

RESOLVING INDIGENOUS CLAIMS TO SELF-DETERMINATION

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Let us put our minds together and see what kind of future we can
build for our children.

-Hunkpapa Lakota Leader, 1876

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I. INTRODUCTION

The right of self-determination is vitally important to indigenous peoples. Self-determination is closely linked to cultural survival, economic development, and the realization of other basic human rights. This right has gradually achieved firm recognition in international law. At present, however, there is no specific forum or process for resolving indigenous claims to self-determination. Indeed, none of the instruments that reference the right to self-determination, such as the International Covenant on Civil and Political Rights, provide specific remedies for addressing violations of this right. Moreover, there are no definitive definitions regarding the contours of this right that could help guide

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the resolution of such claims. Thus, the focus of this paper is twofold: to analyze some of the more difficult issues that a dispute resolution mechanism might face in addressing indigenous claims to self-determination and to articulate an optimal process or forum for resolving such claims.

Part II of the paper addresses the threshold issue of the meaning of the phrase "indigenous self-determination." Much has been written on what the right of self-determination encompasses and who is entitled to that right.¹ National courts,² human rights bodies,³ and states⁴ have similarly expressed their views on the meaning and scope of this term. This section explores the meaning of self-determination for indigenous peoples and the challenges that indigenous peoples have faced in having their right to self-determination recognized.

Part III of this paper analyzes the issue of development and control of lands and resources by indigenous groups. While closely linked to Part I, this issue merits a separate section because of its significant potential for derailing attempts to resolve indigenous claims to self-determination. Yet it is a key aspect of indigenous self-determination in that it is fundamental to the cultural, physical, economic, and political survival of indigenous groups.

Part IV of this paper examines the self-determination experiences of some indigenous groups in the Americas. The legal contours of self-determination are continuously shaped by the realities of practice. Thus, examination of the experiences of groups struggling for the realization of this right is an important step in the creation of any effective dispute resolution mechanism. Within the context of these cases, the section also analyzes some existing fora for addressing indigenous human rights claims and analyzes how these fora might be adapted to better address self-determination claims.

Part V summarizes my findings regarding the appropriate fora for resolving indigenous claims to self-determination, as well as factors that may be crucial to the resolution of such claims.

II. UNDERSTANDING INDIGENOUS SELF-DETERMINATION

Before we can attempt to articulate a process for settling claims of self-determination, we need to understand what that phrase might mean to those asserting it. The circumstances, needs, and concerns of indigenous peoples are

1. See e.g., S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 TRANSNAT'L L. & COMP. PROBS. 131 (1993); Antonio Cassese, *Self-Determination Of Peoples* (1995); Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination* (1990). See also *The Right to Self-Determination: Historical and Current Developments on the Basis of United Nations Instruments*, U.N. Doc. E/CN.4/Sub.2/404/Rev.1, at 31 (1981) (Aureliu Cristescu, Special Rapporteur).

2. REFERENCE RE SECESSION OF QUEBEC, [1998] 37 I.L.M. 1340.

3. See e.g., Hum. Rts. Comm., *The Right to Self-Determination of Peoples* (Art. 1): 13/03/84. CCCR General Comment 12.

4. See *infra* notes 26-48 and accompanying text.

as diverse as the communities that they embody. Yet, in the past several decades, indigenous groups from around the world have come together in a variety of forums to discuss and articulate a vision of indigenous self-determination—what that phrase might mean to culturally distinct groups of peoples and how it might play out in individual cases. While the scope of this paper does not provide an opportunity to fully explore this effort, this section highlights some key aspects of this movement, which should inform any process designed to resolve future claims.

A. *Indigenous Peoples*

A major question that may arise in the context of resolving indigenous claims to self-determination is how to define “indigenous peoples.” While controversy surrounds the use and application of the word “indigenous,” some common elements can be discerned both from scholarship as well as international, regional, and state practices: groups with distinct cultures, histories, and connections to land (spiritual and otherwise) that have been forcibly incorporated into a larger governing society. S. James Anaya in his book *Indigenous Peoples in International Law* explains the relevance of these elements:

[T]he term *indigenous* refers broadly to the living descendants of preinvasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest. The diverse surviving Indian communities and nations of the Western Hemisphere, the Inuit and Aleut of the Arctic, the Aborigines of Australia, the Maori of New Zealand, the tribal peoples of Asia, and other such groups are among those generally regarded as indigenous. They are *indigenous* because their ancestral roots are imbedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Furthermore, they are *peoples* to the extent they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past.⁵

The UN Draft Declaration on the Rights of Indigenous Peoples, which will be discussed shortly, emphasizes above all the importance of self-identification.⁶ The Chairperson-Rapporteur to the UN Working Group on Indigenous Populations has similarly emphasized the importance of flexibility in defining

5. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3 (1996).

6. *Draft United Nations Declaration on the Rights of Indigenous Peoples*, at art. 8, U.N. Doc E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (1994).

the term “indigenous.”⁷ Yet she also suggests some possible factors “relevant to the understanding of the concept of ‘indigenous.’”

- a) Priority in time, with respect to the occupation and use of a specific territory;
- b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of-production, laws, and institutions;
- c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
- d) An experience of subjugation, marginalization, dispossession, exclusion, or discrimination, whether or not conditions persist.⁸

If a state accepts the “indigenoussness” of a particular group, than this is not a particularly difficult issue for any forum designed to resolve self-determination claims. However, a number of countries, particularly in Asia, have consistently denied the existence of such groups within their borders. Therefore this may well be a serious hurdle for some groups.

A tremendous amount of scholarship has also been devoted to the question of who are “peoples” entitled to the right of self-determination. Few today can dispute the notion that “peoples” include sub-national groups that are part of a larger territorial sovereign unit.⁹ Just as international law has evolved from being solely concerned with the rights and duties of sovereigns to include the individual and collective rights of human beings, so too has self-determination evolved into a legal precept benefiting “human beings as human beings and not sovereign entities as such.”¹⁰ Of course that doesn’t address the more difficult question of what groups constitute “peoples” for purposes of exercising a right

7. In her working paper on the concept of “indigenous people,” Chairperson-Rapporteur Daes states that “the concept of ‘indigenous’ is not capable of a precise, inclusive definition which can be applied in the same manner to all regions of the world. However, greater agreement may be achieved with respect to identifying the principal factors which have distinguished ‘indigenous peoples’ from other groups in the practice of the United Nation system and regional intergovernmental organizations.” Working Group on Indigenous Populations, Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of “indigenous peoples,” Comm. on Hum. Rts., Sub-Commission on Prevention of Discrimination and Protection of Minorities, 14th Sess., UN Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996) [hereinafter Working Paper Daes].

8. Working Paper Daes, *supra* note 7, at para. 69; Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 114-16 (1999).

9. See e.g., REFERENCE RE SECESSION OF QUEBEC, [1998] 37 I.L.M. 1340, 1373 (1998); *Report of the Human Rights Committee*, U.N. GAOR, 47th Sess., Supp. No. 40, at 52, U.N. Doc. A/47/40 (1992). But see *infra* notes 26-32 and accompanying text.

10. See, ANAYA, *supra* note 5, at 76, 77-80.

to self-determination. Factors commonly referenced, but by no means exclusive, include: common racial, ethnic, linguistic, religious or cultural history; some claim to territory or land; and a shared sense of political, economic, social, and cultural goals. Indigenous groups often meet each criterion. Yet this definition of peoples fails to fully contemplate the essence of the phrase "indigenous peoples." Another factor often overlooked but nevertheless germane to addressing indigenous claims to self-determination is the role of history. This historical undertaking requires both an inward examination that allows Native peoples to reconstitute their own histories and identities and an outward examination that acknowledges and addresses the wrongs that accompany indigenous claims to self-determination.

B. Self-determination

Another key step in the resolution of indigenous claims to self-determination is to better define what is meant by the term "self-determination."¹¹ While the term has often been equated with secession, we know that its meaning

11. The early origins of the concept of self-determination are well articulated: from the Marxist precepts of class liberation, to the Wilsonian ideals of democracy and freedom, through its incorporation into the United Nations Charter. The push for decolonization in the 1960s shed new light on the right of self-determination, focusing on its humanistic components. By 1970, we see a shift in legal doctrine with the inclusion of the right of self-determination in the *Declaration on Principles of International Law Concerning Friendly Relations*, which envisions both a collective right to fully participate in the political life of a nation and some form of relief for those who are denied full participatory rights. See *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the U.N.G.A. Res. 2624, 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028* [hereinafter *Declaration on Friendly Relations*] (1970). Within the international human rights movement, both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights states that "all peoples have the right of self-determination." See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967) (Annex to G.A. Res. 2200, 21 GAOR, Supp. No. 16, at 490, U.N. Doc. A/6316 (1976) [hereinafter ICESCR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967); (G.A. Res. 2200, 21 GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316) (1976) [hereinafter ICCPR]. This includes the right to "freely determine their political status," to "freely pursue their economic, social, and cultural development, and to "freely dispose of their natural wealth and resources." *Id.* As the Canadian Supreme Court in its 1998 opinion on the secession of Quebec noted, "the existence of the right of the people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond 'convention' and is considered a general principle of international law." See REFERENCE RE SECESSION OF QUEBEC, 2 Can. S.C.R. 217, at para. 111 (1998), *citing e.g.* A. Cassese, *Self-Determination of Peoples: A legal reappraisal* 171-72 (1995). Critics of group rights generally and the right of self-determination for sub-national groups in particular highlight the potential for political instability and violence as a reason for opposing such a right. However, this focus tends to miss the mark. The claims exists; violence and instability can be reduced by providing groups with peaceful and effective processes for addressing alleged violations. Indeed, situations such as East Timor, Kosovo, Eritrea, and Chechnya may have taken a different less violent course had international procedures and institutions been in place to address these claims early on.

is much more nuanced than that, especially where indigenous peoples are concerned. The UN Draft Declaration on the Rights of Indigenous Peoples is a good place to start, since it reflects indigenous peoples' own stories and own struggles for recognition of rights that are essential to their very survival.¹²

The UN Draft Declaration embodies what is meant by the phrase "indigenous self-determination," in that it specifies various freedoms, conditions, and rights necessary for culturally distinct peoples to be fully in control of their own destinies.¹³ As Professor Anaya suggests, these rights, conditions, and freedoms fall within several normative categories: non-discrimination, respect for cultural integrity, control over lands and resources, social welfare and development, and self-government.¹⁴ Adoption of the Draft Declaration by the General Assembly

12. *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Doc E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (1994) [hereinafter U.N. Draft Declaration]. The U.N. Draft Declaration is a document that is being considered by the U.N. Commission on Human Rights for eventual consideration by the General Assembly. See *infra* notes 16-21 and accompanying text for more information.

13. The Draft Declaration includes an express recognition of the right of self-determination, but doesn't stop there. It addresses a number of important collective rights, such as protection against genocide and ethnocide, protection of socioeconomic rights, including the right to own, possess or use lands and natural resources, as well as the right to autonomy or self-government. See U.N. Draft Declaration, *supra* note 12, at arts. 1-36.

