human Rights Committee has also adopted this view. The Committee has commented that "[t]he right to self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights." Thornberry, *supra* note 199, at 883 (quoting the Committee); Thornberry, however, does not cite any references for it. Thornberry also comments that the Human Rights Committee *solely* considers minority rights matters in relation to indigenous peoples (i.e., under Article 27 of the International Covenant on Civil and Political Rights, *supra* note 61, rather than under Article 1). The implication of this is that the Committee considers that, when such human rights have been fulfilled, self-determination has thereby been achieved. *Id.* Since then, the General Assembly has adopted various resolutions that make this link between self-determination and human rights. *See, e.g.*, resolutions 2649 (XXV) of 30 Nov. 1970, 2787 (XXVI) of 6 Dec. 1971, 3382, of 10 Nov. 1975, and 31/34 of 3 Nov. 1976; *See also* the discussion and other resolutions cited in Cristescu, *supra* note 221, para. 229; ESPIELL, *supra* note 260, paras. 2, 3, 10, 11, 16, & 51-55.

⁵⁰⁵ ESPIELL, *supra* note 260, para. 59.

It is because the states drafting the two International Covenants had this instrumental view⁵⁰⁶ that the right of self-determination appears as the primary group right in the Covenants concerning individual rights. The Special Rapporteur on the Problem of Discrimination Against Indigenous Peoples also adopted this instrumental view specifically in relation to indigenous peoples.⁵⁰⁷

None of these statements that the right of self-determination is instrumental suggest that it is also inherent. That it is either not so inherent or is only inherent because its function is to achieve respect for (other) guaranteed inherent, inalienable rights, is an arguable position. This can be argued on the basis of the strong emphasis on the instrumental value of self-determination made in the various international instruments described, coupled with the general language of the instruments that are not particularly clear one way or the other. For example, the first preambular paragraph of the 1960 Declaration⁵⁰⁸ notes the "faith in fundamental human rights [and] in the dignity and worth of the human person;" and the seventh preambular paragraph notes that the denial of self-determination prevents economic, cultural and social development of peoples and militates against peace.⁵⁰⁹ In addition, the first operative declaration provides that the denial of self-determination "constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation."⁵¹⁰ These statements do not necessarily entail the recognition of self-determination as an inherent right in itself.

Despite these arguments, the conclusion that self-determination is seen by the international community as an inherent right of individuals may be deduced from the frequent links made between the human dig-

⁵⁰⁶ Cassese describes the comments made in the preparatory work on the Covenant. Comments made were that: self-determination was the "source" of all other human rights (Poland, U.N. Doc. A/C.3/SR.310, para. 33 (1950)); self-determination is the "prerequisite for the enjoyment of all other human rights" (Ukraine, *id.*, para. 47; Syria, SR.311, para. 4; Byelorussia, SR.359, para. 21 (1951)); "only when that right [of self-determination] has been assured would it be possible to hope for the effective implementation of all the other rights guaranteed in the Covenant (India, *id.*, para. 15 (1950)); "[f]reedom of the individual was a snare and a delusion as long as the nation of which he was a part was not free." U.N. Doc. E/CN.4/SR.255, 6 (1952). All comments quoted in Cassese, *supra* note 248, at 101. Cristescu comments that, during the debate on the drafting of the Covenants in the Third Committee of the General Assembly, "[i]t was maintained that the right to self-determination stood above all other rights and formed the corner-stone of the whole edifice of human rights." Cristescu, *supra* note 221, para. 32.

⁵⁰⁷ The Special Rapporteur recommends that self-determination "must be recognized as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future." Daes, *supra* note 116, at 42. See also *id.*, at 20.

⁵⁰⁸ Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 258.

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

nity inherent in the person and both self-determination and other human rights.⁵¹¹ This link is best made in the second preambular paragraph of the two International Covenants on human rights, which reads: "*Recognizing* that these rights derive from the inherent dignity of the human person."⁵¹² The reference to "these rights" necessarily includes self-determination as it is the primary right declared in Article 1 of both Covenants. That self-determination is viewed as an inherent right of peoples as well as of individuals (the third way that it could be considered inherent) can be derived from the comments of participants in the process of drafting Article 1 of the Covenants. For example, the view was expressed that self-determination is "a corollary of the democratic principle of consent of the governed."⁵¹³ This suggests that the right of self-determination stems from the concept of popular sovereignty and is an inherent right of peoples on the basis that sovereignty inherently resides with the people.

Most scholars appear to adopt the second and third views of the inherent nature of the right of self-determination, although with different emphases. For example, a common introduction to the concept of self-determination includes a description of its origin. While there are many different accounts of when the term or concept first appeared,⁵¹⁴ most agree that the modern concept grew out of, and now embodies, the concept of popular sovereignty espoused in the American and French revolutions.⁵¹⁵ On the other hand, when discussing whether a particular people has achieved self-determination, the upholding of human rights of the individuals of the relevant group is typically⁵¹⁶ taken to be the appropriate standard.⁵¹⁷ Further, the statements of the U.N. Charter and In-

⁵¹¹ Espiell stresses that the right of self-determination is an individual right as well as one of peoples. ESPIELL, *supra* note 260, para. 58.

⁵¹² *Supra* note 61.

⁵¹³ U.N. Doc. A/C.3/SR.647, para. 1 (1955), *quoted in* Cassese, *supra* note 248, at 102.

⁵¹⁴ *See supra* note 183 and accompanying text.

⁵¹⁵ *See supra* notes 184-186 and accompanying text.

⁵¹⁶ I say "typically" because there are scholars who argue that a right of secession should exist even when there have not been deprivations of individual human rights. *See infra* section entitled Secession I. Note that whether a people has been deprived of their self-determination is a different issue from determining the appropriate means to achieve self-determination. While the aim will still be the achievement of respect for human rights, the choice of method will depend on other relevant factors.

⁵¹⁷ As described below in relation to secession, different scholars place different importance on the various factors that affect a choice of the method of self-determination. However, all agree that the aim is to achieve respect for human rights as well as world harmony. *See, e.g.*, Ved P. Nanda, *Self-Determination Outside the Colonial Context*, in SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS 193 (Yonah Alexander & Robert A. Friedlander eds., 1980). Nanda stresses that "[t]he only reliable test for determining the reasonableness of self-determination has to be the nature and extent of the deprivation of human rights of the subgroup claiming the right." *Id.* at 204.

ternational Covenants, and the myriad of statements in human rights instruments tying human rights to the inherent dignity of the human person are widely accepted. I suggest that, in fact, the right of peoples to self-determination is considered to embody all of these views. Paust, an international legal scholar, illustrates this mix of views best when he concludes that "there is no question that self-determination and human dignity are intricately interconnected with human rights *as well as* the only legitimate measure of authority — the 'will of the people'."⁵¹⁸

If the right of self-determination is regarded solely as an instrumental right then self-determination is only applicable insofar as it can achieve respect for human rights. Even if these human rights are regarded as inherent and fundamental, this does not mean that the right of self-determination is thereby inherent and fundamental. This is because the instrumental approach implies that the achievement of human rights by other means would thereby render the right of self-determination redundant. This approach could be taken in individual situations or as a general argument against the need for a right of self-determination in today's world. For example, the latter, general argument could conceivably be made on the basis that there was a need for the protection offered by the right of self-determination when it arose because there was no well-developed human rights regime in international law. Since that time, however, international law has become increasingly concerned with human rights issues and contains many standards for state behavior and treatment of individuals in a wide range of fields.⁵¹⁹ The issue is thus

⁵¹⁸ Jordan J. Paust, *Self-Determination: A Definitional Focus*, in SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS, *supra* note 517, at 13 (emphasis added). Harold S. Johnson & Baljit Singh similarly comment that "[s]elf-[d]etermination is itself becoming the basis for the international system. . . . At the root of this concept of world order is the broader issue of human rights. World order will come to mean the granting of equal opportunity, with no group or individual more equal than another." Harold S. Johnson & Baljit Singh, *Self-Determination and World Order*, in SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS, *supra* note 517, at 349, 359.

⁵¹⁹ Some of the relevant major international instruments adopted since 1960 (in addition to those already mentioned in Part II, *supra*) include the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 350; International Covenants on Human Rights, *supra* note 61, International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, U.N. GAOR, 3rd Comm., 23rd Sess., Supp. No. 30, at 74, U.N. Doc. A/9030 (1973), *reprinted in* 13 I.L.M. 50 (1974); Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 180 U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/RES/34/180 (1979) (entered into force Sept. 3, 1981), *reprinted in*, 19 I.L.M. 33 (1980); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/RES/36/55 (1981), *reprinted in*, 21 I.L.M. 205 (1982), Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment, *opened for signature* February 4, 1985, 23 I.L.M. 1027, changes noted in 24 I.L.M. 535, 25 I.L.M. 500 (entered into force June 26, 1987). Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/Res/44/25 (1989), *reprinted in* 28 I.L.M. 1448 (1989). In addition to these global instruments, various regional human rights instruments have also

whether the existence of a right of self-determination is necessary for the protection of human rights — that is, whether it adds anything to the existing regime — or whether it has been supplanted by the more specific provisions in international law. While human rights are not fully protected in today's world, despite the existence of the various mechanisms for protecting human rights in international law, this argument would propose that a lack of protection only indicates that such mechanisms have not been used; it does not show that only the application of the right of self-determination will guarantee these rights. Both the particular and general approaches thus indicate that an inherent right of self-determination cannot be derived merely from the protection of inherent individual rights — an instrumental right cannot be made inherent and inalienable if it is not applicable where there are other means of achieving its end.

The corollary of regarding the right of self-determination solely as an instrument for the achievement of human rights is that self-determination is only considered to be denied when fundamental human rights are being denied. As the discussion on secession shows, there are those who argue that human rights violations should not be necessary to enable a people to claim self-determination.⁵²⁰ For example, this argument holds that a people should have a right of self-determination where they merely wish to preserve group identity and control the group's own political destiny.⁵²¹ This argument denies that self-determination is merely an instrumental right and argues that it is an inherent right of groups.⁵²² It is therefore incompatible with the purely instrumental view of self-determination.

These implications of taking a purely instrumental view show that the weakest view of the inherent nature of self-determination cannot be what is envisaged by indigenous peoples when they refer to the inherent nature of the right of self-determination. While the abuse of human

been adopted, such as the 1969 American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, its Additional Protocol, P.A.U.T.S. 69 (1988) and the African Charter on Human and Peoples' Rights, *supra* note 299. And, as Harris notes, there are "over 100 International Labour Conventions in force." Harris, *supra* note 295, at 600-01.

⁵²⁰ See, e.g., *infra* notes 614 & 633-640 and accompanying text.

⁵²¹ Buchheit refers to this as 'parochial' self-determination. BUCHHEIT, *supra* note 194, at 223-24. See also *infra* notes 614 & 633-640 and accompanying text.

⁵²² Note that none of the proponents of a right of secession argue that there should be an *unlimited* right of parochial secession. Those who argue for recognition of parochial secession, argue that all the relevant factors and interests involved should be balanced before any determination is made whether the claim to secession is legitimate one. While such a balancing exercise may result in approval of a purely parochial claim, it may not on account of other "disruption factors." BUCHHEIT, *supra* note 194, at 231-38. Abuses of human rights of the group would thus always be *relevant* to any determination of a legitimate claim of secessionist self-determination, even if not always necessary.

rights of indigenous peoples has been a primary argument in justifying the application of self-determination to their situations,⁵²³ this is not their only argument. Indigenous peoples have also argued for the right of self-determination as an inherent right of peoples to control their own destiny.⁵²⁴ This latter argument has been based more on the concept of inherent sovereignty (including sovereignty over their lands), their political organization and ways of life, and the fact that the political organization of the states in which they live is alien to their culture and has been imposed on them in violation of their inherent right of sovereignty.⁵²⁵ This rejects the simplest view of an inherent right of sovereignty on the basis that it is insufficient to satisfy their needs or desires, or what they claim are their inherent rights. It thus compels the adoption of what appears to be a mixture of the second and third views of the inherent nature of self-determination.

One implication of viewing self-determination as a right that is inherent in individuals as well as peoples, and is necessary for the achievement of fundamental human rights, relates to the perceived basis of the international legal system. It encourages adoption of the natural law position that a right does not have to be recognized in positive international law for it to exist. Instead, it exists because of the nature of peoples and individuals. This position compels the recognition of the right of self-determination in positive international law such as the draft Declaration on the Rights of Indigenous Peoples.

A second implication of viewing self-determination as a right that is both inherent and instrumental stems from the conception of self-determination as being derived from the concept of sovereignty. This implication relates to the requirements of internal self-determination. I suggest that, because they are so fundamental to self-determination, the combination of the notions of popular sovereignty and respect for human rights provide definitive standards for the achievement of internal self-determination. Cassese, an international legal scholar, gives one possible such standard:

Internal political self-determination is the right to choose one's government freely and to have a government that, once chosen, is not oppressive or authoritarian. It can be achieved only if the state fully respects and guarantees those civil and political rights of individuals

⁵²³ See, e.g., STATUS AND RIGHTS OF THE JAMES BAY CREES, *supra* note 445.

⁵²⁴ See the statements cited *supra* note 52 and accompanying text. See also the statement made by the Indigenous Peoples' Preparatory Meeting to the Working Group on Indigenous Peoples, *Threat of Quebec Secession from Canada* (1991): "[T]hat Canada and Quebec be urged to clearly recognize the inalienable right of indigenous peoples to self-determination . . . That any referendum on Quebec independence . . . recognize and respect the right of indigenous peoples to determine their own future.

⁵²⁵ *Id.*

whose exercise enables the people to establish and express its will freely and continually.⁵²⁶

The difficulty with such a standard of internal self-determination clearly rests with the judgment that would have to be made about how well any government satisfied it. Such a judgment runs into problems such as who decides, what biases they bring, and objections about interference in domestic affairs. However, such a standard would be an improvement on the present state of affairs, where there is no agreement even on what the concept of representative government entails.⁵²⁷ Such an agreement is a prerequisite to enforcement.

