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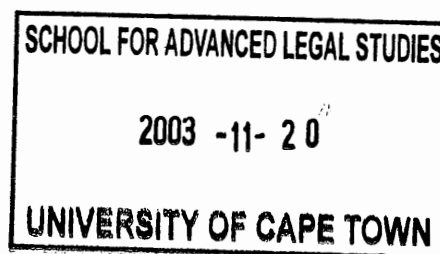
DO INDIGENOUS PEOPLES HAVE THE RIGHT TO SELF-DETERMINATION?

IF SO WHAT DOES THE RIGHT CONTAIN?

MPHIL – Minor Dissertation

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INTRODUCTION

The problem of indigenous peoples goes back a long way in history. In a sense, formulating the matter in this way itself give rise to serious problems. Why for example, is it a problem of indigenous peoples? It may rightly be argued that, far from being a problem of indigenous peoples, it is in fact a problem of the conquering or invading people. Nevertheless however it is formulated, it is an old problem.

In the 15th century, during an era of intense exploitation, European explorers undertook many voyages to distant unknown lands; The Portuguese were the first European to make contact with West Africa in 1440. By 1498, Portuguese voyagers had traveled virtually right round Africa. In the 16th century, in their quest to find a more direct route to India, Spain and Portugal conquered what we today call south and North America and the West Indies.

When the European settled in these unknown lands, a number of problems arose. The people they found there had their own social norms, rules and institutions, which, not infrequently, were very different from those of settling or invading community. One of the first problems that arose, therefore, was the question of which legal system should prevail. Since Europeans generally held non-Europeans and their systems in low regard, and also had the means to enforce their will on indigenous peoples. It was almost natural for them that their social norms, rules and institutions should prevail.¹

Events such as these in some places (e.g. Australia) resulted in indigenous peoples losing their rights to land. In addition, indigenous peoples also lost their land as a result of wars of dispossession, at the conclusion of which Europeans claimed ownership of the lands previously occupied by indigenous peoples by right of conquest.

¹ Williams, R.A: Encounters of the frontiers of International Human Rights Law, Duke Law Journal, pp. 660-73.

In 1982, the United Nations Economic and Social Council in Resolution 1982/34 authorized the Sub- Commission on Prevention of Discrimination and Protection of Minorities to establish annually a working group on indigenous populations, with the mandate to review developments pertaining to the promotion and protection of the human rights of indigenous peoples. In 1993, the Working group on Indigenous Populations submitted its report, including the draft United Nations Declaration on the Rights of Indigenous Peoples.²

In 1994, The United Nations Sub-Commission approved the draft Declaration. After this, an ad hoc working group within the United Nations Commission on Human Rights has considered it. In the ad hoc working group, however, many of the provisions of the draft have proved extremely controversial, and by early 2003 very few of its operational paragraphs have been agreed on.

The right to self-determination of indigenous peoples is one of the most problematic issues of the draft. Article 3 of the draft reads:

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

The background to the controversies on the right of indigenous peoples to self-determination may be found in the revision of the 1957 ILO Convention (No.107) concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, and the drafting of the 1989 ILO Convention (No 169) concerning

² UN doc. E/CN.4/Sub.2/1993/29.

Indigenous and Tribal Peoples in Independent Countries. The 1957 Convention uses the term indigenous populations. During the drafting of the revised convention, the representatives of indigenous peoples implied that the new convention should employ the term indigenous” peoples”. This demand was, however, strongly opposed by a number of governments. As a sort of compromise, the term “peoples” is used throughout the 1989 Convention, while a special explanatory provision provides that the use of the term “peoples” shall not be construed as having any implications as regards the rights, which may attach to the term under international law. The explanatory provision has been interpreted by the governments to exclude the possibility of indigenous peoples to invoke a right of secession under the 1989 Convention.³

Originally, Article 3 of the draft Declaration had a slightly different wording to that of common Article 1 of the two human rights covenants of 1966: the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights⁴. Following an amendment adopted unanimously by the Working group on Indigenous Populations at its eleventh session in 1993, Article 3 received the wording of common Article 1 of the Covenants.

The decision to amend the proposed text of Article 3 was preceded by a vigorous debate between indigenous delegations and government representatives in the Working Group over some of the draft’s key term self-determination in the draft Declaration while according to them it implied a right to full independence and statehood of indigenous peoples. Some governments, such as the governments of Canada, Australia, New Zealand, Norway, Denmark, Japan, Brazil, India, Burma, China, and Indonesia have, from the beginning of the

³ 1989 ILO Provisional Record 25, Supra note 63, at 25/7, para. 31.

⁴ Erica-Irene A. Daes, UN Doc. E/CN.4/ Sub.2/1993/26.

drafting process, been reluctant to apply self-determination to indigenous peoples in its general international law meaning.

In the opinion of the significant majority of the indigenous representatives, the right of self-determination of indigenous peoples should be recognized as equivalent in every respect with the right of self-determination of all other peoples. Consequently, the best way to assert this right, according to them, was to express it using the language in Article 1 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Even so, it was not necessarily their intention to include a provision in the declaration on the right of secession or statehood of indigenous peoples. Although many indigenous peoples speak of themselves as “peoples”, “nations” or “first nations”, a state of their own is a real option for very few of them. In an explanatory note on the draft Declaration, the right to self-determination of indigenous peoples is explained to mean, inter alia, that:

1. The existing state has the duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to share power democratically;

2. Indigenous peoples have the duty to try to reach an agreement, in good faith, on sharing power within the existing state, and to exercise their right to self-determination by this means and other peaceful ways, to the extent possible;

3. The right of self-determination of indigenous peoples should ordinarily be interpreted as their right to freely negotiate their status and representation in the state in which they live.⁵

The debate in the Working Group on indigenous Populations, and later in the Commission on Human Rights on the position of indigenous peoples in relation to the right of self-determination, raises some critical questions. First, are indigenous peoples “peoples” for

⁵ Explanatory note concerning the draft Declaration on the rights of indigenous peoples, UN doc. E/CN.4/Sub.2/1993/26/Add.1, pp5-6.

the purpose of the right to self-determination of peoples in international law? Second, if they are peoples in this sense, do they also have the right to secession and statehood? Or does the right of self-determination of indigenous peoples imply rights other than that of independence?

I. THE ILO AND THE RIGHTS OF INDIGENOUS PEOPLES

Why were the claims of indigenous peoples placed before International forums?

Since the 1970s, in international human rights forums around the world, indigenous peoples have contested the international legal system's continued acquiescence to the assertions of exclusive state sovereignty and jurisdiction over the terms of their survival.

Pushed to the brink of extinction by state-sanctioned policies of genocide and ethnocide, indigenous peoples have demand heightened international concern and legal protection for their continued survival.⁶

In order to try and protect their rights and interests, indigenous peoples organizations have proliferated and forged links in the World Council of Indigenous Peoples (WCIP). The World Council of Indigenous Peoples brings together indigenous peoples organizations in some twenty countries and represents approximately 30 million such peoples.⁷ Indigenous peoples, therefore, have brought their plight to the international forums in the resolution of their problems. They recognized that few states could withstand over time the isolation that comes with flouting international instruments. But they also wished to reverse the controlling assumption that indigenous peoples are not proper subjects of international legal concerns.⁸

⁶ Williams, R.A, Op-cit.

⁷ Burger. *Indigenous Peoples: New Rights for Old Wrongs*, in Davies, P. *Human Rights*, 1998, p. 101.

⁸ *Idem*.

The first international forum which did something concrete about the plight of indigenous peoples was the International Labour Organization (ILO). In 1957 the ILO adopted *The Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries Convention, No 107*.

The convention codified for the first time the rights of indigenous and tribal peoples. Four articles of Convention No.107, namely Articles 11, 12, 13, and 14, deal with land rights. Article 11 states that collectively, as well as individually owned land, which indigenous populations have occupied traditionally, shall be recognized. Where their removal is necessary, Article 12 provides for indigenous peoples to be given lands of quality at least equal to the land from which they are removed. Article 13 provides for the recognition of traditional and customary procedures of transmission of land ownership within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social developments. Article 14 states that there shall be equal opportunities for indigenous within the framework of national agrarian programmes.

1. The scope of Convention 107

The Convention itself reads:

Members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws and regulations.

If states are able to evade the injunctions of the international instruments concerned by arguing that there are no indigenous peoples in their boundaries, then the instruments do not appear to be very helpful.

2. Convention No 169

Article 1(1) of the Convention reads:

This convention applies to:

- a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Article 1(2) reads:

Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

Article 1(3) stipulate:

The use of the term “peoples” in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

It would seem, however, that in practice the introduction of the subjective element (self-definition) has not brought about any difference in the discourse on indigenous rights. It is evident from the fact that in 1995 delegates at the 13th Session of the Working Group on indigenous Populations were still arguing for a clearer definition of indigenous peoples.