14. See ANAYA, *supra* note 5, at 97-125. Critics who oppose indigenous self-determination might contend that many of these norms are readily achievable irrespective of any recognition of a separate group right. It is true that nondiscrimination, respect for culture, right to welfare and development, and protection of property are already an integral part of conventional and individual human rights law. However, this analysis fails to recognize the inextricable link between each of these norms and the norm of self-government, as well as the collective nature of the right of self-determination. It is through the process of political autonomy that indigenous peoples reclaim control of their land and natural resources, rebuild their social and economic infrastructure, protect their way of life, and enhance their democratic participation in the larger society. The U.N. Draft Declaration on Indigenous People Rights offers the clearest written articulation of this interrelationship between the right of self-determination and other important human rights.

The preamble to the 1992 Indigenous Peoples Earth Charter illustrates further the meaning of indigenous self-determination:

We the indigenous peoples walk to the future in the footprints of our ancestors.
From the smallest to the largest living being, from the four directions.
From the air, the land and the mountains, the creator has placed us, the indigenous peoples upon our mother earth.
The footprints of our ancestors are permanently etched upon the lands our peoples.
We, the indigenous peoples maintain our inherent right to self-determination. We have always had the right to decide our own forms of government, to use our own ways to raise and educate our children, to our own cultural identity without interference.
We continue to maintain our rights as people despite centuries of deprivation, assimilation, and genocide.
We maintain our inalienable rights to our lands and territories, to all our resources—above and below—to our waters. We assert our ongoing responsibility to pass these on to our future generations.
We cannot be removed from our lands. We, the indigenous peoples, are connected by

would provide guidance to any process designed to resolve future claims. This is no easy task, however, given the opposition to this document by some states, particularly to the notion of self-determination.¹⁵ The next section provides further analysis of this opposition. By examining the current debates surrounding the draft declaration we can gain a clearer picture of the kinds of issues that a dispute resolution forum will be faced with resolving. For instance, how does secession relate to the right of self-determination, how does one bridge the ideological divide between individual and group rights, and to whom and under what circumstances does the right to development attach vis-à-vis the right to self-determination?

C. Controversy Surrounding the Adoption of the UN Draft Declaration

In the past several decades, indigenous peoples have garnered international support for their rights to live and develop as distinct communities.¹⁶ Their efforts have brought about significant changes in both conventional and customary international law. For instance, in 1982, the United Nations Economic and Social Council, along with the United Nations Human Rights Commission authorized the formation of a Working Group on Indigenous Populations, made up of five experts from the Sub-commission on the Prevention of Discrimination and Protection of Minorities.¹⁷ The Working Group's original mandate was the development of international standards concerning the rights of indigenous populations. In 1993, a Draft UN Declaration on the Rights of Indigenous Peoples was completed and subsequently adopted by the Sub-commission. That same year, the General Assembly proclaimed the International Decade of the World's Indigenous People. These two events are conceptually linked in that adoption of the Declaration by the General Assembly is a major goal of the Decade.¹⁸

the circle of life to our lands and environments.

We, the indigenous peoples, walk to the future in the footprints of our ancestors.

15. See *infra* notes 26 and accompanying text.

16. See, e.g., ANAYA, *supra* note 5, at 45-58; see also Programme of Activities for the International Decade of the World's Indigenous People (1995-2004) (para. 4), G.A.Res. 50/157 of Dec. 21, 1995, annex., Introduction, at <http://www.unhchr.ch/html/menu6/2/fs9.htm> (last visited Mar. 17, 2004).

17. Hum. Rts. Comm. Res. 1982/19 (Mar. 10, 1982); E.S.C. Res. 1982/34, May 7, 1982, U.N. ESCOR, 1982, Supp. No. 1, at 26, U.N. Doc E/1982/82 (1982), at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/691996bd9d67c914c1256965004df3d3?Opendocument> (last visited Mar. 18, 2004).

18. In 1995, The Commission on Human Rights established an open-ended, inter-sessional working group to consider the various provisions of the draft declaration. Upon completion of its work, the group will send its draft to the Commission. If the Commission is satisfied, the draft will be approved by the Economic and Social Council, which will in turn submit it to the Third Committee. Upon approval by the Third Committee, it will be submitted to the General Assembly for final adoption. The goal was to finish this work by the end of the Decade in 2004, but for reasons discussed later in this paper this is not likely to occur.

The Draft Declaration represents a monumental achievement for indigenous peoples. As Professor Turpel notes:

First and foremost, it represents a remarkable feat of international legal drafting by Indigenous peoples, human rights experts, and State representatives. This kind of power-sharing of the pen is dramatic because Indigenous peoples and their governments have been virtually shut out of the institutions of the United Nations, relegated to the status of 'individuals' or 'non-governmental organizations.'¹⁹

In fulfilling its mandate to facilitate and encourage dialogue between Governments and indigenous peoples, the working group reached out to large numbers of indigenous nations and organizations—many of whom played a pivotal role in the drafting of the declaration.²⁰ For reasons more fully explored in Part III, this kind of participation by indigenous groups in the design and implementation of any future dispute resolution mechanism cannot be undervalued. As Professor Robert Williams' suggests "the Working Group's Draft provides one important measure of the power of indigenous peoples' own stories to transform legal thought and doctrine about the rights that matter most to them."²¹

As noted earlier, the draft declaration specifies important freedoms, conditions, and rights necessary for distinct peoples to be fully in control of their own destinies.²² Yet it is not a one sided agreement but rather represents—in the

19. M. E. Turpel, *Draft Declaration on the Rights of Indigenous Peoples—Commentaries*, 1 C.N.L. R. 50 (1994).

20. The current working group on the draft declaration is similarly designed to provide for significant participation by indigenous groups, even those lacking consultative status with the Economic and Social Council.

21. Robert A. Williams, Jr., *Frontier of Legal Thought III: Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 683-84 (1990).

22. Part I of the U.N. Draft Declaration affirms the right of non-discrimination, full participation in the life of the State, and self-determination generally. Article 3 of this part mirrors the language found in the Covenant on Civil and Political Rights and the Covenant on Economic, Cultural, and Social Rights that 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." Part II addresses collective rights to live as distinct peoples, including protection against genocide and ethnocide. Part III protects the cultural, spiritual, and linguistic identities of indigenous peoples. Part IV addresses education, labour, and communication rights. Part V and VI focuses primarily on development and socioeconomic rights, including the right to own, possess, or use indigenous lands and natural resources. Part VII focus on certain political rights, including the right to determine citizenship and maintain institutional structures. Most notably Article 31 states that:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government, in matters relating to their internal and

words of Chairperson-Rapporteur Erica-Irene Daes—"a fair balance between the aspirations of indigenous peoples and the legitimate concern of States."²³ Indigenous organizations and representatives have expressed support for the declaration in its current form, with a willingness by many to consider changes that strengthen and clarify the original text, are non-discriminatory, and are consistent with international law.²⁴ States involved in the working group consultations have had varying views on the Draft Declaration. Some have expressed a willingness to accept the declaration as it currently stands, including Article 3.²⁵ However, several prominent states have expressed strong opposition to key aspects of the declaration.²⁶ By far the most controversial aspect of the declaration is its use of the terms "peoples" and "self-determination."

For instance, the United States' position on the declaration has remained fairly constant during the past eight years: indigenous peoples are not "peoples" who are entitled to the full panoply of rights associated with the right of self-determination. In its 1995 Statement on Article 3, the U.S. stated that "there [are] no international practice[s] or international instruments that recognizes indigenous groups as peoples in the sense of having the legal right of self-determination."²⁷ In 1998 it articulated its objections in somewhat broader terms contending that "no international practice or instrument recognizes sub-

local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Finally, parts VIII and IX address implementation and interpretation of the declaration.

23. *Discrimination Against Indigenous Peoples: First Revised Text of the Draft Universal Declaration on Rights of Indigenous Peoples*, 3 U.N. Doc. E/CN.4/Sub.2/1989/33 (1989).

24. See, e.g., Statements submitted by non-governmental organizations in consultative status with the Economic and Social Council at Permanent Forum on Indigenous Issues, Second Session, by International Indian Treaty Council, E/C.19/2003/NGO/1; Joint Statement to the 9th Intersessional Working Group on the U.N. *Draft Declaration for the Rights of Indigenous Peoples*, at www.treatycouncil.org/new_page_55211221212.htm (last visited Feb. 11, 2004); 8th Intersessional Working Group on the *Draft Declaration on the Rights of the World's Indigenous Peoples, Report of the Tetuwan Oyate Teton Sioux Nation Treaty Council*, at www.tsntc.org/files/12_02_IWG.htm (last visited Feb. 11, 2004) [hereinafter Report of the Teton Sioux].

25. See *Report of the working group established in accordance with Commission on Human Rights resolution, 1995/32, E/CN.4/2003/92* (Jan. 6, 2003) (Chairperson-Rapporteur: Mr. Luis-Enrique Chavez) [hereinafter Report of Working Group 2003]. See also Summary of the Informal Intersessional Consultations: Geneva Sept. 16-19, 2002, at www.treatycouncil.org/new_page_552.htm (last visited Feb. 12, 2004) [hereinafter Informal Consultations 2002].

26. See *id.* See also Lorie M. Graham, *Self-determination for Indigenous Peoples After Kosovo: Translating Self-determination "Into Practice" and "Into Peace,"* 6 ILSA J. OF INT'L & COMP. L. 455, 462 (2000).

27. See *id.*

national groups as having the legal right of self-determination”²⁸ and further that the United States has “concerns about adopting a declaration which suggests that all indigenous groups have a right to be sovereign, independent states.”²⁹ In the 2002 working group consultation, the United States shifted its position somewhat arguing for the adoption of a right of “internal self-determination.”³⁰

However, the United States is not alone in its objections. Other Western countries with significant indigenous populations have expressed similar concerns.³¹ In particular they cite concerns over what impact the full realization of indigenous self-determination would have on the territorial integrity and political unity of sovereign and independent states. This rhetoric is neither surprising nor new. States have had a long history of arguing against self-determination claims on the basis of territorial sovereignty, and much scholarship has been written on this issue. On closer examination, however, these objections by states appear somewhat specious.³² Yet without a strategy for addressing these fundamental objections no amount of process will help to resolve disputes over the right to self-determination. Thus, the next two subsections as well as Part II offers an analytical framework for addressing those objections.

1. The Right to Secession

Many of the states that oppose the use of the terms “peoples” and “self-determination” do so on the grounds that it would signify some right to secession. The comments of the United States quoted above clearly signify this concern. However, these comments suggest a fundamental misunderstanding about the “substantive” and “remedial” aspects of indigenous self-determination,³³ as well as a desire to apply different international standards where indigenous peoples are concerned.