Yet, it is not clear that such a standard is sufficient for the purposes of indigenous peoples. The most obvious shortcoming of the linking of the respect for human rights with popular sovereignty is illustrated by Cassese's definition of internal self-determination.⁵²⁸ The problem is the focus on solely civil and political rights. These are not the only fundamental rights recognized in international law; economic, cultural and social rights are also considered to be fundamental.⁵²⁹ Indigenous peoples place great emphasis on these additional rights, arguing that a people has a right, not merely to the protection of their culture, but also for the cultural group to choose their own political structure.⁵³⁰ Therefore, in addition to not being oppressive or authoritarian, a government must uphold positive rights of peoples to the preservation of their cultural identity. Further, there should exist a right of a people to form their own political structure, distinct from that of the existing state. This right should exist both where the relevant culture cannot be protected within a particular state and where it may be minimally protected, but would be nurtured and could develop under a different structure. This is linked to the claims that a right of self-determination should be recognized in situations where it is necessary for the preservation of a culture as an inherent right as well as situations where a people seek to exercise their inherent right to form their own political associations. The focus is on both individual human rights and rights to protect interests of the group; it is both instrumental and inherent — a means to an end and an end in itself.

4. Internal Self-Government

As discussed above, the requirement that a state have a representa-

⁵²⁶ Cassese, *supra* note 248, at 102.

⁵²⁷ See *supra* Part II(B)(2)(a)(ii) entitled "Internal Status."

⁵²⁸ See *supra* text accompanying note 526.

⁵²⁹ See, e.g., the International Covenant on Economic, Social and Cultural Rights, *supra* note 61.

⁵³⁰ This is the essence of the claims to self-determination as described in Part I, *supra*.

tive government in order to be entitled to self-determination of the state as a whole, and thus the protection of their territorial integrity, is not assessed critically.⁵³¹ This lack of attention is due primarily to the lack of clarity in the definition of "representative government" itself. While this may presently be the case, there are indications that this is changing and that an international standard for legitimate, representative government is emerging.⁵³² A good exposition of this view is given by international legal scholar, Thomas Franck.⁵³³ As Franck describes, there are many factors that have contributed to its emergence.⁵³⁴ In addition, I suggest that the recent proclaimed desires for, and movements toward, democratic forms of government in the former USSR will promote this trend.⁵³⁵ This is because the primary reason why there was a stalemate at the times of previous consideration of the standard of internal self-determination is that there was tension between the strongly differing views of adherents to Western-style democracy and adherents to the Soviet classless society.⁵³⁶ The breakdown of these divisions can only promote agreement. Therefore, while the norm of liberal democracy may not yet have emerged as binding international law, it appears to be moving in this direction. This movement must therefore be evaluated from the indigenous peoples' standpoint. Any government, in order to be considered representative of indigenous peoples as well as other people within the state, must secure the respect for human rights and cultural distinctiveness of indigenous peoples and enable them to determine their own future.

The standards that Franck argues are emerging are those of a Western-style, liberal democracy.⁵³⁷ As described above, the primary components of such a democracy are free speech and what are termed free and fair elections.⁵³⁸ These elements are expressed in Article 21 of the Universal Declaration of Human Rights and in Article 25 of the U.N. Covenant on Civil and Political Rights.⁵³⁹ Additional implied elements are a commitment to liberal individualism and to the rule of law.⁵⁴⁰ While these elements all have a substantive component, the legitimacy of a government is achieved through the use of a particular process: "by subject-

⁵³¹ See *supra* Part II(B)(2)(a)(ii) entitled "Internal Status."

⁵³² *Supra* notes 362-367 and accompanying text.

⁵³³ Franck, *supra* note 362.

⁵³⁴ The fact that "government cannot govern by force alone [is a] sociological truism." *Id.* at 48.

⁵³⁵ Assuming these events occurred after Franck wrote the article since they are not referred to in Franck's article while the August 1991 coup is. *Id.* at 46.

⁵³⁶ See *supra* notes 356-361 and accompanying text.

⁵³⁷ See *supra* notes 363-366 and accompanying text.

⁵³⁸ *Supra* notes 364-365 and accompanying text.

⁵³⁹ See *supra* notes 352-353.

⁵⁴⁰ Franck, *supra* note 362.

ing the political process to rules."⁵⁴¹ The issue for indigenous peoples is whether such a commitment to Western, liberal democratic rules as the standard for legitimate government, and thus for internal self-determination for the people(s) of a state, is satisfactory. Indications that it is not are that, first, indigenous peoples within Western democracies are still oppressed and denied fundamental human rights.⁵⁴² Democracy alone is clearly not enough.⁵⁴³ Second, this standard still assumes that the people of a state as a whole will achieve self-determination in this manner. This denies indigenous peoples the right to choose a separate form of government in order to determine their own destiny.

The primary problem for indigenous peoples of traditional, individual-centred democracies that rely on majority rule and minority protection is simply that the interests of the minority too often are overridden by the interests of the majority, without sufficient protection being provided. Two related reasons can be identified as causes. One is the focus on individualism. Even where provisions exist that are designed to protect the minority from abuse by the majority, these provisions are designed to protect the minority individual rather than the group. Further, these provisions are not designed to offer electoral participation other than on an individual, one-person-one-vote basis. This does not ensure participation by the minority group as such. This focus denies the existence of group rights or interests, and fails to recognize that some human rights can only be protected by recognizing such interests and according such rights to the group.⁵⁴⁴

The second problem occurs where the cultural values of the minority are so different from the majority that there is no "consensus on the fundamental principles of nationhood,"⁵⁴⁵ and the values of the minority consistently are overruled by the majority. This problem is well described by Francis Deng, an international legal scholar:

Liberal democracy presupposes a framework characterized by a broad consensus on the fundamental principles of nationhood, the structure of government, and the shaping and sharing of power, wealth, and other national resources. Where consensus on these fundamentals is lacking, and peoples lack even a shared sense of belonging

⁵⁴¹ *Id.* at 50.

⁵⁴² See authorities cited *supra* note 2.

⁵⁴³ See, e.g., the Cobo Report conclusions discussed *infra* note 561 and his recommendations *infra* notes 560-565 and accompanying text.

⁵⁴⁴ Van Dyke, a political scientist, identifies cultural survival and group distinctiveness as such rights. VERNON VAN DYKE, *HUMAN RIGHTS, ETHNICITY, AND DISCRIMINATION* (1985). The protection of individual human rights and interests is not the only justification for group rights. See, e.g., Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities* 66 *NOTRE DAME L.REV.* 1219, 1234-39 & 1244-65 (1991).

⁵⁴⁵ Francis M. Deng, *Myth and Reality in Sudanese Identity*, in *THE SEARCH FOR PEACE AND UNITY IN THE SUDAN* 61, 69 (Deng & Gifford eds., 1987).

to the nation, even the concepts of majority and minority cannot apply. Parliamentary democracy under those circumstances becomes a rule of the numerical majority imposed on an alienated minority, whether numerically determined or otherwise marginalized. Such a structure cannot enjoy legitimacy or stability. This means that we must address the pending fundamental issues of nationhood before we can legitimately invoke majority votes as justification for imposing any decisions on the minority.⁵⁴⁶

This comment suggests that the lack of a shared sense of nation explains why democracy hasn't worked and why the indigenous peoples consider that they are not presently exercising self-determination.⁵⁴⁷ Indigenous peoples are challenging the concept of the nation-state and the suggestion that a state, once independent, is exercising self-determination through representative self-government. While the state may be doing so, the peoples or nations within may be being denied such independence. The suggestion is that nationhood and democracy have been imposed on indigenous peoples when they do not fit.⁵⁴⁸ This has entailed the rule of the dominant "nation" over the oppressed indigenous "nation".⁵⁴⁹

While Deng does not provide a solution that could be used as the basis for a definition of representative government which could achieve the self-determination of indigenous peoples, it is clear that he believes that a traditional, individualist, majority rule, unitary democracy will not be appropriate in situations such as the one he describes. Where a solution involves accommodating different peoples or "nations" within a state, it should have a constitutional framework that is devised specifically to achieve the self-determination of all separate peoples within the state, rather than aggregating them and assuming that they will achieve self-determination as an amorphous whole.

The problem of achieving self-determination for the peoples of a state such that one group does not oppress another group by virtue of the state's constitutional arrangements has been addressed by advocates of consociational democracies.⁵⁵⁰ The theory of consociationalism recom-

⁵⁴⁶ *Id.*

⁵⁴⁷ This comment clearly refers to very complex matters concerning political theory, nation-state identity, and discrimination which could easily be the topic of an entirely separate essay. Thus, the substance or validity of the claim made in the quote will not be addressed.

⁵⁴⁸ This is related to internal colonialism. *See supra* section entitled Colonialism and Foreign Subjugation.

⁵⁴⁹ *Id.*

⁵⁵⁰ While Max Weber earlier described the formation of group identification as a process of consociation, the best exposition of its application to democratic theory is provided by Lijphart. *See* AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* (1977) [hereinafter *LIJPHART, DEMOCRACY IN PLURAL SOCIETIES*]. *See also* AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIANISM AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* (1984).

mends that a government be a "coalition of the political leaders of all significant segments of the plural society,"⁵⁵¹ with special provisions built in to protect minority groups.⁵⁵² Such provisions should include proportional representation, a veto power in special circumstances (such as for constitutional amendments) and, where appropriate, self-government through the autonomy of the various groups within the state.⁵⁵³ Criteria have been suggested for determining which groups should have such rights,⁵⁵⁴ as well as types of arrangements that will be appropriate in different circumstances.⁵⁵⁵ The most striking aspect of consociationalism in terms of American democratic theory is that it considers that such separate treatment of groups is not only in accordance with the demands of justice, equality, and self-determination, but is required by them.⁵⁵⁶

Such consociational arrangements based on group identity and group rights appear to be the only democratic arrangements that could achieve the self-determination of indigenous peoples within the states in which they live and, further, achieve it in their own independent states.⁵⁵⁷ Because the appropriate arrangements will differ according to the situation that indigenous peoples are in within their present states, it is not possible to say what constitutional and institutional structures will

⁵⁵¹ VAN DYKE, *supra* note 544, at 203-04 (quoting Arend Lijphart's conception of consociationalism). See LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES*, *supra* note 550, at 25.

⁵⁵² VAN DYKE, *supra* note 544, at 203-04.

⁵⁵³ *Id.*

⁵⁵⁴ For example, Van Dyke proposes nine considerations: (1) A group self-consciousness — a 'we-they' relationship with other groups; (2) Cleavages between the group and others (how enduring, deep, etc.); (3) A size that enables it to preserve itself; (4) Significance in the lives of its members (e.g., individuals define themselves by membership); (5) The importance of the right sought to the interests of the members; (6) Clarity of conditions of membership; (7) Effective organization of the group i.e., (the ability to press claims and undertake responsibilities); (8) Tradition of treating the group as a group (e.g., historical discrimination); and (9) The rights claimed are compatible with equality — the exercise of such a right would not thereby obstruct other groups from achieving self-determination. Van Dyke argues that mere interest groups and social classes would not satisfy these criteria, while indigenous peoples would. *Id.* at 213-15.

⁵⁵⁵ Van Dyke describes the various types of arrangements that have been used in different countries in order to respond to problems caused by different types of group identities (for example, language, race, or religion). He assesses the advantages and disadvantages of the various arrangements and makes recommendations. *Id.* at chs. 2-7.

⁵⁵⁶ Van Dyke argues that Americans should recognize the limits inherent in individualism; that, the deeper the cleavages between ethnic groups, the more individual rights need to be supplemented with group rights; and that the "meaning of equal and non-discriminatory treatment must be adjusted accordingly." *Id.* at 167.

⁵⁵⁷ The appropriate form of government for a state comprised of an indigenous people will clearly depend to an extent on the culture of the indigenous peoples themselves. However, what the choice of a definition of 'representative government' is attempting to do is provide general principles that will be appropriate for all states, whether composed of primarily indigenous peoples or only minimally. The contribution of consociationalism is in identifying principles that would work better where there are strong group identities within a state — that is, better than the individualist principles that are more commonly upheld as the ideal.

be most appropriate to indigenous peoples in general. However, despite this possible range of types of situations, the one that has received the most attention in relation to the situations of indigenous peoples has been the creation of autonomous regions within states, where the indigenous peoples essentially exercise local government, subject to only minimal interference by the overarching state.⁵⁵⁸ Because of the attention given to autonomy as a preferred option, I will discuss it in more detail.⁵⁵⁹

a. Autonomy

The creation of consociational democracies and a right of autonomy for indigenous peoples was suggested by the U.N. Special Rapporteur, Jose R. Martinez Cobo, in his *Study of the Problem of Discrimination Against Indigenous Populations*.⁵⁶⁰ His recommendations for consociational arrangements include the setting aside of a certain number of (central) parliamentary and other governmental seats for indigenous candidates.⁵⁶¹ At a more general level he argues that,

measures taken to achieve participation must respect and support the internal organizational structures of such populations. Accordingly, Governments must abandon their policies of intervening in the organization and development of indigenous peoples and must grant them autonomy, together with the capacity for managing the relevant economic processes in the manner which they themselves deem appropriate to their interests and needs.⁵⁶²

⁵⁵⁸ See *supra* Part I.

⁵⁵⁹ The concept of autonomy within existing states is important for the further reason that recognition of a right of autonomy has been suggested as an alternative to the recognition of a full (external) right of self-determination for indigenous peoples precisely because of the clash with the principle and practices of state sovereignty. See, e.g., *supra* notes 84-85, 112-113 & 116-117 and accompanying text. There are advantages and disadvantages to autonomy regimes in relation to ethnic minorities. See, e.g., Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Ethnic Minorities*, 66 NOTRE DAME L. REV. 1539 (1991) (although he deliberately does not address application to the situations of indigenous peoples).

⁵⁶⁰ Cobo Report, *supra*, note 1 (discussing the situation of indigenous peoples and recommending remedies needed to overcome their oppression).

⁵⁶¹ *Id.* at 42, para. 576. Such measures were recommended as necessary in order to exercise their legally recognized civil and political rights and "to ensure that their representation in public office is genuine and just." *Id.* at 20, para. 261. The Special Rapporteur considered that the development of political rights was thwarted by the de facto state of affairs within which indigenous peoples had to exercise them. *Id.* at 20, para. 257. An example given of such state of affairs is of the need to be able to read and write in order to vote, which is not justified today "in view of the various procedures which have been established to enable people who cannot read or write to vote." *Id.* para. 258. Another example is that of manipulative practices in relation to "the demarcation of electoral districts and the location of ballot boxes." *Id.* para. 259. The Special Rapporteur commented further that "the representation of indigenous peoples remains inadequate and is sometimes purely symbolic." *Id.* para. 261.