It was noted, for example, that during the 12th session of the Working Group a few indigenous representatives expressed the view that certain of the participants claiming status as indigenous people were in fact not so. Furthermore, several governments, which have

regularly attended the Working Group as observers, have stated most recently at the fifty-fourth session of the Commission on Human Rights that there are no indigenous peoples in their countries. Finally, in the light of the proclamation by the General Assembly of the International Decade of the World's Indigenous People focusing on operational activities, concerned United Nations agencies will be obliged to ensure that the beneficiaries of special programmes and projects are indigenous peoples.⁹ It must be emphasized, though, that the introduction of "self-identification" in the definition of indigenous people can also lead to problematic situations. Indeed, the fact that indigenous people are calling for the definition to prevent non-indigenous people from acquiring that status simply by defining themselves as indigenous, already illustrates the problematic nature of the innovation.

The object of Article 1(3) seems to be to appease the states in which indigenous peoples find themselves, so that it will be clear, for example, that the international community sees indigenous as subjects of International Law. This would also signal that the international community does not approve any secessionist tendencies on the part of indigenous groups.

Convention 169 contains seven articles dealing with land. Article 13 improves on the previous formulation (Convention 107, Art.11) by including in relation to land "the total environment of the areas which the peoples use or occupy". This is important because the protection of the total environment in which indigenous peoples live will make the protection of their lives more meaningful.

It would be pointless, therefore, to protect the right of indigenous peoples to their lands if that were all governments were constrained to do. What sense would it make to give indigenous peoples their land, if governments were still free to pursue policies that may well

⁹ E/CN.4/ Sub.2/AC.4/1995/3; 4.

render that land useless to them? If, on the other hand, governments are required not only to respect the rights of indigenous peoples to land, but also to refrain from harming the environment so that the land continues to meet the needs of the indigenous peoples, that can only be an improvement.

Article 14 deals with ownership and possession of land by indigenous peoples. It requires states to respect the rights of indigenous peoples to lands to which, traditionally, they have had access for their subsistence and traditional activities, even if indigenous peoples do not exclusively occupy such lands. It urges states to pay particular attention to the interests of nomadic peoples and to identify occupied lands, with a view to provide effective protection of the rights of indigenous peoples to such lands. Governments are also required to put in place adequate mechanisms for resolving disputes arising from lands claims.¹⁰

The question now is, if people leave their lands in order to escape wars, do their lands, in fairness, become terra nullius? On the East Rand and in KwaZulu Natal, how many people evacuated their premises in order to escape internecine violence? Who in their right minds would argue today that the premises they have so evacuated are therefore terra nullius? This kind of logic must clearly have applied to lands, which were temporarily vacant on account of the forces of conquest of indigenous peoples too. Although it might not be possible to correct historical injustices in this regard, Convention 169 will prevent lands, which are temporarily vacated as a result of the nomadic mode of life of the indigenous from being taken over because they have no recognizable owner.

¹⁰ Convention No 169 Article 14(1)

Article 15 deals with the resources that are found in the land. It states that the rights of indigenous peoples to the said resources shall be protected. Where the state reserves for itself the right to mineral, subsurface and other resources, the indigenous peoples concerned must be consulted before implementing any expletory programmes. Wherever possible the indigenous peoples concerned must be given a share of the benefits of such programmes and they must be compensated fairly for any loss.

The report of the 7th Session of the Working Group on indigenous Populations, states:

A duty emphasized by many of the indigenous speakers relates to states obtaining the consent of indigenous peoples before embarking upon development of their lands, territories and natural resources. They felt that consultation in good faith is not sufficient to prevent abusive practices. Consent, however, requires recognition. It was stressed that negotiations to obtain full and informed consent must be completed with authentic, defined and chosen representatives of indigenous governments. A government observer expressed concern that the scope of the term "consult" in the draft declaration may be too wide, but he added, when consultations refer to projects to be carried out on indigenous lands, that the requirement for states simply "to consult" is too weak.¹¹

It is clear, therefore, that the requirement to consult may not go far enough in protecting the interests that Article 15 of Convention 169 seeks to protect.

Article 16(1) directs that indigenous peoples should not be removed from lands they occupy.

¹¹ E/CN.4/Sub.2/1989/36:20.

Article 16(2) states that if it is necessary to move them, they can be moved only with their free and informed consent. However, it also states that where such consent cannot be obtained, the indigenous peoples can be moved in accordance with procedures stipulated in the national laws and regulations, that such laws and regulations are to provide for public inquiries where appropriate, and for effective representation of the people concerned.

Under Article 16(3), whenever possible, indigenous peoples who have thus been relocated will have the option of returning to their traditional land as soon as the reason for their removal no longer exists.

Article 16(4) states that, where it is not possible for such people to return to their lands, they must be given alternative lands at least equal in quality to those from which they are moved.

Article 16(5) provides for people who have been relocated to be fully compensated for any resultant loss or injury.

Article 16 confirms the fears expressed about the limited protection given to indigenous peoples with regard to the requirement to consult. It makes it abundantly clear that, where interests of the indigenous peoples and those of the state are irreconcilable, the interests of the State prevail. Few will doubt the ability of States to pass the kind of laws that comply with the form and letter of the convention, but whose operation negates spirit.

Article 17 improves on Article 14 of Convention 107 by laying down that persons not belonging to these groups shall be prevented from taking advantage of their customs or lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them. This is important for at least two reasons:

Firstly, we have already noted how indigenous peoples were induced, through trifling gifts, to give their lands away. If this should now happen again, one must suppose that the

value of the exchange weighed against the land alienated, and an inquiry launched into whether the exchange was equitable. If the inquiry shows that indigenous peoples have not been fairly compensated, one must suppose that the other party has taken advantage of the naivete of the indigenous person involved.

Secondly, because, as already noted, there is a distinct possibility that indigenous peoples alienated their lands without understanding what they were doing, it can be attributed to their lack of understanding of the laws of the Europeans regarding contract, property and the alienation thereof.

Article 18 directs that States should establish adequate penalties for the unauthorized intrusion upon, or use of the lands of indigenous peoples.

Convention 169 deals with other issues as well, for example cross-border co-operation, administration, social security and health, education, vocational training, recruitment and conditions of employment.

The Convention should be supported for contributing to the discourse on the protection of the rights of indigenous peoples. Nevertheless its inadequacies must also be pointed for this is certainly ample scope for improvement. Convention 169 also assumes that indigenous peoples are happy to be part of the dominant societies in which they find themselves. While that assumption is understandable because the International Labour Organization requires the support of the member states if they are to work, the assumption must be questioned in the light of the function the conventions are supposed to fulfill.

Furthermore, like its predecessor, the States concerned have been very slow to ratify Convention 169.

II. THE WORKING GROUP ON INDIGENOUS POPULATIONS

1. Functions.

The Working Group on indigenous Populations functions under the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The latter sub-commission in turn functions under the United Nations Economic and Social Council (ECOSOC).

ECOSOC established the Working Group in 1982. The Working Group was given the following mandate, among other things:

a) To review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous peoples;

b) To give special attention to the evolution of standards concerning the rights of indigenous peoples, taking into account both the similarities and dissimilarities in the situation and aspiration of indigenous peoples throughout the world.¹²

The Working Group consists of five international legal experts, drawn from the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities. It has been suggested that one of the more important differences between the approach of the Working Group and that of the International Labour Organization is that the latter deals with both the rights of indigenous peoples and those of tribal peoples, whereas the Working Group deals with the rights of indigenous peoples only.¹³

The Working Group meets annually and the session continues for the whole week. Indigenous peoples and other interested persons address the Working Group for a maximum of ten minutes each. They may also submit written reports or submissions to the Working

¹² E/CN.4/Sub.2/1989/36: 3.

¹³ Plant, R, Land Rights and Minorities, 1994, p. 11

Group before or during sessions. Members of the Group itself; the International Labour Organization; state members of the United Nations; Amnesty International and Organizations of Indigenous Peoples attend sessions of the Working Group. Scholars and experts also attend the sessions of the Working Group in their individual capacities.¹⁴

2. Definition of Indigenous Peoples according to the Working Group

When it had to grapple with the problem of defining indigenous peoples, it had the advantage of having noted the difficulties raised by the International Labour Organization's attempts. Therefore it wished to eschew those problems. For understandable reasons indigenous peoples preferred the term "peoples", arguing that it "never been known as populations". They argued that there was no need to limit the term, as did Convention 169, since the fear of indigenous self-determination leading to secession is unfounded because of the general approach and understanding of the international legal instruments. Some indigenous speakers argued that there needed to be clear and explicit recognition of their right to self-determination. State observers; on the other hand, argued against the use of the term peoples, because when the International Labour Organization had used it, it had raised the sensitive issue of the right to self-determination under international law.¹⁵ They argued that if the term "peoples" is used, it should be qualified in the manner of Convention 169, so that it would be clear that by using the term the Working Group does not intent to infer that indigenous peoples are therefore separate national entities. Some States observers argued that it was not necessary at all to define indigenous peoples.

¹⁴ E/CN.4 / Sub.2/ 1989/ 36: 3-5.

