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Human Rights of Indigenous Peoples: Will the United States Rise to the Occasion?

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RECENT DEVELOPMENTS

HUMAN RIGHTS OF INDIGENOUS PEOPLES: WILL THE UNITED STATES RISE TO THE OCCASION?

Dean B. Suagee*

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Introduction

In July 1996, the United States Department of State invited tribal government officials to Washington, D.C. for a consultation session on the Draft United Nations Declaration on the Rights of Indigenous Peoples. After the Washington, D.C. consultation, the State Department conducted two

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additional consultations, one in Honolulu, Hawaii, and one in Fort Laramie, Wyoming.

Did these consultations signal something new and significant? Is the U.S. government really ready to begin seriously considering the views of American Indian tribes, nations and other indigenous peoples whose homelands are now within the borders of the United States of America?¹ Sadly, the answers to both of these questions appear to be "No." While the U.S. government should be commended for its dedication to indigenous participation in UN forums, and while the State Department did call tribal leaders to Washington and even went to Wyoming and Hawaii, the fact that it has not revised its positions (particularly those concerning the "s" on peoples and the self-determination issue) suggests that the meetings have just become examples of how the practice of "consultation" seems to have a different meaning for federal officials than it has for tribal representatives.² Rather than capitalizing on an opportunity for meaningful exchanges and cooperative efforts, the consultations seem to have been ploys by the U.S. in its efforts to convince the UN and its member states that its positions are responsive to indigenous concerns and possibly even consented to by the tribes.³

This article reports on some of the recent developments in international human rights law as it pertains to indigenous peoples. Part I provides background information on the emerging international law, with a focus on the Draft UN Declaration. Part II reviews and critiques some of the positions taken by the United States on the UN Draft and notes some of the criticisms made by representatives of tribal governments. Part III reports on positions taken by the United States in the Organization of American States Draft American Declaration on the Rights of Indigenous Peoples (OAS Draft). This draft was

1. The United Nations created the UN Working Group on Indigenous Populations (WGIP) fifteen years ago. In 1993, WGIP completed its Draft UN Declaration on the Rights of Indigenous Peoples (UN Draft). Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session, at 115, U.N. Doc. E/CN.4/1995/2 (1994).

2. In July 1996, the Cherokee Nation issued a position paper which illustrates the wary attitude that indigenous peoples have when called to consultations. The paper stated that while "consultation" implies that Native American peoples will be given "a substantive voice in the determination of much of their future," their representatives will "see to it that the paternalism and neocolonialism of the past remains" in the past, and that they attend the meetings with the intention to "move forward as partners, not wards." *See* Indigenous Rights from the Perspective of the Cherokee Nation 1 (July 23, 1996) (position paper prepared for State Department-Tribal Consultation).

3. Opening Statement of the U.S. Delegation, Presented by Gare A. Smith, Deputy Ass't Secretary, Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples at 2 (Oct. 24, 1996) [hereinafter U.S. Opening Statement] (explaining to Human Rights Commission Working Group that the State Department had a "series of consultations with U.S.-based indigenous peoples . . . [on] the draft declaration," noting that 100 indigenous representatives were at the Washington meeting, and asserting that a "strong declaration" alone could not remedy the "vestiges of the tragic past [that] continue to haunt them even today").

prepared under the auspices of the Inter-American Commission on Human Rights (IACHR). Particular emphasis in parts II and III is placed on the United States positions relating to the issues of collective rights and self-determination. The conclusion poses the fundamental question of what it will take for the United States to live up to its self-image as a leader in forging and upholding the international law of human rights.

I. Emerging International Law on the Rights of Indigenous Peoples

A. International Labour Organization (ILO) Convention No. 169

The International Labour Organization (ILO) was created as part of the League of Nations in 1919 and became a specialized agency within the United Nations in 1945.⁴ The structure of the ILO includes representatives of national governments, employers and workers, and its mission includes a broad range of "labor" issues, many of which can be described as human rights issues.⁵ The ILO has adopted conventions (multi-lateral treaties) on subjects such as freedom of association, the right to organize, collective bargaining, abolition of forced labor, discrimination in employment and many others. These conventions are binding on state parties that ratify them, and compliance is monitored by the ILO.⁶ The only international convention that relates specifically to the rights of indigenous peoples is the ILO Convention No. 169.⁷ Its predecessor, ILO Convention No. 107,⁸ became the object of criticism for its integration and assimilation overtones, and indigenous peoples and their advocates demanded its revision.⁹ The new convention, which was adopted in 1989 after extensive discussions during the 1988 and 1989 sessions

4. See Lee Swepston, *Human Rights Complaint Procedures of the International Labour Organization*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 99, 99 (Hurst Hannum, ed., 2d ed. 1992) [hereinafter GUIDE].

5. *Id.* at 100-01.

6. *Id.*

7. See ILO Convention No. 169, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, International Labour Conference, available in WESTLAW, International Legal Materials Library, 28 I.L.M. 1382 (1989), reprinted in S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 193 (1996).

8. See Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, International Labour Conference, 328 U.N.T.S. 247 (entered into force June 2, 1959).

9. See, e.g., ANAYA, *supra* note 7, at 47-48 (explaining that the "Convention No. 107 of 1957 came to be regarded as anachronistic"); INDIAN LAW RESOURCE CENTER, *INDIAN RIGHTS HUMAN RIGHTS: HANDBOOK FOR INDIANS ON INTERNATIONAL HUMAN RIGHTS COMPLAINT PROCEDURES* 16-17 (1984) (noting that the tone of Convention No. 107 was harmful to Indians and predicting that the Convention would need revision "to bring it in line with evolving standards for the protection of Indian rights.") [hereinafter INDIAN RIGHTS HUMAN RIGHTS]; ROBERT CLINTON ET AL., *AMERICAN INDIAN LAW: CASES AND MATERIALS* 175-80 (3d. Michie Co. 1991) (explaining the need for revision as a result of changes in world politics stressing self-determination rather than integration) [hereinafter AMERICAN INDIAN LAW].

of the ILO, has been described as "international law's most concrete manifestation of the growing responsiveness to indigenous peoples' demands."¹⁰ The Convention's revised philosophy, as expressed in the preamble, acknowledges that: (1) there are numerous international instruments on the prevention of discrimination,¹¹ (2) the state of indigenous populations has significantly changed since 1957,¹² and (3) indigenous peoples "exercise control over their own institutions, ways of life . . . economic development and . . . maintain and develop their identities, languages and religions, within the framework of the States in which they live."¹³ While Convention No. 169 did avoid the assimilation themes that had characterized the earlier Convention, it is still criticized for leaving in too much residual state authority over indigenous peoples.¹⁴ Its failure to firmly recognize the right of indigenous "peoples" to self-determination is seen as a flaw that indigenous groups are determined to avoid in the declarations of the UN and OAS.¹⁵

B. Draft United Nations Declaration

In 1971, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (UN Sub-Commission) appointed a Special Rapporteur to study the problem of discrimination against indigenous peoples.¹⁶ The first

10. ANAYA, *supra* note 7, at 47. Although the 1988 and 1989 discussions included indigenous representation, the representation was very limited. *Id.* Only a handful of countries have actually ratified ILO Convention No. 169, ANAYA, *supra* note 7, at 48 n.55 (stating that Norway, Mexico, Bolivia, Columbia, Costa Rica, Honduras, Paraguay, and Peru have ratified the Convention), and therefore, the rights that it does protect are difficult to enforce. The lack of support for the document's contents foreshadows the uphill battle indigenous peoples face in order to achieve adoption of the UN and OAS drafts. See International Indian Treaty Council (IITC) Position, OAS, IACHR, *Draft of the "Inter-American Declaration on the Rights of Indigenous Peoples"* (visited Apr. 5, 1997) <<http://www.hawaii-nation.org/iitc/oas-position.html>> (noting that the IITC will continue to promote the Convention adoption despite its many "shortcomings, knowing that the states respect even fewer of Indigenous rights than recognized by that document") [hereinafter *IITC Position-OAS*].

11. ILO Convention No. 169, *supra* note 7, at 1384.

12. *Id.*

13. *Id.*

14. See ANAYA, *supra* note 7, at 48 (explaining that dissatisfaction with Convention's language was expressed given that several "caveats" in some provisions still left openings for state assertions of authority).