⁵⁶² *Id.* para. 268.

Cobo uses "autonomous" "in the sense of possessing a separate and distinct administrative structure and judicial system, determined by and intrinsic to that people or group."⁵⁶³

The primary requirement of any arrangement is that it ensures that all human rights of indigenous peoples are protected. That is, the focus will not be solely on political rights but will include all the other categories of rights identified by indigenous peoples as essential to their survival.⁵⁶⁴ These include the protection of their language and culture, a right to education in a manner consistent with local tradition, rights to other social services and rights to land.⁵⁶⁵ These rights are in addition to political rights such as access to government service and the adoption of a representative local and national government. However, it is the adoption of representative local government that is the cornerstone of such a right to autonomy because, through relative independence, the other rights are more easily protected from abuse by the national government.

Hurst Hannum, an international legal scholar, takes this general description of autonomy further and suggests in more detail what an autonomous territory might look like.⁵⁶⁶ Hannum focuses on the fully

⁵⁶³ *Id.* para. 273.

⁵⁶⁴ While a number of these rights already exist in international law, and few formal provisions today discriminate against indigenous peoples, the practice of implementation of such rights fares differently (despite the assumption that a democracy ensures that the fundamental rights of all citizens are protected). For examples of the rights that are currently protected: rights to personal security are recognized in the right to life, liberty and security of the person in the Universal Declaration on Human Rights, *supra* note 241, the Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 U.N.T.S. 277, and in the prohibitions against torture in Article 5 of the Universal Declaration on Human Rights, *supra* note 241; Articles 6 and 7 of the International Covenant on Civil and Political Rights, *supra* note 61. Cultural rights of minorities are recognized in Article 27 of the International Covenant on Civil and Political Rights, *supra* note 61. Religious rights are recognized in Article 18 of the International Covenant on Civil and Political Rights, *supra* note 61, and of the Universal Declaration, *supra* note 241, (although the U.N. Declaration on the Elimination of All Forms of Intolerance and Of Discrimination Based on Religion or Belief, G.A. Res. 55, U.N. GAOR, 36th Sess., Supp. 51, at 171, provides the most comprehensive protection). Both International Covenants prohibit discrimination on race, colour, or national or social origin (e.g. art. 2), as does the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 212. The definition of "racial discrimination" in Article 1(1) of the Convention on Racial Discrimination includes discrimination against indigenous peoples:

[A]ny distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Id. at 216. In respect of the implementation of political rights, see *supra* note 561, for a description of the Special Rapporteur's findings.

⁵⁶⁵ See *supra* Part I.

⁵⁶⁶ HANNUM, *supra* note 22. Hannum actually argues for the creation of a right of autonomy in place of the more general right of self-determination (i.e., self-determination including a right of secession). His primary reasons are that it would be easier for states to agree to it, so that it would be recognized in international law much more quickly than a right of self-determination would be; and

autonomous territory within a Western-style democracy based on the separation of powers and devises a list of the powers that such a fully autonomous territory might be expected to possess.⁵⁶⁷ While this list of powers is general and intended to be applicable to a broad range of groups within states, he specifically recognizes that indigenous societies within states may have their own governmental structures that are different from the separation of powers model. In this situation, Hannum recognizes that "the preservation of such traditional structures may be the best means of guaranteeing effective autonomy. So long as members of indigenous communities desire to maintain their form of government, those structures should normally be immune from the intervention of an outside authority."⁵⁶⁸ This is not to say that autonomous regions should expect to be immune from "the overall framework of the fundamental norms of the state,"⁵⁶⁹ because "[a]utonomy is not equivalent to independence."⁵⁷⁰ However, as Hannum stresses, "the state must adopt a flexible attitude which will enable the autonomous region to exercise real power, precisely when that exercise of power runs counter to the state's inherent preference for centralization and uniformity."⁵⁷¹

Hannum only addresses in detail the (local) governmental arrangements for the autonomous territory. While he does not address necessary provisions for central government in such detail, it is clear that the more general suggestions of the Special Rapporteur and the suggestions made by consociationalists relating to special representation for the group — in this case, the autonomous entity — would be required in order to ensure that there was effective representation of the locality in relation to decisions of the central government that affected them. Only such an arrangement could satisfy Hannum's concern that the central government not override the local in every clash of interest.

One situation that territorial autonomy does not address is where indigenous peoples are not presently territorially defined but are dispersed throughout a state, regardless of whether this dispersal is volun-

it would achieve the respect of nearly all the relevant human rights of indigenous peoples, so it would thus achieve substantially the same result as the application of a right to self-determination but much more easily. *See, e.g., id.* at 454, 468-69 & 473-74. I am not adopting this position, but merely using his description of his suggested right to autonomy as an illustration of how a right of internal self-determination might be made more specific.

⁵⁶⁷ This list addresses the powers of a locally elected legislative body, a locally selected chief executive, an independent local judiciary, and areas of joint concern, including the handling of disputes concerning the extent of local authority. *Id.* at 467-68. Hannum devises this list from a survey of various different autonomous arrangements that have been devised in response to "geographic, political, ethnic, linguistic, or other differences within a single sovereignty." *Id.* at 333.

⁵⁶⁸ *Id.* at 468.

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.*

⁵⁷¹ *Id.*

tary, the result of oppressive policies of governments, historical accident, or a mixture of all three.⁵⁷² One option would be to create territorial areas of autonomy. Another would be to adopt more group rights within the central government according to consociationalist principles; this would create greater power-sharing among the groups with less emphasis on the formal equality of individuals that are characteristic of most present democracies. The choice (within these ideas) of method and particular governmental and institutional structures will clearly depend entirely on the situation of the indigenous people(s) and the state in question.

In the context of the draft declaration on the rights of indigenous peoples currently being developed by the Working Group, the approaches and considerations described in this section should be used in order to measure the utility of the provisions of the present draft declaration.⁵⁷³ The development of these principles should be undertaken with representatives of peoples themselves, not just with the governments of states in which such peoples live. The standards that indigenous peoples themselves consider are necessary in order to achieve self-determination could thus be properly addressed.

The general principles devised are likely to be based on consociationalist principles: an emphasis on the group rather than just on the individual. It will clearly not be appropriate to provide what the appropriate self-government arrangement is for all indigenous peoples, because different types of self-government arrangements, and thus different principles and provisions, will be appropriate for different peoples and states. But it is appropriate to specify general guidelines for different types of arrangements, while leaving the details to be devised separately, perhaps in agreements between particular states and indigenous peoples. For example, while autonomy should clearly not be required, guidelines for its delineation should be included for those situations in which it is appropriate. Such guidelines could include Hannum's points about the preservation of traditional indigenous structures and about the appropriate balance of power between local and central governments.⁵⁷⁴ Such guidelines would not pre-determine the specific appropriate relationship between indigenous peoples and states, nor provide limits on the forms of government that indigenous peoples could agree to, but would instead provide protections that indigenous peoples could insist on in negotiations with states in individual cases.

In addition to these general substantive provisions, the draft decla-

⁵⁷² One example is the Maori of Aotearoa/New Zealand.

⁵⁷³ I do not propose to examine whether the draft declaration fulfills the criteria suggested by either Cobo or Hannum. This is partly because the relevant provisions on political rights have not been discussed as extensively as the other provisions in the draft declaration, but more because it is a large, detailed project in its own right.

⁵⁷⁴ See *supra* notes 567-571 and accompanying text.

ration should provide for the process of negotiation between states and indigenous peoples on these matters.⁵⁷⁵ Such a provision, in focusing on the process of negotiation, would stress both the need for different arrangements for different indigenous peoples and the fact that the situation of any particular people changes over time with the changing relationship between them and the state. A prescribed on-going process of negotiation would enable such changes over time to also be accommodated.

In conclusion, the initial problem with the international law of internal self-determination, or representative self-government, is that there are no standards for assessing when it is achieved. The lack of agreement causes states to fall back on the achievement of external self-determination, except in extreme circumstances, and provides a barrier to the separate self-determination of indigenous peoples within states. While the lack of standards appears to be in the process being resolved by the emerging norm of democratic governance, a new problem arises with it: the emerging standards themselves are not able to satisfy the concerns and interests of indigenous peoples. These standards do not properly address the criticism that the state should not be considered as an amorphous whole for the purposes of self-determination and they thus ignore issues of nationhood and institutionalized oppression that may exist within that state. The unfortunate result of ignoring such issues is that peoples within the so-called nation-state may be denied their (internal) self-determination. The alternative approaches that I have outlined do address such issues. Whatever actual solution is chosen, it is clear that appropriate standards and processes will not be dependent on the traditional conception of a western-style, individualistic, majority rule democracy. Indigenous peoples will not achieve control over their destiny if such conceptions provide the only standard for its achievement.

5. Secession

The reasons given by states for the inability of indigenous peoples to secede from their present states are varied, but can be categorized as being of two types. The first type relates to the definition of a state. As described above, international law recognizes four criteria for sovereign, independent statehood.⁵⁷⁶ States typically claim that indigenous peoples do not fulfill these criteria, yet there is no real analysis of whether or not this is the case. Some indigenous peoples and scholars have argued that

⁵⁷⁵ Maivn Clech Lm suggests that such processes should be "internationally-mediated." Lm, *supra* note 109, at 62.

⁵⁷⁶ The four criteria are: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other states. Convention on the Rights and Duties of States, *supra* note 179, art. 1.

they do indeed fulfill these requirements.⁵⁷⁷ Further, at different times in history, indigenous peoples have been considered sovereign nations.⁵⁷⁸ Whether or not indigenous peoples actually fulfill these criteria, or have ever been considered to fulfill these criteria, appears to be considered irrelevant in some situations. For example, even if North American Indian nations presently satisfy the criteria, states still deny that there is a right of secession under present international law.⁵⁷⁹ This denial is caused by the second type of objection to secession.

The second type of objection is that based on policy grounds, namely policy concerning the consequences of the existence of a right of secession. Of these consequences, there are two types. The first is pragmatic, which includes: that the (mere) existence of a right of secession will entail the infinite divisibility of states; that too many small or "mini" states will be created; and that any group will be able to hold the electoral system to ransom in order to get its way by threatening to secede. The second type of policy argument based on consequences concerns the violation of basic principles of international law. The view of states is that secession would violate the territorial integrity of states and that any determination of claims or assistance to claimant groups would violate the principle of non-intervention in states' domestic affairs, both of these being fundamental premises of the present system of states and state sovereignty.⁵⁸⁰ It is this argument from basic principles that forms the primary objection to secession by indigenous peoples from the states in which they live.

Whether there is or could be a right to secession is subject to debate

⁵⁷⁷ John H. Clinebell & Jim Thompson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFF. L.R. 669, 673-679 (1978).

⁵⁷⁸ Vitoria, Vattel, Gentili and Grotius attributed sovereignty to indigenous peoples at the time of contact with Western European powers; numerous other scholars continued this position into the nineteenth century. See, e.g., WILLIAMS, *supra* note 7; Clinebell, *supra* note 577, at 679-83. It can be argued that the making of treaties with the indigenous peoples in 'discovered' lands is evidence that the indigenous peoples were considered to have sovereignty over the territory in question. The U.S. Supreme Court (the Marshall court of the 1830's) has recognized that some Indian nations constituted a state because of their treatment as a state by the U.S. government. See, e.g., *The Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). This treatment was explicitly altered by U.S. legislation in 1871 (Act of March 3, 1871, 16 Stat. 544) which the U.S. Supreme Court has held meant that "the tribes were no longer regarded as sovereign nations." *DeCoteau v. District County Court for the Tenth Judicial District Court*, 420 U.S. 425, 432 (1975).

⁵⁷⁹ Further, in addition to the non-recognition of nations that fulfill the criteria for statehood, formally and substantively, it has been argued that some African states and other mini-states have been recognized that do not substantially fulfill these requirements. See, e.g., Jackson, *supra* note 179 (examining African states not substantially fulfilling requirements of statehood). On the requirements of statehood, see CRAWFORD, *supra* note 168.

⁵⁸⁰ See *supra* Part II. See also *infra* note 597 (Buchheit's description of the fears of states).

in the international sphere.⁵⁸¹ As described in Part II, the more traditional view of secession is that exemplified in the comment made by a Secretary-General of the United Nations, U Thant: "So far as the question of secession of a particular section of a Member State is concerned, the United Nations has never accepted and does not accept and I do not believe will ever accept the principle of secession of a part of its Member State."⁵⁸² Despite this being the more traditional view, some secessionist claimants and some scholars insist that there is a right of secessionist self-determination in international law. I suggest that part of the disagreement over whether there is such a right is due to the rhetoric and terminology used. This section will describe the various approaches that have been taken in response to the position as exemplified by U Thant's statement⁵⁸³ and suggest how there is actually more agreement on what international law provides than at first appears. The focus is on the future recognition of such a right in the draft declaration and the barriers to that positive recognition. Because of this, and because the negotiation on the draft declaration is being undertaken with states who take a positive view of international law, the following description will adopt the framework of positivism.⁵⁸⁴ This will more easily indicate how the argument for recognition of a right in the draft declaration could be approached.

Under the positive view of international law, there are four possible approaches to the issue of secession. One is to deny that what is at issue is secession. Another is to argue that such a right is already recognized for (at least some) indigenous peoples. A third is to argue that, even if it has not yet been recognized, such a right could be recognized and still be consistent with international law. The fourth is to argue that it should be so recognized, and then address what the content of such a right may be. All four approaches have been taken in relation to indigenous peoples, the fourth argument typically being coupled with the third.

⁵⁸¹ See *supra* Part I.

⁵⁸² *Transcript of Press Conference of January 9, 1970, at Dakar, Senegal*, 7 U.N. MONTHLY CHRON. 34, at 36 (Feb. 1970). This comment was made in response to the claims to secede made by Biafra. For a discussion of the Biafran situation, see, e.g., BUCHHEIT, *supra* note 194, at 162-176.