As suggested by Professor Anaya, substantive self-determination includes the right to participate “in the creation of or change in institutions of government” as well as the right “to make meaningful choices in matters touching upon all spheres of life on a continuous basis” such as economic, cultural, and social development.³⁴ “The substance of the norm,” however, “must be distinguished from the remedial prescriptions that may follow from a violation

28. See *id.* After Kosovo, it is difficult for the U.S. to continue to make such a claim regarding sub-national groups.

29. See *id.*

30. See Informal Consultations 2002, *supra* note 25, at 21.

31. See Report of Working Group 2003, *supra* note 25; see also Informal Consultations 2002, *supra* note 25.

32. See *infra* notes 33-49 and accompanying text.

33. See ANAYA, *supra* note 5, at 80-85.

34. *Id.* at 81-82.

of the norm.”³⁵ Secession is only one possible remedy to a violation of the right of self-determination and a limited one at that. Traditionally, secession was seen as the primary remedy for undoing colonization. It has also been considered an appropriate remedy in cases of alien occupation or subjugation. The more recent trend has been to apply that remedy to denials of self-determination involving serious human rights violations. The Canadian Supreme Court in its decision on the possibility of secession for Quebec summed up the right of secession as follows:

[T]he international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social, and cultural development.³⁶

This interpretation is further supported by the United Nations’ 1970 Declaration on Friendly Relations, which suggests limitations on the territorial integrity and sovereignty of a state when that state fails to conduct itself “in compliance with the principle of equal rights and self-determination of peoples.”³⁷ Indeed, during the December 2002 working group consultations, Norway proposed amending the UN Draft Declaration to include an express reference to the 1970 Declaration on Friendly Relations:

BEARING IN MIND that nothing in this Declaration may be used to deny any peoples their right of self-determination, *yet nothing in this Declaration shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent State conducting themselves in compliance with the principle of equal rights and self-determination of peoples.*³⁸

The Norway proposal merely reflects current law on the balance between the remedy of secession for violations of the right of self-determination and the protection of territorial integrity of existing states that meet their obligations of a government representing the whole people. However, its incorporation in the declaration is viewed by some as problematic in that it suggests a stagnation of the right of self-determination that is not applicable to other peoples entitled to

35. *Id.* at 80.

36. REFERENCE RE SECESSION OF QUEBEC, [1998] 37 I.L.M. 1340.

37. *See supra* note 11.

38. *See Report of Working Group 2003, supra* note 25.

the same right. Self-determination is a dynamic legal norm that is continuously shaped by the realities of practice. Such changes should inure equally to the benefit of all who are entitled to exercise that right.³⁹

Moreover, it is important to remember that indigenous self-determination embodies something much more than a claim to secession; in its fullest sense, it embodies the right of indigenous peoples to live and develop as culturally distinct groups, in control of their own destinies and under conditions of equality. If these rights are honored, secession becomes a moot point. Given the limited legal and practical reach of the remedy of secession perhaps something more fundamental is at issue here. Progress toward the adoption of the draft declaration seems to be stalled, in part, as a result of some perceived conflict between individual and group identities.

2. The Individual v. The Group

The 2002 working group consultation proceedings suggest an ongoing struggle between the affirmation of individual rights and recognition of group rights generally. While the draft declaration guarantees basic human rights of all individuals, such as the right of non-discrimination, it covers much more than that—at its core is the recognition of a set of collective rights that are essential to the survival of indigenous peoples as peoples. A 1988 working group report notes that “the harsh lessons of past history showed that recognition of individual rights alone would not suffice to uphold and guarantee the continued dignity and distinctiveness of indigenous societies and cultures.”⁴⁰ The UN Draft Declaration reflects this view. For instance, Article 7 provides for protection against “ethnocide” and “cultural genocide,” including any act that deprives indigenous peoples of “their integrity as distinct peoples.” Other articles recognize collective rights to land, culture, education, language, and institutions of government.⁴¹

However, it is because of its strong affirmation of group rights that I believe the document is perhaps meeting so much resistance. It has fallen victim to the longstanding ideological debate over whether group rights are a proper subject matter of human rights. There are both philosophical and political strands to this debate, which is centered on the liberal democratic

39. As of August of 2003, progress had not been made on the approval of the self-determination articles. The 9th Intersessional Working Group on the UN Draft Declaration was to be held in the fall of 2003, where further progress on the declaration may have been made.

40. See *Report of the Working Group on Indigenous Populations on its Sixth Session*, U.N. ESCOR CN.4, U.N. Doc. E/CN.4/Sub.2/1988/24 at 21, para. 77 (1988). See generally Williams, *supra* note 21, at 685-88.

41. See, e.g., U.N. Draft Declaration, *supra* note 12, at arts. 8, 12, 13, 14, 15, 25, 26, 27, 28, 29, 30, 31, 32.

principles of individual rights.⁴² In short, that we are all entitled to be treated as individuals apart from our race, ancestry, ethnicity and so on, and that to acknowledge group rights in their fullest sense is to create a political quagmire that will lead to social and civil unrest. Of course the reality of the situation is that collective rights are already very much a part of international law, from the United Nations Charter to the International Covenants on Civil and Political Rights as well as Economic, Social, and Cultural Rights. As Professor Thomas Pogge argues group rights “are at the very heart our international order.”⁴³

Yet representatives from various states continue to deny the existence of collective rights—a resistance which is reflected in the working group proceedings. As of August 2003 only two of the forty five articles of the UN Draft Declaration had been approved, both dealing with principles of individual rights and equality: Article 5 which states that “every indigenous individual has the right to a nationality,” and Article 43 which states that “All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.”⁴⁴ Moreover, during the September 2002 informal inter-sessional consultations some states expressed concern “over collective (rather than individual) rights to land” articulated in Article 26 of the declaration.⁴⁵ Similar concerns were expressed regarding the “collective” intellectual property rights articulated in Article 29.⁴⁶ And while there seems to be a general consensus that indigenous peoples “need to be protected from genocide or racial hatred,” several states continued the debate over “the issue of a collective identity/rights v. individual identity/rights” when discussing Article 7 on the right to be protected against ethnocide.⁴⁷ One state went as far as to denounce any claim to group rights, stressing that “human rights belonged to individuals.” Several others agreed “that the individual should be the focus and principle beneficiary of human rights.”⁴⁸ Contrast this with comments from an Indigenous Peoples Preparatory Meeting at the 1989 Working Group session that:

The concept of Indigenous peoples’ collective rights is of paramount importance. It is the establishment of rights of peoples as groups, and not merely the recognition of individual rights, which is one of the

42. See, e.g., Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 66 NOTRE DAME L. REV. 1291 (1991); Robert Cullen, *Human Rights Quandary*, 71 FOREIGN AFFAIRS 79-88 (Winter 1992/93); Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 UCLA L. REV. 943, 974-76 (2002).

43. THOMAS W. POGGE, GROUP RIGHTS AND ETHNICITY, ETHNICITY AND GROUP RIGHTS 187, 192-93 (Will Kymlicka & Ian Shapiro eds., 1997).

44. See, e.g., U.N. Draft Declaration, *supra* note 12, at arts. 5, 43.

45. See Informal Consultations 2002, *supra* note 25.

46. *Id.*

47. *Id.*

48. *Id.*

most important purposes of this Declaration. Without this, the Declaration cannot adequately protect our most basic interests.⁴⁹

Since self-determination is a collective right of peoples, the difficult question for the resolution of future claims is how to close the ideological divide between individual and group rights. A partial answer to that question lies with a better understanding of what aspects of group rights states are concerned with (beyond secession). The proceedings surrounding the Draft Declaration suggest that states are particularly concerned with indigenous peoples' collective exercise of development, of land and resource rights.

3. Development

For indigenous peoples the right to development, including control over land and resources, is critical to their survival as distinct peoples. Yet the right to development remains a major point of contention for many states. Given both the complexity and importance of this issue to the future resolution of indigenous claims to self-determination, it is dealt with in more depth in the following section on the economics of self-determination.

III. THE ECONOMICS OF SELF-DETERMINATION

One reason why the issue of development may be so controversial is because it is inextricably linked to the right of self-determination. For instance, both human rights covenants link the right of self-determination to the right of peoples to "pursue economic, social, and cultural development," to dispose of their "natural wealth and resources," and to maintain their "own means of subsistence."⁵⁰ Article 55 of the UN Charter similarly links the "right of self-determination" with the promotion of "higher standards of living, full employment, and conditions of economic and social progress and development."⁵¹ This linkage is an important one particularly where indigenous peoples are concerned, and is best summed up in a recent UN study on lands and indigenous peoples:

- [A] number of elements . . . are unique to indigenous peoples:
- i) a profound relationship exists between indigenous peoples and their lands, territories, and resources;

49. *Indigenous Peoples' Preparatory Meeting, Comments on the First Revised Text of the Draft Declaration on Rights of Indigenous Peoples* (July 28, 1989), quoted in Williams, *supra* note 21, at 686.

50. See ICCPR, *supra* note 11, at art. 1; ICESCR, *supra* note 11, at art. 1.

51. See U.N. Charter, art. 55, at <http://www.unhchr.ch/html/menu3/b/ch-chp9.htm> (last visited Feb. 17, 2004).

- ii) this relationship has various social, cultural, spiritual, economic, and political dimensions and responsibilities;
- iii) the collective dimension of this relationship is significant; and
- iv) the inter-generational aspect of such a relationship is also crucial to indigenous peoples' identity, survival, and cultural viability.⁵²

For many indigenous nations, land is a major economic resource and in some cases serves as the primary means of subsistence. Equally important to the economic stability and growth of indigenous communities is the ability to control other forms of property, such as cultural and intellectual property rights.⁵³ However, the right of development is not just a matter of economics, but one of personal survival. Native peoples from around the world continue to confront serious issues of poverty and its social consequences. As Professor Anaya notes with respect to indigenous peoples worldwide, "the progressive plundering of indigenous peoples' land and resources over time" along with systemic "discrimination" have "impaired or devastated indigenous economies and subsistence life, and left indigenous peoples among the poorest of the poor."⁵⁴ Control over economic resources provides a basis on which to reverse these socio-economic trends.

There is also a strong connection between indigenous cultures and socioeconomic rights. This connection is reflected in some recent UN human rights decisions, such as *Lubicon Lake Band v. Canada*, in which the Human Rights Committee found that the cultural survival of Lubicon Lake Band of Cree Indians was tied to its ability to control natural resource development on its ancestral lands.⁵⁵ Economic self-sufficiency provides indigenous peoples with the freedom and ability to practice their cultures and to preserve and enhance those cultures. Yet culture is more than just an end goal; it is itself a "critical factor" in the development process in that it "informs and legitimizes

52. *Indigenous People and Their Relationship to Land: Second Progress Report on the Working Paper*, Erica-Irene Daes, Special Rapporteur, U.N. SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/Sub.2/1999/18 (June 1999).

53. See, e.g. U.N. Draft Declaration, *supra* note 12, at art. 29; see also *Study on the Protection of the Cultural and Intellectual Property of Indigenous People*, Erica-Irene Daes, Special Rapporteur, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1993/28 (July 1993); *Protection of the Heritage of Indigenous People: Final Report of The Special Rapporteur*, Erica-Irene Daes, U.N. SUBCOMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, E/CN.4/Sub.2/1995/26 (June 1995).