¹⁵ E/CN.4/ Sub.2/1989/ 36: 17

By June 1995 the Working Group had still not been able to arrive at a definition of indigenous peoples. It contented itself, for the time being, with some conceptual indicators in order to guide practice at the international level.¹⁶ These indicators include various studies, guidelines and legal instruments which have some bearing on the definition of indigenous peoples.¹⁷

An examination of the indicators listed by the Working Group shows that the seminal study of José Martínez Cobo,¹⁸ carries much weight in the Group's thinking. It might, therefore, be useful to state Cobo's definition of indigenous peoples, since the Working Group seems to give tacit approval to it:

“Indigenous communities”, “peoples”, and “nations” are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹⁹

In 1985 the Working Group released 14 draft principles, which came later to be known as the First Revised Text of a Draft Universal Declaration on Rights of Indigenous Peoples.²⁰

The rights as envisaged by the principles are listed as:

¹⁶ E/CN.4 / Sub .2 / AC.4/1995/3:4.

¹⁷ Ibid.

¹⁸ The Problem of Discrimination Against Indigenous Populations, E/ CN.4 / Sub .2/ 1986/7.

¹⁹ E/CN.4/Sub.2/Ac.4/1995/3:9

²⁰ William, R.A, Op-cit.

a) The right to the full and effective enjoyment of the fundamental rights and freedoms universally recognized in international instruments...

b) The right to be free and equal to all other human beings in dignity and rights, and to be free from discrimination of any kind;

c) The collective right to exist and to be protected against genocide, as well as the individual right to life, physical integrity, liberty, and security of the person;

d) The collective right to maintain and develop their ethnic characteristics and identity;

e) The collective right to protection against any act, which has the aim or effect of depriving them of their ethnic characteristics or identity;

f) The collective right to participate fully in the economic, political and social life, and to have their specific character reflected in the legal system and in the political institutions of the country;

g) The duty of the State to grant the necessary assistance for the maintenance of their identity and their development;

h) The right to special state measures for the immediate, effective and continuing improvement of their social and economic conditions, with their consent, that reflect their own priorities;

i) The right to be secure in the enjoyment of their own traditional means of substance, and to engage freely in their traditional and economic activities, without adverse discrimination;

j) The right to determine, plan and implement all health, housing and other social and economic programmes affecting them;

k) The right to manifest, teach, practice and observe their own religious traditions and ceremonies, and to maintain, protect and have access to sites for their purposes;

l) The right to all forms of education, including the right to have access to education in their own languages, and to establish their own educational institutions;

m) The right to preserve their cultural identity and traditions, and to pursue their own cultural development; and

n) The right to promote intercultural information and education, recognizing the dignity and diversity of cultures.

It is intended that the draft declaration should at some stage be tabled before the United Nations General Assembly for ratification, at which stage it will take its place among other authoritative international human rights instruments in the modern world legal order, as declarative of the international community's minimum legal standards for the protection of indigenous peoples human rights to survival.²¹

Article 12 states that indigenous peoples shall have the right of collective and individual ownership, possession and use of the lands or resources, which they have traditionally occupied or used. The lands may only be taken away from them with their free and informed consent as witnessed by a treaty or agreement.

The objection was raised that different laws apply to land ownership and to resources in the land. Therefore, it was argued, the two issues (land and resources) should be dealt with in two separate articles. Furthermore, in contrast to the ILO convention which speaks of occupation of indigenous peoples of the said lands in the present tense, the declaration used the past tense. It was argued that the implication of that should be clarified. Indigenous

²¹ Williams, R.A, Op-cit.

peoples argued that the scope of Article 12 should be broadened to include lands presently held.

Article 15 states that indigenous peoples shall have the right to reclaim land and surface resources or, where this is not possible, to seek just and fair compensation for the same, when the property has been taken away from them without consent, in particular, if such deprivation has been based on theories such as those related to discovery, *terra nullius*, waste lands or idle lands. Compensation, if the parties agree, may take the form of land or resources of quality and legal status at least equal to that of the prosperity previously by them.

There was a proposal that, to cover the entire problem experienced by indigenous peoples in this regard, lands lost by them as a result of occupation, cession and abandonment, should also be brought into the ambit of the article.

Article 17 provides for indigenous peoples to have the right to require that States consult with indigenous peoples and with both domestic and transnational corporations prior to the commencement of any large –scale projects, particularly natural resource projects or exploitation of mineral and other subsoil resources in order to enhance the projects benefits and mitigate any adverse economic, social, environmental and cultural effect. Just and fair compensation shall be provided for any such activity undertaken or adverse consequence thereof.

The problems raised in respect of this clause have been discussed under the limitations of the consultation requirement. It may be added, however, that a government observer at the meeting said that if the lands contemplated are those owned by indigenous peoples, then the

requirement of consultation is too weak. If, on the other hand, the lands targeted by the article are not those owned by indigenous peoples, then the scope of the article is unacceptably broad.

Article 23 states that indigenous peoples shall have the collective right to autonomy in matters relating to their own internal and local affairs, including education, information, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration and environment, as well as internal taxation for financing these autonomous functions.

There was an obligation that the logical conclusion of such a directive would be segregation. Conversely an indigenous spokesperson expressed the reservation that the article did not go far enough, since it failed to spell out indigenous control and jurisdiction concerning fiscal matters more specifically.

Article 24 provides for indigenous peoples to have the right to decide upon the structures of their autonomous institutions, to select membership of such institutions, and to determine the membership of the indigenous peoples concerned for these purposes.

An indigenous spokesperson stated that the article did not go far enough since it did not specifically give indigenous peoples the right to determine their own citizenship without external interference. She argued that the right to determine citizenship is the key to the perpetuation of indigenous peoples: her tribe was at that very moment facing two major court cases in which the question of who could determine citizenship was at issue. She feared that the issue might be determined according to non-indigenous law.

On 20 April 1994, another milestone was reached in the arduous road towards the recognition of the rights of indigenous peoples. The Draft Declaration of the Working Group on Indigenous Populations became the United Nations Draft Declaration on the Right of Indigenous Peoples.

Article 3 states: indigenous peoples have the right of self-determination.

By virtue of that right they may freely determine their political status and freely pursue their economic, social and cultural development. It would seem that Article 3 has to be read with Article 31, which states:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.²²

The formulation of Article 3 suggests that while the framers of the declaration wished to grant indigenous peoples the right of self-determination, they simultaneously wished to accommodate the concern of member states that such a right may give rise to secessionist tendencies.

The article appears to try to reconcile these contradictory interests by granting the right, but at the same time defining its sphere of operation.

Indigenous peoples, by virtue of this right, may freely determine their political status and freely pursue their economic, social and cultural development compare with international Covenants (1966).

²² E/CN.4/Sub.2/1994/2/Add. 1: 3 & 9

But what happens if indigenous peoples should wish to use their right of self-determination to achieve objects other than those mentioned in the article?

They might argue that it was never intended that the issues mentioned in the article should be the sum total of the contents of their right of self-determination. Such a claim may have to be resolved on the basis of the *Ejusdem generis* principle, that is, in the absence of a contrary intention; the scope of the term self-determination may be limited by the scope of the other terms used with it. It may then become necessary to decide whether self-determination in the geopolitical sense belongs to the same class as determining one's political status and pursuing one's economic, social and cultural development. This argument on the part of indigenous peoples may be answered by the fact that article 31 suggests that the intention of the declaration was to confer individual self-determination rather than geopolitical self-determination. In all events Article 45 provides that nothing contained in the declaration may be interpreted as implying any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

Article 4 states:

Indigenous peoples have the right to maintain and Strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the state.

Recognition of the legal systems of indigenous peoples is far cry from the attitude of certain Europeans when they invaded foreign lands in colonial times. However, the belated recognition of indigenous legal systems is not devoid of problems. As already mentioned, some government observers have been concerned about the possibility that such recognition might lead to dual legal systems. Therefore states will have to deal with the contradictions

occasioned by such duality and there is always the possibility that, in resolving the contradictions, states will be inclined to the old view that indigenous laws prevail only to the extent that they do not contradict national law.

Another problem in this area may arise from the fact that the formulation of the article gives indigenous peoples a choice: if they so choose, they may participate fully in the political, economic, social and cultural life of the State. If they should choose not to so participate, serious problems may arise. If it is supposed that the basis for government is the consent of the governed, and indigenous peoples choose not to participate in the political life of the state, on what basis may it be said that they have given their consent to the national government? What authority would a national government then have over them? Yet if it can have no authority over them, why then would a national government be bound to carry out all the other duties enjoined on them by the declaration on indigenous peoples?

Articles 7 protect indigenous peoples against ethnocide and cultural genocide. It prevents and offers them redress for any action, which may lead to the loss of their lands, territories and resources. It also protects them against statutorily imposed assimilation or integration. Any form of propaganda against them is prohibited.

It has already been noted that the United States Of America, along with Australia and New Zealand, is cited most often for the violation of the seeks to curb freedom of expression, it can be expected that the United States of America might be a serious battleground where this issue may be fought. The vigour with which the U S Supreme Court has upheld the provisions of the U S Constitution's First Amendment leaves little doubt about the direction in which the battle will lean.

Article 10 protects indigenous peoples from being forcibly removed from their lands. It also requires that, where they give their consent for their removal, indigenous peoples must do so from an informed position. Among other things, article 30 provides that states should obtain the informed permission of indigenous peoples if their lands are to be exploited for mineral resources.

Article 26 guarantees the use of such lands, including the total environment of the lands by indigenous peoples. It also recognizes indigenous law regarding ownership and the transmission of the ownership over land.