⁵⁸³ *Transcript of Press Conference, supra* note 582.

⁵⁸⁴ Positive lawyers argue that no right exists until its recognition by states in international law. Natural law theorists, on the other hand, say that a right can exist even when it has not been recognized by states in positive international law. However, the adoption of the positivist framework in this section will not greatly affect the outcome of the arguments made because even natural lawyers have not argued for an unlimited right of secession and have, moreover, argued for a qualified right only in a few cases. See, e.g., BUCHHEIT, *supra* note 194, at 55-56 (concluding that natural rights theory and terminology does not provide much support for modern separatist movements). The positivist framework makes a distinction between what is current positive law — i.e., what states have recognized as law — and what might be law in the future. Thus, while a right may not have been recognized in the past, that does not mean that it will not be in the future. It is the arguments for the explicit recognition of a qualified right of secessionist self-determination that is the primary focus of this section.

The first approach in response to states' objections that there is no right of secession in international law is that made by Brownlie, described above.⁵⁸⁵ This approach is to deny that what many indigenous peoples are claiming is secession. The justification for this position is that those indigenous peoples who can be considered as being colonized under Brownlie's interpretation of that concept, are entitled to self-determination under positive international law and do not need to argue for a right of secession. That is because the states within which they are currently located are not entitled to the territorial integrity of their presently-asserted boundaries, so it is not a simple case of secession.⁵⁸⁶

This approach, however, does not dispose of the issue of the recognition of a right of secession, for two reasons. The first reason is that the international boundaries of many states with indigenous peoples within their borders have been accepted for so long that an exercise in semantics — saying that indigenous peoples' independence is not really secession — is not enough to get over the hurdle of the impression that this *is* a real case of the possible break-up of an established state. These boundaries are more established than, for example, those of the European colonists who claimed that the colonies were part of the actual larger state.⁵⁸⁷ So the *impression* that this is an issue of real secession provides a barrier to the acceptance of Brownlie's arguments.

The second reason is that there are many indigenous peoples who would not benefit from the application of even Brownlie's (arguably extended) concept of colonialism. This is because they are not so properly territorially separate from the larger state (whatever the cause of that diminished separation may be). Because of the insistence that the right of self-determination includes the option of complete independence and thus possibly secession, approaches to recognizing a right to secession therefore must therefore be addressed.

In relation to the second approach, there have been no arguments that there is an unqualified right of secession in international law — that a people can secede merely on a whim — nor any that there should be. There have been a few arguments that there is a qualified right of secession already recognized in international law but they are either not particularly sound⁵⁸⁸ or are really arguments in favor of recognition of a

⁵⁸⁵ See *supra* notes 469-474 and accompanying text.

⁵⁸⁶ See R.S. Bhalla, *The Right of Self-Determination in International Law*, in ISSUES OF SELF-DETERMINATION 91 (William Twining ed., 1991). This approach is also taken by Igor Grazin in his discussion of the case of the Baltic States. Grazin, *supra* note 325. Grazin argues that the Baltic states were entitled to secede from the Soviet Union under the Soviet law on secession on the basis that they were under alien occupation and never consented to join the Soviet Union. *Id.* at 1413-16.

⁵⁸⁷ See *supra* note 269.

⁵⁸⁸ For example, Clinebell and Thompson imply that there is currently a right of secession when they argue that the prohibition on secession "applies only to people who have originally made

right of secession.⁵⁸⁹ Accordingly, I will not address them further here. By far the most common approaches taken in relation to secession are the third and fourth approaches that I have defined.

The third approach is based on the argument that international law, even if it has not recognized a positive right to secession, and even if it rejects an unlimited right, has not completely rejected future recognition of a *limited* right of secession. Moreover, such a limited right of secession would be consistent with existing international law.

Examples of scholars who argue that international law does not prohibit "all secessions under all circumstances"⁵⁹⁰ are Umozurike,⁵⁹¹ Carey,⁵⁹² Nawaz,⁵⁹³ and Buchheit.⁵⁹⁴ While I will not repeat their arguments here, they also argue that there is room for future recognition

a choice to be included in a state." Clinebell, *supra* note 577, at 709. As authority for this proposition they cite Thomas C. Carey, *Self-Determination in the Post-Colonial Era: The Case of Quebec*, 1 AM. SOC'Y INT'L L. 47 (1977). Clinebell, *supra* note 577, at 709. Carey, on the other hand, makes no such argument. While Carey argues that this should be the case, he expressly acknowledges that a right of secession has not been uniformly recognized in international law. *Id.* at 51-55 & 70-71. Nor is there any requirement that "the consent of a people is necessary to bind them inexorably into a nation-state." *Id.* at 60. Instead, Carey concludes that "[i]f international law does come to recognize the right of a people to secede, it will probably do so for peoples subject to extreme forms of neo-colonialism." *Id.* at 71. I thus suggest that Clinebell and Thompson's argument, despite its appeal, rests on a false premise and cannot be taken as a statement of what international law actually recognizes.

Buchheit also describes some arguments made by scholars that there is a limited right of secession in international law. BUCHHEIT, *supra* note 194, at 133-37. These scholars, however, include two who wrote during the League of Nations period. While their recommended content of a right to self-determination is similar to that recommended today, I suggest that the justifications for their positions can no longer be used as precedent in such a different international climate. Other jurists cited include two from the "communist bloc." *Id.* at 135. However, as Buchheit himself acknowledges, the communist theoretical position on self-determination is not matched by its practice. *Id.* at 121-27. Charles Rousseau is cited, *Id.* at 135. But his view is that secession is only legitimate when it is accepted by the State in question. *Id.* at 135. I suggest that this is not an argument that there is a right of secession in the sense that secessionists argue. Finally, Umozurike is cited, *id.* at 134. However, I suggest that Umozurike is not arguing that there currently exists a right of secession but that there is room for such recognition in the future.

⁵⁸⁹ For example, Brownlie's approach could be categorized as an argument for secession if you label as secession what indigenous peoples such as the Dene and Inuit would be doing under the guise of self-determination (even though Brownlie disagrees that this is what it is). See *supra* notes 469-474 and accompanying text.

⁵⁹⁰ UMOZURIKE, *supra* note 188, at 199.

⁵⁹¹ There is no rule of international law that condemns all secessions under all circumstances. The principle of fundamental human rights is as important, or perhaps more so, as than of territorial integrity. Neither a majority nor minority has the legal right to secede, without more, since secession may jeopardise the legitimate interests of the other part. . . . [A] majority or minority accorded its normal democratic rights cannot legally request the international community to help it to secede.

Id.

⁵⁹² Carey, *supra* note 588, at 65-67. Carey cites Umozurike for support. *Id.* at 66.

⁵⁹³ Nawaz, *supra* note 184, at 91.

⁵⁹⁴ BUCHHEIT, *supra* note 194, at 134-135 (citing Umozurike for support).

of a limited right of self-determination — i.e., that it could be made consistent with existing international law.⁵⁹⁵ I note that all of these approaches entail the primacy of fundamental human rights over the principle of territorial integrity and state sovereignty.⁵⁹⁶ As the description of the present law shows, however, these barriers will not be easily overcome. But if any approach will be able to do it, it will be one that directly balances the factors that the various proponents of the fourth approach propose.

There are clearly various arguments against secession in any particular case.⁵⁹⁷ These arguments, however, do not justify a blanket refusal of the existence of a right of secession. Because there are reasons both for and against secession in any particular case, the fourth approach argues instead for the development of a framework whereby the advantages and disadvantages can be directly compared and balanced before a decision is made on the legitimacy of a claim to secede. This would open the door to claims, but avoid the “slippery slope” by defining in advance what types of claims are considered legitimate. This would enable a right of secession to be recognized in international law, but only as a qualified right.

While the various proponents of this approach place different emphases on the factors to be considered, and devise different tests for the legitimacy of secessionist claims, the most significant feature of this approach is that they have in common a rejection of the automatic priority of territorial integrity and non-intervention. The differences among the proponents of this approach appear to be due to the readiness with which they accord other principles priority over these principles of state sovereignty. The proposals for a qualified right to secession range from those that would only override the principles of territorial integrity and non-intervention in extreme cases of oppression and abuse, to those that argue

⁵⁹⁵ See, e.g., Carey, *supra* note 588, at 65-67. There are those who argue that there is no prohibition on secession, but do not make any arguments relating to the future recognition of any right. For example, Akehurst simply takes the position that “[t]here is no rule of international law which forbids secession from an existing State; nor is there any rule that prohibits the motherstate to crush the secessionary movement, if it can. Whatever the outcome of the struggle, it will be accepted in the eyes of international law.” MICHAEL B. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW (1970) at 72, cited in BUCHHEIT, *supra* note 194, at 132.

⁵⁹⁶ See, e.g., Umzurike, *supra* note 188, at 199 & 268-70.

⁵⁹⁷ Buchheit identifies six “fundamental apprehensions” which stem from “political and emotional fears expressed in response to suggestions of secessionist self-determination.” BUCHHEIT, *supra* note 194, at 27. Some of these apprehensions are: indefinite indivisibility; “Balkanization;” the danger of economic non-viability of the seceding entity as a state; where the seceding state is richer than the remaining state; the non-viability of the remaining state; minorities trapped within the seceding state having their human rights abused. *Id.* at 28-31. In sum, the fear of states appears to be that secessionist self-determination “would constitute an unmanageable threat to intra-State harmony and consequently have an adverse effect upon the stability of the international system.” *Id.* at 19. Buchheit also discusses the case against secession more generally. *Id.* at 20-27.

that the right of secession should be allowed even where there is no abuse of human rights.⁵⁹⁸

Nanda, an international legal scholar, for example, argues that the present international system of states and state sovereignty is at least relatively stable;⁵⁹⁹ the maintenance of world order thus requires upholding as much of the system as is consistent with the respect for human rights (otherwise, chaos would ensue, with the possibility of worse deprivations of human rights).⁶⁰⁰ The result is that secession may only be resorted to when all other methods of achieving respect for human rights have failed. The effect of this approach is that severe deprivations of human rights must be shown before recourse may be had to such a drastic remedy as secession.⁶⁰¹

Those that would allow secession more readily do so for various reasons. A common sentiment is that it is ridiculous to wait for some arbitrary amount of suffering to be endured before a right to secession is recognized.⁶⁰² Some proponents of this alternative approach are Reisman, Suzuki, Buchheit, Chen, Brilmayer (all international legal scholars), Beitz (an international relations scholar), and Buchanan (a philosopher), all of which are described and commented upon below.⁶⁰³

Reisman comments that "International law expresses guarded preferences for the avoidance of territorial division but accepts them when order and justice are more likely to be served."⁶⁰⁴ The primary reason against territorial division is the need to create a viable state. This requires the creation of "communities with sufficient internal stability and vigor to stand against outside force and to prevent the introduction of extra regional forces."⁶⁰⁵ The undesirability of creating a landlocked state would militate against division.⁶⁰⁶ While Reisman's focus on order and justice includes a focus on human rights, and implies that secession is only accepted when this cannot be achieved by other means, his view does not appear to be as strict as Nanda's. This arises from Reisman's

⁵⁹⁸ Heraclides labels the continuum as going from those that take a "strict" approach to those that take a more "lenient" approach. ALEXIS V.A. HERACLIDES, *THE SELF-DETERMINATION OF MINORITIES IN INTERNATIONAL POLITICS* 29-30 (1991).

⁵⁹⁹ See Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 *CASE W. RES. J. INT'L L.* 257, 264-65 (1981).

⁶⁰⁰ See *id.* at 276.

⁶⁰¹ *Id.*

⁶⁰² See, e.g., BUCHHEIT, *supra* note 194, at 213.

⁶⁰³ There are other proponents of this alternative approach, such as Umzurike, described *supra* note 188 and accompanying text, but the scholars described here supply the range of views held.

⁶⁰⁴ W. Michael Reisman, *Somali Self-Determination in the Horn*, in *NATIONALISM AND SELF-DETERMINATION IN THE HORN OF AFRICA* 151, 169 (I.M. Lewis ed., 1983).

⁶⁰⁵ *Id.* at 168.

⁶⁰⁶ *Id.* at 169.

belief that "[b]oundaries should be designed to be instrumental to the achievement of major social goals. In particular, they should facilitate rather than impede social contact between group members."⁶⁰⁷ Thus, while Nanda expresses a preference for upholding the present world system for the sake of stability, Reisman appears to see the present world system as less inherently desirable and, instead, only desirable in as far as it serves the social goals of peoples.⁶⁰⁸

Suzuki subscribes to similar views as Reisman, but places less stress on the negative aspects of secession, and thus appears more open to territorial division.⁶⁰⁹ Suzuki more openly utilizes the "New Haven School" of international law⁶¹⁰ by expressly taking as his goal optimum world public order (including the recognition of human dignity for all) while maintaining minimum public order (minimizing the negative effects of striving to achieve the goal).⁶¹¹ As a result, Suzuki holds that the principles of territorial integrity and "domestic jurisdiction" are not "absolute or sacred."⁶¹² Instead, "both principles must be subservient to the overriding concern for human dignity."⁶¹³ Further, "consistency in improving the quality of public order, rather than consistency in supporting change or stability, should be the goal."⁶¹⁴ In determining the legitimacy of a claim to secede, "the test of reasonableness is the determining factor. . . . The total context of such a claim must be considered: the potential effects of the grant or denial of self-determination on the sub-group, the incumbent group, neighboring regions, and the world community."⁶¹⁵ Ultimately, however, the overriding concern in the choice between the territorial integrity of a state and its disintegration is that of human rights: any choice "should be made in such a way as to establish a

⁶⁰⁷ *Id.* at 168-69.

⁶⁰⁸ I note that Heraclides categorizes Reisman as strictly as he does Nanda, citing the views that I have quoted. HERACLIDES, *supra* note 598, at 30. For the reasons I have outlined, I disagree with Heraclides' characterization.

⁶⁰⁹ Eisuke Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779 (1976).

⁶¹⁰ So called because its originators, Harold Lasswell, Myers MacDougal, and Michael Reisman, were all based at Yale University, in New Haven, Connecticut. For an extensive description of the School's philosophy see Myres S. McDougal, et. al. *Theories About International Law: A Prologue to a Configurative Jurisprudence* 8 VA. J. INT'L L. 188 (1968), reprinted in MYERS S. MCDUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW ESSAYS* 43 (1981). For an extensive exposition of the School's philosophy in the field of human rights, see MRYES S. MCDUGAL, *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* (1980).