54. See ANAYA, *supra* note 5, at 108.

55. See *Lubicon Lake Band v. Canada*, Communication No. 167/184 (Mar. 1990), at <http://heiwww.unige.ch/humanrts/undocs/session45/167-1984.htm> (last visited Mar. 18, 2004); U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990), at <http://www.un.org/documents/ga/res/45/a45r040.htm> (last visited Mar. 18, 2004). This case is explored more fully in part III of this paper.

conceptions of self, of social and political organization, of how the world works, and how the individual and group appropriately work in the world.”⁵⁶

Economic self-sufficiency is similarly connected to political self-determination. It is through the exercise of self-government that indigenous peoples are able to maintain and strengthen the institutions upon which strong economies are built. As one economist notes in relation to the experiences in Latin America and Asia, “the key to economic growth is not [just] resources, it’s institutions. It’s things like stability in government, clear rules governing contracts and effective institutions.” Finally, you have an issue of participation—indigenous peoples seek to be actively engaged in any decision-making process that affects their economic rights, especially natural resource development decisions that are being made by states and third parties claiming rights through a state.

The UN Draft Declaration encompasses many of these ideas on economic control, protection, enhancement, and participation. The Preamble to the Covenant recognizes “the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories, and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies.”⁵⁷ It further notes “that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures, and traditions, and to promote their development in accordance with their aspirations and needs.”⁵⁸ While development rights are dealt with primarily in Articles 21-30, a number of other articles touch upon those rights demonstrating their broad reach.

At the 2002 working group consultations, key development articles were discussed and debated. While some states expressed support for these articles, a number of states expressed reservations.⁵⁹ Some purportedly went as far as to suggest that the economic aspects of the right of self-determination may not apply to indigenous peoples.⁶⁰ Others took a less draconian view, focusing on the breadth of the articles and their impact on third party rights.⁶¹

56. DUANE CHAMPANE, ECONOMIC CULTURE, INSTITUTIONAL ORDER, AND SUSTAINED MARKET ENTERPRISE: COMPARISONS OF HISTORICAL AND CONTEMPORARY AMERICAN INDIAN CASES, PROPERTY RIGHTS AND INDIAN ECONOMIES 245-46 (Terry L. Anderson ed. 1992).

57. See U.N. Draft Declaration, *supra* note 12, at Annex I.

58. *Id.*

59. See generally Report of the Working Group 2003, *supra* note 25, at para. 27-49; see also Informal Consultations 2002, *supra* note 25.

60. See Report of The Teton Sioux, *supra* note 24, at 7.

61. Article 26 provides for the right of indigenous peoples to “own, develop, control, and use the lands and territories, including the total environment of lands, air, waters, coastal seas, sea-ice, flora, and fauna and other resources which they have traditionally owned or otherwise occupied or used.” Several states were concerned that the language was “extremely broad and did not recognize the rights of other parties.” Similar

State resistance to indigenous peoples' rights to land and resources is not limited to the UN Draft Declaration. Many current disputes between states and indigenous groups center on this issue.⁶² For instance, the San Andres Accords, which are negotiated peace accords between the Zapatistas and Mexican government, are close to collapse because Congress chose to remove the provisions that provide for local indigenous control of land and resources.⁶³ Many of the cases that end up before international bodies deal with similar issues. One example would be the recent decision by the Inter-American Court of Human Rights involving the Awas Tingni of Nicaragua's Atlantic Coast, in which the Court held that the Awas Tingni had the right to demarcation and protection of their traditional and customary lands under the American Convention on Human Rights.⁶⁴ Several other major cases involving the issue of the economic rights are working their way through the Inter-American human rights system—cases which could in theory change the legal landscape with respect to the legitimacy of a state's resistance to international recognition of indigenous rights to land and resources.⁶⁵

However, this resistance may not be completely muted by judicial or quasi-judicial decisions if we do not understand what lies at its core. Why are some states so opposed to the notion of indigenous development when as a practical matter it would help to alleviate the dire poverty that exists in many native communities? A partial answer may lie in the fact that economics has historically played a crucial role in the process of state-making (particularly control of

concerns were expressed regarding Article 25 on the recognition of the special relationship between indigenous peoples and their lands, Article 27 restitutions of lands and resources, and Article 28 on the conservation, restoration and protection of lands and resources. See Informal Consultations 2002, *supra* note 25, at art. 26. In response to these claims, indigenous delegations noted that the articles are "appropriately drafted in a broad manner so as to accommodate all the possible land and resource rights of indigenous peoples in the different regions of the world." Report of the Teton Sioux, *supra* note 24, at 12. On third-party rights, several states expressed concern over the interests of the non-indigenous parties that live on or have interests in lands claims by indigenous peoples. Indigenous representatives noted in regard to third party rights that some states were portraying "an incomplete and distorted picture of the historical and contemporary context relating to indigenous peoples." *Id.* Finally on Article 29 dealing with intellectual property rights, some states took issue with the collective aspects of those rights since such a right was not presently recognized in domestic or international legal systems. See Informal Consultations 2002, *supra* note 25, at art. 29.

62. See S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001).

63. In Sept. of 2002, Mexico's Supreme Court upheld the revised Accords which deleted reference to local control of lands and resources.

64. See *The Case of the Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-Am. C.H.R., Judgment of Aug. 31, 2001, <http://www.law.arizona.edu/Journals/AJICL/AJICL2002/vol191.htm> (last visited Feb. 18, 2004); see also, S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1 (2002).

65. See Anaya & Williams, *supra* note 62.

major economic exchanges within a defined territory) and thus may be viewed by some states as a backdoor to eventual secession and independence.⁶⁶ It also may be that indigenous peoples' right to development is caught up in the debate regarding possible linkages between human rights law and international economic and trade law.⁶⁷ Indigenous peoples' rights have been primarily the province of international human rights law, whereas the right to development has often taken shape within the contours of the policies of the Bretton Woods system. This system led to the creation of a separate set of international bodies and instruments, such as the World Bank, the International Monetary Fund, the General Agreement on Tariffs and Trade, and more recently the World Trade Organization.⁶⁸ Human rights advocates have spoken out against the threats that globalization may pose to non-trade rights.⁶⁹ Until perhaps more recently, however, the law of trade and economics has remained separate from other non-trade concerns such as human rights, labor, and the environment.⁷⁰ As Professors Chinkin and Wright explain

[d]evelopment, as channeled through the financial, monetary, and trading wings of the Bretton Woods system, had tended to entrench and extend a Western free market economic model. This capitalist model depends on growth and expansion, the proliferation and export of First World technology, the gearing of developing economies to servicing First World industrial needs, and the exploitation of Third World economic and social structures."⁷¹

Human rights, on the other hand, have often been invisible in this free market system of rules and institutions.

However, in the UN Draft Declaration, indigenous peoples' rights to self-determination are connected to development rights, which are in turn connected to other important human rights, such as the right to be free from environmental degradation, the right to a basic standard of living, the right to subsistence, and

66. See generally Diane Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1, 11 (1988).

67. Cf. Sara Dillon, *A Farewell to "Linkage": International Trade Law and Global Sustainability Indicators*, 55 RUTGERS L. REV. 87 (2002); Christine Chinkin & Shelley Wright, *The Hunger Trap: Women, Food, and Self-Determination*, 14 MICH. J. INT'L L. 262, 304-07 (1993).

68. Cf. G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995).

69. See, e.g., Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273 (2002). See also JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (Norton 2002).

70. See, e.g., Dillon, *supra* note 67.

71. See Chinkin & Wright *supra* note 67, at 306.

the right of equality, to name a few.⁷² These connections may be perceived by some states as significantly impacting the larger debate over whether trade and economic law should be linked to non-economic concerns. A related issue is the impact that this linkage may have on multinational corporations doing business with nation-states, particularly since the Draft Declaration requires states to consult with indigenous peoples prior to commencing any development project that affects their lands, territories, and resources.

Each of these concerns can be answered in turn. It is important to note that the Draft Declaration is not a declaration of absolutes. In the words of Professor Robert Williams, it does “delegitimize the five-hundred-year-old legacy of the European doctrine of discovery” by recognizing indigenous peoples right to occupy and control traditional lands and resources.⁷³ Yet states also retain a large measure of control over key economic resources.⁷⁴ This does not mean that states can ignore the concerns and rights of indigenous peoples with respect to the development of those resources. States must protect indigenous peoples’ “total environment,” seek their “free and informed consent,” and provide them with “just and fair compensation” prior to moving forward with any project affecting indigenous lands and resources.⁷⁵ In this way, we see a clear link between the economic rights of the state and the human rights concerns of indigenous peoples—linkages which are already occurring in other aspects of international economic and trade law.

One example would be the World Bank’s decision to adopt a “holistic approach to development” that takes into consideration “the interdependence of all elements of development—social, structural, human, governance, donors, environmental, economic, and financial.”⁷⁶ Beginning in 1982, the World Bank issued its first policy directive on “Tribal People in Bank-financed Projects,” which focused on protecting tribal land rights and health services. This policy was strengthened in 1991 with the development of Operational Directive 4.20, which was designed to promote “the rights of indigenous peoples to participate in, and benefit from, [World Bank] development projects.”⁷⁷ These newer

72. See U.N. Draft Declaration, *supra* note 12.

73. See Williams, *supra* note 21, at 691.

74. See *id.*; see also U.N. Draft Declaration, *supra* note 12, at art. 30.

75. *Id.*

76. See Richard Cameron Blake, *The World Bank’s Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development*, 3 YALE HUM. RTS. & DEV. L.J. 159, 160 (2000), (citing to World Bank Group, Comprehensive Development Framework, at <http://www.worldbank.org/cdf> (last visited Mar. 17, 2004)).

77. *The World Bank & Indigenous Peoples*, The World Bank Fact Sheet (Aug. 2002), at [http://lnweb18.worldbank.org/ESSD/essdext.nsf/43ByDocName/TheWorldBankIndigenousPeoples-FactSheet151KBPDF/\\$FILE/IndigenousPeopleExternalBriefWSSD2002.pdf](http://lnweb18.worldbank.org/ESSD/essdext.nsf/43ByDocName/TheWorldBankIndigenousPeoples-FactSheet151KBPDF/$FILE/IndigenousPeopleExternalBriefWSSD2002.pdf). (last visited Mar. 17, 2004). Operational Directive 4.20 specifically requires that indigenous peoples have “a voice in projects that affect them;” that “adverse impacts on indigenous peoples are avoided, or if not possible, minimized or mitigated;”

policies and directives are more in line with conventional and emerging customary law regarding indigenous rights to lands and natural resources, as well as rights to self-determination.⁷⁸

In sum, given the importance of development rights to the cultural, political, and social survival of Native peoples it is unrealistic to believe that any dispute resolution process will be able to adequately address indigenous claims to self-determination if no strategy is in place to resolve these complementary economic claims. While we may be tempted to try to separate these rights in the way that they have been historically separated into economic/trade law and human rights law, the trend in international law is to develop policies and instruments that recognize their co-dependence. States who are negotiating or addressing the self-determining rights of indigenous peoples should therefore adopt similar approaches.