15. *IITC Position-OAS*, *supra* note 10 (noting how the issues regarding "peoples" and "self-determination" have been treated in ILO Convention No. 169, the OAS and the UN Drafts). In Article 1(1)(b), the ILO Convention No. 169 allows for the use of the term "peoples." See ILO Convention No. 169, *supra* note 7, at 1385. Article 1(3), however, qualifies this by stating that "[t]he use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law." *Id.* It was also agreed that the understanding expressed in Article 1(3) would be repeated in the accompanying records of the committee proceedings supporting the Convention. ANAYA, *supra* note 7, at 49.

16. The Rights of Indigenous Peoples, Fact Sheet No. 9, at 5-6 (United Nations publication)

major meeting of indigenous peoples in Geneva took place in 1977 at the International Nongovernmental Organization (NGO) Conference on Discrimination Against Indigenous Populations in the Americas.¹⁷ At this meeting, the indigenous representatives proposed a declaration of thirteen principles¹⁸ and requested completion of a study of indigenous peoples throughout the world.¹⁹

In 1982 the Economic and Social Council (ECOSOC)²⁰ — the parent body of the UN's human rights organs — established the Working Group on Indigenous Populations (WGIP).²¹ The WGIP²² was charged with the

(noting that José R. Martínez Cobo (from Ecuador) was appointed and asked to conduct a study with the aim of suggesting "national and international measures for eliminating discrimination"). [hereinafter U.N. Fact Sheet].

17. ANAYA, *supra* note 7, at 46; Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 613-14 (1987) (stating that this was the first time that indigenous peoples had opportunity to "express their view in an international forum").

18. U.N. DOC. E/CN.4/Sub.2/476/Add.5 and Annex 4 (1981) (headings of each principle are as follows: Recognition of Indigenous Nations, Subjects of International Law, Guarantee of Rights, Accordance of Independence, Treaties and Agreements, Abrogation of Treaties and Other Rights, Jurisdiction, Claims to Territory, Settlement of Disputes, National and Cultural Integrity, Environmental Protection, Indigenous Membership, and Conclusion). The World Council of Indigenous Peoples also adopted a "Declaration of Principles of Indigenous Rights." See U.N. DOC. E/CN.4/1985/22, Annex 2 (1985). Also, an additional "Declaration of Principles on the Rights of Indigenous Peoples" was adopted by indigenous peoples and organizations at a July, 1985 meeting in Geneva and was reaffirmed and amended by indigenous peoples and organizations at a subsequent meeting in Geneva in July 1987. See U.N. DOC. E/CN.4/Sub.2/1987/22, Annex 5 (1987).

19. This study was finally completed in 1983 by Mexican Ambassador José R. Martínez Cobo, Special Rapporteur for the Sub-Commission on the Prevention of and the Discrimination of Minorities. J. MARTÍNEZ COBO, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS (1983), in U.N. DOC. E/CN.4/Sub.2/1986/7 and Add. 1-4 (1986); see Kronowitz, *supra* note 17, at 613 (noting that the document included conclusions and recommendations for achieving international protections of indigenous peoples). The report was submitted in sections between 1973 and 1983 and comprises 24 volumes. See Robert T. Coulter, *The Draft UN Declaration on the Rights of Indigenous Peoples: What is it? What does it mean?*, 13 NETH. Q. HUM. RTS. 123, 125 n.5 (1995).

20. The hierarchy of the relevant UN bodies is as follows: the WGIP is under the auspices of the Sub-Commission. The Sub-Commission is a body of experts acting not for their respective governments, but in their individual capacities. (The Sub-Commission is authorized to hear human rights complaints. See ANAYA, *supra* note 7, at 51-52; Kronowitz, *supra* note 17, at 603-04.) The Sub-Commission is under the purview of the Human Rights Commission [hereinafter Commission]. The Commission is underneath ECOSOC. See generally Coulter, *supra* note 19, at 123; Nigel S. Rodley, *United Nations Non-Treaty Procedures for Dealing with Human Rights Violations*, in GUIDE, *supra* note 4. The Declaration will have to pass through all of these bodies before it is presented to the General Assembly for member state adoption. See U.N. Fact Sheet, *supra* note 16, at 9.

21. Coulter, *supra* note 19, at 125.

22. WGIP's five members are appointed by the Sub-Commission Chair and they each represent one of the five regions of the world and serve as "independent experts." See *id.* at 125.

responsibility to review developments affecting indigenous peoples and to draw up a draft declaration on the rights of indigenous peoples for eventual consideration by the UN General Assembly.²³

The WGIP began drafting international standards for the protection of indigenous human rights during its 1984 and 1985 sessions.²⁴ In 1989, at its seventh session, WGIP considered the second draft of the Draft Declaration on the Rights of Indigenous Peoples.²⁵ From 1989 to 1992 the WGIP circulated the Draft to indigenous peoples and governments requesting written comments and suggestions.²⁶ The WGIP also had several private meetings with indigenous representatives — complete with translation services when necessary.²⁷

At its eleventh session in 1993, the WGIP approved the Draft and forwarded it to the Sub-Commission.²⁸ Subsequently in August 1994, the Sub-Commission approved the Draft and passed it on to the Human Rights Commission for consideration at its fifty-second session.²⁹ WGIP's

The WGIP is open to "all representatives of indigenous peoples and their communities and organizations." U.N. Fact Sheet, *supra* note 16, at 7.

23. U.N. Fact Sheet, *supra* note 16, at 7-8 (noting that in reviewing recent developments, WGIP receives significant information from governments, NGO's, other UN organs, indigenous peoples, and national and international intergovernmental organizations).

24. See Kronowitz, *supra* note 17, at 615; see also, *Statement of Phyllis Young, Hunkpapa Treaty Council, Before the UN Open-ended Inter-sessional Working Group, Geneva, Switzerland Oct. 25, 1996* (visited Apr. 6, 1997) <<http://www.hookele.com/netwarriors/hunkpapa.html>> (acknowledging that the "Declaration represents twelve years of testimony and documentation as well as oral history of indigenous suffering, torture, death, massacres, extermination and genocide of once egalitarian societies seeking redress and protection for our survival and our children").

25. S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, in 1989 HARVARD INDIAN LAW SYMPOSIUM 191 (1990) reprinted in part AMERICAN INDIAN LAW, *supra* note 9, at 1272. At this time, there were other significant developments in indigenous rights. In the same year, the General Assembly of the Organization of American States (OAS) resolved to request the Inter-American Commission on Human Rights (IACHR) to draft its own legal instrument on the rights of indigenous peoples. See *Annual Report of the Inter-American Commission on Human Rights 1988-89*, 245-50, OEA/Ser.L/V/II.76, doc. 10 (1989) [hereinafter *Inter-American 1989*]. In addition, the ILO revised Convention No. 107 and adopted ILO Convention No. 169. See ILO Convention No. 169, *supra* note 7.

26. Dr. Erica-Irene A. Daes, *Equality of Indigenous Peoples Under the Auspices of the United Nations — Draft Declaration on the Rights of Indigenous Peoples*, 7 ST. THOMAS L. REV. 493, 494 (1995) [hereinafter Daes, *Equality*].

27. *Id.* (noting that as a result, the text "reflects an extraordinarily liberal, transparent, and democratic procedure that encouraged broad and unified indigenous input").

28. See *Report of the Working Group on Indigenous Populations on its Eleventh Session*, U.N. Doc. at 44, 50-60, E/CN.4/Sub.2/1993/29 (1993).

29. See *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session*, U.N. Doc. at 104, E/CN.4/1995 (1994). The Draft was not adopted during the Commission's fifty-second session. See generally *Report of the Working Group established in accordance with the Commission on Human Rights resolution 1995/32 of 3 March 1995*, U.N. Doc., E/CN.4/1996/84 (1996) (containing a summary of what did occur at the session).