⁶¹¹ Suzuki, *supra* note 609, at 792.

⁶¹² *Id.* at 848.

⁶¹³ *Id.*

⁶¹⁴ *Id.* at 785.

⁶¹⁵ *Id.* at 784.

fundamental basis for the enjoyment of all human rights."⁶¹⁶

Buchheit's approach is similar to Suzuki's in that the legitimacy of a claim to secede results from a balancing of all the various factors concerned.⁶¹⁷ Buchheit, however, can be said to have a more lenient test for legitimacy as his model accommodates not only claims for remedial secession (for oppression and abuses of human rights) but also what he terms parochial secession, where the claim is based simply on the preservation of group identity and control of the group's own political destiny rather than solely on the denial of human rights.⁶¹⁸

This more generous view of the legitimacy of secession appears to be also shared by Chen, an international legal scholar who utilizes the New Haven School approach.⁶¹⁹ Chen argues that the international law of self-determination should be developed beyond colonialism on the basis that "the consent of the governed is an essential element of human dignity."⁶²⁰

Deeply rooted in the ultimate goal of human dignity, self-determination would continue to serve as a ringing doctrine and symbol for group formation and identification, a symbol for the perpetual search of the collective self. Groups would be allowed to break away from established nation-states when it would help promote abundant production and wide sharing of values for the group directly concerned, without causing undue hardship to the remaining community of which it was a part and without its having a serious disruptive impact on the public order both regionally and globally.⁶²¹

While Chen's focus is similar to Suzuki's, in that it includes human rights and undertakes a balancing of the various interests in any situation, Chen's emphasis on the sharing of values and on group formation

⁶¹⁶ *Id.* at 862.

⁶¹⁷ BUCHHEIT, *supra* note 194. Buchheit argues that legitimacy "must result from the balancing of the internal merits of the claimants' case against the justifiable concerns of the international community expressed in its calculation of the disruptive consequences of the situation." *Id.* at 238. The "internal merits" referred to are the nature of the group (the existence of a genuine 'self'; see *e.g.*, *id.* at 228) and its situation within the governing state (the extent of oppression and the range of remedies available). *Id.* at 235-38. The external merits, or "justifiable concerns", are the prospects for the independent existence of the state (economic viability, political structure, and future cohesiveness) and the effect of the separation on the world and on the remaining community. *Id.* at 232. Buchheit articulates a mathematical relationship whereby the higher the internal merits of the claim, the higher the disruption factor must be in order to outweigh the merits. *Id.* at 238-245.

⁶¹⁸ Note, however, that it is not the most lenient; Buchheit sees himself as accommodating the claims of the strict remedialists and the loose parochialists by the use of the sliding scale introduced by the mathematical relationship. *Id.* at 224-35.

⁶¹⁹ Chen, *supra* note 206.

⁶²⁰ *Id.* at 241.

⁶²¹ *Id.*

and identification is wider than what is typically encompassed by a reference to the protection of human rights.

Charles Beitz takes the view that “[s]elf-determination is a means to the end of social justice.”⁶²² This is wider than Suzuki’s approach in that Beitz seems to envisage that social justice encompasses more than what is typically encompassed by references to human rights, with each case depending “on the contents of the principles of social justice appropriate to particular groups.”⁶²³ Yet it is also narrower than Buchheit’s approach, because Beitz holds that a right of secession can only be extended to all groups “when it can be shown that independent statehood is a necessary political means for the satisfaction of appropriate principles of justice.”⁶²⁴ Further, Beitz considers that in many cases, injustice would be a “deep and relatively fixed [feature] of the social and political life of the group.”⁶²⁵ This requirement precludes the parochial self-determination that Buchheit envisages as being possible if not outweighed by the disruptive consequences.⁶²⁶ Beitz does not argue for the inclusion of this situation.

Brilmayer emphasizes a different aspect, arguing that human rights abuses are not enough in themselves to justify a right to secession, but instead a claim to secession must include a justification to take the territory that is also being claimed.⁶²⁷ Thus, in order for a claim to secede to be legitimate, it must articulate a theory of sovereignty over territory presently within the state.⁶²⁸ Once that is established, other criteria will be weighed, such as the extent of the fault of the current majority group in any grievance, any other grievances such as human rights abuses, and the disruption to the present state if secession is granted.⁶²⁹ Perhaps the most radical element of Brilmayer’s thesis is her claim that the present rhetoric that pits the satisfaction of human rights through secession against the territorial integrity of states is wrong.⁶³⁰ Instead, she argues, territorial integrity can accommodate self-determination if we regard

⁶²² CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 104 (1979). See also, *id.* at 112, (extending his comments to groups other than those subject to colonialism).

⁶²³ *Id.* at 104. With respect to the principles of social justice, Beitz posits an exercise whereby principles of justice would be chosen by rational members of the group; these principles could cover “exploitation and distributive inequality” in addition to “the more conventional interpretation [concerning] . . . an absence of representative institutions.” *Id.* at 98-99.

⁶²⁴ *Id.* at 112.

⁶²⁵ *Id.* at 115.

⁶²⁶ See *supra* notes 617 & 618 and accompanying text.

⁶²⁷ Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 *YALE J. INT’L L.* 177 (1991). As a comparison, Brilmayer posits the alternative situation of refugees, who may leave for reasons of abuse, but who do not have a valid territorial claim. *Id.* at 187-189.

⁶²⁸ *Id.* at 199 (positing that this claim will typically be based on an historical grievance).

⁶²⁹ *Id.* at 199-201.

⁶³⁰ *Id.* at 178-79, 192-97 & 201-202.

claimants as simply making competing claims to territorial integrity; that is, to their territorial integrity rather than the state's.⁶³¹

The most recent contribution to the debate on the legitimacy of secession is that of Buchanan.⁶³² Buchanan considers that the most sound ground for establishing the legitimacy of secession is that the group has been treated unjustly, such injustice encompassing more than typical considerations of human rights.⁶³³ While injustice is the "[c]hief and least controversial"⁶³⁴ of the sound moral justifications for secession, Buchanan goes further, arguing that self-defense, cultural preservation and the goals of political association may also justify secession.⁶³⁵ Buchanan does not place an absolute limit on these grounds by requiring that secession be a last resort, but the less reliant the claim is on serious injustices, the more that other alternatives must be sought first.⁶³⁶

A more radical approach is taken in a 1980 Yale Law Journal Note, which argues that a prima facie right to secede is established when there is an associational desire on the part of the majority of a separate group, and that group has a viable, identifiable land base.⁶³⁷ The proposed secession is then balanced against any negative consequences to the existing state, and violence on the part of either side is considered.⁶³⁸ The Note argues that "the individual's right to choose the community he regards as optimal for his development is a fundamental social value"⁶³⁹ and that "the institutions of civil government [should be adjusted] to evolving concepts of group identity."⁶⁴⁰ It implies that the goal of self-determination, and thus secession, should be to achieve such choice and group identity, with a minimum of disruption. Perhaps the most instructive guiding principle is "the fallacy of simply equating territorial integrity with stability, and self-determination with disruptive change."⁶⁴¹ Instead, in some cases, "adherence to territorial integrity has promoted disorder whereas a right of secession could well occasion future stability and

⁶³¹ *Id.*

⁶³² ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC (1991).

⁶³³ Examples given are when: "Its territorial sovereignty has been violated; it has suffered discriminatory redistribution; its members have been denied equality of opportunity; or their individual or states' rights have been violated." *Id.* at 132.

⁶³⁴ *Id.*

⁶³⁵ Buchanan succinctly summarizes his right to secede and the competing factors. *Id.* at 152-53.

⁶³⁶ *Id.*

⁶³⁷ Debra A. Valentine, Note, *The Logic of Secession*, 89 YALE L.J. 802 (1980).

⁶³⁸ *Id.* at 815-820.

⁶³⁹ *Id.* at 802.

⁶⁴⁰ *Id.* at 803.

⁶⁴¹ *Id.* at 824.

peace."⁶⁴²

Not all indigenous peoples presently argue for the right to secede.⁶⁴³ In fact, as was shown in the debates in the Working Group, many specifically stress that they are not looking for the right to secede for themselves, only alternative forms of government that protect their interests and are more appropriate to the structure of indigenous societies.⁶⁴⁴ Where a claim to secede has been made, it has typically been presented on the basis of geographical separateness and historical colonialism.⁶⁴⁵ Such claims have been based on the criteria that currently exist in international law, extended to the arguably similar situations of many indigenous peoples.⁶⁴⁶ Very few have been made on the simple basis, for example, of an inherent right of self-determination and an inherent attribute of sovereignty over their lands that requires the restoration of ownership. I suggest, however, that the existence of the present legal categories and international rules of self-determination have defined the debate and the claims made within it. For example, indigenous peoples in fact have traditional views of land that typically do not envisage human sovereignty over it. Instead, people belong to the land.⁶⁴⁷ Perhaps the most that can be said of an indigenous human right to land is the customary right of use of particular areas. Today, such a right of use has often been translated into a right of ownership simply in order to preserve the land for the use of the respective indigenous peoples. While this does not affect a territorial claim or right to secede, it illustrates the way the rhetoric and even legal concepts are adapted to fit the prevailing world view. The same could perhaps be said of the claims for secession.

If the international law of secession were changed in line with the proposals of the various scholars described above, I suggest that the discourse used by indigenous peoples would correspondingly change. As the right to secession under the different theories proposed depends en-

⁶⁴² *Id.* The Note argues that the Ogaden was then such a case.

⁶⁴³ See, e.g., the submissions by the National Indian Youth Council contained in *Analytical Compilation of Observations and Comments supra* note 40, at 13-15.

⁶⁴⁴ See *supra* note 54 and accompanying text.

⁶⁴⁵ For example, the Dene and Inuit of the Canadian Northwestern Territories make this claim. See *supra* notes 469-474 and accompanying text.

⁶⁴⁶ *Id.*

⁶⁴⁷ On the importance of land to indigenous peoples see, e.g., the statements made in the context of the Working Group. *The Study of Discrimination, supra* note 51, at 7, para. 27; *Review of Developments - Consideration of the Evolution of Standards - Information Received From Non-Governmental Organizations, supra* note 51, at 11; *Analytical Compilation of Observations and Comments, supra* note 40, Add. 1, at 26-27; *Analytical Commentary on the Draft Principles Contained in the First Revised Text of the Draft Declaration on the Rights of Indigenous Peoples (E/CN.4/Sub.2/1989/36) Elaborated on by the Chairman/Rapporteur of the WGIP*, at 10-15, U.N. Doc. E/CN.4/Sub.2/39 (1990); *Ninth Report of the WGIP, supra* note 28, para. 51. See also *Cobo Report, supra* note 1, at 16, paras. 196-97; STAVENHAGEN, *supra* note 1, at 100-105.

tirely on factors specific to the situation in question, it is impossible here to give a general assessment as to the likely results under the different theories. I will suggest, however, that the more lenient approaches are the most suitable for accommodating all of the concerns of indigenous peoples.

Indigenous peoples have been subjected to historical injustices. All are still subject to varying degrees of injustice today. As noted in the description of the discussion of the draft declaration in the Working Group, the point stressed most often is the violation of the human rights of indigenous peoples.⁶⁴⁸ Such points are not made solely in the context of claims for self-determination or secession; they are also elaborated on in the discussion under the agenda item Review of Developments.⁶⁴⁹ It is clear that some indigenous peoples can be described as suffering severe human rights deprivations and may thus satisfy the criteria for a right of self-determination even under strict tests such as those posed by Nanda.⁶⁵⁰ Any theory that legitimizes a right of secession even solely on the strict basis of severe deprivations of human rights would be likely to enable more indigenous peoples to achieve full self-determination.

Despite the fact that some indigenous peoples may satisfy even the strict approach, such an approach would not necessarily accord with the indigenous peoples' view that self-determination and self-government are inherent rights of peoples; nor does it accord with their view that their culture is incompatible with the prevailing cultures imposed on them by the states in which they live, and that, in order to preserve their culture, indigenous peoples need to operate their own, separate systems of government and laws. In order to accommodate such views, the stricter approaches would not be enough; instead, the more lenient approaches would be necessary, such as those of Buchheit, Chen, Buchanan, and of the Yale Law Journal Note.

Brilmayer's requirement of a claim to territory does not pose any

⁶⁴⁸ See, e.g., *supra* notes 50-51 and accompanying text.

⁶⁴⁹ See *supra* note 25 and accompanying text.

⁶⁵⁰ For example, the Jumma, indigenous peoples of the Chittagong Hill Tracts in Bangladesh, could be candidates for such a right of secession if the present recommendations for autonomy are not implemented and/or prove to be insufficient to end the violations of their human rights. On the human rights deprivations suffered by these peoples, see CHITTAGONG HILL TRACTS COMMISSION, REPORT: 'LIFE IS NOT OURS' - LAND AND HUMAN RIGHTS IN THE CHITTAGONG HILL TRACTS, BANGLADESH (May 1991). For a summary of findings and recommendations of the Chittagong Hill Tracts Commission (an independent international body established to investigate the allegations of human rights violations in 1990-1991), see *Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/AC.4/5 (1991). See also *Submission by the Jumma delegation to the WGIP*, Geneva, 29 July - 2 August 1991, *Written Submission to the WGIP by the Chittagong Hill Tracts Commission*, Geneva, August 1 1991, and *Oral Statement by Leif Dunffeld (member of the Chittagong Hill Tracts Commission) to the WGIP*, July 1991 (all documents on file with author).

particular problems for indigenous peoples because their historical ties to the land are typically not in question. I would even go so far as to say that it is clear that indigenous peoples have historical grievances in relation to the lands they claim and can articulate theories of sovereignty in relation to them. Where I differ from Brilmayer is in her description that, because we can regard claimants to territory as making competing claims to territorial integrity, we can say that the human rights claims do not really clash with territorial integrity and that, therefore, territorial integrity does not pose a real barrier to the achievement of self-determination. As the description of the debate in the international sphere on self-determination shows, it is the territorial integrity of *present states* that is a fundamental norm of the present world system of states and state sovereignty.⁶⁵¹ The concept of territorial integrity poses a barrier to secession as long as it is conceived of as protecting the present boundaries of states. Brilmayer is quite correct in arguing that this should not be the case, because everyone is really appealing to territorial integrity.⁶⁵² However, a simple appeal to the concept of territorial integrity is not the barrier in question; the real barrier is the assumption that protection of the present boundaries of states is so necessary that no derogations will be permitted unless the state concerned agrees to them.⁶⁵³ With the present rules of state sovereignty, the achievement of respect for human rights via secession does indeed run hard up against the principle of the territorial integrity of present states.