IV. EXPLORING MECHANISMS FOR RESOLVING INDIGENOUS CLAIMS

Thus far the paper has attempted to better define what is meant by indigenous self-determination, while at the same time identifying and analyzing some of the major hurdles to resolving claims to self-determination, such as the issue of control of land and resources and the right to development. This section explores actual processes or mechanisms that may be used for resolving such claims. It includes an analysis of some of the mechanisms already in use by indigenous groups in their struggle for self-determination and then distills from these experiences a list of factors that may be helpful to the resolution of future of claims. The focus here is on the indigenous peoples of the western

and that "project benefits are tailored to the specific needs of indigenous peoples." This policy is undergoing additional revisions to "ensure that the development process fosters full respect for the dignity, human rights, and cultures of indigenous peoples." *Id.* The draft Operational Policies 4.10 strengthen earlier policies by "providing clearer provisions for early and meaningful consultation and informed participation of affected groups . . . adding new mandatory requirements regarding the commercial use of natural resources . . . on lands owned, or customarily used by, indigenous groups . . . and adding new mandatory requirements regarding the commercial use of cultural resources (including indigenous knowledge)." *Id.* See generally Fergus MacKay, *Universal Rights or a Universe unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 AM. U. INT'L L. REV. 527 (2002).

78. See, e.g., Anaya & Williams, *supra* note 62. For instance in its concluding observations to Canada, the U.N. Hmn. Rts. Comm. noted the important link between indigenous peoples' rights to land and resource allocation and the right to self-determination. See *Concluding Observations of the Human Rights Committee: Canada*, U.N. GAOR, Hum. Rts. Comm., 65th Sess., U.N. Doc. CCPR/C/79/Add.105 (1999). In regard to the "aboriginal peoples" of Canada, the "Committee emphasize[d] that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence." *Id.* at para. 8. It further noted that the "practice of extinguishing inherent aboriginal rights" to lands and resources was "incompatible" with article 1 of the Covenant on Civil and Political Rights. *Id.*

hemisphere, although many of the points are applicable to indigenous groups elsewhere in the world.

While the draft declaration does not establish its own dispute resolution mechanism, it does envision the establishment of “mutually acceptable and fair procedures, such as negotiations, mediation, arbitration, national courts, and international and regional human rights review and complaint mechanisms” for the resolution of disputes with States.⁷⁹ Many of these mechanisms are already being used by indigenous groups in their struggle for self-determination, with varying degrees of success. The following sections analyze the strengths and weaknesses of some of the more readily used mechanisms.

A. *UN Human Rights Committee*

The Human Rights Committee has been the most active UN treaty-based body to address indigenous people’s claims to self-determination. The two mechanisms in which this right has been explored are the state reporting procedures of the ICCPR and the individual complaint procedures under the Optional Protocol. Through its reporting procedures, the Committee has urged a more comprehensive reporting of actions taken by states to implement Article 1 of the ICCPR as it applies to those nations’ aboriginal peoples.⁸⁰ This is an important concession in terms of official recognition by a UN body that the right applies to those groups. However merely requesting that a government pay closer attention to the implementation of this right does little to ensure that the right is actually honored. If a government chooses to ignore the recommen-

79. See Fact Sheet No. 9 (Rev. 1), *The Rights of Indigenous Peoples, Programme of Activities for the International Decade of the World’s Indigenous People (1995-2004)* (at para. 4), G.A. Res. 50/157 of Dec. 21, 1995, annex., at <http://www.unhcr.ch/html/menu6/2/fs9.htm> (last visited Mar. 17, 2004); see also U.N. Draft Declaration, *supra* note 12, at art. 39.

80. Like most UN human rights treaty regimes, the ICCPR requires state parties to submit periodic reports on the measures taken to give effect to the rights recognized in the treaty. See ICCPR, *supra* note 11, at art. 40. The Committee is then required to study the reports and offer comments to the state parties. In its 1984 general comment on the right to self-determination, the Committee noted in particular the persistent failure of states to meet their reporting obligations under Article 1. See *The Right of Self-Determination of Peoples* (Art.1): 13/03/84, CCPR General comment 12, para. 3. The Committee stressed the need for states to provide information on each paragraph in article 1, including information on the political, economic, social and cultural aspects of the right of self-determination. *Id.* In recent concluding observations to reports submitted by Canada, Norway and Mexico, the U.N. Human Rights Committee emphasized the importance of this concept as it applies to those nations’ aboriginal peoples. See *Concluding Observations of the Human Rights Committee: Canada*, U.N. GAOR, Hum. Rts. Comm., 65th Sess., at para. 8, U.N. Doc. CCPR/C/79/Add.105 (1999); *Concluding Observations of the Human Rights Committee: Mexico*, U.N. GAOR, Hum. Rts. Comm., 66th Sess., at para. 19, U.N. Doc. CCPR/C/79/Add.109 (1999); *Concluding Observations of the Human Rights Committee: Norway*, U.N. GAOR, Hum. Rts. Comm., 67th Sess., at paras. 10, 17, U.N. Doc. CCPR/C/79/Add.112 (1999).

dations of the Committee, the reporting procedures of the ICCPR provide no real means of enforcement.⁸¹

Thus, indigenous groups have turned to yet another ICCPR mechanism to assert violations of that right—the complaint procedure adopted under the Optional Protocol. This strategy has brought about mixed results. One example would be the Lubicon Lake Band of Cree Indians case in which Canada was accused of violating the First Nation's right to self-determination when it allowed oil and gas exploration on the Band's aboriginal lands.⁸² The Human Rights Committee dismissed the self-determination claim, noting that the optional protocol was designed to address complaints based on violations of individual and not group rights.⁸³ In the end, the Committee did allow the submission under Article 27, the rights of persons, in community with others, to enjoy their own culture—demonstrating an important link between cultural integrity rights and the right to self-determination.⁸⁴

Yet similar to the Committee's reporting procedures, the enforcement aspects of the Protocol are almost non-existent. In the Lubicon case, it's been 20 years since the Committee's decision against Canada and the dispute is still ongoing. Thus, while the Human Rights Committee has been willing to identify what amounts to self-determination violations (or more appropriately violations of important norms associated with that right), it can offer very little in the way of ensuring that this right will be ultimately realized.

B. Inter-American System

As an alternative, indigenous peoples have taken their claims to regional bodies—such as the Inter-American Commission on Human Rights and the Inter-American Court. Unlike the Human Rights Committee, the Commission has demonstrated a willingness to entertain claims filed by indigenous groups for violations of group rights. It has also shown a strong interest in mediating disputes between indigenous groups and member states. However, much like the Human Rights Committee, this system has built procedural and substantive limitations.

For instance, in a case involving the Miskito Indians of the Atlantic Coast of Nicaragua, the Commission refused to entertain a *direct* claim for a violation of the right to self-determination, equating that right with decolonization

81. This is a criticism that is often voiced in relation to the human rights treaty system generally. On the other hand, reporting under the UN human rights treaty regime does offer a quasi-public forum for making the world aware of lack of compliance by a state. Yet the process offers no immediate relief to groups being denied their right to self-determination.

82. See Lubicon Lake Band, *supra* note 55, at para. 2.1.

83. See *id.* at para. 13.3.

84. See *id.* at para. 13.4.

procedures.⁸⁵ In the end, the report actually supports indigenous self-determination, or the norms that surround indigenous self-determination, in that it called for an institutional reordering of the Nicaraguan state to protect the group integrity and development rights of the Miskito Indians.⁸⁶ The decision also helped to bring about negotiations between the Nicaraguan government and indigenous leaders. However, as the following discussion shows, another shortcoming of the present system is the issue of compliance.

Since the *Miskito* case, the Inter-American Commission has received a number of petitions that address key aspects of the right of self-determination. One such case, *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, also involved the Indians of the Atlantic Coast of Nicaragua.⁸⁷ The Inter-American Commission expressed concern with Nicaragua's continued failure to demarcate and protect Awas Tingni traditional land and resource rights.⁸⁸ Thus, the case proceeded, upon submission by the Commission, to the Inter-American Court on Human Rights. The Court ruled in favor of the Awas Tingni Community.⁸⁹ It was a seminal decision in that the Court included

85. See Inter-American Comm. on Hum. Rts., *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin & Resolution on the Friendly Settlement Procedures Regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin*, O.A.S. Doc. OEA/Ser.L/V/II.62, doc. 10, rev. 3 (1983), OEA/Ser.L/V/II.62, doc. 26 (1984), at <http://www.cidh.oas.org/countryrep/Miskitoeng/toc.htm> (last visited Mar. 17, 2004) [hereinafter *Miskito Report*]. See also ANAYA, *supra* note 5, at 87-88. Clashes between the indigenous peoples of the Atlantic Coast and the Sandinista government arose shortly after the government assumed power in 1979 and attempted to force the indigenous communities to assimilate to the political and social objectives of Sandinista National Liberation Front. See *Miskito Report*, Part I. Demands by the Indians of the Atlantic Coast for political autonomy and self-determination were met with violent resistance by the government. The Indians sought relief before the Inter-American Commission on Human rights (Inter-Am. C.H.R.), asserting, among other things, violations of their inherent rights to traditional lands, political autonomy, and self-determination.

86. See *Miskito Report*, *supra* note 85, at Part Three, Conclusions and Recommendations.

87. See *The Case of the Mayagna (Sumo) Awas Tingni Cmty v. Nicaragua*, Inter-Am C.H.R., Judgment of Aug. 31, 2001, <http://www.law.arizona.edu/Journals/AJICL/AJICL2002/col191.htm> (last visited Feb. 18, 2004). See also, Anaya & Grossman, *supra* note 64. In 1995, the Awas Tingni community had submitted a petition to the Inter-American Commission seeking assistance in the recognition of their rights to lands that they had historically occupied and which were essential to their survival. The Nicaraguan government had refused to demarcate Awas Tingni communal lands as required by domestic law and had in fact offered logging concessions on parts of that land to a foreign company, leading the Awas Tingni to seek relief before the Commission. The petition alleged, among other things, violations of the right to property under the American Convention on Human Rights as well as violations of the right to cultural integrity under article 27 of the ICCPR. See S. James Anaya, *The Awas Tingni Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers, and Governmental Neglect in Nicaragua*, 9 ST. THOMAS L. REV. 157 (1996). See generally Li-ann Thio, *Battling Balkanization: Regional Approaches Toward Minority Protection Beyond Europe*, 43 HARV. INT'L L.J. 409, 435-36 (2002).

88. Anaya & Grossman, *supra* note 64, at 8. See also Anaya, *supra* note 87.

89. See *The Case of the Mayagna (Sumo) Awas Tingni Cmty v. Nicaragua*, Inter-Am C.H.R., Judgment of Aug. 31, 2001, <http://www.law.arizona.edu/Journals/AJICL/AJICL2002/col191.htm>. (last visited Feb. 18, 2004).

communal property rights within the tenure of property protected under regional human rights law. As noted in Section III of this paper, a major stumbling block to the resolution of indigenous self-determination claims centers around assertions of rights to lands and resources. This case helps bring clarity to the scope of those rights as they exist within the Inter-American human rights regime.