Chairperson-Rapporteur, Dr. Erica-Irene Daes commented on the Draft and made several key points. She began by stressing the importance of having representatives of indigenous peoples participate in the consideration of the Draft Declaration by the Commission and by ECOSOC, noting that the Sub-Commission had recommended that both the Commission and ECOSOC take "effective measures" to ensure such participation (regardless of "consultative status"), and she implored governments to respond affirmatively to this recommendation.³⁰

With respect to the substance of the Draft Declaration, Dr. Daes explained its general philosophy and logical order, and said that there are three main elements "which distinguish it from all other human rights instruments."³¹ She referred to these elements as "legal personality, territorial security and international responsibility."³² Briefly, by these concepts Dr. Daes means that indigenous peoples must be recognized as "peoples," each of which possesses a collective legal character; that each indigenous people needs security within its own territory in order to maintain its distinctive identity; and that, while indigenous peoples generally do not aspire to independent statehood, they do seek to live as distinct communities that will never be completely integrated into the states of the world, and so, to protect the integrity of their relationships with states, they need access to international legal fora.³³ While acknowledging that the text of the Draft Declaration no doubt could be further refined, she advocated its adoption without substantive change as soon as possible, saying:

In many parts of the world, indigenous peoples are still suffering from physical, ecological and cultural destruction. It is imperative, in my mind, that the United Nations system as a whole begin to act firmly and formally in the defense of these peoples while they still have hope of survival. The Draft Declaration would provide the mandate for a concerted United Nations program in defense of indigenous peoples. I do not see how textual refinements or other abstract and unjustified pretexts could justify delaying such a mandate any further.³⁴

In 1995, the Human Rights Commission established its own Working Group (HRC Working Group) and established procedures by which indigenous organizations and representatives could apply for participation at these meetings.³⁵ Like the NGOs with consultative status, the indigenous

30. Daes, *Equality*, *supra* note 26, at 493-94, 498-99.

31. *Id.* at 496.

32. *Id.*

33. *Id.* at 496-97.

34. *Id.* at 498.

35. The participatory process for indigenous peoples and organizations without ECOSOC consultative status was put in place through the Commission on Human Rights Resolution 1995/32 of March 3, 1995. See also *Annex: Participation of Organizations of Indigenous People*

representatives are able to address the floor, but they are not able to make motions or vote.³⁶ As of October 1996, about 106 indigenous groups had been approved for participation at the HRC Working Group sessions.³⁷ The United States deserves significant praise for taking a leading role in securing a relaxation of the ECOSOC rules on consultative status, in effect granting such status to organizations for the purpose of attending the HRC Working Group.³⁸

C. Draft Inter-American Declaration

The Organization of American States (OAS) process for developing a draft declaration on the rights of indigenous peoples began in November 1989, when the General Assembly of the (OAS) resolved to request the IACHR to draft its own legal instrument on the rights of indigenous peoples.³⁹ An initial series of consultations with indigenous groups, NGO's, and member state governments took place between the period of 1991 to 1993.⁴⁰ A preliminary draft was written by the IACHR based on responses it received to the questionnaire and a subsequent meeting with governments and government-formed indigenous institutes in each of the OAS member-states.⁴¹ In February 1995 a preliminary

in the *Open-Ended Inter-Sessional Working Group* (visited Apr. 6, 1997) <<http://www.hawaii-nation.org/iitc/annex.html>>.

36. See *Unrepresented Nations and Peoples Organization (UNPO) Monitor, Draft Summary of the Principal Points Raised at the HRC Working Group, Oct. 21-22, 1996* (visited Apr. 6, 1997) <<http://www.hookele.com/netwarriors/unpo1.html>> [hereinafter *UNPO Monitor*]. (This document can also be requested by writing to UNPO, Americas Coordination Office, 444 North Capitol St., Suite 846, Washington, DC 20001-1570.)

37. *Id.* For information on attending the HRC Working Group, tribes and organizations of indigenous peoples should apply to the Coordinator of the International Decade. (Inquiries may also be made about the voluntary fund for financial assistance.) Organizations may write to: Human Rights Coordinator, Assistant Secretary General for Human Rights, Human Rights Center, Office of the United Nations in Geneva, Palais des Nations, 8-14 Avenue de la Paix, 1211 Geneva, Switzerland (tel. 41 22 917 12 34, fax. 41 22 917 02 12). Petitions for participation should include the following information: (1) the name, headquarters or seat, address and contact person for the organization; (2) the aims and purposes of the organization (these should be in the conformity with the spirit, purposes, and principles of the Charter of the United Nations); (3) information on the programs and activities of the organization and the country or countries in which they are carried out or to which they apply; (4) a description of the membership of the organization indicating the total number of members. For a more detailed discussion of this procedure, see also the *International Indian Treaty Council Web Site* (visited Apr. 6, 1997) <<http://www.hawaii-nation.org/iitc/annex.html>>.

38. See U.S. Opening Statement, *supra* note 3, at 2.

39. See *Inter-American 1989*, *supra* note 25.

40. See *Annual Report of the Inter-American Commission on Human Rights 1996*, OEA/sr.L/V/II.95, doc. 7 rev., at 627 n.2 (1997) [hereinafter *Inter-American 1996*]. The IACHR prompted the discussion by preparing and distributing to government officials, indigenous organizations, the media, and experts a questionnaire that it prepared "based on previous consultations, national constitutions and legislation, international instruments and statements on this subject." *Id.*

41. See *IITC Position-OAS*, *supra* note 10.

draft was prepared and in September 1995 the IACHR approved its first draft of the Inter-American Declaration on the Rights of Indigenous Peoples (OAS Draft).⁴² Until this OAS Draft was made public in September, no indigenous peoples or their non-governmental organizations were consulted on the actual text of the preliminary draft while it was being elaborated.⁴³ As a result, it is difficult for indigenous peoples to determine "what rights were addressed in previous drafts that [were] not in the [September 1995] draft."⁴⁴ The IACHR subsequently announced that the preliminary draft would be circulated to member state governments, "indigenous entities" and other interested organizations to solicit "comments and observations" with the intention of reviewing the draft in light of the responses obtained and submitting a final draft to the General Assembly for its adoption at its twenty-seventh regular session.⁴⁵ In February of 1997, the IACHR approved the final draft of the American Declaration on the Rights of Indigenous Peoples.⁴⁶ The document has now been submitted to the General Assembly and to its Permanent Council for possible adoption by the member states at the 1998 General Assembly.⁴⁷

As the final OAS Draft is being considered, there is significant discussion about how thoroughly the declaration actually reflects indigenous commentaries. The "consultations" that were associated with the OAS Draft have received mixed criticism. In its recent Annual Report, the IACHR stated that the proposed Draft included suggestions and comments from governments, indigenous and intergovernmental organizations.⁴⁸ Nevertheless, despite the various meetings which the OAS organized or participated in from October 1995 until February 1997,⁴⁹ the fact that indigenous communities were essentially screened out of the actual drafting process (save the solicitation of responses to a questionnaire) and the fact that the OAS lacked the resources for broader consultations with indigenous peoples, leaves many with the feeling that the OAS Draft does not have the indigenous ownership that is necessary to warrant adoption of the Draft at this time, and therefore, such action should be delayed until the OAS can secure — at a minimum — indigenous participation

42. See OEA/ser.L/V/II.90, doc. 9, rev. 1 (1995) (containing Draft approved by the IACHR at the 1278 session held on Sept. 18, 1995) [hereinafter 1995 OAS Draft].

43. See *IITC Position-OAS*, *supra* note 10 (suggesting that "[g]iven the lack of real Indigenous input" the only way to provide for such input is to insist on "more formal, open and direct Indigenous Peoples' comment and criticism").

44. *Id.*

45. Press Release, Organization of American States, IACHR, No. 9/95 (Sept. 22, 1995).

46. See *Proposed American Declaration on the Rights of Indigenous Peoples*, CP/doc.2878/97 corr. 1 (1997) [hereinafter *1997 Draft OAS Declaration*]; see also O.A.S. G.A. Res. OEA/ser.P, AG/doc.3573/97 (1997).

47. *Inter-American 1996*, *supra* note 40, at 627.

48. *Id.*

49. *Id.*

comparable to what has been achieved at the United Nations in the development of the UN Draft.⁵⁰

II. Developments Regarding the Draft UN Declaration

As a result of the open participation and solicitation of indigenous' comments during the WGIP meetings and now before the HRC Working Group, the Draft UN Declaration has emerged through a democratic process which has a significant degree of ownership by indigenous peoples. It is because of this continual participation over the years that many indigenous peoples are now dismayed by those countries who have entered the debate late, and are now attempting to revise what many have consulted upon, reviewed, debated, and agonized over for more than a decade.

Representatives of the United States did not play a very prominent role when the WGIP developed the UN Draft.⁵¹ Therefore, for purposes of this article I will not examine the positions taken and comments made by the US delegations during that phase of the standard-setting process. Rather, I begin my analysis with the set of "Preliminary Statements" submitted by the US delegation to the first session of the HRC Working Group.⁵²

50. See Letter to Osvaldo Kraemer, Human Rights Specialist, IACHR, OAS, from Dalee Sambo Dorough, Human Rights Specialist, Indian Law Resource Center (Dec. 4, 1996) (on file with the *American Indian Law Review*) (stating that more time and resources would be needed "to ensure that good faith consultations and genuine dialogue take place" and noting that the UN process began earlier and has "developed a momentum of its own"); see also *IITC Position-OAS*, *supra* note 10 (arguing that the OAS "can wait a year or two more, to ensure that their declaration . . . meets with and is responsive to the realities, desires and aspirations of Indigenous Peoples themselves . . . [I]t would be sad indeed, if the OAS itself did not heed its own call with regard to the international recognition of the human rights and fundamental freedoms of Indigenous Peoples.").