In conclusion, the various proponents of a qualified right of self-determination all attack the states' argument that any right of secession would be unmanageable. Further, the proponents all argue that a qualified right of secession would be more in accord with principles of justice (including respect for human rights) and thus with world peace (including the maintenance of stability and world order). The primary requirement for implementing such a qualified right is that the factors described be openly debated and balanced in the determination of a claim to secede. If such a right is to be recognized in the draft declaration, this debate must be undertaken for negotiation of the appropriate wording of the recognized right. This kind of debate is not undertaken at present, so it will clearly entail the adoption of a new rhetoric in the international sphere.

Whether such a new rhetoric is able to be adopted depends at least

⁶⁵¹ See *supra* Part II.

⁶⁵² See *supra* notes 630-631 and accompanying text.

⁶⁵³ It is this element of agreement that distinguishes the breakup of the U.S.S.R. from the claims of indigenous peoples and minorities to self-determination through secession. See *supra* note 325 for possible interpretations of how the secession of the various states of the U.S.S.R. and of Yugoslavia could change the international law on secession such that it makes any difference to the justification of secession by indigenous peoples.

partly on the barriers to the recognition of the right itself. The only real barrier to the adoption of a qualified right of secession is the present principle of state sovereignty. The states' position appears to be that, even if such a right would accord with the principles of justice, world peace can only be achieved if the principles of territorial integrity and non-intervention are adhered to.⁶⁵⁴ The result is that, if indigenous peoples are to be accorded even a qualified right of secession in order to achieve self-determination, then the present strict adherence to the principles of territorial integrity, and thus non-intervention, will have to be relaxed. While this will not necessarily entail the elimination or alteration of the general concept of state sovereignty over territory, it does mean at least that the present distributions of land will be modified. This will require an alternative way of conceiving the world system and the use of appropriate rhetoric in order to debate it properly in the international realm. It remains to be seen whether this can be achieved within the present world system of state sovereignty or whether an alternative theory of sovereignty needs to be developed.⁶⁵⁵

B. Territorial Entitlement

As the previous section argues, if a right of secessionist self-determination is to be recognized in international law then, among other things, alternative theories of entitlement to land need to be developed, along with the means necessary to debate entitlements in the international sphere.⁶⁵⁶ At present territorial entitlement is justified by a range of international legal principles.⁶⁵⁷ The disputes over territory that are debated in the international realm use these principles to argue for an entitlement to territory. These particular principles are not static and in fact have evolved to meet changing circumstances and changing attitudes.⁶⁵⁸ While there is not clear, overarching metatheory used to guide the development of these principles, there are two general types of rea-

⁶⁵⁴ As Lea Brilmayer has argued, the simple concept of territorial integrity and having sovereignty over land is not a real barrier. See *supra* notes 627-631 and accompanying text. However, even if this is the case, this is not the only issue; the primary issue is who has the right to the territory in question. States have decided that, as a general rule, claims to land made by secessionist groups, even those based on historical grievance, are overridden by the right of present states to their present borders. The assumed justification is that the stability of the world system depends on this. While Brilmayer makes the distinction between the general concept and its application in her book (*infra* note 660, at 52-78), it also needs to be made explicitly in her article.

⁶⁵⁵ See *infra* section entitled Sovereignty (discussing the possibility that a different conception of sovereignty may be required).

⁶⁵⁶ The previous section also shows that there is a need to debate the general pros and cons of secession in any particular case, but this is not in issue in this section. For discussion of one aspect of this, see *infra* section entitled Non-Intervention with States' Domestic Affairs.

⁶⁵⁷ See, e.g., BROWNIE, *supra* note 171, at 133-171 (identifying over twenty such principles).

⁶⁵⁸ See, e.g., BROWNIE, *supra* note 171, at 146 (commenting on the doctrine of discovery).

sons that are used to justify laws, including international law: principle and pragmatism. The principled reason for an international legal right to states' territory would be that it creates a property system in the interests of justice of all states, and thus all peoples, and thereby creates a moral right to territory. The pragmatic reason is that, while there may or may not be any principled, moral right to territory held today, respect for the principle of territorial integrity is a practical solution. It is in the interests of states and peoples to respect territorial integrity because to hold otherwise would lead to too much conflict, violence, and international warfare. I suggest that both of these reasons should be scrutinized to see if they do justify present holdings to territory or the territorial integrity of present states.⁶⁵⁹

The development of any theory of territorial entitlement is clearly a large and difficult task,⁶⁶⁰ so the following discussion is not intended to be an extensive discussion of the moral or pragmatic justifications of states' rights to territory. But it is intended to show that any purported justification must be addressed and identified directly.

The issue whether individuals within states can have moral rights to territory has been addressed extensively by various philosophers, many of whom have answered "yes."⁶⁶¹ The issue whether *nations* can have a moral right to their territory, however, has been addressed by relatively few. In the "real, real world" of state relations, it is clearly assumed by states that the legal right to presently-held territory is in the interests of all states and peoples. It is not clear, however, what their reasons for this assumption are. States may think that it is a matter of moral principle, or justice, perhaps on the basis of extension of the principled reasoning justifying property systems giving territorial rights to individuals within states. Alternatively, they may merely think that it is a pragmatic solution in a world of different and competing peoples and ideologies; protection of present property holdings is required in the interests of stability and peace.

International relations theorists who have considered this issue generally conclude that states cannot have any moral rights to their present territories. For example, Charles Beitz argues that the existing distribution of territory and resources is completely *morally* arbitrary.⁶⁶² Lea Brilmayer comments that Beitz is only one of the international relations theorists who "have made this argument many times."⁶⁶³ Brilmayer her-

⁶⁵⁹ Recall that we are not concerned with the simple idea of keeping borders intact, but with the present borders. See *supra* notes 651-653 and accompanying text.

⁶⁶⁰ See, e.g., LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS 52-78 (1989).

⁶⁶¹ See, e.g., JOHN RAWLS, A THEORY OF JUSTICE (1971); ROBERT NOZICK, ANARCHY STATE AND UTOPIA (1974).

⁶⁶² BEITZ, *supra* note 622, at 136-143.

⁶⁶³ BRILMAYER, *supra* note 660, at 76.

self adopts this view.⁶⁶⁴

It appears that few philosophers have attempted to justify nations' or states' rights to territory on moral grounds.⁶⁶⁵ Two contemporary philosophers who have addressed this issue have concluded that there cannot be any moral rights to present territories. Jeffrey Reiman considers the arguments used by Locke, Nozick and Rawls to justify individual rights to property and examines whether they can be extrapolated to justify the present holdings of land by states.⁶⁶⁶ He argues, first, that, as nations are groups of individuals, and individuals are all considered morally equal, some nations cannot be arbitrarily entitled to more property, resources or territory than others.⁶⁶⁷ Therefore, nations cannot be the units of moral calculus; only individuals can.⁶⁶⁸ Second, in order to justify any system of property entitlements, the system must be in the interests of justice for all.⁶⁶⁹ This can be satisfied within states because a government can ensure that the system will not worsen the prospects of all, including those that do not own property.⁶⁷⁰ In the international sphere, however, Reiman notes that there is no such government, so there can be no similar justification of the property system.⁶⁷¹ Thus, after considering the justifications put forward by Locke, Nozick and Rawls, Reiman concludes that the arguments used to justify the rights of individuals to land cannot be extrapolated to justify the present holdings of land by states.

Richard Winfield similarly rejects the extension of individual rights to relations between states.⁶⁷² He argues that the only justification of territory holdings are instrumental, in that territory is necessary in order to exercise political life, self-government and thus self-determination. I suggest that this does not justify the present holdings of territory and thus does not justify the present rule of territorial integrity.

The pragmatic reason for upholding the present rule of territorial integrity can be scrutinized similarly. If the reason for upholding the rule is that it is in the interests of states, namely for peace and security, that can be objectively assessed. Questions to ask include: What is the rule actually protecting? Does it really serve the interests of peace and security? What should the purpose of territorial rights be?

⁶⁶⁴ *Id.* at 76-77.

⁶⁶⁵ *See id.* at 77 n.32 (exemplifying those philosophers).

⁶⁶⁶ Jeffrey Reiman, *Can Nations Have a Moral Right to Territory?* in *THE TERRITORIAL RIGHTS OF NATIONS AND PEOPLES* 163 (John R. Jacobson ed., 1989).

⁶⁶⁷ *Id.*

⁶⁶⁸ *Id.* at 174.

⁶⁶⁹ *Id.* at 175-76.

⁶⁷⁰ *Id.*

⁶⁷¹ *Id.* at 176.

⁶⁷² Richard Dien Winfield, *Territorial Rights in THE TERRITORIAL RIGHTS OF NATIONS AND PEOPLES* 187 (John R. Jacobson ed., 1989).

The rule is clearly protecting rights to use of the land and resources currently within a state's borders. It protects — at least in theory — the right of the people in the state to have and enjoy their chosen form of government, and thus protects their right of self-determination. Further, in holding that violations of the rule will not be permitted, it protects — again, in theory — a state from constant attempts by other people or states to acquire the property of the first state by violence. All of these justifications can be examined to see if they are legitimate purposes of the rule of territorial integrity and to see if the rule actually furthers them. Specifically, even if these interests are furthered in the abstract, they must be justified in relation to the *present* holdings of states, as that is what the rule of territorial integrity protects.

Winfield argues, for example, that there is only one legitimate justification for the protection of territorial rights, which is that it enables peoples to achieve self-determination by enabling them to create a space in which to exercise political self-government.⁶⁷³ However, just because there is a justification for property rights in the abstract does not entail that rights to the present distribution of property is justified. They may only be justified, for example, if they actually serve the interest of self-determination. Thus, vast disparities in the different property holdings of different states would need to be justified by reference to the needs of self-determination rather than, for example, a simple rule of “finder’s, keeper’s” or maintenance of the status quo.

A similar process could be undertaken with respect to the reason of peace and security. While this may justify a system of property holdings, in the abstract, that does not mean that any particular system and distribution of property is justified. It may not be justified if the system chosen is so repugnant to the demands of justice that it leads to aggression on the part of states that hold too little property to achieve the other goals of a property-holdings system (such as of achieving self-determination) against states who hold more than is so necessary.

It is at least arguable that there are no principled, moral justifications of the international rule of upholding the territorial integrity of *present* states. This means that the alternative justification of the rule — that of upholding it for pragmatic considerations — may be the only justification. If this is the case, not only should it be directly identified, but it should be critically evaluated, to see if it does in fact serve the purpose that it is said to serve. I have not answered the questions that I posed regarding the pragmatic justification of a state property-holdings system, but I have indicated the kind of discussion that must be openly undertaken. This discussion must involve the identification and explicit

⁶⁷³ *Id.* at 205.

balancing of the various interests involved, particularly where the principle is not justifiable by reference to the interests of distributive justice.

The arguments made by indigenous peoples are relevant precisely because many indigenous peoples challenge the legal justification for the rights of present states to the land and resources that they have acquired through the conquest of indigenous peoples. International law has made might right; therefore, the issue that should be addressed is whether this is justified. If it is concluded that it is not, then the appropriate remedy for the injustices done to indigenous peoples must be considered, which must include discussion of such issues as the application of self-determination and whether the territorial integrity of present states should be upheld today. Such discussion will necessarily entail debate on the interests being protected by the principle of territorial integrity and how the various interests involved, including the human rights of indigenous peoples, should be balanced. I suggest that one of the primary factors included in the discussion must be the justification of all territorial entitlements.

C. *Non-Intervention in States' Domestic Affairs*

The principle of non-intervention in a state's domestic affairs is a constitutive principle of the present world system of nation-states. It is, however, not as inviolable as the territorial integrity of present states. The principle of non-intervention is enshrined in the Charter of the United Nations in Article 2(7), the only stated exception being enforcement measures taken to maintain or restore international peace and security.⁶⁷⁴ Very few such measures have been taken.⁶⁷⁵ However, this has not stopped United Nations organs from taking action⁶⁷⁶ on matters concerning the relations between a government and the people of a state under Chapters IX and X of the Charter,⁶⁷⁷ most notably in respect to human rights matters.⁶⁷⁸ The result is that the United Nations has in-

⁶⁷⁴ Article 2(7) provides:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall nor prejudice the application of enforcement measures under Chapter VII.

U.N. CHARTER art. 2, para. 7. Chapter VII provides for enforcement measures to maintain international peace and security in situations of threats to the peace, breaches of the peace, and acts of aggression. *Id.* art. 39.

⁶⁷⁵ This is commonly attributed to the difficulty that the Security Council had in acting during the cold war.

⁶⁷⁶ The type of action commonly thought not to be inhibited by Article 2(7) ranges from discussion as an agenda item, to recommendation, and even to resolutions addressed to particular states. BROWNIE, *supra* note 171, at 294.

⁶⁷⁷ U.N. CHARTER chs. IX & X (concerning economic and social co-operation).

⁶⁷⁸ Such interventions are made under Articles 55 and 56, concerning the promotion of respect

creasingly treated a widening range of affairs between a government and the people of a state as *not* essentially domestic concerns, intervening other than on the basis of Chapter VII, and thereby eroding domestic jurisdiction.⁶⁷⁹

The justification for such intervention has at least three elements. One is that Article 2(7) cannot be taken to override other conflicting provisions of the Charter (for example, Articles 55 and 56).⁶⁸⁰ Another is that Article 2(7) cannot protect activities that have an impact beyond the state in question; for example, civil strife due to human rights abuses that threatens to affect neighboring states.⁶⁸¹ A third is that there may be some things so contrary to public policy that they cannot be countenanced. In the case of human rights, such public policy has focused on the protection of human dignity (intervention in cases of genocide and torture are common examples). In the case of the environment, public policy concerns have been based on the future of humanity as a whole. Both of these in turn illustrate the concept that there are some things that simply cannot be regarded as the "property" of a state.