With that said, states like the United States (who are not subject to the Inter-American Court's jurisdiction) tend to ignore such decisions, despite their importance in articulating general human rights obligations applicable to all OAS member states. One recent example would be a case involving the Western Shoshones of Nevada and two of its elders, Carrie and Mary Dann.⁹⁰ The United States is ignoring a decision by the Commission that U.S. claims to Western Shoshone lands are illegal under international law and that the United States has used illegitimate means to assert ownership over those lands.⁹¹ Since the Commission's decision is not legally binding (in the same way that a decision from the Inter-American Court would be), it appears that the United States will have the last say on what happens in this matter, leaving the Shoshones with no further regional or international recourse.⁹²

90. Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, Inter-Am. C.H.R. (2002), at <http://www1.umn.edu/humanrts/cases/75-02a.html> (last visited Feb. 24, 2004) [hereinafter Dann Report].

91. The case has a long and complicated history. In short, the Western Shoshones maintain that they have never relinquished aboriginal title to certain lands and resources and that the US is claiming rights to those lands and resources as a result of a process that illegally discriminates against Native Americans, denying the Dann sisters and other Shoshones basic due process rights as well as rights to property and non-discrimination—key aspects of indigenous self-determination. After several years of review and communications with the parties, the Commission ruled in favor of the Dann sisters. In order to come in compliance with its human rights obligations, the Commission recommended that the United States (1) provide the Danns and other Shoshone members with an equitable remedy for determining their land rights (which may include adopting appropriate legislation or other such measures) and (2) review its laws, procedures, and practices to ensure that the property rights of Indigenous persons are determined in accordance with the rights established in the American Declaration. See Dann Report *supra* note 90. Throughout the proceedings, the United States has denied not only the substantive claims but the Commission's jurisdiction to hear such claims. The United States' defiance has been most evident in its continued confiscation and sale of livestock that the Dann sisters were grazing on aboriginal lands and its attempt to move forward on the distribution of funds for those lands based on what the Commission found to be an illegitimate and discriminatory process. See, e.g., Report by Amnesty International on the Western Shoshone case, at http://www.amnestyusa.org/justearth/indigenous_people/western_shoshone.html (last visited Feb. 24, 2004).

92. The United States is not a party to the American Convention and has not accepted the jurisdiction of the Inter-American Court. Thus the decision of the Commission is non-binding. The Commission could take additional measures such as attempting to verify compliance or holding additional hearings, but the United States does not seem amendable to any services the Commission may have to offer in resolving this dispute.

It is worth noting that there are other ways in which alleged violations of indigenous self-determination have been dealt with in the Inter-American system. This includes country studies, on-site investigations, and even a Proposed American Declaration on the Rights of Indigenous Peoples. The Commission has the power to initiate country studies and, with the permission of the state, on-site investigations relating to human rights violations. In the last several years, the Commission has focused more closely on the indigenous human rights issues in its country reports.⁹³ This heightened attention has led to increased awareness and in some cases the taking of positive steps by the affected country in protecting the group rights of indigenous populations within their borders.

The Commission has also prepared, at the request of the OAS General Assembly, a Proposed American Declaration on the Rights of Indigenous Peoples.⁹⁴ Similar to the UN draft declaration, the American declaration was prepared in consultation with indigenous groups and OAS member states, and is now under review by a working group established by the General Assembly. Interestingly enough, the right to “self-determination” is not explicitly mentioned in the draft American declaration. Perhaps this is intentional as a means of avoiding the issues that have bogged down the U.N. Draft Declaration process. The OAS Declaration has been criticized by some for the lack of proper input by indigenous groups and because of concerns that it waters down the rights articulated in the U.N. Draft Declaration.⁹⁵ And it may well be true that some of the provisions of the OAS Declaration in its current form are weaker than its UN counterpart. At its core, however, it attempts to do much of what the UN Declaration does with respect to recognizing and upholding the various norms essential to realizing the right to indigenous self-determination. For instance, Article XV mirrors in many respects the language found in the two UN human rights covenants that “indigenous peoples have the right to freely determine their political status and freely pursue their economic, social, spiritual, and cultural development.”⁹⁶

93. The Commission has reported on situations involving indigenous peoples in Guatemala, Paraguay, Ecuador, Colombia, Peru, and Brazil to name a few. See <http://www.cidh.oas.org/publi.eng.htm> (last visited Mar. 17, 2004). The Commission’s annual reports have similarly focused on the human rights conditions of indigenous peoples throughout the Americas. See *id.*

94. See Proposed American Declaration on the Rights of Indigenous Peoples, at <http://www.cidh.oas.org/Indigenous.htm> (last visited Mar. 17, 2004) [hereinafter Proposed Declaration].

95. Resolution regarding the *Draft OAS American Declaration of Rights of the Indigenous Peoples*, at http://www.treatycouncil.org/section_211554.htm (last visited Mar. 17, 2004) (International Indian Treaty Council Resolution on the proposed declaration).

96. See Proposed Declaration, *supra* note 94. Cf. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 104-07 (1999).

In sum, the Inter-American system has been utilized by indigenous peoples of the Americas to assert their rights to cultural integrity, land and resources, non-discrimination, and greater political autonomy—all key norms associated with the right of self-determination. Moreover, the General Assembly, the Inter-American Commission, and the Inter-American Court have all shown a willingness to extend a measure of group protection to indigenous peoples, although there has been some reluctance to do so within the express framework of the internationally prescribed right to self-determination. In addition, the Commission has shown a strong interest in mediating disputes between indigenous peoples and member states. Yet cases like the *Western Shoshone* demonstrate the limits of the Inter-American system (at least as it is currently structured) in providing lasting remedies to indigenous peoples. These limitations have substantial consequences for indigenous peoples who are already struggling to survive on the edges of society.

C. State Systems

This is not to say that all states are ignoring the important changes which are occurring regionally and internationally. States throughout the Americas, and the world for that matter, are well aware of the momentum that has been created in the area of indigenous rights and international law and are responding through their own systems of law, again with varying degrees of success. This section will highlight some of those changes, from constitutional and legislative reform to negotiated settlements. However, not all of these changes have led to improved conditions for indigenous peoples, even within states that have taken substantial steps to conform domestic law to international law and practice. Thus this section will also explore some of the shortcomings implicit in any process that leaves resolution of indigenous self-determination claims to states without proper regional or international oversight.

In Latin America during the '80s and '90s many countries amended their constitutions in ways that offered greater protection to the rights of indigenous peoples.⁹⁷ Of all the constitutional changes Colombia's is perhaps the most comprehensive providing for the right of self-government within indigenous territories, which includes among other things, the right to administer justice, levy taxes, and regulate resources.⁹⁸ This decentralized system of government places control at the community level allowing for self-determination to take hold in accordance with indigenous customs and traditions. With respect to natural resource development by the state, the indigenous communities are guaranteed the right of meaningful consultation and protection against further

97. See, e.g., Anaya & Williams, *supra* note 62 at 59-64; Wiessner, *supra* note 96, at 74-89.

98. CONSTITUCION POLITICA arts. 246-47, 285-87 (Colom.).

derogation of their economic, social, and cultural integrity rights.⁹⁹ It similarly provides protection for the cultural identity and diversity of Colombia's indigenous peoples, through such things as the recognition of Native languages and control over education.¹⁰⁰ Unfortunately, Colombia's civil war has prevented indigenous peoples from realizing most of these rights.

Many other Latin American countries have taken constitutional steps to protect the political, social, economic, and cultural rights of indigenous peoples, each with a varying degree of success often tied to the larger political and economic stability of the country. For instance, the 1998 Ecuadorian Constitution recognizes the collective rights of indigenous people to "maintain and develop their spiritual, cultural, linguistic, social, political and economic traditions," including protection of their community lands from seizure or taxation.¹⁰¹ Like the Colombian constitution, the indigenous peoples of Ecuador have the right to be consulted regarding non-renewable resource exploration and exploitation and to benefit from those activities. They also retain certain rights to renewable resources found on their lands and to the promotion of indigenous "bio-diversity management, traditional forms of social organizations, and collective intellectual property."¹⁰² With respect to self-government, Article 224 provides for the establishment of indigenous territorial districts with the eventual development of "autonomous [governing] entities."¹⁰³ Yet political unrest and economic degradation, particularly in Ecuador's Amazon region, continue to threaten the cultural and economic traditions of Ecuador's indigenous peoples. It similarly struggles with the issues of under-representation of indigenous groups in national and regional politics.¹⁰⁴

Nicaragua is yet another example of a country that has undergone major legal reform that has yet to be realized in practice. The Nicaraguan Constitution guarantees, among other things, the land and resource rights of indigenous peoples based on their traditional and customary patterns of use and occupancy.¹⁰⁵ Legislation adopted in 1987 went even further, establishing autonomous political regions for the indigenous communities of the Atlantic Coast.¹⁰⁶

99. *Id.* at art. 330.

100. *Id.* at art. 246.

101. CONSTITUCION Ch. 5, art. 84 (Ecuador).

102. See Anaya & Williams, *supra* note 62, at 62.

103. CONSTITUCION art. 225 (Ecuador).

104. Inter-American Comm. on Hum. Rts., *Report on the Situation in Ecuador*, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, Apr. 24, 1997, at <http://www.cidh.oas.org/countryrep/ecuador-eng/index%20-%20ecuador.htm> (last visited Feb. 25, 2004).

105. CONSTITUCION POLITICA arts. 89, 180 (Nicar.).

106. See *Autonomy Statute for the Regions of the Atlantic Coast of Nicaragua*, Law No. 28, Chap. 2, arts. 6-9, at <http://translate.google.com/translate?hl=en&sl=es&u=http://www.csd.gob.ni/autonomiaca.htm&prev=/search%3Fq%3DEstatuto%2Bde%2Bla%2Bautonom%25C3%25ADa%2Bpara%2Bla%2Bregi%25C3%25B3n%2Bde%2Bla%2Bcosta%2Batl%25C3%25A1ntica%2Bde%2BNicaragua%26hl%3Den>

However, the *Awás Tingni* case demonstrates Nicaragua's failure to implement these constitutional and legislative changes, most notably in its refusal to demarcate and protect indigenous lands and culture.

One place outside Latin America where constitutional reform has made a difference in some cases is Canada.¹⁰⁷ A well-known example is the 1993 Nunavut Land Claims Agreement between the Inuit people and the Canadian government.¹⁰⁸ The Premier of Nunavut has stated that prior to the passage of

[%261r%3D%26ie%3DUTF-8%26oe%3DUTF-8](#) (last visited Mar. 18, 2004); see also CONSTITUCION POLITICA art. 181 (Nicar.).

107. In the 1980's Canada underwent important constitutional reform, which included added protections for the rights of Canada's aboriginal peoples. See generally, Anaya & Williams, *supra* note 62, at 65; Wiessner, *supra* note 96, at 66-71. The 1982 Constitution Act recognized and affirmed "The existing aboriginal and treaty rights of the aboriginal peoples of Canada." Can. Const. (Constitution Act, 1982) pt. II (Rights of Aboriginal Peoples of Canada), sec. 35(1). In addition, Section 25 of the Canadian Charter of Rights and Freedoms recognized that the rights and freedoms articulated therein "shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal people of Canada." While the Constitution does not expressly discuss indigenous self-government or political self-determination, such rights are an inherent part of the aboriginal and treaty rights recognized under the Constitution. Realization of aboriginal or treaty rights to lands and resources, to improved socio-economic conditions, and to cultural survival is all inextricably linked to the ability of indigenous peoples to govern themselves and to determine their own destiny in accordance with their traditions and cultures.