Article 28 requires that the environment and the productive capacity of indigenous peoples lands be conserved, restored and protected while Article requires that restitution be made to indigenous peoples in respect of lands and resources of which they have been deprived. Where restitution is not possible.

Article 27 requires that indigenous peoples be compensated, preferably with lands of equal value to those from which they were removed.

As stated previously, it is important that the lands of indigenous peoples be kept in a condition conducive to the purposes for which they are needed. If that condition is not protected, the protection of their right to the land would be an empty shell. It is therefore also important that, where their land has been rendered unusable, it should be restored to the required state.

Article 30 improve on Article 17 in the working Group's draft, since it requires the state to obtain the consent of indigenous peoples for the use of their lands for any contemplated activities. The original draft merely required the state to consult indigenous peoples. Both Articles 30 and 17 referred to above are an echo of article 15 on the International Labour Organization Convention 169, but also a retreat from the latter article, which in the benefits of the mineral resources recovered. One of the problems with this article is to ascertain how far back it intends to go, speaking as it does about states and their successors. Another problem is that it requires the said treaties to be honoured according to their original spirit and intent. As previously pointed out, there was probably a great deal of misunderstanding between parties on the alienation of land. Furthermore the importance of the provision that neutral bodies should adjudicate conflicts arising from such treaties cannot be over-emphasized.

III. THE RIGHT OF SELF DETERMINATION OF PEOPLES

1. Peoples' rights

The term 'people's right' is found both in national legal orders and the instruments of international law. An example of national legislation that recognizes peoples' rights is Part II of the 1982 Canadian Charter of Rights and Freedoms, called Rights of the Aboriginal Peoples of Canada. Again, the 1981 African Charter on Human and Peoples Rights is an example of an instrument of international law, which sets forth peoples rights.

The right of peoples to self-determination is by no means a new concept. Philosophers such as Thomas Hobbes, Benjamin Whichcote, Immanuel Kant and Jeremy Bentham spoke for the right of all nations, and peoples to self-determination. As a political concept it has found, for instance, in the American Declaration of Independence of 1776 which declares that Government Are instituted among Men, deriving their just powers from the consent of the

governed and that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government. Again, one of the guiding principles of the French Revolution (1789) was that will of the People, not the will of the King, should be the basis of the constitution. Notwithstanding its long historical roots, the right of peoples to self-determination has, above all, been associated with the peace treaties concluded after World War I. One of the main aims of the Conference of Versailles was the creation of a new Europe consisting of national states. A necessary prerequisite for the realization of this goal was the creation of an European system of minority protection. According to the former US president Wilson, this system should be based on the right of peoples to self-determination.²³ Although the principle of self-determination plays an important role in modern political thought, especially since the Great War, it must be pointed out that there is no mention to it in the Covenant of the League of Nations. The recognition of the principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.²⁴

2. The Right to Self-Determination of Peoples since The Charter of the United Nations

Although much has been said and written on the right of peoples to self-determination, it has remained one of the most controversial rights in international law.

The principle of self-determination of peoples is recognized in the Charter of the United Nations. It is according to article 1(2) of the Charter one of the purposes of the United Nations to develop friendly relations among nations based on respect for the principle of equal rights

²³ Whelan, A, *Wilsonian Self-Determination and the Versailles Settlement*, *International and Comparative Law Quarterly*, Vol.43, 1994, pp.99-115.

²⁴ Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon aspects of the Aaland Islands question.

and self-determination of peoples, and to take other appropriate measure to strengthen universal peace. The first part of Article 55 of the Charter provides that with a view to the creation of conditions of stability and well-being which are necessary for the peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall...²⁵ Implicitly, the principle of self-determination of peoples is also found in Article 73 on the declaration regarding non-self-governing territories and in Article 76 on the international trusteeship system. It should be noted that the Charter speaks of a principle and not of a right of self-determination of peoples, and that the Charter makes no attempt to define the substance of the principle or the right of peoples to self-determination. However, according to some authors on international law, the fact that the Travaux Préparatoires on the inclusion of *the right to self-determination* in the United Nations Charter refer to a right to self-government and not to a right to secession shows that the right during the drafting of the Charter was conceived of as denoting autonomy and not independent statehood.²⁶

Through the adoption by the United Nations General Assembly in 1960 of the Declaration on the Granting of Independence to Colonial Countries and Peoples,²⁷ the principle of self-determination in the Charter of the United Nations evolved into a “right” of self-determination. The Declaration proclaims the necessity of bringing, to a speedy and unconditional end, colonialism in all its forms and manifestations, and declares that all peoples have the right to self-determination, By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. It also

²⁵ The draft Charter submitted at Dumbarton Oaks did not include any references to the principle, but this principle was embodied in a Soviet initiative at the U.N Conference on International Organization, in San Francisco, May 1945.

²⁶ Heintze, H.J, *Autonomy: Application and Implications*, The Hague, 1998, pp7-32.

²⁷ General Assembly Resolution 1514(XV), 14 December 1960.

declares that inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence. Notwithstanding the fact that the 1960 Declaration recognizes the right of colonial countries and peoples to independence, Article 6 of the Declaration expresses another, equally fundamental principle of international law, in providing that any attempt aimed at partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

2.1. General Assembly Resolutions.

General Assembly Resolution 1541 contains a set of principles to guide states in determining whether they should provide information under Article 73(e) of the United Nations Charter on non-self-governing territories.²⁸ Although the resolution was adopted the day after the 1960 Declaration, it includes no reference to the former. Nor does it mention the right to self-determination but concerns itself with self-government. Even though it seems apparent that at least colonial peoples and territories have a right to independence under the 1960 Declaration, the exact substance of the declaration and the resolution remains unclear.

The principle of self-determination has developed in the post-war period from an essentially political concept into a legal right. It has been incorporated into the most fundamental instrument of modern international law, the Charter of the United Nations, as well as into other important international instruments such as the International Covenant of Civil and Political Rights, and the International Covenant of Economic, Social and Cultural Rights. The reference to self-determination in these specific instruments did not delimit in any precise or definitive manner the scope of the principle as a legal right, but this has been done to a certain extent by General Assembly resolutions, most notably by Resolutions 1514(XV),

²⁸ General Assembly Resolution 1541, 15 December 1960.

1541(XV), and 2625(XXV). By virtue of these resolutions self-determination has become closely associated with the process of decolonization, and the International Court of Justice has confirmed that this aspect of self-determination constitutes a part of international law. There are, however, considerable differences between the provisions of Resolutions 1514(XV) and 1541(XV), on one hand, and Resolution 2625(XXV) on the other.

From the wording of various international instruments it appears that the legal right of self-determination extends beyond the colonial context. Article 1 of the two International Human Rights Covenants declared that self-determination was a right of all peoples. Resolution 2625(XXV) declared that self-determination was a right applicable to all peoples and a duty incumbent upon all states. Although the principle of self-determination constitutes a legal right for the peoples of independent states, as well as those of non-governing territories, however, the nature and extent of the right with regard to peoples of independent states remains unclear. No definitive demarcation between self-determination as a political concept and self-determination as a legal right can be found in the Charter of the United Nations, the International Human Rights Covenants, General Assembly resolutions, or the decisions of the International Court of Justice. Consequently, the nature and extent of self-determination as a legal right remains a matter of considerable controversy amongst states.

2.2 Friendly Relations Declaration.

Through the adoption in 1970 of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,²⁹ The United Nations General Assembly seems to have extended the right of self-determination beyond the context of decolonization. The declaration declares that

²⁹ General Assembly Resolution 2625 (XXV), 24 October 1970.

by virtue of the principle of equal rights and self-determination of peoples as enshrined in the Charter of the United Nations, all peoples have the right to self-determination. Although it offers no definition of a “people”, the Declaration clearly concerns all peoples, and is therefore not restricted to colonized peoples. Furthermore, the Declaration reaffirms that the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Like the Declaration on Colonial Independence, the Friendly Relations Declaration also embodies a provision on the principles of territorial integrity and the political unity of states.

According to the 1970 declaration:

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

Consequently, the Friendly Relations Declaration is not primarily an instrument on the right of peoples to secession or statehood. Its aim is not to promote separatism. Although the principle of territorial integrity or political unity in the Friendly Relations Declaration may at first seem to be superior to that of self-determination in general, this is true only in relation to states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour. In other words, under the 1970 Declaration a people has a right of secession and statehood only in case the government is not conducting itself in compliance with the principle of equal rights and self-determination of peoples. This principle is reaffirmed in the Vienna

Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993.³⁰ Paragraph I (2) of the Declaration states:

All 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...

In accordance with the Declaration of Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind. Neither the Friendly Relations Declaration nor the Vienna Declaration seems to require that governments must represent the people as a whole without any exceptions. What they require is that the governments represent the entire mass of people belonging to the territory without distinction as to race, creed or colour or any kind. The requirement of representativeness in the 1970 Friendly Relations Declaration cannot mean that the only government that can be deemed representative is one which specifically recognizes all the various ethnic, religious, linguistic and other communities within a state. The mere fact that a democratic, non-discriminatory voting system results in the domination of political life by an ethnic majority in a particular state does not mean that the state is unrepresentative with the terms of the Declaration.³¹ Hannum holds that this view is consistent with the concerns of most of the United Nations members when the Declaration was adopted in 1970.