The primary objection presently raised against the increasing interference on the basis of human rights is that the relations between a government and people of a state are regulated by cultural norms.⁶⁸² Such cultural norms, it is argued, make it inappropriate for states with different norms to be telling such countries (governments and people) how to order their relationships.⁶⁸³ Possible justifications of this are that the people of the state being "interfered" with actually agree with the powers and actions of the government because of their cultural beliefs; and that, even if they disagree, they prefer to solve their own problems themselves, without interference from others. Another justification other often is that they do not share the Western concept of rights and therefore do not welcome solutions based on such a concept.

From an indigenous perspective the tension between human rights universality and cultural relativity is problematic. On the one hand, indigenous peoples disagree that states should have the powers that they claim over the people within them and argue for a recognition of univer-

for human rights. An increasing category of interventions is matters relating to the protection of the environment.

⁶⁷⁹ Brownlie comments that the use of Article 2(7) has "resulted in the erosion of the reservation of domestic jurisdiction, although its drafters intended its reinforcement." BROWNIE, *supra* note 171, at 294.

⁶⁸⁰ *Id.*

⁶⁸¹ This is because Article 2(7) does not prevent measures taken to maintain international peace and security. See *supra* note 674.

⁶⁸² For a discussion of cultural relativism see JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 109-160 (1989). See *infra* note 687 for a description of Donnelly's suggested reconciliation of universalist and relativist positions.

⁶⁸³ DONNELLY, *supra* note 682, at 109.

sal fundamental human rights. To this end, indigenous peoples endorse the international human rights standard-setting approach, endorsing the concept of human rights protection.⁶⁸⁴ On the other hand, their complaints are directed more at the present states, with their present composition and boundaries, having such powers rather than a wholesale attack on the concept of non-interference. They do believe that there are genuine cultural differences between themselves and other peoples and, on the basis of cultural relativity, reject interference by others in matters that may be expressions of culture.⁶⁸⁵ Their problem thus appears to be not so much with the fact of intervention, but with the purposes for intervention, and situations in which it is undertaken.

This approach supports the view that the principle of non-intervention with states' domestic affairs is not an absolute principle, but one that is subject to override by factors other than just those of Chapter VII. This in turn supports the development of a theory of intervention, including who may decide to undertake interventions and upon what criteria they may be undertaken. I will not attempt such a theory here, but it is clear that an assessment of the value of the principle of sovereignty must be made as well as the value of the other rights that it is presently said to supersede. In relation to indigenous peoples, this must assess what interests are being protected by the states' insistences on the principle of non-interference and what interests of indigenous peoples may be violated by such adherence. It is clear that states consider sovereignty to be important because they consider it to be the only guarantee of the self-determination of the state as a whole.⁶⁸⁶ But the issue should be whether it is so

⁶⁸⁴ For example, their endorsement of the development of the draft Declaration on the Rights of Indigenous Peoples.

⁶⁸⁵ See, e.g., the indigenous representatives' proposals for provisions on the protection of their culture to be included in the draft declaration. *Supra* note 53. Operative paragraphs 5-12 of the most recent draft of the declaration protect cultural rights of indigenous peoples. This includes:

5. Indigenous peoples have the collective and individual right to maintain and develop their distinct ethnic and cultural characteristics and identities, including the right to self-identification.
6. Indigenous peoples have the collective and individual right to be protected from cultural genocide, including the prevention of and redress for:
 - (a) any act which has the aim or effect of depriving them of their integrity as distinct societies, or of their cultural or ethnic characteristics or identities;
 - (b) any form of forced assimilation or integration;
 - (c) dispossession of their lands, territories or resources;
 - (d) imposition of other cultures or ways of life; and
 - (e) any propaganda directed against them.

Even I.L.O. Convention No. 169 recognizes "the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life . . . and to maintain and develop their identities, languages and religions." I.L.O. Convention, *supra* note 8, preambular para. 5.

⁶⁸⁶ For example, see the concerns expressed in the 1960 Declaration, *supra* note 258, Annex I and the Declaration on Friendly Relations, *supra* note 278, Annex III.

important that it should supersede claims of individuals to have their basic human rights respected, including a right to exercise self-determination as a group smaller than that of the state as a whole.⁶⁸⁷

D. Sovereignty

The practice and concept of state sovereignty has been brought into focus at several different stages throughout the discussion of indigenous peoples' claims to recognition of a right of self-determination. At a basic level, the nature of the concept of sovereignty is raised by issues such as whether sovereignty is an inherent right of peoples or whether a people's sovereignty can be taken from them. The view of states seems to be that the sovereignty once enjoyed by indigenous peoples has either been ceded by treaties or lost via conquest. Indigenous peoples do not appear to argue that a genuine treaty of cession cannot alter the exercise of the right of sovereignty. They deny that there are any proper treaties of cession that have not been violated by force; instead, they argue that their exercise of sovereignty has been prevented by force. Their view of sovereignty is that it is an inherent right that cannot be taken by conquest. Instead, conquest and subsequent subjugation merely suppresses their right to enjoy the practices of sovereignty. According to indigenous peoples, the recognition of their rights to self-determination would thus be merely a reinstatement of their ability to exercise the rights of sovereignty that they would be entitled to in the absence of violation by states. I will not delve into the nature or definition of sovereignty here, as it is much too large a subject. What I want to stress, however, is that this fundamental, large and complicated subject is relevant to a proper discussion of the claims of indigenous peoples to self-determination.

At another level, the concept of sovereignty has been brought into focus by the discussion of the principles of non-intervention in the domestic affairs of states and respect for the territorial integrity of states. While these two principles have been discussed in separate sections, and

⁶⁸⁷ One approach has been to use the concept of universal human rights. For example, Donnelly argues that the best compromise between cultural relativism and universalism appears to be the endorsement of a "weak cultural relativist position that permits deviations from universal human rights standards primarily at the level of form." DONNELLY, *supra* note 682, at 110 (footnote omitted). Note that the primary proponents of cultural relativism have been leaders of Third World nations decrying the inappropriate imposition of First World values. See Donnelly's description and criticisms of some of these appeals to cultural relativism. *Id.* at 118-121. However, while such arguments are relevant to a general theory of non-interference, they are not of primary concern here. This is because indigenous peoples live in many different states, both from the First and Third World, and have joined together to draft joint proposals for the draft declaration. See proposals cited *supra* note 53. The development of rights of indigenous peoples can therefore less easily be regarded as the imposition of one world's set of values upon the other. Moreover, I note that many states from the First and Third Worlds find themselves in alliance opposing the claims of indigenous peoples to self-determination. See *supra* notes 57-64 and accompanying text.

appear to be separate principles of international law, they are both intertwined as “*practices* of state sovereignty.”⁶⁸⁸ It is these practices that are reified by “the formalization of state sovereignty as the primary constitutive *principle* of modern political life.”⁶⁸⁹ The principles that I have discussed are therefore only part of a wider principle underlying the present world system of states: that of state sovereignty.

In my discussion of the two principles, I have suggested that they need to be addressed in more detail in any discussion of the indigenous peoples’ claims to self-determination. They need to be questioned and the interests that lie behind their expression need to be directly evaluated. Because they are only expressions of the principle of sovereignty, any attempts to question or contest these principles must thus be seen as an attempt to contest the overarching principle of state sovereignty. As with the principles of non-intervention and territorial integrity, the discussion to date on indigenous peoples’ claims to self-determination has merely assumed that state sovereignty is the ultimately important principle; it does not argue why this should be so. Further, it does not address arguments why that might not be so or why it might be overridden by other important principles and competing interests.⁶⁹⁰ The primary problem with this approach is that, in obscuring the true interests involved, it prevents the resolution of the problem in the best interests of all of those concerned. In the interests of obtaining a proper resolution of the claims, including a proper consideration of the arguments used to reject them, the interests behind the world system of state sovereignty must also be evaluated.

In addition, the discussion of both the international law of self-de-

⁶⁸⁸ R.B.J. Walker, *Sovereignty, Identity, Community: Reflections on the Horizons of Contemporary Political Practice* in *CONTENDING SOVEREIGNTIES* 159, 160 (R.B.J. Walker & Saul H. Mendlovitz eds., 1990) [hereinafter *Sovereignty, Identity, Community*]. Walker argues that these can be seen merely as aspects of the overarching principle because they are both different ways of conceiving of the state. That is, the state can be understood “as territory, as geography, as extension across the physical surface of the earth.” *Id.* at 173. The state can also be understood “less in terms of the lines of spatial extension than of the fixed point from which spatial extension is measured.” *Id.* That is, this point is “a fixed point of power and legitimacy.” *Id.* The state is understood as “the sovereign center around which society, polity, culture, economy, and territory may be circumscribed.” *Id.* Thus, “[t]he claim to power and authority at the center may be treated as more or less coextensive with the claim to control a piece of territory.” *Id.*

⁶⁸⁹ *Id.* at 159-160.

⁶⁹⁰ For example, the interests involved in situations of colonialism serve as an illustration of what questions are avoided by the use of state sovereignty as a trump principle. Note that this approach is not limited to colonialism and can be used to analyze other elements of self-determination. For example, in discussing why there is no agreement on what constitutes representative government, one must look at the real interests involved. In this example, the principle of non-interference is posed as the most important principle to uphold. This, however, puts up barriers to discussion because it does not even address, let alone evaluate, the usefulness of the principle to the interests at issue.

termination and the debate on the indigenous peoples' claims has shown that the principle of sovereignty and its practices comprise the barriers raised to the claims by indigenous peoples for self-determination.⁶⁹¹ I therefore suggest that any satisfaction of the claims of indigenous peoples to self-determination necessarily challenges these principles and practices. Not only must the various interests be evaluated, but it appears that some of the interests presently protected by the adherence to the principle of sovereignty will need to be overridden if all indigenous peoples are to achieve their self-determination.

The difficulty with this challenge to the concept of sovereignty is that it is not clear how much is able to be undertaken within the present paradigm of international law and relations. Sovereignty is part of the definition of the system. It may thus be that sovereignty cannot be contested in the present state system but must instead be done within another paradigm. Alternatively, it is possible to question its value to the present state system without suggesting that the foundation of the present system be altered, merely their application. The challenge to territorial integrity illustrates the different possible approaches: the challenge can be directed at the whole concept of a territorially-defined state, or at the present definitions of territory enjoyed by states — a challenge to the principle or to its application. Yet, even if it is only a question of application, it is still unclear how this can be challenged within a system that does not permit challenges to the application of the principle of territorial integrity — i.e., challenges to the territorial integrity of present states. The issue is thus how fundamental any resulting change must be: can we tinker with the present system and achieve self-determination for all peoples while upholding the concept of sovereignty (if not its present application), or must we re-conceptualize our present system and/or sovereignty in order to achieve our goals?

The following section discusses two alternative theories of international law and relations — constructivism and normative theory — which illustrate an attempt to develop another paradigm. Both of these theories refuse to treat sovereignty as a given and instead argue for its justification. While I do not evaluate the desirability of using such theories as new bases for international law and relations, I do suggest that only theories such as those will be able to properly resolve indigenous peoples' claims to self-determination.

E. Contesting Sovereignty

The rationalist and realist theories of international law and relations are presently the dominant theories held by academics. More importantly, perhaps, they also constitute the dominant mode of discourse and

⁶⁹¹ See *supra* Parts I and II.

behavior of states. Realist theory holds that international politics is a struggle between power-maximizing states in an environment of international anarchy. Rationalist theory, adopting the realist view of international relations, addresses what is rational behavior of states given certain interests (power-maximization) and given both the game and states as players in that game. Both theories treat states and state sovereignty as givens in the international system. Territory and boundaries are thus also givens, and only the internal state can agree to cede some of its sovereignty. Security and other interests are exogenous to the state system; they cannot be changed because they are part of the system that is taken for granted by this view.

The contribution of rationalism and realism is limited to solving problems within the status quo.⁶⁹² These theories do not, however, challenge the concept of sovereignty, its practices, or application because these are taken for granted.⁶⁹³ Nor do they explain the concept of state interests; the fact that states have interests is also assumed. Neither rationalism nor realism, therefore, can challenge or even address the interests that sovereignty protects, or evaluate their importance in any particular situation. Because such interests need to be debated in order for many of the issues raised in this paper to be properly addressed, it appears that the claims by indigenous peoples can be neither fully addressed nor resolved within the paradigm created by these present theories. It thus appears that, even if we are only concerned with contesting the application and not the concept of sovereignty, it cannot be done within the present paradigm.

Constructivist theory has been devised to address these questions of state interest and the construction of states as actors in the international sphere. While rationalism and realism depend on the ideological concept of a state as a territorial entity and locus of power, constructivists argue that this definition is socially constructed. The constructivist view poses that states themselves and their interests are socially defined and that the present rationalist and realist views do not provide the only possible conception of states and sovereignty.

The constructivist view allows sovereignty to be contested by enabling it to be questioned and redefined; it does not assume that states or the state system have to remain as they presently are. The constructivist view of sovereignty is that the sovereign state was a historically-specific "resolution of questions about the character and location of political community as these were articulated in early-modern Europe."⁶⁹⁴ The

⁶⁹² For example, rationalism attempts to explain cooperation by states on the basis of states having interests.

⁶⁹³ For example, both the present concept of territorial integrity *and* the integrity of present territorial boundaries are taken as givens in this system.

⁶⁹⁴ *Sovereignty, Identity, Community*, *supra* note 688, at 169.

practices of sovereignty serve to empower states as sovereign actors in the international sphere and to reinforce the principle of sovereignty. As Alexander Wendt, a constructivist international relations scholar, puts it, "the reproduction of sovereign states is an ongoing accomplishment of knowledgeable practice, not a natural, exogenously given fact of international life."⁶⁹⁵ Wendt thus comments that sovereignty is "both practice and institution"⁶⁹⁶ and that the reproduction of this institution is "central to [the states'] identity as subjects of contemporary international life."⁶⁹⁷ While this identification of sovereignty as socially constructed does not view sovereignty as a problem or suggest that it should be changed, it permits this to be done by opening up to investigation what was previously considered to be like the closed black box of a flight recorder.⁶⁹⁸

Related to this description of the construction and reproduction of sovereignty is the view that the boundaries of states are also socially constructed. This view of boundaries leads to the view that the idea of the state *itself* as the locus of moral community is also socially constructed. If this view of moral community can be redefined then it leaves room for the operation of international human rights norms to form part of a world-wide moral community. Such a redefinition would also help to contest both the application and concept of state sovereignty.