108. See Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada, at <http://www.tunngavik.com/site-eng/nlca/nlca.htm>. (last visited Mar. 17, 2004). The story of the Inuit people and their encounter with the Europeans is a familiar one. See Premier Paul Okalik, *Nunavut-North America's Newest Democracy*, available at <http://www.gov.nu.ca/Nunavut/English/premier/press/nand.shtml> (last visited Mar. 17, 2004). Europeans began to arrive in what is now Nunavut in the 1600s, looking for a passage to Asia. What they found were small nomadic villages that followed the migration routes of the caribou and other animal herds. They were a self-governing people who managed their own lands and resources according to their own laws and customs. And while encounter brought changes in their lives, they held fast to their way of life until the early 1960s when the Canadian government decided to move the Inuit from a land-based economy to a community-based one. It was then that most of the cultural upheaval occurred, as the Inuit people were forced to adopt a foreign system of government and lost control over their lands and resources. However, the 1970s brought about renewed activism and interest in indigenous rights leading to a number of aboriginal groups being formed in Canada, particularly around the issue of land and resources. In 1971 a national Inuit organization was formed to protect the interest and rights of the Inuit people. This renewed interest in the protection of indigenous rights was aided by a number of important court decisions, most notably *Calder v. Attorney General for British Columbia*, in which three of the seven judges supported the claims of the Nisga'a people regarding their aboriginal ownership of lands. Although the Nisga'a Indians technically lost the case, with three judges concluding that their rights had been extinguished and one dismissing on procedural grounds, it signaled a change in the Court's thinking on aboriginal rights. This provided the impetus necessary to push the Canadian government toward negotiation of outstanding aboriginal claims. It was during this time that the Inuit began to push for recognition both of their self-governing rights and their rights to land and resources. In 1975, they presented a draft land claims agreement to the Canadian government and open discussions regarding the establishment of a public government. However, it wasn't until 1982, with the passage of the Constitution Act and Charter that things really began to change for the Inuit people. As earlier noted, these constitutional changes offered a measure of legal security for the Inuit people which allowed for them to move forward with settlement. In 1985, the federal

the 1982 Canadian Constitutional Act there was “little incentive to negotiate and sign a land claims when a subsequent government had the power to overturn that agreement, if it so chose.”¹⁰⁹ The Land Claims Agreement provides for “constitutionally-protected rights to land, money, renewable resources, and social and political development.”¹¹⁰ The Agreement also establishes an arbitration board to resolve certain claims arising under the agreement. The most well known aspect of the agreement, however, was the eventual establishment of Nunavut, a new Canadian territory. The Inuit people chose to exercise their right to self-determination through a public government structure. Yet eighty-five percent of the population of Nunavut is Inuit and, not surprisingly, Inuit worldviews have strongly influenced government operations and policies.

Other First Nations have negotiated agreements with Canada that similarly provide for a measure of self-government and control over lands and resources. Each accord varies, depending on the circumstances and needs of individual nations. For instance, the Sechelt Indian Band in British Columbia chose a municipal form of government under the Sechelt Self-Government Act,¹¹¹ which transfers certain local powers to the band as well as ownership rights to some 2500 acres of original reserve land. Other powers, such as police and court, remain with the federal government. Another example would be the Nisga’a Final Agreement,¹¹² which establishes ownership and self-government rights to some 1900 square kilometers of land in the lower Nass Valley of British Columbia. This includes all subsurface and timber resources located on those lands, as well as a host of other rights relating to wildlife and fisheries. In terms of self-government, the agreement provides for the establishment of a central government and four village governments and includes the right to police themselves and establish their own court systems. Individuals who are not Nisga’a citizens, but who lived on Nisga’a lands, have the right to be consulted or participate in some capacity regarding decisions that affect their rights. Their rights are similarly protected by the Canadian Constitution and the Canadian Charter of Rights and Freedoms.

The above examples demonstrate that Canada has had some success in addressing the self-determining right of aboriginal peoples through treaty-type negotiations and agreements. This process has been greatly aided not only by

government announced its support for a new northern territory providing the last important component to the realization of the Inuit peoples’ right to self-determination.

109. Paul Okalik, *Nunavut-North America’s Newest Democracy*, Dec. 3, 2001, at 4, available at <http://www.gov.nu.ca/Nunavut/English/premier/press/nand.shtml> (last visited Mar. 17, 2004).

110. *Id.*

111. Sechelt Indian Band Self-Government Act, [1986, c. 27], available at Sechelt Indian Band Self-Government Act, c. 27 (1986), available at <http://www.canlii.org/ca/sta/s-6.6/> (last visited Feb. 25, 2004).

112. See Nisga Final Agreement, at http://www.ainc-inac.gc.ca/pr/agr/nsga/nisgafb_e.html (last visited Feb. 25, 2004).

the constitutionalization of indigenous rights but by the willingness of the Supreme Court to begin to adapt Canadian law to contemporary human rights law on indigenous peoples. Yet there are still a number of outstanding claims in Canada, many of which are stalled as a result of an inability to reach agreement regarding the control of natural resources and development. *Lubicon Lake*, discussed earlier, is a perfect example.¹¹³ Situations like that of *Lubicon Lake*, and even some of the cases in Latin America, would benefit tremendously from the establishment of an international body that was empowered to mediate claims that have failed to reach a negotiated settlement within a given period of time. This proposal is discussed in more detail in the final section of this paper.

Similar issues arise in the context of the United States, which has officially recognized and supported the policy of self-determination since the 1970s.¹¹⁴ The United States has, in the past twenty years, negotiated new land and self-government agreements with a number of indigenous nations.¹¹⁵ Yet a major shortcoming of these negotiated settlements is that US domestic law is so lopsided in favor of federal "plenary power" that this may have precluded a fair and balanced settlement with respect to the rights of certain tribes.¹¹⁶ This is especially true if the tribe was claiming rights to lands rich in natural

113. See *Lubicon Lake Band v. Canada*, Communication No. 167/184 (March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).

114. Since the early 1970s, the legislative and executive branches of the United States government has recognized and supported a policy of self-determination for indigenous nations or Indian tribes located within its exterior borders. However, this has not always been the case. Between 1778 and 1871 the United States entered into some 800 treaties with Indian nations, about half of which were ratified by the Senate. These treaties, at least in the eyes of Native nations, were considered solemn, government-to-government exchanges designed to ensure the sovereign rights of tribes to their lands and territories. However, formal treaty making with tribes ended in 1871 and with the push westward increased pressure was placed on Indian nations to "assimilate" and adopt the ways of the dominant society. Perhaps the worst of the federal policies during this time with respect to the self-determining rights of Indian nations was the allotment policy which promoted the break up of communal land into individual parcels and the sale of so-called "excess" land to non-Indians. 1934 ushered in a new era of self-government for tribes in the United States with the passage of the Indian Reorganization Act. This law was designed to improve the deplorable economic conditions of tribes and their citizens by supporting tribal self-government. However, by the 1940s we were seeing a reversal of this support for tribal self-government toward policy of termination. It was during this time that the Indian Claims Commission Act took effect, creating a special forum for the settlement of indigenous group claims against the United States. While the ICC could have been a useful mechanism for bringing justice to the indigenous peoples of the United States for violations of their aboriginal and treaty rights, it was from the outset tainted by the policy of termination. The 1970s were a turning point in federal/Indian relations, with the adoption of the policy of self-determination. This has been accomplished through a series of laws that touch upon key aspects of the right to indigenous self-determination, such as education, Indian child welfare, cultural rights, self-government, and economic development.

115. See, *Indian Land Claims Settlement Act*, 25 U.S.C. §§ 1701-1778h (2003).

116. In addition, current federal practice does not always conform itself to either domestic or international norms on the rights of indigenous peoples, as evidenced by the recent Inter-Commission decision involving the Western Shoshone.

resources.¹¹⁷ Perhaps even more disturbing is the recent trend in the United States Supreme Court to cut back on the self-determining rights of tribes within their own sovereign borders.¹¹⁸ Indian nations in the United States retain and exercise a large degree of self-determination perhaps more so than any other country where indigenous peoples reside. However, since these rights have been subject to legislative and judicial abrogation, indigenous nations in the United States are in a very precarious situation, always uncertain of what future policies or decisions may bring their way. An international forum for exploring and resolving indigenous claims to self-determination could be a valuable tool for United States tribes, if for no other reason than it would help to level the playing field somewhat.¹¹⁹

D. United Nations Permanent Forum on Indigenous Issues

One such forum that might be able to assume that responsibility in the future is the newly created United Nations Permanent Forum on Indigenous Issues.¹²⁰ A discussion regarding the creation of this forum began at the Vienna

117. Compare *Maine Indian Claims Settlement*, 25 U.S.C. §§ 1721-1735 (2003) with *Connecticut Indian Land Claims Settlement*, 25 U.S.C. §§ 1751-1760 (2003).

118. The United States Constitution denotes Indian tribes as one of three types of sovereigns that Congress has the power to regulate commerce with, and while one might think that such constitutional recognition would include the right not to interfere with the internal affairs of a tribe, the courts to date have not read such a limitation into the United States commerce clause. Long ago the United States Supreme Court proclaimed Indian nations to be “domestic dependent nations,” whose powers are subject to the “plenary power” of Congress. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). According to the U.S. Supreme Court, Congress has both the power to abrogate treaties with Indian nations and pass laws that affect their internal rights and interests so long as those laws are rationally related to Congress’ unique trust obligation toward tribes. See, e.g., *Morton v. Mancari*, 417 U.S. 535 (1974). Thus, unlike the situation that now exists in Canada, the rights of indigenous peoples in the United States have never been constitutionalized, at least not to point where they are insulated from legislative or judicial reform. Yet during the early years of the self-determination, the US Supreme Court advanced a rather robust definition of tribal sovereignty. It reaffirmed their status as self-governing political entities with distinct sovereign powers, such as the power to raise revenue, enact and enforce laws, remedy disputes, and conduct government-to-government relations with the US and other domestic governmental bodies. See, e.g., *United States v. Wheeler*, 435 U.S. 313 (1978); *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164 (1973). The Court also recognized an important limit on the exercise of the federal government’s plenary power, stating that the power was “not absolute” but rather needed to be judged against the federal government’s unique trust obligation toward Indian nations. See, e.g., *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977). Yet in the last few years the US Supreme Court has been moving in the opposite direction providing less protection to tribes and actively engaging in what some have referred to as “judicial termination.” See, e.g., *Nevada v. Hicks*, 533 U.S. 353 (2001).

119. The problem of course lies with getting countries like the United States to sign on to such a process. As earlier noted, an important step would be to reach some agreement on the UN draft declaration, particularly around the issue of what the right of self-determination entails for Native peoples.