³⁰ World Conference on Human Rights, Vienna, 14-25 June 1993. Vienna Declaration and Programme of Action, UN doc. A/ CONF.157 / 23, 12 July 1993.

³¹ Hannum, H, Self-determination in the Post-Colonial Era, p.19.

2.3 The Right of Self-Determination of Peoples in the International Covenants (1966)

The right of peoples to self-determination is included in two legally binding human rights instruments as well: in common Article 1 of the ICCPR and the ICESCR.

Common Article 1 of the Covenants reads:

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

By virtue of the right of self-determination under Article 1(1), all peoples freely determine their political status and freely pursue their economic, social and cultural development. The text of Article 1(1) does not restrict the right of self-determination to colonial peoples or colonial situations, but applies to all peoples. Nor does the provision provide for any restrictions as for the modes of implementing the right of all peoples to self-determination. Furthermore, it lacks a reference to a representative government. An additional problem is that Article 1 does not include a definition of a "people" who would be entitled to this right. As the right of self-determination of all peoples, being a collective right is not a right cognizable under the Optional Protocol to the International Covenant on Civil and Political Right, which is available for individuals only, the Human Rights Committee has not submitted any views under the Optional Protocol on the interpretation of Article 1. Neither do

the Travaux Préparatoires on the Covenant shed much light on the substance of this provision. Likewise, the general comment on Article 1 adopted by the Human Rights Committee in 1984 is only of limited help, for instance, in determining a “people”³². It should nevertheless be observed that the Committee, with regard to the paragraph 1 of Article 1 in its general comment, requests the States Parties to the Covenant to describe the constitutional and political processes which according to the Committee in practice allow the exercise of this right.³³

In its general comment on Article 25, the Committee reaffirms the relationship between Article 1 and the right to participate in the conduct of public affairs in Article 25.³⁴ It has further emphasized that there is a distinction between the right of all peoples to self-determination and the rights of persons belonging to minorities as in Article 27. The Committee nevertheless admits with regard to the cultural rights protected under Article 27 of the Covenant that the enjoyment of such rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities including indigenous peoples in decisions, which affect them. In other words, apart from certain differences there are, according to the Human Rights Committee, similarities as well between the right of self-determination of all peoples (Article 1), the right of minority members to participate in decisions, which affect their culture and identity (Article 27).

³² Human Rights Committee, General Comment 12(21), on Article 1. UN doc. A/39/40, pp. 142-3. Yearbook of the Human Rights Committee 1983-1984, Vol. I (New York: United Nations, 1991, summary Records of the meetings of the twenty-first session, 503rd meeting, 4 April 1984, p.423, para.32.

³³ Para.4 of the General Comment 12(21).

³⁴ Human Rights Committee, General Comment 25(57), regarding Article 25, UN doc. A/51/40, pp. 98-103.

In 1999 a concluding observation concerning a state report of Canada as submitted under Article 40 of the ICCPR, the Human Rights Committee makes note of the concept of self-determination as applies by Canada to the aboriginal peoples, but regrets that no explanation was given by the delegation concerning the elements that make up that concept. The Committee notes that, as the State party acknowledged, the situation of the aboriginal peoples remains the most pressing human rights issue facing Canadians... With reference to the conclusions by the Royal Commission on Aboriginal Peoples (RCAP) that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes 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 (Art. 1, Para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendation on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with Article 1 of the Covenant.³⁵

Although the recommendation by the Human Rights Committee is somewhat unclear in formulation and difficult to generalize, it nevertheless shows that indigenous peoples such as the aboriginal peoples of Canada may be beneficiaries of at least some of the rights included in the right of self-determination of peoples.

2.4 The CSCE/ OSCE Instruments

The right of peoples to self-determination has also been addressed in some instruments of the Conference on Security and Cooperation in Europe (CSCE) and the Organization for

³⁵ UN doc. CCPR / C / 79 / Add. 105, Para. 8.

Security and Cooperation in Europe (OSCE).³⁶ This right was already included in the Helsinki Final Act of 1975. Its Principle VIII, entitled Equal Rights and Self-determination of Peoples reads: 'The participating States will respect the equal rights of peoples and their right to self-determination, acting all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States'.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of elimination of any form of violation of this principle.

The right of self-determination of peoples was reaffirmed in the Concluding Document of the Vienna Conference of 1989. In Principle 4, under the title "Questions relating to security in Europe" of the Concluding Document it is provided: They also confirm that, by virtue of the principle of equal rights and self-determination of peoples and in conformity with the relevant provisions of the Final Act, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. It should be noted, in particular, that the Conference on Security and

³⁶ Cassese, A, The Helsinki Declaration and Self-Determination of Peoples, in T. Buergenthal (ed), Human Rights; International Law and the Helsinki Accord, 1977, pp. 83-110.

Cooperation in Europe and the Organization for Security and Cooperation in Europe documents above refer to the internal as well as external political status of peoples.³⁷

In 1991, a CSCE Meeting of Experts on National Minorities in Geneva submitted some recommendations on special political rights for mediations on special political rights for minorities through the establishment of special structures and facilities of participation. According to the expert meeting such approaches were: advisory and decision-making bodies in which minorities are represented, in particular with regard to education, culture and religion, elected bodies and assemblies of national minority affairs; local and autonomous administration, as well as autonomy on a territorial basis, including the existence of consultative, legislative and executive bodies chosen through free and periodic elections; self-administration by a national minority of aspects concerning its identity in situations where autonomy on a territorial basis does not apply; decentralized or local forms of government; encouragement of the establishment of permanent mixed commissions, either inter-state or regional, to facilitate continuing dialogue between the border regions concerned. In its report, the expert meeting underlines that the suggested special measures and facilities are only recommendations and possible approaches and not necessarily the rights of minorities under international law.

2.5 Internal and External Self –Determination.

Antonio Cassese was one of the first authors on international law to introduce the concepts of internal and external self-determination.³⁸ Later, most human rights lawyers have at least in principle accepted the view that the right of peoples to self-determination has an

³⁷ Helsinki Monitor, Vol. 2, No 4, 1991, pp. 83-91.

³⁸ Cassese, A, UN Law/Fundamental Rights: Two Topics in International Law, 1979, pp. 137-173.

external as well as internal aspect.³⁹ Despite this, it has been difficult to agree on the exact content of these two aspects of self-determination.

According to Cassese, there are grounds for holding the view that a customary rule of internal self-determination as a right of the whole population of a sovereign state is currently taking shape in the international community. Under this customary norm, the whole people of every state would have the right freely to choose its rulers, through a democratic and pluralistic process and, in particular, by means of free and genuine elections. This right would be an ongoing one, i.e. permanent in character: it would by no means be a “once and for all” right.⁴⁰ However, Cassese continues with regard to the implementation of this emerging right:

Both customary and treaty law on internal self-determination have little to say with respect to the possible modes of implementing democratic governance. Nor do they provide guidelines on the possible distribution of power among institutionalized units or regions. Still less do they furnish workable standards concerning some possible forms of realizing internal self-determination, such as devolution, autonomy, or regional self-government.⁴¹

In 1996, the Committee on the Elimination of Racial Discrimination adopted General Recommendation XXI on self-determination. In its recommendation, the Committee notes that ethnic or religious groups or minorities frequently refer to the right of self-determination as a basis for an alleged right of secession.

According to the Committee, the right to self-determination of peoples is a fundamental principle of international law. It is enshrined in Article 1 of the Charter of the United Nations

³⁹ United Nations doc. A/C.3/43/SR.7, p.16.

⁴⁰ Cassese, A, *Self-Determination of Peoples*, 1995, p 311 and 347.

⁴¹ Cassese. A, p. 332.

and in common Article 1 of the ICESCR and the ICCPR, as well as in some other human rights instruments. The ICCPR provides for the right of peoples to self-determination not only in respect to the right of ethnic, religious, linguistic minorities to enjoy their own culture, but to also profess and practice their own religion or to use their own language.

Regarding the distinction between internal and external self-determination, the Committee observes:

In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in Article 5(c) of the International Convention on the Elimination of All Forms Racial Discrimination. In consequence, Governments are to represent the whole population without distinction as to race, color, descent or national or ethnic origin. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and prohibition to subject people to alien subjugation, domination and exploitation.⁴²

In other words, the view of the Committee is that the external aspect of the right of peoples to self-determination denotes that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of

⁴² Committee on the Elimination of Racial Discrimination. General Recommendation XXI (48), UN doc. A/ 51 / 18 /, pp. 125-26, Para. 4.

equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject people to alien subjugation, domination, and exploitation. In paragraph 6 of General Recommendation XXI (48), the Committee emphasizes that, in accordance with the declaration on Friendly Relations, none of the Committee's actions shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and possessing a Government representing the whole people belonging to the territory, without distinction as to race, creed or color. In the view of the Committee, international law has not recognized a general right of peoples unilaterally to declare secession from a State. In this respect, the Committee follows the views expressed in An Agenda for Peace (Para. 17 and following), namely, that a fragmentation of States may be detrimental to the protection of human rights, as well as to the preservation of peace and security. This does not however, exclude the possibility of arrangements reach by free agreements of all parties concerned. On the other hand, the Committee does not seem to have a position regarding the question whether the right of all people to self-determination may include the right of people to unilaterally declare secession from an independent and sovereign state, which does not possess a government representing the whole people belonging to the territory without distinction as to race, creed or color.