A third way that the constructivist view could help contest and possibly redefine sovereignty, and help indigenous peoples achieve their human rights, is in its emphasis that there should be a theory of state interests. The suggestion is that such a theory should address how actors in the international sphere have and develop interests. Such a theory would enable those interests to be criticized and thus enable questions, such as the ones I have posed in relation to non-intervention and territorial integrity, to be directly addressed.⁶⁹⁹

All of these aspects of the constructivist view, by showing how the concept of state sovereignty is not a given, opens the subject up and calls for justification and possibly change. It is precisely this kind of approach that would enable the interests of indigenous peoples to be evaluated against those of states in relation to claims of self-determination.

Normative theories of international law also challenge the principle of sovereignty. The normative view directly addresses the moral and ethical obligations of states and other actors in the international sphere. This

⁶⁹⁵ Alexander Wendt, *Sovereignty and the Social Construction of Power Politics* 24 (1990) (unpublished manuscript). Wendt refers to Richard Ashley, *Untying the Sovereign State: A Double Reading of the Anarchy Problematique* 17 MILLENIUM 227 (1988).

⁶⁹⁶ *Id.*

⁶⁹⁷ *Id.*

⁶⁹⁸ Perhaps, a Pandora's flight recorder.

⁶⁹⁹ See earlier sections in this Part.

is in contrast with the rationalist and realist views of international law which disagree that moral thinking is relevant to international law and relations.⁷⁰⁰ Within normative thinking, there are different strands, each with different views of where such moral obligations originate; that is, whether they originate from people, states, or both. Different theorists thus have different views on the relevance of sovereignty.

The cosmopolitan view considers that people are the source of moral values.⁷⁰¹ This view considers that human rights principles, as derived from ethics, should govern all behavior in the international sphere, including that of states. This view leads to a direct confrontation with the principles of state sovereignty where it conflicts with moral principles of behavior, such as the respect for human rights. It thus directly challenges and contests both the principle and practices of state sovereignty. It accordingly helps the claims to self-determination in two ways; first, in questioning the value of sovereignty and, second, in affirming the upholding of human rights. It is important to note that the cosmopolitan view doesn't necessarily reject the principle of sovereignty per se, but it stresses that it cannot be a *premise* of any theory about international law or relations. It could instead, for example, be a conclusion from principled arguments. The value of this view is that it stresses that such principles require justification; i.e. we cannot assume that the interests that a principle such as sovereignty protects are morally legitimate.

Other normative theorists take the view that both states and people ought to inform international morality. Lea Brilmayer calls this the "vertical" view, in that the sources of norms are not ethics — which takes a "horizontal" approach — but political theory.⁷⁰² This is "vertical" because it integrates both individuals and states, which are typically considered to be in a vertical hierarchy.⁷⁰³ Brilmayer suggests that she and Charles Beitz fall into this category. The usefulness of this view is that it accommodates international issues such as those concerning human rights, when views that focus solely on either states or individuals cannot.

Charles Beitz directly addresses sovereignty as a concept and considers that it should be problematic.⁷⁰⁴ He argues that, where sovereignty comes into conflict with another principle, it should not automatically overrule the other principle. A protest that sovereignty would be violated "must point toward some sort of harm, or . . . evil, that would be brought about by the violation of the state's sovereignty, the prospect of which is sufficient to overrule whatever are the reasons in

⁷⁰⁰ See BEITZ, *supra* note 622, at 15-27.

⁷⁰¹ This view is taken by Lichtenburg, for example.

⁷⁰² BRILMAYER, *supra* note 660, at 56.

⁷⁰³ *Id.*

⁷⁰⁴ BEITZ, *supra* note 622, at 69.

favour of the threatened course of action.”⁷⁰⁵ Beitz suggests that a theory of sovereignty should be developed by examining the political contexts in which conflicts between sovereignty and other principles such as morality occur.⁷⁰⁶ By examining how sovereignty is invoked, we may be able to identify the best justification for sovereignty and thus how conflict between it and other principles might be resolved. He suggests “the principled basis of appeals to sovereignty, as well as the weight we should attach to it when it comes into conflict with other concerns, will depend on specific features of the setting in which the appeals are made.”⁷⁰⁷ Beitz suggests that, through such an analysis, a normative theory of sovereignty can be developed.

Beitz’s view is similar to the position taken on sovereignty by those holding the cosmopolitan view in that both hold that sovereignty should be viewed as problematic rather than taken as a given. It thus similarly supports a better examination of the claims of self-determination by indigenous peoples and their conflict with the principle and practices of sovereignty. While it also does not assume that sovereignty will be discarded, it urges an examination of its justification in this setting as well as others. It is thus open to the possibility that, even if it is not discarded, it can be modified such that it does not provide a blanket barrier to such claims. Instead, the value of sovereignty will be weighed against the value of the conflicting principle, allowing for the result that best accords with the interests concerned.

None of the alternative theories outlined above have suggested what the solution will be when conflicts occur between the principles and practices of sovereignty (such as those of non-intervention and territorial integrity) and other important principles (such as the maintenance of human rights). For example, none have suggested that all possible human rights should always be upheld whenever they come into conflict with these two aspects of sovereignty.⁷⁰⁸ What they do suggest, constructivist and normative theories alike, is that the answer will vary and that it is at least possible that it will be thought much more important to uphold the rights being violated instead of upholding an interest of a state in either being left to treat its citizens as it sees appropriate or an interest in keeping intact the territory over which it has control. Thus, while the concept of sovereignty itself may not need to be renounced in

⁷⁰⁵ *Id.*

⁷⁰⁶ Charles R. Beitz, *Sovereignty and Morality in International Affairs*, in *POLITICAL THEORY TODAY* 236, 254 (David Held ed., 1991).

⁷⁰⁷ *Id.*

⁷⁰⁸ I note that, while many states presently profess that fundamental human rights are always important and should always be upheld, their actions in ignoring abuses, or defining them away (for example, by saying that a particular group is not entitled to a particular right), speak louder than their words.

order for people to be free, our attachment to it will be.⁷⁰⁹

This sort of solution is the minimum required in order to address the actual concerns of indigenous peoples. As this sort of exercise is not envisaged as appropriate under the presently-held rationalist or realist approaches to international law and relations, these approaches are therefore seen as inadequate for the resolution of such problems as those posed by claims of self-determination by indigenous peoples.⁷¹⁰

CONCLUSION

“Self-determination” is used to refer to a people’s control of their own destiny. As such it is used to refer to the protection of a wide range of rights, including: the right to use one’s language; to develop one’s own culture, to use and ownership of lands and resources; and to achieve political autonomy, self-government and ultimate independence, even where that may entail secession from an existing state. The use of “self-

⁷⁰⁹ See, e.g., HANNAH ARENDT, ON VIOLENCE 165 (1969). “If men wish to be free, it is precisely sovereignty they must renounce.” *Id.*

⁷¹⁰ What these theories do not address is how one might go further than this — for example, to suggest how the principle of sovereignty might be more fundamentally altered. One constructivist who has taken the contesting of sovereignty further than describing its social construction is R.B.J. Walker. In addition to allowing for the evaluation of sovereignty in any given situation (as in conflicts with other principles such as human rights), Walker criticizes the conception and argues that we need an alternative principle by which to organize the world political community. See, e.g., R.B.J. WALKER, ONE WORLD, MANY WORLDS: STRUGGLES FOR A JUST WORLD PEACE (1988); *Sovereignty, Identity, Community*, *supra* note 688, at 159. Walker argues that any critical evaluation of sovereignty is much more difficult than it at first appears because “the problematic identified by the principle of state sovereignty is an effect of a more encompassing problem of sovereign identity.” *Id.* at 175. Therefore, in order to understand and address sovereignty, and to consider what kind of sovereignty we want, we must “come to terms with deeply entrenched philosophical principles, of which sovereignty is only one expression.” *Id.* These principles are the philosophical bases of sovereign identity and political community. This means that, if we are to challenge the principle and practices of sovereignty, we must first address the way that we understand human identity and political community as organized around sovereign states. The fate of the principle and practices of sovereignty will thus depend on the extent to which these fundamental philosophical principles are challenged.

While Walker describes what changes in views of sovereignty fundamentally challenge its philosophical bases, he does not prescribe a strategy for undertaking such a challenge. The primary relevance of his work to the achievement of self-determination for indigenous peoples is thus in his identification of the principles of state sovereignty as part of the wider set of philosophical beliefs entrenched in the definition of the present world community. This means that indigenous peoples may in the future find that, as a result of any changes in the conception of sovereignty that occur in response to their achievement of self-determination, their views on sovereignty may change further such that they find themselves on the path to a fundamentally different conception of political community. At present, however, it is arguable that their conception of political community is not fundamentally different from that which underlies the present system. For example, the use of boundaries does not challenge “the spatial articulations of political life that place the boundaries where they are.” *Id.* at 179. For this reason, I do not pursue Walker’s analysis here, but I do identify it as likely to be relevant in the future.

determination" in the Working Group setting is no exception. Both states and indigenous peoples envisage that it includes this broad range of rights, including the option of ultimate secession. Indigenous peoples argue that they have the natural law right to self-determination; while some go further, arguing that they have a positive international legal right of self-determination. Whatever the reason, they argue that such a right must be included in the draft Declaration on the Rights of Indigenous Peoples. States have denied that indigenous peoples have such a right of self-determination and are only prepared to recognize in the draft declaration rights other than rights to independence or secession. States maintain that indigenous peoples do not have *the* international legal right of self-determination. As this paper has shown, the barrier to the inclusion of such a right is the feared violation of the constitutive principles of modern (statist) international law and relations: territorial integrity, non-intervention and thus state sovereignty.

Despite such fears, the focus of the debate is wrong. One cannot deny a claim to what should be merely by reference to what is. Instead the reasons behind the adoption and continuation of the present system must be explicitly addressed, evaluated and even, in this case, challenged. It is not clear that states' fears should outweigh those of indigenous peoples. It is clear that the interests of states in keeping the status quo should not have automatic priority over those of indigenous peoples in achieving self-determination. While the rhetoric employed has obscured at least the assumed interests of states, this should not be allowed to continue.

In Part III, I criticized the non-application of the international legal right of self-determination to indigenous peoples. I suggested how the law of self-determination should be applied and how, in any such application, the competing interests should be identified, directly debated, and balanced in order to properly resolve the claims of indigenous peoples to self-determination. I then identified the barriers to such an interpretation and application of the principle of self-determination and identified the inconsistencies forced by the assumption of these barriers.⁷¹¹ Finally, in the section on sovereignty I argued that these barriers can only be overcome if the present statist, realist and rationalist paradigm of international law and relations gives way to one that does not take these barriers as givens.

At this point, the task ahead for those that argue for the recognition of indigenous peoples' rights appears daunting. If the inclusion in the draft declaration of a full right of self-determination for indigenous peoples depends on everyone, including states, changing their view of the world system, then it may never be achieved. I, however, am not so

⁷¹¹ See, e.g., *supra* section entitled Colonialism and Foreign Intervention.

daunted. While it is not an aim of this paper to chronicle the nature of international law and relations over time and how it has changed, I suggest that the evolution of international law and relations has entailed the evolution of the concept of sovereignty. The United Nations system, as well as being one that preserves the concept of sovereignty, is also a system designed to limit it in certain respects. The inroads on the basis of human rights into the principle of non-intervention in states' domestic affairs can be seen as a slow evolution of the statist paradigm. It may not take much more to flip this paradigm.⁷¹² Unfortunately, until that happens, we will not know that it is about to do so.

This is where the rhetoric used to debate matters in the international sphere, particularly human rights matters, becomes relevant. While the overall world view frames the debate, the debate also helps form the world view. If the rhetoric is changed, the international legal paradigm may also change. It is possible that, if all the issues raised in Part III are forced into the debate, they will be discussed rather than merely brushed aside. From the indigenous peoples' position, steering the debate is not an easy task, as they lack the power and authority given to states by the present paradigm. Despite this disadvantage, however, and although it has been a long and slow process, it has only been through the pressure of indigenous peoples that we have got as far as the drafting of a declaration of the rights of indigenous peoples. As Robert Williams has put it, indigenous peoples have reversed "the controlling assumption that indigenous peoples are not proper legal subjects of international concern or sanction."⁷¹³ I suggest that through such continued pressure, particularly on the points that I have identified, indigenous peoples may be able to trigger that crisis in thought that precedes change.⁷¹⁴

Such a change would reinstate the human rights component of self-determination⁷¹⁵ and reinstate the belief that the state exists for the benefit of people, rather than the reverse.⁷¹⁶ Only through such changes will

⁷¹² THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTION* 92-96 (1962).

⁷¹³ Williams, *supra* note 1, at 669.

⁷¹⁴ Crenshaw argues: "Powerless people can sometimes trigger . . . a crisis by challenging an institution internally, that is by using its own logic against it. Such a crisis occurs when powerless people force open and politicize a contradiction between the dominant ideology and their reality." Williams, *supra* note 1, at 701.

As Richard Falk points out, several social movements appeared absurd and unobtainable at their initiation but that an unpredicted convergence of various forces enabled a transformation in thought and thus the success of the movements. Falk, *supra* note 162, at 63-67. The approach that I have suggested could encourage such a convergence and thus transformation and success.

⁷¹⁵ After reviewing various interpretations of the right to self-determination expressed in the International Covenant, Thornberry comments that "perhaps the truth is that self-determination has little to do with human rights." Thornberry, *supra* note 199, at 884.

⁷¹⁶ As James Anaya puts it, the state should be seen "as an instrument of human society rather than its master." Anaya, *supra* note 54, at 225.

indigenous peoples achieve control of their destiny, or their self-determination. Any other approach is tantamount to a rejection of a world order based on principle and an embrace of might as right.