120. For more information on the United Nations Permanent Forum on Indigenous Issues, see http://www.unhcr.ch/indigenous/ind_pfii.htm (last visited Mar. 9, 2004). Any process designed to resolve

Conference on Human Rights and, after many years of consultation with indigenous groups, was finally established by the Economic and Social Council in 2002. The Forum provides advice and information to the Council on indigenous issues relating to “economic and social development, culture, the environment, education, health and human rights.”¹²¹ More specifically, it is empowered to:

- “provide expert advice and recommendations on indigenous issues to the Council, as well as to programmes, funds and agencies of the United Nations . . . [.]”

indigenous claims to self-determination should keep the following two things in mind: First, it is important to create a space in which native peoples voices can be heard. Secondly, in formulating such a process it would be valuable to look not just at existing western processes but also at indigenous processes involving dispute resolution. Many state and international processes through procedural or evidentiary requirements have excluded valuable information and suppressed indigenous voices. Yet resolution of indigenous claims to self-determination cannot come about without taking into account both the historical realities and the goals and aspirations of Native peoples. The processes of storytelling and listening cannot be undervalued as means of collecting this information and creating pathways to justice. Recall, for instance, the case involving the Western Shoshone and two of its tribal members, Carrie and Mary Dann before the Inter-American Commission on Human Rights. The case reached a regional human rights body because there was no competent domestic forum in which the Shoshone and other Indian nations could articulate their own stories regarding the historical and contemporary wrongs committed by the United States government. And it is not only in domestic processes that this is an issue. It has come up for instance in the context of discussions regarding the UN Draft Declaration, in particular around Article 36 which deals with the recognition and enforceability of Indian treaties and other related agreements. Article 36 provides for the enforceability of treaties in accordance with “their original spirit and intent,” which means looking beyond the text to other relevant information that would help shed light on what the parties intended when they signed the agreement. Some states have advocated for the removal of this language, despite objections from indigenous groups that such a change might preclude indigenous knowledge such as oral history from being considered in the interpretative process. See *Informal Consultations 2002*, *supra* note 25. Cf. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1110. (Supreme Court of Canada overturned a lower court’s ruling on the inadmissibility of oral history to establish aboriginal land occupancy. The Court further noted that in relation to the disposition of indigenous lands and resources there “is always a duty of consultation . . .” And in some cases this duty “will be significantly deeper than mere consultation.” It may “require the full consent of an aboriginal nation.”). This brings us to the second issue regarding the value of exploring indigenous processes to ensure that the self-determination mechanisms provide the greatest opportunity for indigenous participation and input. An extensive exploration of the key aspects of these processes may be helpful in ensuring meaningful participation. While it is beyond the scope of this paper to undertake such an examination, one ancient method of dispute resolution that might be looked at is tribal peacemaking. While the process varies from nation to nation depending on custom and culture, tribal peacemaking in general entails a “form of horizontal justice” in which non-adversarial strategies are employed to bring about “conciliation and the restoration of peace and harmony.” See William Bradford, “*With a Very Great Blame on Our Hearts*”: *Reparations, Reconciliation, and An American Indian Plea for Peace and Justice*, 27 AM. INDIAN L. REV. 1, 164 (2002); see also Phyllis Bernard, *Community and Conscience: the Dynamic Challenge of Lawyers’ Ethics in Tribal Peacemaking*, 27 U. TOL. L. REV. 821 (1996).

121. See *supra* note 120, United Nations Permanent Forum on Indigenous Issues, at http://www.unhcr.ch/indigenous/ind_pfii.htm. (last visited Mar. 9, 2004).

- “raise awareness and promote the integration and coordination of activities related to indigenous issues within the UN system [;]” and
- “prepare and disseminate information on indigenous issues.”

The Forum is made up of sixteen members, eight of whom are nominated by governments and elected by ECOSOC, and eight of whom are appointed by the President of ECOSOC following formal consultations with governments on the basis of consultations with indigenous representatives. Each member serves in his or her personal capacity as an independent expert for a term of three years. One of the most positive attributes of the new forum is its level of openness. For instance, when the Permanent Forum held its first annual session in May of 2002, over 1000 indigenous representatives from around the world were present. The 2003 session was attended by some 1,800 individuals from 500 different indigenous nations and organizations. Over seventy states and a number of UN agencies including the World Bank also participated in the session.

In 2003, the Forum did debate whether to make indigenous self-determination the focus of its 2004 annual session. Ultimately, the Forum tabled that issue for another year, deciding instead to focus on the rights of indigenous women. Given the Forum’s reluctance to tackle the self-determination issue, the question remains how useful it will be, or can be, in resolving these types of claims. The fact that a *permanent* forum even exists in the UN is an important first step. Not only does it create a mechanism for allowing indigenous peoples to participate in formal decision-making at the UN, it also sends a message that indigenous issues are matters of international (and not just domestic) importance. Additionally, the Forum’s mandate appears broad enough to allow for the development of future procedures designed to address issues that directly affect the self-determining rights of indigenous peoples. Indeed, many of the issues that the Forum is charged with addressing—economic and social development, culture, the environment, education, health, and human rights—encompass key aspects of indigenous self-determination. Yet it is too early in the Forum’s history to know exactly what particular functions or levels of processes it will assume in relation to the realization of this right. The next section offers some thoughts on what role the Forum might play in the future resolution of these claims.¹²²

122. The Forum is not the only UN non-treaty based process available to indigenous peoples. Other processes beyond the Permanent Forum include the UN Working Group on Indigenous Populations, which is charged both with standard-setting duties as well as the task of reviewing national developments regarding the promotion and protection of indigenous peoples’ rights. See Fact Sheet No. 9 (Rev.1), *The Rights of Indigenous Peoples*, Introduction at <http://www.unhchr.ch/html/menu6/2/fs9.htm>. (last visited Feb. 24, 2004). Although the Working Group’s mandate does not authorize it to examine specific complaints, some have

V. SUMMARY

An abundance of activity around indigenous peoples' rights has unfolded at the UN and elsewhere during the last 25 years, culminating in the creation of a Permanent Forum. The question that remains then, is whether these processes are sufficient to address disputes over indigenous self-determination or whether something more can be done to help bring about the realization of the norms associated with that right. None of the processes reviewed thus far are designed specifically to hear claims of self-determination and many, like the Human Rights Committee and the Inter-American Commission, have foreclosed the possibility of an indigenous group invoking that principle directly. Additionally, state constitutions or agreements generally do not reference the right. Yet the norms that surround indigenous self-determination—control of lands and resources, protection of culture, social and economic development, and some form of autonomy or self-governance—have been the focal points of many of the claims that have worked themselves through domestic, regional, and international channels. Thus, self-determination, as a practical matter, has been at the heart of most of these cases even if the term itself has been rarely invoked.

In terms of the success of the various processes in resolving actual disputes, there appears to be no single factor that is likely to bring about a resolution. Yet the above cases do suggest some common factors that seem to aid the process:

- increased activism and mobilization by indigenous groups;
- domestic constitutional (and judicial) reform that recognizes and solidifies the rights of indigenous peoples;

suggested that "an informal complaint procedure has emerged de facto in the deliberations of the UN Working Group." ANAYA, *supra* note 5, at 159. This is due in part to the openness of the Working Group's public sessions, in which indigenous communities and organizations are allowed to speak freely and offer written submissions for further consideration. *Id.* The Working Group also receives written material from governments, specialized agencies, intergovernmental organizations and NGOs, and can conduct visits to individual countries to gain to collect and disseminate information. In addition to the Working Group a number of studies have been prepared for the Economic and Social Council on key issues affecting indigenous peoples, such as the study on treaties and agreements with indigenous peoples and the study on the protection of the heritage of indigenous peoples. See Fact Sheet No. 9 (Rev.1), *The Rights of Indigenous Peoples*, Introduction, at <http://www.unhchr.ch/html/menu6/2/fs9.htm> (last visited Feb. 24, 2004). More recently a Special Rapporteur was appointed by the Commission on Human Rights to study "the situation of the human rights and fundamental freedoms of indigenous people." See ANAYA, *supra* note 5. The Special Rapporteur's mandate includes, among other things, the power to receive information and communications on alleged indigenous human rights violations, to conduct fact-finding missions relating to those violations, and to formulate recommendations on measures that can be taken to prevent and remedy those violations. Additional complaint procedures that have been utilized by indigenous groups to address alleged violations of human rights include ECOSOC Resolutions 1235 and 1503 procedures. See ANAYA, *supra* note 5, at 160-61.

- a state's willingness to partake in meaningful dialogue, particularly on such thorny issues as control of land and resources;
- and some type of quasi-judicial/mediation procedure to ensure a proper balance of power among the parties, especially in the area of follow-through.

Another consistent theme that seems to emerge in many of the cases previously discussed is the usefulness of negotiated settlements. States seem more amenable to such a process and, if done in a manner respectful of indigenous views and objectives, it creates the space necessary to ensure that all interested parties have a voice in the final agreement. Additionally, a negotiation model seems better suited to address the many complexities that surround indigenous claims to self-determination. However, many of the cases also suggest that negotiated settlements without sustained regional or international oversight may prove to be difficult.

This brings us back to the issue of the Permanent Forum and what role it could play in the future resolution of indigenous claims to self-determination. As currently formulated, the Forum has the power to provide "advice" and "information" on indigenous issues. However, indigenous groups would be better served by the creation of a formal mediation or even perhaps an arbitration mechanism within the Forum itself. The body could be charged with several functions, such as assisting with the drafting of bilateral agreements or serving as formal mediator, particularly where bilateral talks have failed to bring about a timely resolution. The difficulty, of course, lies with getting parties to partake in such a forum. Perhaps they would be more amenable to such a process, if it lacked binding authority as is the case with the UN Human Rights Committee. Then again, such a body may suffer from the same deficiencies as other UN human rights mechanisms.¹²³ In the beginning it would be helpful to make the process voluntary and even non-binding until states and indigenous nations are comfortable with the Forum's ability to resolve such claims in a fair and objective manner. Ultimately, however, it may be useful to institute a binding dispute resolution mechanism that steps in and resolves or helps to resolve claims that have not been settled within a reasonable period of time. The Forum would be empowered to issue binding decisions, including articulating appropriate remedies for addressing both past and ongoing violations of the right to self-determination.

In closing, the late Ingrid Washinawatok once wrote that the United Nations is a place of talk and discussion, not necessarily a place of resolution.¹²⁴

123. Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183 (2002).

124. Ingrid Washinawatok, *International Emergence: Twenty Years at the United Nations*, 14 NATIVE AMERICAS 13 (1997).

The struggle for indigenous peoples then is how to transform this system into one that not only “talks about” justice, but also “dispenses” it. An international self-determination forum that is designed to assist in the negotiation of claims between indigenous peoples and nation-states would be a step in the right direction. A structure for such a forum has already begun to unfold with the creation of the Permanent Forum on Indigenous Issues. Yet the scope of the Forum’s powers as it relates to the development of agreements between these two parties will need to be clarified. In terms of the substantive rights that will inform such a dialogue, many have already been articulated in various international and regional human rights instruments and through state practices, and can be further clarified and enhanced with the adoption of the UN Draft Declaration on the Rights of Indigenous Peoples.