As for the internal aspect of the right of all peoples to self-determination, the Committee concludes that this right implies a right of all peoples to freely pursue their economic, social and cultural development without outside interference, and that there is, in this respect, a link to the right of citizens to take part in the conduct of public affairs at any level, as well as to

the right to a government which is representative of the whole population without distinction as to race, color, descent, national or ethnic origin.

What is even more interesting is that General Recommendation XXI by the Committee on the Elimination of Racial Discrimination adds a new element to the content of the right of peoples to internal aspect: namely, the right of persons of ethnic or linguistic groups to play their part in the government of their country and to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.⁴³

The wording of paragraph 5 gives reason to believe that the general recommendation has been influenced by the guiding principles of the general comments of the Human Rights Committee on the similarities between the rights the rights under Articles 1, 25, and 27 of the International Covenant on Civil and Political Rights. It is easy to agree that the effective exercise of the recommended right of persons of ethnic or linguistic groups to play their part in the government of their country and to engage in activities that are particularly relevant to the preservation of their identity may require more far-reaching political rights than equal voting rights.

Despite the fact that the right of self-determination of all peoples is widely recognized to be of particular importance for the effective guarantee and observance of every other human right, and that this right was placed before all of the other rights in the international Covenants, it is still one of the most controversial of human rights. Hannum has concluded, and many will probably agree with him, that United Nations and state practice up through the 1990s thus far has recognized only a very limited right to self-determination, which includes: (1) freedom from a colonial power; and once independence has been achieved, (2) freedom of

⁴³ General Recommendation XXI by the Committee on the Elimination of Racial Discrimination, Paragraph 5.

the population of the entire state from foreign intervention or undue influence. He nevertheless admits that the content of the right of self-determination is changing, and that this reflects the fact that international law, like national law, is constantly evolving.⁴⁴

From what has been said above, it may be concluded that the right of peoples to internal self-determination is at least an emerging right of international law. By virtue of this right all peoples have the right to a government that represents the whole people of the state without distinction of any kind. Internal self-determination may also include, as suggested, *inter alia*, by the Committee on the elimination of Racial Discrimination, the right of members of ethnic and linguistic groups to play an active role in the government of their country and to engage in such activities, which are particularly relevant to the preservation of their identity. On one point, the United Nations and state practice is definite: there is no general unilateral right in international law to secession or independent statehood by part of the population of a sovereign democratic State.

IV. ARE INDIGENOUS PEOPLES “PEOPLE” ENTITLED TO SELF-DETERMINATION?

Why self-determination of indigenous peoples?

Because self-determination is a broadest right, which it consider to be the right of a people to independently choose their form of political organization and to freely establish the means it deems appropriate to bring about their economic, social and cultural development.

There is constant reference by indigenous communities and organizations to the concept of self-determination, which they consider essential in order to be able to control their own

⁴⁴ Hannum.H, Op-cit, pp. 26 and 37.

destiny. Under international law only “peoples” have the right to self-determination.⁴⁵ The problem is that international law does not define the concept of a “people”. In general terms a people is often described as a group of individuals who enjoy some or all of the following features:

1. A common historical tradition;
2. Ethnic identity;
3. Cultural homogeneity;
4. Linguistic unity;
5. Religious or ideological affinity;
6. Territorial connection;
7. A common economic life.

It is easy to realize that this rather unspecific definition of a people may include many other groups as well.

1. Definition of an Indigenous People.

Notwithstanding that there has been several attempts to define an indigenous people, and that some instruments of international law embody such a definition, there is still no common agreement on the term.

A working definition submitted by the Special Rapporteur of the United Nations Sub-Commission, Jose Martinez Cobo.

The historical continuity of indigenous peoples with the pre-invasion and pre-colonial societies on their territories may, according to Martinez Cobo, consist of the following factors: (1) occupation of ancestral lands, or at least part of them; (2) common ancestry with

⁴⁵ Anaya.S.J, *Indigenous Peoples in International Law*, 1996, pp. 77-80.

the original occupants of those lands; (3) culture in general, or its specific manifestations; (4) language; (5) residence in certain in certain parts of the country or in certain regions of the world; and (6) other relevant factors. Self-identification as an indigenous people is an important principle of Martinez Cobo's working definition. The Chairperson-Rapporteur of the United Nations Working Group on Indigenous Populations, Erica-Irene A. Daes, has compiled a list of factors that international organizations and experts of international law consider relevant for the understanding of the concept of indigenous peoples. These factors are:

- (a) Priority in time, with respect to the occupation and use of a specific territory;
- (b) The voluntary perpetuation of cultural distinctiveness, which 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 these conditions persist.⁴⁶

Many indigenous peoples consider themselves peoples and claim the right of self-determination. The draft UN Declaration on the Rights of Indigenous Peoples does not contain a definition of an indigenous people. The majority of the indigenous representatives did not consider such a definition necessary. Instead, they emphasized the principle of self-identification. Consequently, Article 8 of the draft declaration provides that indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to

⁴⁶ Working Paper on the concept of Indigenous people. UN doc. E / CN.4 / Sub.2 / Ac.4 / 1996/ 2, para.69.

be recognized as such. In the so-called Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government, adopted by the United Nations Meeting of Experts in Nuuk, Greenland in 1991, the meeting declared that it shares the view that indigenous peoples constitute distinct peoples and societies, with the right to self-determination including the rights of autonomy, self-government and self-identification, and that they have the right to self-determination as provides for in the international covenants on human rights and public international law as a consequence of their continued existence as distinct peoples. Following The recommendations, this right shall be implemented with due consideration to other basic principles of international law. According to the conclusions and recommendations of the expert meeting, an integral part of the right of self-determination is the inherent and fundamental right to autonomy and self-government.⁴⁷

In 1997, the Inter-American Commission on Human Rights adopted a draft declaration on the rights of indigenous peoples.⁴⁸ This draft embodies the political rights of these peoples as well, such as the right of self-determination and political participation. .

It should be noted that the text of the draft uses the phrase “and accordingly” between the right of indigenous peoples to freely determine their political status (right of political self-determination) and their right to autonomy and self-government. This indicates that the right to self-determination of indigenous peoples according to the draft would, in fact, be restricted to a right to autonomy or self-government. The question whether an indigenous people constitutes a “people” for the purpose of international law on self-determination has been addressed by the Chairperson of the United Nations Working Group on Indigenous Populations, Erica-Irene A. Daes as well. According to her, indigenous peoples are

⁴⁷ Nuuk, Greenland, 24-28 September 1991, UN doc. E /CN.4 / 1992 / 42.

⁴⁸ Annual Report of the Inter-American Commission on Human Rights 1996, Washington D.C: OAS, 1997, pp. 633-45.

unquestionably “peoples” in every social, cultural and ethnological meaning of this term. She nevertheless emphasizes that not every people have the right to secede and form a separate state, and that the limitations on the exercise of this right are expressed most fully in the 1970 Friendly Relations declarations. She writes: Once an independent State has been established and recognized, its constituent peoples must express their aspirations through the national political system, and not through the creation of new States. That holds true unless the national political system becomes so exclusive and non-democratic that it no longer can be said to represent the whole of the population.⁴⁹

In conclusion, indigenous peoples are evidently peoples at least in the social, cultural and ethnological meaning of the term. They may also be peoples for the purpose of the international law of self-determination of peoples. This does not mean that they would be entitled to claim the right of self-determination in its external sense, that is, in the form of secession. Only indigenous peoples and other groups in a state with a profoundly undemocratic or repressive government may claim this right.⁵⁰ At least in the light of this interpretation the government’s main objection against the inclusion of the right of indigenous peoples to self-determination into the United Nations Declarations seems unfounded.

2. Land right.

Indigenous peoples universally emphasize the spiritual nature of their relationship with the land or earth, which is basic to their existence and to their beliefs, customs, traditions, and culture. While the economic benefits that may be obtained from exploitation of natural

⁴⁹ Erica-Irene. A.D, The right of Indigenous Peoples to self-determination in the Contemporary World Order, in D. Clark and R. Williamson, *Self-Determination: International Perspectives*, 1996, pp 50-1.

⁵⁰ It is difficult to see why “peoples” but not other groups such as indigenous peoples would be protected against profoundly undemocratic and repressive governments.

resources are of increasing importance to many indigenous communities, land is not merely a possession or means of production. The Chairman of the Yarrabah, an aboriginal community in Queens-land, Australia, put it aptly when he asked this question: “If we haven’t got land rights, what have we got to manage anyway?”⁵¹

The history of indigenous peoples is, to a large extent, the chronicle of their unsuccessful attempts to defend their land against invaders.

The legal veneer for the seizure of Indians lands in the Americas was generally provided by the imposition of notions of private property ownership that were unknown and irrelevant to indigenous societies.