51. See Letter to Gare Smith, Deputy Ass't. Secretary, Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, from Steven M. Tullberg, Indian Law Resource Center (July 25, 1996) (enclosing with letter a position paper prepared by the State Department Legal Advisor's Office on July 12, 1993 by Kathryn Nutt Skipper regarding the UN Draft). The first page of the document admits that the "U.S. Government has not actively [participated] in the Working Group in the past . . ." *Id.* The document not only shows how unprepared the lawyers were to talk about the Draft and international law, but also their inability to explain U.S. federal-Indian law in an international forum. *Id.* Tullberg puts excerpts of the document into his letter addressing specific quotes from Ms. Skipper's internal memo such as (1) that the U.S. "oppose[d] notions of 'peoples rights' because they are vague and woolly [sic] headed"; (2) that the U.S. worried "about collective rights because they can be stalking horses for unseemly conduct"; (3) that the U.S. recognized Indian tribes in domestic law as "collective entities with collective rights opposable against the[] Government."; and (4) that Skipper was so unfamiliar with basic principles of federal Indian law that she had to ask whether "Indian tribes hold anything like title to their lands." *Id.*

52. See U.S. Dep't of State, United States Preliminary Statements: Draft United Nations Declaration on the Rights of Indigenous Peoples (Nov. 1995) [hereinafter U.S. Preliminary Statements]. For a copy of this document or other documents authored by the State Department and mentioned throughout this article, write to: Bureau of Democracy, Human Rights & Labor,

A. U.S. Preliminary Statements and Critique

At the first session of the HRC Working Group the US delegation submitted a set of comments on the Draft UN Declaration. The U.S. delegation framed each comment as a "Preliminary Statement" directed to a specific article in the Declaration.⁵³ All of these U.S. comments were distributed in a packet of materials to tribal representatives attending the State Department consultation on July 23, 1996. For purposes of this article, I have limited my commentary on these "Preliminary Statements" to a few key issues. I focus mainly on the issues of collective rights (as distinct from individual rights)⁵⁴ and on the right of self-determination.⁵⁵ In commenting on the "Preliminary Statements" I also have drawn upon comments submitted by tribal officials.⁵⁶

1. Collective Rights

The U.S. Preliminary Statement on Article 1 of the draft⁵⁷ raises a

Room 7802, Department of State, Washington, DC 20520.

53. See U.S. Opening Statement, *supra* note 3, at 1 (reminding the HRC Working Group at its second session that the U.S. delivered extensive preliminary comments on each article of the UN Draft at the first session of the HRC Working Group).

54. It is generally agreed that throughout the history and development of international human rights law the beneficiaries of the fundamental rights and freedoms guaranteed therein were always "individual human beings, in whom they 'inhere', 'inalienably', by virtue of their humanity, and the dignity and integrity to which that characteristic entitles them." See PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 367 (1983); see also BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 900, 902 (1995) (stating that international law has historically made the individual the true beneficiary of human rights guarantees and noting that the movement to recognize group rights has been criticized as being inconsistent with the concept of individual rights) [hereinafter *INTERNATIONAL LAW*]. Nevertheless, collective rights cannot be dismissed as if their recognition in international law is a new phenomena never seen before. See *INDIAN RIGHTS HUMAN RIGHTS*, *supra* note 9, at 4 (suggesting that "important group rights are already part of international human rights law, at least in principle"); see also SIEGHART, *supra*, at 368-78 (providing examples of numerous articles in various international covenants and declarations where group rights are recognized for purposes of self-determination, liberation, and equality; international peace and security; use of wealth and resources; the right to social, economic, and cultural development, the right to a satisfactory environment, and the right of ethnic, religious or linguistic minorities to be free to enjoy their own cultures, use their own languages and profess their own faiths). Collective rights do exist. See Comments of the United States on the Draft Inter-American Declaration on the Rights of Indigenous Peoples I (1997) (unpublished manuscript, on file with the *American Indian Law Review*) [hereinafter U.S. Comments-OAS Draft] (acknowledgment by the U.S. that there have been a "few exceptions" to the general rule that international human rights law protects the rights of individuals).

55. See Steven M. Tullberg, *Indigenous Peoples, Self-Determination and the Unfounded Fear of Secession, Indigenous Affairs*, *INDIGENOUS AFFAIRS*, Jan./Feb./Mar. 1995, at 11, 13 (defining self-determination as the right of every people "to be in control of its own destiny").

56. In particular, I have drawn upon a comment letter drafted for the Metlakatla Indian Community.

57. The Draft Declaration has been published in several sources, originally in the Report of the Working Group on Indigenous Populations on its Eleventh Session, U.N. ESCOR, Comm. on Hum. Rts., Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, 45th

fundamental issue that surfaces over and over again throughout the set of U.S. Preliminary Statements. This is the issue of whether, in addition to individual rights, the UN Draft should also recognize the collective or group rights of indigenous peoples.

The U.S. Preliminary Statement says: "As other delegations have noted, international instruments generally speak of individual, not collective, rights."⁵⁸ Although this is generally true, the generalization ignores the right of all peoples to self-determination, a collective right enshrined in numerous international documents.⁵⁹ This, of course, is the collective right that many of the delegations of national governments now seek to deny indigenous peoples, by seeking to delete the letter "s" from the term "indigenous peoples." Some countries, including the United States and Brazil⁶⁰ continue to resist the use of the term "peoples" in both the OAS and UN drafts, not only because of its implied recognition of collective rights,⁶¹ but also because of its association with the right to self-determination which some say carries the right to independent statehood and secession under international law.⁶² Well aware of

Sess., Annex I, Agenda Item 14, U.N. DOC. E/CN.4/Sub.2/1993/29 (1993) [hereinafter *U.N. Draft Declaration*]. Article 1 provides:

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Id., reprinted in ANAYA, *supra* note 7, at 207.

58. U.S. Preliminary Statements, *supra* note 52, at 1.

59. See, e.g., U.N. CHARTER art. 1, 55, 56, 73 (recognizing the right of "peoples" to self-determination); International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171, art. 1(1) [hereinafter ICCPR] (asserting that "All peoples have the right of self-determination"); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 1(1) (same as ICCPR); African Charter on Human and Peoples' Rights (Banjul Charter) June 27, 1981, 21 I.L.M. 59 (1981), art. 20 (1) ("[a]ll peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen."); Vienna Convention on the Law of International Treaties, May 23, 1969, U.N. DOC. A/CONF. 39/27, preambular para. 5 ("Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained").

60. Canada recently staked out a position distinct from that of the U.S. when it acknowledged at the last HRC Working Group session that self-determination is a right applicable "equally to all collectivities, indigenous and non-indigenous, which qualify as peoples under international law." See Statement of Canada on Articles 3, 31 & 34 Before the HRC Working Group I (Oct. 31, 1996) (on file with the *American Indian Law Review*). This overture by Canada is a breakthrough, even though qualified by the following statements: (1) Canada would only accept indigenous people's right to self-determination if it respected "the political, constitutional and territorial integrity of democratic states," and (2) the right to self-determination would be "implemented flexibly through negotiations between the governments and indigenous groups." *Id.* at 2.

61. See SIEGHART, *supra* note 54, at 367 (discussing in his chapter on "collective rights" those rights that are "very largely, expressed to attach to 'peoples', rather than to 'persons' or 'individuals'").

62. Compare *id.* (describing that when a group is entitled to call itself a "people" it can

tensions building on the issue, WGIP Chairperson-Rapporteur, Dr. Erica-Irene Daes spoke on this upon delivery of the draft U.N. Declaration. She asserted that "the historical distinction between indigenous and other peoples is doomed to join racism, colonialism, and totalitarianism among the pretexts for inhumanity and greed that our era has struggled to eliminate forever. A compromise on this issue would be as backward-looking a step today, as a compromise on freedom of speech and dissent a decade ago."⁶³

The United States and others did not respond favorably to Dr. Daes' call to higher ground. In its attempt to legitimize their denial of this collective right, the U.S. said, in its comment on Article 2, that:

[I]ndividuals may and often will exercise their rights in community with others. . . . But characterizing a right as belonging to a community, or collective, rather than an individual, can be and often is construed to limit the exercise of that right (since only the group can invoke it), and thus may open the door to the denial of the right to the individual.