Under western law, there was no “title” to indigenous lands, and , even where aboriginal title was recognized ,it was often effectively bypassed by collusion between governments and private parties which resulted in the “legal” alienation of vast tracts of indigenous land. In many instances, lands inhabited by indigenous peoples were presumed to be vacant and were claimed by the government on the theory of discovery of a “terra nullius”.⁵²

While even ILO Convention No 107 recognizes indigenous rights to collective ownership of land and to compensation for land expropriated by government, its provisions regarding forcible relocation are weak.

In addition, many states assert ownership of all rights to sub-soil resources, even if indigenous ownership of the land itself is recognized.

For example the WCIP principles submitted to the Sub-Commission’s Working Group in 1985 state:

⁵¹ Barbara.M, Thaspirations of Aborigines living at Yarrabah in relation to local management and human rights, Canberra: Human Rights Commission, Discussion Paper No 7, at 78.

⁵² Western Sahara Case, ICJ Reports (1975)

Indigenous people shall have exclusive rights to their traditional lands and its resources and where the lands and resources of the indigenous peoples have been taken away without their free and informed consent such lands and resources shall be returned.

The land rights of an indigenous people include surface and subsurface rights, full rights to interior and coastal waters and rights to adequate and exclusive coastal economic zones within the limits of international law.

No action or course of conduct may be undertaken which, directly or indirectly, may result in the destruction of land, air, water, sea ice. Wildlife, habitat or natural resources without the free and informed consent of the indigenous peoples affected.⁵³

International law as regards land rights of indigenous peoples is underdeveloped in comparison to national laws. The ILO Convention remains the only legally binding instrument specially addressing this issue. The national legislations of Canada, Australia, Finland, Norway and Sweden all point towards an evolving body of international customary law. In these countries national legislation has evolved because of international pressure

However, since indigenous peoples claim the right to own land as well as rights to manage and own their natural resources, it is important to keep in mind the implications of 'territory' in understanding indigenous claims.

The issues of land, territory and resources are clearly related to the right of self-determination since the ultimate purpose of territorial rights includes the right to own and manage land with maximum liberty. While a focus on the issue of self-determination alone would not be a complete representation of the debate concerning land rights it is nonetheless important to recognize the 'shadow' that self-determination casts on a discussion about indigenous land rights. In this regard, the issue of indigenous peoples rights to land is often

⁵³ WCIP Principles 9 and 10.

regarded as a question of 'internal self-determination' rather than an issue relating to international boundary disputes.⁵⁴

3. Minorities.

3.1 definition of minority

Since the Paris Peace conference of 1919 there have been repeated attempts to define "peoples" and "minorities" as two separate and distinct concepts. This has occurred because only peoples are entitled to self-determination. The creation of the minorities treaties regime was, in one respect, an attempt by the Allies to prevent those ethnic groups which had been separated from their respective nation-states as a result of the Conference from claiming a right to self-determination by categorizing them as minorities. Attempts to keep the concept of peoples separate from minorities continued after the War, as can be seen in international instruments such as the International Covenant on Civil and Political Rights and the Helsinki Declaration.⁵⁵ Article 1 of the International Covenant grants peoples the right to self-determination and Article 27 protects the rights of minorities. Article 1 seeks to ensure the development of a "people" in all spheres: political, economic, social, and cultural, whereas Article 27 simply protects the members of minorities from being denied the right to enjoy their own culture, practice their own religion, or use their own language.⁵⁶ A minority is not entitled under Article 27 to any right of self-determination. It cannot determine its own political status, unlike a people under Article 1. This same dichotomy between peoples and minorities is evident in the Helsinki Declaration. Paragraph 4 of Principle VII provides

⁵⁴ Stavenhagen, R., 'Indigenous Rights: Some Conceptual Problems' (1994) 20

⁵⁵ (1975) 14 ILM 1292.

⁵⁶ Cassese, A., The self-determination of Peoples in Louis Henkin (ed) The International Bill of Rights , 1981, p. 96.

protection for national minorities. Principal VIII grants peoples a right of self-determination. Minorities cannot invoke the right of self-determination under Principle VIII.

In 1954 a minority was defined by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities as follows: ‘ the term minority shall include only those non-dominant groups in the population which possess and wish to preserve ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population’. A definition which has obtained wide currency was that formulated by Capotorti in 1979. Capotorti described a minority as :

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members being nationals of the State possess ethnic, religious or linguistic characteristics different from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.⁵⁷

Each of these definitions elaborates a set of criteria by which the minority may be identified and distinguished. They also specify that there must be a subjective element of awareness by minority of its own distinct identity and a desire by minority to preserve that identity. Since only "peoples" are entitled to self-determination in contemporary international law, minorities must demonstrate that they are "peoples" in order to qualify for self-determination.

3.2 The Interrelation between minority rights and the right to self-determination.

A first remark that should be made when evaluating the prospects of a right to self-determination for minorities is that secession has for a long time coloured this debate in the

⁵⁷ Capotorti, F, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities (UN study E/CN.4/ Sub.2/384/Rev.1) New York: United Nations, 1979, 96.

most negative way.⁵⁸ A recognition of this right and more specifically an acceptance and recognition of its internal dimension could make it more easily acceptable to states to grant minorities a qualified right to self-determination. Some kind of internal self-determination for minorities should, however, still be complemented by a right to external self-determination and secession in extreme cases of denial of their physical and cultural existence.⁵⁹

A more theoretical argumentation in favour of a right to internal self-determination for minorities relies on two key considerations of minority protection, namely the principle of substantive equality and the right to identity of minorities. A certain degree of autonomy for minorities can indeed be linked to the demands of the equality principle as such internal self-determination might be essential to put members of minorities on an equal footing with the rest of the population.⁶⁰ Similarly, the right to identity of minorities and a right to internal self-determination can be argued to go hand in hand in that:

‘The intrinsic idea of the right of self-determination is to provide every people with the possibility to live under those political, social and cultural conditions that correspond best with its characteristic singularity, and above all to protect and develop its own identity. If that is so, then self-determination, short of secession, is not only possible but also a valid claim under international law. So if the criteria that lead to a right of secession are not fulfilled, then the people have the right to a minimum of internal autonomy within the boundaries of its state’.⁶¹

⁵⁸ Harhoff, F. ‘Self-Determination, Ethics and Law (1996) 174

⁵⁹ UN Resolution 2625, and more specifically its ‘conditional’ reference to a government representing the entire population.

⁶⁰ Hannikainen, L., ‘Self-Determination and Autonomy in international law (1998) 79-95

⁶¹ Hannum, H., ‘The Limits of Sovereignty and Majority Rule: Minorities, Indigenous Peoples and the Right to Autonomy (1989), 3-24.

The recognition of the link between an internal right to self-determination for minorities and their right to identity furthermore reveals how minority rights and such right to self-determination interrelate for the elaboration of an adequate system of minority protection. Although minority rights are meant to be more attentive for and attuned to specific minority concerns and their typically vulnerable position in society, these rights are overall still deficient in their contribution towards an optimal protection and promotion of the minorities right to identity (within the constraints of substantive equality).⁶² An internal right to self-determination for minorities would undeniably improve the quality of minority protection since it concerns a group right which is closely linked to the right to identity of minorities. It can also take up and further improve the essence and achievements of minority rights⁶³

The above analysis arguably confirms and supports the conclusion that there is an intrinsic connection between minority rights and an internal right to self-determination for minorities⁶⁴ in that they both contribute in an interrelated way to the right to identity of minorities (and to the demands of substantive equality), and thus to an adequate system of minority protection.

⁶² Hannum, H., 'Rethinking Self-Determination' *Virginia Journal of International Law*, (1993-1994) 1-69

⁶³ *Idem*

⁶⁴ Lerner, N., 'Group Rights and Discrimination in International Law', (1991) 29

4. Autonomy and indigenous peoples

4.1. General considerations

According to some scholars, territorial autonomy represents the practical and internal working out of the concept of self-determination.⁶⁵ At least in theory, autonomy may be a means to accommodate the aspirations of indigenous peoples of constitutional reforms designed to share power democratically and to exercise their right to self-determination to the extent possible. Although separate ethnic or linguistic groups in sovereign and democratic states may not invoke the right of peoples to self-determination in its external context, the recent statements by the human Rights Committee and the Committee on the Elimination of Racial Discrimination indicate that the right to internal self-determination is at least an emerging right of groups.

4.2 Autonomy.

The subject of autonomy is always a group, a people, an indigenous people or a minority. In the legal literature autonomy is often treated as a territorial / regional solution. For instance, Crawford has defined autonomy as follows:

Regions of a State, usually possessing some ethnic or cultural distinctiveness, which have been granted separate powers of internal administration, to whatever degree, without being detached from the State of which they are part.