This approach is consistent with the general view of the United States, as developed by its domestic experience, that the rights of all people are best assured when the rights of each person are effectively protected.⁶⁴

This "general view of the United States" is contradicted by more than two centuries of U.S. "domestic experience" in dealing with Indian tribes and nations. From the earliest days of the Union, federal law has recognized collective rights of Indian tribes to continue to exist as distinct, self-governing communities.⁶⁵ This basic arrangement was established in numerous treaties, Acts of Congress, and Supreme Court opinions interpreting treaties and statutes. The same U.S. officials responsible for the U.S. Preliminary statements would agree that the idea that "Indians are disappearing peoples"⁶⁶ or should be

"claim the right of 'self determination' as a legitimate ground for seceding from the State") with Tullberg, *supra* note 55, at 13 (declaring that after a "careful reading of international law . . . there is no foundation for either the notion that the right of self-determination promises independence or the notion that the exercise of self-determination necessarily results in secession"). See text accompanying *infra* notes 82-88.

63. See *Introductory Statement on the United Nations Draft Declaration on the Rights of Indigenous Peoples* by Dr. Erica-Irene A. Daes, Chairperson/Rapporteur of the Working Group on Indigenous Populations, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess. 7-8 (Aug. 22, 1994) (unofficial text, on file with the *American Indian Law Review*).

64. U.S. Preliminary Statements, *supra* note 52, at 1.

65. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet) 1, 17 (1831) (describing Indian tribes as "domestic dependent nations"); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832) (holding that, under treaties and federal statutes, Indian tribes retain a substantial measure of their original sovereignty to govern their reservations free from interference from the states).

66. Armstrong Wiggins, *Indian Rights and the Environment*, 18 YALE J. INT'L L. 346 (1993)

forcibly assimilated into mainstream America⁶⁷ are antiquated misconceptions that should no longer inform government policies. If the history of federal Indian policy teaches nothing else, the larger American society should have learned by now that Indian people insist on continuing to be Indian, and that their sovereign right to self-governance within a recognized territory⁶⁸ is essential to their survival and not remotely open to compromise.⁶⁹

The United States has a long tradition of recognizing and upholding the rights of individual citizens. Acknowledging this tradition, however, does not require policy-makers to overlook the fact that the United States also has a long tradition of recognizing the collective rights of Indian tribes to exist.⁷⁰ The right of a tribe to continue to exist is a fundamental collective right. If the tribe itself ceases to exist, all the rights that individual members might have had as members of the group no longer have any meaning. This is a critical point where the United States should take a leadership role in support of the rights of indigenous peoples.

The U.S. Preliminary Statement on Article 2 of the UN Draft⁷¹ provides

(remarking that the "disappearing" Indian concept is a myth). Wiggins specifically quotes a lecture given by Justice John Marshall Harlan in 1898 when the Justice said:

[The Indian race] is disappearing and probably within the lifetime of some that are now hearing me there will be very few in this country. In a hundred years you will probably not find one anywhere. . . . It is as certain as fate that in the course of time there will be nobody on this North American continent but Anglo-Saxons. All other races are steadily going to the wall. They are diminishing every year.

Id.

67. On two occasions, the federal government unilaterally changed the terms of the federal-tribal arrangement and tried to force Indian tribes to give up their separate existence and merge as individuals into the American melting pot. For information on these two periods, see *AMERICAN INDIAN LAW*, *supra* note 9, at 147-52 & 155-58 (describing the Allotment Period and Forced Assimilation (1871-1934) and the Termination Era (1940-1962) respectively).

68. *See supra* note 62.

69. *See generally Tribal Positions and Statements* (visited Apr. 6, 1997) <<http://hookele.com/netwarriors/index.html>>.

70. *See, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450-450n, 458-458hh (1994)) (recognizing that tribes have a collective right to take over government services and programs that would otherwise be administered by the Bureau of Indian Affairs and the Indian Health Service); Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-1902, 1911-1923, 1931-1934, 1951-1952, 1961-1963 (1994)) (recognizing a collective right of tribes to exercise jurisdiction over child custody and adoption matters and, in cases in which a tribe's judicial institutions do not decide such cases, a collective right of the tribe to participate in such proceedings as a party); Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001 - 3013 (1994) (recognizing a collective right in tribes to the repatriation of the remains of ancestors, as well as funerary objects and certain other kinds of cultural items, when such human remains and cultural items are in the possession of federal agencies and institutions that receive federal funding).

71. *U.N. Draft Declaration*, *supra* note 57, article 2. The article provides:

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of

another example of the reluctance of the United States to acknowledge and embrace the collective rights of indigenous peoples as peoples. The U.S. Preliminary Statement begins by saying that the "general thrust" of the Article is acceptable, but then goes on to say: "It would not seem appropriate, however, to state that indigenous peoples are equal to all other peoples in rights since 'peoples' have certain rights under international law and the term would not necessarily include ALL indigenous communities."⁷²

After the US Preliminary Statements were filed, but before the US consultations with tribes began, the United Nations published a document captioned "Working Paper by the Chairperson-Rapporteur, Dr. Erica-Irene A. Daes, on the Concept of 'indigenous people.'"⁷³ This "Working Paper" serves to bring the vaguely-worded U.S. objection into focus. Paragraph 72 of the Working Paper states:

In presenting this analysis, the Chairperson-Rapporteur wishes to stress that she can find no satisfactory reasoning for distinguishing

adverse discrimination, in particular that based on their indigenous origin or identity.

Id.

72. U.S. Preliminary Statements, *supra* note 52, at 3.

73. See U.N. Commission on Human Rights, Sub-Commission on Prevention and Discrimination and Protection of Minorities, Working Group on Indigenous Populations, 14th Sess., Item 4 of the provisional agenda, U.N. DOC. E/CN.4/Sub.2/AC.4/1996/2 (1996) [hereinafter Daes, *Working Paper*]. Because of the intensity of the "peoples" debate at the 13th session of the WGIP, the group decided to recommend to the Sub-Commission that WGIP's Chairperson-Rapporteur, Dr. Erica-Irene Daes prepare and present a working paper on the criteria for a definition of the term. *Id.* at 3. The Sub-Commission approved the request in its resolution 1995/38 of August 24, 1995. Then the Commission, in paragraph 7 of its resolution 1996/40 of April 19, 1996, took note of the recommendation and asked that the paper be discussed at WGIP's 14th session and transmitted to governments, organizations, and indigenous participants before the second session of the HRC Working Group of the Commission. *Id.* While she was specifically charged with considering opinions on the issue as reported to her by governments, NGO's, and indigenous peoples, not one government or Indian nation responded to her request. She presented some preliminary findings on the issue at the Thirteenth Session of the WGIP. *Id.* at 3-4.

In summary, she traced the definition of the "peoples" term through its use by the League of Nations, the Pan-American Union, the UN Charter, the ILO Conventions No. 107 and 169, the Martfnez Cobo Study, and the views as expressed by governments and indigenous nations and organizations at the meetings of the Sub-Commission and Commission Working Group sessions. *Id.* at 6-15. She determined that over time, the factors that have most generally been viewed as associated with the term's application were: priority in time (indigenous presence on lands before the arrival of others); a voluntary perpetuation of cultural distinctiveness; self-identification as indigenous; and experiences of marginalization, dispossession, subjugation, and oppression which may or may not continue to this date. *Id.* at 22-23.

It is also clear from her piece that the Chairperson-Rapporteur is hesitant about the necessity of defining the term "peoples" and even more cautious about the reality of finding a universal definition that will suitably cover all existing indigenous groups and appropriately take into consideration regional particularities. See *id.* at 22-23.

between "indigenous" and "tribal" peoples in the practice or precedents of the United Nations. Nor is she persuaded that there is any distinction between "indigenous" peoples, and "peoples" generally, other than the fact that the groups typically identified as "indigenous" have been unable to exercise the right of self-determination by participating in the construction of a contemporary nation-State.⁷⁴

In other words, rather than the vague "certain rights" asserted in the U.S. Preliminary Statement, under international law indigenous peoples have been treated as not having one particular right that other peoples have — the right to choose to become a nation-state.

At the July 23, 1996, consultation and in written statements, a number of tribal representatives said that it would be more productive for the United States to focus on how to change the practices of states so that there are no unreasonable distinctions between indigenous peoples and other peoples, rather than to simply join in the chorus of states chanting that because the international community has not treated indigenous peoples as having a right to independent statehood we should not even use the term "peoples."⁷⁵

2. Self-Determination

In response to article 3 of the UN Draft,⁷⁶ the U.S. Preliminary Statement says that the United States has long recognized that Indian tribes are "political entities with powers of self-government. In the domestic U.S. context 'self-determination' means promoting tribal self-government and autonomy over a broad range of issues."⁷⁷ The Statement then goes on to say that in contemporary international law there is no consensus on the meaning of the term; that the meaning varies depending on the context; that in the context of colonialism the term self-determination "has been interpreted to mean the right to an independent state"; and that "there seems to be no international practice or international instruments that recognizes indigenous groups as peoples in the sense of having a legal right of self-determination."⁷⁸ The Statement suggests

74. *Id.* at 22-23.

75. *See, e.g.*, Letter to Hon. Dr. Timothy E. Wirth, Under Secretary for Global Affairs, Dep't of State, from Jesse Taken Alive, Chairman, Standing Rock Sioux Tribe (July 31, 1996) (referring to a congressional resolution, in which Congress uses the terms "indigenous peoples" and inquiring as to the why State Department is having so much trouble accepting the language); *see also* Daes, *Equality*, *supra* note 26, at 498 (suggesting that "governments that publicly oppose the equality of indigenous peoples will, in the long run, do more harm to themselves than to the indigenous peoples concerned").

76. *U.N. Draft Declaration*, *supra* note 57, article 3. The article provides: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." *Id.*

77. U.S. Preliminary Statements, *supra* note 52.

78. *Id.*

that the term "self-determination" is so politically charged that it might prove counter-productive to use it, in that the states of the world may not support the Declaration if the term is not removed or qualified.

Rather than bemoan the possibility that the states of the world might dig in their heels in opposition to self-determination for indigenous peoples, the United States could choose to provide leadership by example and stake out a position on the moral high ground. Self-determination may be the most important principle in the entire draft Declaration.⁷⁹ It is also a term that is thoroughly embedded in federal statutory law relating to Indian tribes.⁸⁰ Self-determination is the principle through which individual human beings, comprised as a unit of people, take control of their own destiny. Indigenous peoples believe that they should have just as much right as any other peoples to control their own destiny. They will not waver on this issue.⁸¹ This is the principle by which the legitimacy of governmental institutions is judged. The U.S. reluctance to use the "self-determination" language conveys a backing away from a concept already recognized in U.S. federal-Indian law.

In written comments to the State Department, some tribal representatives suggested that the most productive approach to the issue of self-determination is the one explained by Professor James Anaya.⁸² Professor Anaya's distinction between the "substantive" and the "remedial" aspects of self-determination is particularly useful for defining the content of self-determination within the context of indigenous peoples. According to Professor Anaya, the *substantive* content of self-determination consists of a "constitutive" aspect and an "ongoing" aspect, which he summarizes as follows:

First, in what may be called its *constitutive* aspect, self-determination requires that the governing institutional order be substantially the creation of processes guided by the will of the

79. See Daes, *Equality*, *supra* note 26, at 498; *UNPO Monitor*, *supra* note 36 (describing the statement by Mick Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner). Dodson stated:

In the general statements there is no room for doubts in regards to the right of self-determination, it is fundamental to the integrity of the draft declaration. It is the firm view, that all other rights enunciated and afforded, including the recognition and protection of indigenous' rights, all rest on the observance of indigenous peoples' self-determination. Any diminishment or reduction of this position would, in our view, render the declaration meaningless to us.

Id.

80. See generally Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified and amended at 25 U.S.C. §§ 450-450n, 458-458hh (1994)).

81. See *IITC-Position-OAS*, *supra* note 10 (explaining that just because the states do not recognize the right does not mean that indigenous peoples do not have the right or cannot claim it). IITC goes on further to state that "[s]elf determination was and is our right as Peoples" and the work towards full international recognition of that right "may never end, but it will always be our struggle." *Id.*

82. See ANAYA, *supra* note 7, at 80-88.

people, or peoples, governed. Second, in what may be called its *ongoing* aspect, self-determination requires that the governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis.⁸³

In other words, through constitutive self-determination, a people determines its political status and its institutional order for exercising self-government. Through ongoing self-determination, a people makes its governing order serve the interests of individuals and groups in their daily lives. In addition to its *substantive* aspects, the right of self-determination also includes *remedial* aspects — if a people have been deprived of self-determination, the international community may prescribe a remedy.⁸⁴

This analysis helps to explain how the term self-determination can be applied to both the context of decolonization and the context of indigenous peoples without establishing a right on the part of indigenous peoples to independent statehood. In the period following World War II, the international community came to recognize that people living under the rule of colonial regimes had been deprived of the right of self-determination, in both its constitutive aspect and its ongoing aspect.⁸⁵ Since colonial regimes were imposed from without, the people governed by such regimes were deprived of constitutive self-determination — they had no say in the establishment of the governing orders under which they lived. In addition, the international community came to regard colonial regimes as an inherently oppressive form of governance — and thus a deprivation of the ongoing aspect of self-determination. The international community fashioned a remedy for this deprivation of self-determination, a remedy that assumed a right on the part of the people(s) living in a colonial territory to choose to become a sovereign independent state.⁸⁶

This remedy should be understood as the response of the international community to colonialism, which, as a deprivation of self-determination was *sui generis*, a class by itself. The deprivations of self-determination that indigenous peoples have suffered comprise a class that is different from decolonization. Remedial measures need not be the same as those provided in the decolonization context. Professor Anaya suggests that, for most indigenous peoples, independent statehood would not be an appropriate remedy, although it may be for a limited number of groups.⁸⁷

This analysis could help to move the dialogue beyond the fear of secession, a fear that seems to permeate the concerns of national governments.⁸⁸ By using

83. *Id.* at 81.

84. *Id.* at 83.

85. *Id.* at 85.

86. *Id.* at 82-85.

87. *Id.* at 84-85.

88. See generally Tullberg, *supra* note 55 (dissecting the fear of secession and finding there

this analysis, we can focus on fashioning remedial measures that will ensure meaningful self-determination for indigenous peoples, remedial measures that address both the constitutive and the ongoing aspects of self-determination.

B. HRC Working Group 1996 Session

The HRC Working Group's first session took place between November 20 and December 1, 1995.⁸⁹ A total of 326 people attended the session which consisted of eighteen meetings; this total included representatives from sixty-one governments and sixty-four indigenous and non-governmental organizations.⁹⁰ The HRC Working Group's second session met from October 21 through November 2, 1996. The indigenous delegates met two days earlier and unanimously agreed upon various issues and elaborated a strategy.⁹¹

This session became somewhat of a turning point in the draft process when all of the indigenous delegations walked out of the meeting after the indigenous representatives requested that the draft be immediately adopted as is, and then were dismissed by the Chair with the reminder that, as they were not representatives of member states, they could not make such motions.⁹²

The response to the walkout was mixed. The Chairman made comments reflecting his sentiment that such actions were not necessarily productive. Some states — e.g., Canada, Mexico, Chile, South Africa, Denmark, Bolivia, Finland, and Venezuela — all supported suspending the meeting until the return of the

is no legitimate basis for it).

89. See *Report of the HRC Working Group Established in Accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995*, 52nd Sess., Item 3 of the provisional agenda, at 1, U.N. Doc. E/CN.4/1996/84 (1996) (containing a full summary of the HRC Working Groups session).

90. *Id.*

91. See generally *UNPO Monitor*, *supra* note 36; *Intersessional Working Group on the United Nations Draft Declaration on the Rights of Indigenous Peoples* (visited Apr. 6, 1997) <<http://www.hookele.com/netwarriors/index.html>> [hereinafter *Intersessional*]. All of the indigenous delegates agreed upon the following: (1) They would not engage in dialogue aimed at diminishing the rights espoused in the Draft as they unanimously believe that the articles of the Draft are already minimum standards; (2) They would not approve of amending the Draft, changing it, or regrouping articles, but instead desired general discussion on the overall principles elaborated in the Draft; (3) They unanimously agreed to support the Draft as is and move for its adoption at this session; (4) They agreed to request a relaxation of the ECOSOC principles to increase the equality of their participation in this forum.

92. On the first day, last session's Chairman, José Urrutia (Peru) was reelected. See *UNPO monitor*, *supra* note 36. The agenda was then approved by the member states. *Id.* It was clear that full discussion of general principles of the Draft would not take place until the end of the session. Articles were to be regrouped for discussion individually, and most importantly, the Draft was clearly open to amendment. *Id.* Moanna Jackson of the Maori delegation was called upon and he spoke for the entire indigenous delegation when he moved that the Draft be adopted immediately as is. *Id.* The Chairman acknowledged his comment and said it would be reflected in the meeting's record; the floor discussion moved on. *Id.* As member states began their discussions, subsequent indigenous peoples and supporting NGOs reasserted and supported Jackson's request. *Id.*

delegation could be secured. Other countries moved on with their comments on the articles in question — e.g., Brazil, U.S., China, Ukraine, Switzerland, France, and Japan. The Chair put the question to the member states as to whether they should continue or suspend the session. Discussions of the Draft's articles continued without indigenous presence.⁹³ Eventually, on October 23 the indigenous delegates returned with a set of clear requests mirroring the principle they agreed upon at their pre-session meeting. At the forefront of the list was the call for a relaxation of the ECOSOC rules to allow for greater parity in the participation of indigenous peoples. The current procedures were seen as restricting the right of indigenous peoples to exercise self-determination and as continuing a system of colonialism that was not tolerable.⁹⁴ Some indigenous delegations withdrew completely from the session and returned home to speak with their people and reassess their future participation.⁹⁵

Bridges that took years to build were weakening at the foundations, but some indigenous representatives found ways to reinforce those foundations. As a result of the unanimous action of the indigenous delegation, a modification of the agenda was secured.⁹⁶ The Chairman agreed to move the discussion of the general Draft principle to the beginning of the schedule.⁹⁷ In addition, the Chairman stated that no changes to the Draft would take place during this session.⁹⁸ Extensive discussion on various articles did take place. The United States representative addressed the HRC Working Group on several occasions and summarized the U.S. government's position on every Article, including places where there was agreement, changes where the U.S. believed the

93. *Id.*

94. *Id.* See generally *Report from the Indigenous Peoples Caucus, Closing Statement by the Representative of Fiji, Netwarriors Update on the Indigenous Peoples Global Caucus, in Intersessional*, *supra* note 91.

95. During the second session of the HRC Working Group last October, the Maori delegation formally withdrew from the process. *Statement on Behalf of the Maori Delegation, United Nations Intersessional Working Group on the Draft Declaration of Indigenous Peoples* (visited Apr. 6, 1997) <<http://hookele.com/netwarriors/maori2.html>> (noting that if certain changes occur they may resume participation). The Maori delegation withdrew specifically because they believed that the "meaningful participation" that they were originally part of no longer existed. They specifically stated that

[f]ull and effective participation by Indigenous Peoples is essential as a recognition of our sovereign status, and it can only occur if there is an acknowledgment by both parties in a process that there must not only be textual compromise where that is achievable, but also procedural flexibility where that is necessary.

Id. To the Maori delegation, if a relaxation of the ECOSOC procedural rules does not occur to place them at parity with the member state representatives (i.e., allowing indigenous peoples and their organizations the ability to make motions), their "participation is effectively restricted and [they] become subordinate actors in a process that is actually crucial to [their] future." *Id.*

96. *UNPO Monitor*, *supra* note 36.

97. *Id.*

98. *Id.*

declaration could be made stronger, and changes the U.S. believed were necessary before it could support adoption of the declaration.⁹⁹

III. Developments Regarding the Draft Inter-American Declaration

A. U.S. Position and Critique

In response to the preliminary draft approved in September 1995,¹⁰⁰ the United States submitted to the IACHR an extensive list of comments — both general and article-specific.¹⁰¹ Many of the comments mirrored those made on the Draft UN Declaration, including suggestions for revisions to render the OAS Draft consistent with the nuances of U.S. federal Indian law, leading some critics to describe the U.S. comments as an attempt to use the OAS process of adopting a Declaration as a way to water down the standards in the UN process.¹⁰² While international instruments should be consistent with domestic laws so as not to infringe on a right already guaranteed by member states,¹⁰³ the principle of consistency is misapplied when used to prevent adoption of an international instrument that is not compatible with a domestic law simply because it calls for a higher standard of protection and, therefore, member-state legal reform.¹⁰⁴ If such were the case, no instruments of international law would be ratifiable and international human rights law would be rendered ineffectual.¹⁰⁵

As the U.S. tried to carve out a place for its own domestic law in the Draft, it also proposed a revision of Article 1¹⁰⁶ by suggesting a replacement of

99. For a more detailed discussion, see generally U.S. Opening Statement, *supra* note 3; U.S. Preliminary Statements, *supra* note 52.

100. See *supra* notes 39-50 and accompanying text.

101. See U.S. Comments-OAS Draft, *supra* note 54.

102. Indian Law Resource Center, Update on the Inter-American Commission on Human Rights Draft Declaration on the Rights of Indigenous Peoples (Feb. 14, 1997). In his speech before the indigenous delegations at last July's State Department consultation with indigenous peoples in Washington, then Associate Deputy Attorney General, Seth P. Waxman, captured the essence of the U.S. strategy with respect to both drafts. He declared that "[t]here are aspects of US law which we think may serve as a model in articulating the application of international law to indigenous groups." Remarks of Seth P. Waxman at the Department of State Consultation with Tribes on the UN Draft Declaration on the Rights of Indigenous Peoples, Department of State, Loy Henderson Auditorium at 6 (July 23, 1996) [hereinafter Waxman] (unpublished manuscript, on file with the *American Indian Law Review*).

103. *Id.*

104. "[I]nternational human rights law can be made most effective only if each [nation] state makes these rules part of its own domestic legal system . . . [and] incorporate[s] international human rights standards into their own internal legal order . . .". Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE, *supra* note 4, at 3, 3.

105. See *id.* (describing foundation of human rights movement as based on concept that every nation has an obligation to "respect the human rights of its citizens" and "to protest" if this obligation is not honored in practice).

106. Article 1 of the OAS Draft provides:

"indigenous peoples" with the term "indigenous societies."¹⁰⁷ The U.S. also proposed an alternative definition of "indigenous" as elaborated by the Supreme Court in *Montoya v. United States*,¹⁰⁸ saying that the change was necessary to prevent non-indigenous groups who do not fall within this definition from gaining access to the benefits provided by the U.S. government and from enjoying the government-to-government relationship with the United States.¹⁰⁹ The U.S. had proposed a similar approach with the UN Draft, suggesting that indigenous peoples be replaced with a distinction between "indigenous communities" and "indigenous individuals."¹¹⁰ Under such a distinction, "indigenous individuals" would receive the protection of individual rights such as freedom from discrimination and freedom of association, while "indigenous communities" would receive the rights of self-governance.¹¹¹ Despite this attempt to rid the Draft of the "peoples" terminology, when the final version of the OAS Draft was released, "indigenous peoples" remained in the Draft.¹¹² The significance of the term is qualified, however, as the OAS Draft, like ILO Convention 169, provides that "[t]he use of the term 'peoples' in this Instrument shall not be construed as having any implication with respect to any other rights that might be attached to that term in international law."¹¹³

This Declaration applies to indigenous peoples as well as peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

Inter-American 1996, *supra* note 40, at 635; *see also 1997 Draft OAS Declaration*, *supra* note 46.

107. *See* U.S. Comments-OAS Draft, *supra* note 54, at 1, 4-5. This suggested change could be seen as a shift in the U.S. position, in effect recognizing collective rights while still refusing to use the term "peoples."

108. 180 U.S. 262, 266 (1901); *see* U.S. Comments-OAS Draft, *supra* note 54, at 5-6. The Comments provide that:

"indigenous societies" are those groups that (1) are composed of descendants of persons who inhabited a geographic area prior to the sovereignty of the present State; (2) historically exercised sovereignty or attributes of sovereignty; and (3) comprise a distinct community with its own governing institutions.

Id.

109. *See* U.S. Comments-OAS Draft, *supra* note 54, at 4-5.

110. *See* Waxman, *supra* note 102 (suggesting that the authors of the Draft should incorporate a multi-tier approach to the term "indigenous peoples").

111. *See id.* at 9-10 (rendering recognition of "self-governance" even further from recognition of self-determination by asserting that each State would then hold the authority to "acknowledge" these communities "through a fair and impartial process" and that only "federally recognized tribes would constitute "indigenous communities").

112. *See 1997 Draft OAS Declaration*, *supra* note 46, at art. 2.

113. *Compare 1997 Draft OAS Declaration*, *supra* note 46, at art. 1(3) with ILO Convention No. 169, *supra* note 7, at 1385.

B. Commentary on the Draft Inter-American Declaration

With a few exceptions, the final approved OAS Draft did not adopt the substantive changes that were suggested by the United States.¹¹⁴ For example, despite the repeated U.S. concern over the recognition of collective rights and the implications that the term "peoples" carries,¹¹⁵ the final OAS Draft retains its acknowledgement of collective rights in the preamble and again in Article II.¹¹⁶ For the most part, the final approved OAS Draft has stronger language than in the Draft approved in September 1995. For instance, a close reading of the old and new OAS Drafts reveal the following: all references to the term "populations"¹¹⁷ have been replaced with the term "peoples"¹¹⁸ and references

114. There were a few exceptions such as the deletion of the reference to "colonization" as a source of indigenous poverty and deprivations of fundamental human rights, *see 1997 Draft OAS Declaration, supra* note 46, at preambular para. 2, and the elimination of the reference to "competent international bodies" in article 22. Now "[c]onflicts and disputes which cannot otherwise be settled" should only be submitted to "competent bodies." *Id.*

115. *See* U.S. Comments-OAS Draft, *supra* note 54, at first unnumbered page (explaining that "[s]ince international law, with few exceptions, promotes and protects the rights of individuals, as opposed to groups, it is confusing to state that international law accords certain rights to indigenous 'peoples' as such"). The United States also reaffirmed its position that under U.S. law, the references to indigenous groups as "peoples" carries a different meaning than under international law. *Id.* One indigenous response to this line of argument was the following:

The U.S. was kind enough to clarify that under U.S. federal Indian law we misunderstood that there is a right of self-determination. In reality, it is a right to selfish determination, which will enable us to now be as acquisitive and possessive as other individuals of the dominating society.

Analysis of Comments by U.S. Representatives by Indian-anonymous (Oct. 24, 1996) (visited Apr. 6, 1997) <<http://hookele.com/netwarriors/analysis1024.html>>. Readers interested in reading multiple opinions by indigenous peoples and organizations can visit <<http://hookele.com/netwarriors>>. The authors of this site have not only provided a forum for indigenous representatives to share and post their opinions, but they have also provided a place where individuals can receive up to date information on indigenous rights development and the United Nations process.

116. *1997 Draft OAS Declaration, supra* note 46, at preambular para. 8. The Draft states: "Recalling the international recognition of rights that can only be enjoyed when exercised collectively." *Id.* Article 2 (Full Observance of Human Rights) provides that:

"[I]ndigenous peoples have the collective rights that are indispensable to the enjoyment of the individual human rights of their members. Accordingly the states recognize *inter alia* the right of the indigenous peoples to collective action, to their cultures, to profess and practice their spiritual beliefs, and to use their languages."

Id. at art. 2.

While both statements provide recognition of collective rights, it has been asserted that greater clarifications must be made to assure that these group rights exist independently and not just when they are necessary to effectuate the enjoyment of an individual right. *See* General Comments to the Inter-American Commission on the Human Rights Draft Declaration on the Rights of Indigenous Peoples, Submitted to the IACHR by the Indian Law Resource Center at 6 (Dec. 4, 1996) (unpublished manuscript, on file with the *American Indian Law Review*).

117. *See* 1995 OAS Draft, *supra* note 42.

118. *See Inter-American 1996, supra* note 40.

to "compensation in accordance with international law"¹¹⁹ has been qualified to mean "compensation on a basis *not less favorable than the standard of International law.*"¹²⁰ In addition, in Article 7 (Right to cultural integrity), the words "institutions, practices, beliefs, and values"¹²¹ were added to the list of aspects of cultural integrity deserving state recognition and respect. Additional text was added to Article 10 (Spiritual and religious freedom) to require that "[t]he states shall encourage respect by all people for the integrity of indigenous spiritual symbols, practices, sacred ceremonies, expressions and protocols."¹²² Furthermore, stronger language was added to Article 13 (Right to environmental protection) to acknowledge that the entitlement to a "safe and healthy environment" is actually a "right" and necessary for the enjoyment not just of the "right to life,"¹²³ but also the "collective well-being."¹²⁴ Also, two new sections were added to Article 13 to deal with radioactive materials, toxic substances, chemical, biological, and nuclear weapons in indigenous areas, and to require the informed consent and participation of indigenous peoples in certain cases of potential natural resource development.

Conclusion

The United States has told the international community that it believes a "strong" Declaration on the Rights of Indigenous Peoples should be adopted during the International Decade for the World's Indigenous People.¹²⁵ The credibility of such a statement is called into question, however, by the resistance of the U.S. to the basic concept of collective rights, the right of self-determination for indigenous peoples, and even the letter "s" on the word "peoples." And so, in the fourth year of the International Decade, as the State Department digs in its heels, the image of the United States as a world leader in the field of human rights is endangered. Will the United States live up to its image of itself?

For Indian tribes in the United States, the adoption by the UN or the OAS of a Declaration of the Rights of Indigenous Peoples may appear not to be a matter of great urgency. After all, federal law does recognize that Indian tribes have many of the rights listed in the Draft Declaration. We have more immediate concerns, such as trying to persuade Congress that tribes still need federal funding through the Indian Self-Determination Act, despite the fact that a few tribes are doing well in gaming.

119. 1995 OAS Draft, *supra* note 42, at art. 18(7) & (5).

120. *Inter-American 1996*, *supra* note 40, at art. 18(7) & (5) (emphasis added).

121. *Id.* at art. 7.

122. *Id.* at art. 10.

123. *Id.* at art. 13.

124. *Id.* (emphasis added).

125. *E.g.*, U.S. Opening Statement, *supra* note 3, at 1 (stating belief that a strong declaration is one of the most important goals of the International Indigenous Decade).

On the other hand, adoption of strong declarations by the UN and OAS could help to curb some of the more dangerous aspects of federal Indian law. For example, the principles in the Declaration could be used by Congress to set some limits on its own "plenary" power or to limit the power of courts to rule that tribes have been "implicitly divested" of their original sovereignty. The notion of implicit divestiture, as announced by the U.S. Supreme Court in *Oliphant v. Suquamish Indian Tribe*,¹²⁶ and as applied in several cases since then,¹²⁷ strikes me as fundamentally inconsistent with the principle of self-determination — can we seriously imagine that a tribe, negotiating a treaty, would agree that a federal court more than a century later would have the power to divest tribes of their original sovereign powers, based on its reading of the understandings of Congress and the Executive Branch?

Even in the absence of final UN action on the Declaration, the principles expressed in the Declaration can be drawn upon to influence federal law and policy. For example, bills that would limit tribal sovereignty, such as recently proposed amendments to the Indian Child Welfare Act and the Clean Water Act, could be subjected to debate as matters of human rights. To briefly sketch this line of reasoning, consider tribal regulatory authority under the Clean Water Act. The federal laws of the Allotment era — taking tribal land and dividing it up among tribal members and then making the "surplus" available for settlement by non-Indians — can be described as violating the right of self-determination.¹²⁸ When Congress considers proposals to revise the Clean Water Act, tribes may want to argue that the human rights implications must be considered in the legislative process.

Indigenous peoples in many other countries do not have rights like those recognized under U.S. law. In many countries, survival for indigenous peoples is a daily struggle and genocide is not an abstract concept. The United States can help change this by stopping its efforts to weaken the UN Declaration and the OAS Declaration and by working for their adoption. Will the United States live up to its self-image and provide real human rights leadership for the rest of the world?

In light of the recent developments reported in this article, tribal officials and advocates cannot assume that the U.S. will spontaneously rise to the occasion. In the emerging international law of the human rights of indigenous peoples, the moral high ground includes endorsing the basic idea of collective human rights,

126. 435 U.S. 191 (1978).

127. See generally N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994). See also Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65, 91-94 (1992) (suggesting the reformation of the implicit divestiture rule to render its application consistent with the emerging principle of indigenous self-determination under international law).

128. See Dean B. Suagee, *Clean Water and Human Rights in Indian Country*, NAT. RESOURCES & ENVT., Fall 1996, at 46.

recognizing that indigenous peoples have the right of self-determination, and using the term "peoples" without hesitancy or qualifying language. Those of us who believe that the United States of America truly belongs on that moral high ground should act on the assumption that each of us must do our part to make it happen. The indigenous peoples of the world need the United States to rise to the occasion — soon.