For such status to be of present interest, it must be in some way internationally binding upon the central authorities. Giving such guarantees, the local entity may have a certain status, although since that does not normally invoke any foreign relations capacity, it is necessarily

⁶⁵ Brownlie, I., *The Rights of Peoples in Modern International Law*, in Crawford, J., *The Rights of Peoples*, 1988, p.6.

limited. Until a very advanced stage is reached in the progress towards self-government, such areas are not States.⁶⁶

4.3 Territorial Autonomy.

Territorial autonomy may be implemented only if the group in question lives within a geographically well-defined territory and constitutes a considerable majority there. Within the autonomous region, all inhabitants are subject to this status regardless of the ethnic or linguistic group to which they belong. According to Hannum, fully autonomous territories usually possess (1) locally elected legislative assemblies; (2) local administrative authorities; and (3) local independent courts of law. Furthermore, the administration of common issues may be subjected to flexible arrangements for the division of power between the autonomous territory and the State.⁶⁷ Territorial autonomy is, however, not the only possible form of autonomy. The term cultural autonomy refers to a non-territorial self-administration of linguistic and cultural matters of a group. Cultural autonomy does not normally include legislative powers, though it may presume a body representative of the group.⁶⁸ At least in theory, it is possible to distinguish between the forms of autonomy as well, such as ethno-territorial autonomy and ethno-political self-government. The term ethno-territorial autonomy means territorial autonomy, the beneficiaries of which are only those inhabitants of the autonomous territory who belong to a certain ethnic or linguistic group and who, for instance, possesses a specific regional citizenship.⁶⁹ From the point of view of international law in

⁶⁶ Crawford.J, Op-cit, pp 211-12.

⁶⁷ Hannum.H, *Autonomy, Sovereignty, and Self-Determination*, 1992, pp. 467-68.

⁶⁸ The cultural autonomy of the Estonian national minorities under the 1993 Estonian Act on Cultural autonomy of National Minorities.

⁶⁹ Myntti. K, and Scheinin.M, *The right of Domicile in the Aaland Islands in the Light of Human Rights Treaties and European Integration Process*, in L. Hannikainen and F. Horn, Op-cit, pp. 131-50.

particular in the light of principles such as equality and non-discrimination; ethno-territorial autonomy is a questionable model of autonomy.

The term ethno-political self-government refers to a non-territorial self-governance in linguistic and cultural matters as well as solutions that ensure that a group can effectively express its opinion in legal and administrative matters, which especially concern the group, or the region in which they live. In regard to indigenous peoples, an essential additional element of this right is the right of control, through ownership and possession, over the lands traditionally occupied by them.⁷⁰

Does the right to autonomy or self-government, in one form or the other represents also represents the right of indigenous peoples under international law?

According to the Nuuk Conclusions and recommendations on Indigenous Autonomy and self-Government, indigenous peoples constitute distinct peoples and societies with the right to self-determination. The conclusions and recommendations further verify that the inherent and fundamental right to autonomy and self-government is an integral part of the right of self-determination of indigenous peoples. However, the meeting also concludes, that autonomy and self-government can be built on treaties, constitutional recognition or statutory provisions recognizing indigenous rights. This seems contradictory to the earlier opinion of the meeting according to which autonomy would be an inherent right of indigenous peoples. Although territorial autonomy has sometimes been classified as a principle and right of international law derived from, inter alia, the frequent occurrence of this right.⁷¹

Many indigenous communities have retained *de facto* their own institutions of autonomous governance, which are at least partly rooted in historical patterns of social and political interaction and control. These systems often include customary or written laws as

⁷⁰ The cultural autonomies of the Sami in the Nordic countries are example of such arrangements.

⁷¹ UN doc. E / CN.4 / 1992/42/ Add. 1.

well as dispute resolution and adjudicative mechanisms developed over centuries. For some indigenous groups, such as Indian tribes within the United States of America, such autonomous institutions have also existed *de jure* within legal systems of the states within which they live.⁷²

Independently of the extent to which indigenous peoples have retained *de facto* or *de jure* autonomous institutions, they generally are entitled to develop autonomous governance appropriate to their circumstances on grounds instrumental to securing ongoing self-determination. In general, autonomous governance for indigenous communities is considered instrumental to their capacities to control the development of their distinctive cultures, including their use of land and resources.

Autonomous governance, furthermore, is understood as a means of enhancing democracy. Because of their non-dominant positions within the states in which they live, indigenous communities and their members typically have been denied full and equal participation in the political processes that have sought to govern over them.⁷³ Even as indigenous individuals have been granted full rights of citizenship and overtly racially discriminatory policies have diminished, indigenous groups still typically constitute economically disadvantaged numerical minorities within the states in which they live.⁷⁴ This condition is one of political vulnerability. To devolve governmental authority onto indigenous communities is to diminish their vulnerability in the face of powerful majority or elite interests and to enhance the responsiveness of government to the unique interests of indigenous communities and their members.

Hence, the draft U.N declaration states:

⁷² David, G.H et al, 'Federal Indian Law: Cases and Materials (1993) 395-736

⁷³ UN Indigenous study, Add.4, para.261

⁷⁴ Burger. J., Op-cit, p 17-33

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs..., as well as ways and means for financing these autonomous functions.⁷⁵

Although differing in their willingness to accept such a formulation of a 'right to autonomy', states increasingly have expressed agreement that indigenous peoples are entitled to maintain and develop their traditional institutions and to otherwise enjoy autonomous spheres of governmental or administrative authority appropriate to their circumstances.⁷⁶

V. INDIGENOUS PEOPLES AND THE RIGHT TO EFFECTIVE POLITICAL PARTICIPATION

1. Indigenous Peoples and Minority Rights.

In 1997, the Committee on the Elimination of Racial discrimination adopted a general recommendation concerning indigenous peoples. In its recommendation the Committee calls upon the states to the Convention, inter alia, to ensure that the members of *indigenous* peoples have equal rights in respect of effective participation in public life and there is no decisions directly relating to their rights and interests are taken without their informed consent.⁷⁷

The right to effective political participation is a right of indigenous peoples under the Nuuk Conclusions and recommendations on Indigenous Autonomy and self-Government as well:

⁷⁵ Draft United Nations Declaration, Article 33

⁷⁶ UN Doc.E/CN.4/Sub.2/AC.4/1991/1.

⁷⁷ General Recommendation XXIII, concerning indigenous peoples. UN doc. A/52/18, pp 122-23, Para. 4(d).

Subject to the freely expressed desire of the indigenous peoples concerned, autonomy and self-government include, inter alia, jurisdiction over or active *and effective* participation in decision-making on matters concerning their land, resources, environment, development, justice, education, information, communications, culture, religion, health, housing, social welfare, trade, traditional economic systems, including hunting, fishing and gathering, and other economic and management activities, as well as the right to guaranteed financial arrangements and, where applicable, to levy taxes for financing these functions.⁷⁸

Apart from these recommendations there is little evidence that the right to effective participation would be a specific right of indigenous peoples under international law. It is, however, a specific right of persons belonging to ethnic, linguistic or religious minorities. As has already been noted above, many indigenous peoples speak of themselves as peoples, nations or first nations. The representatives of such indigenous peoples often hold that indigenous peoples are not minorities even if they did constitute numerical minorities in the states in which they now live. They also argue that because the indigenous were the first inhabitants on their territories they are entitled to the right of self-determination, a right that minorities cannot invoke.⁷⁹

While the norm of indigenous self-government upholds the development of autonomous institutions for indigenous peoples, it also upholds their effective participation in the larger political order. The draft UN declaration affirms the overwhelmingly accepted view that 'indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making which may affect their rights'. Similarly, ILO Convention No 169 requires effective means by which indigenous peoples 'can freely participate at all levels of decision-

⁷⁸ UN doc. E / CN.4 / 1992/42, para.12.

⁷⁹ UN doc. E/ CN.4 / Sub.2 / AC.4 / 1996/2.

making' affecting them.⁸⁰ It is evident that this requirement applies not only to decision-making within the framework of domestic or municipal processes but also to decision making within the international realm. United Nations bodies and other international institutions increasingly have allowed for, and even solicited, the participation of indigenous peoples representatives in their policy-making and standard-setting work in areas of concern to indigenous peoples.⁸¹

The dual thrust of the normative regime concerning indigenous peoples self-government on the one hand autonomy and on the other participatory engagement reflects the view, apparently held by indigenous peoples themselves, that they are not to be considered a priori unconnected from the larger social and political structures.⁸² Rather, indigenous groups whether characterized as communities, peoples, nations, or other are appropriately viewed as simultaneously distinct from yet parts of larger units of social and political interaction, units they may include indigenous federations, the states within which they live, and the global community itself. This view challenges traditional Western conceptions that envisage mutually exclusive status as the primary factor for locating power and community, and the view promotes a political order that is less state-centered and more centered on people in a world of distinct yet increasingly integrated and overlapping spheres of community and authority.⁸³

Self-government for indigenous peoples, therefore, typically is established in the consensual development of a nuanced political order that accommodates both inward and outward-looking associational patterns. International law does not require or allow for any

⁸⁰ Draft United Nations Declaration, Article 19

⁸¹ William, R.A., Op-cit, 676-85 (1990)

⁸² UN Doc. E/CN.4/Sub.2/AC.4/1991/1/(1991)

⁸³ Gregory, H.F., 'The Right to Political Participation in International Law', 17 *Yale Journal of International Law*, (1992) 539.

one particular form of structural accommodation for all indigenous peoples indeed, the very fact of the diversity of indigenous cultures and their surrounding circumstances belies a singular formula. The underlying objective of the self-government norm, however, is that of allowing indigenous peoples to achieve meaningful self-government through political institutions that reflects their specific cultural patterns and that permit them to be genuinely associated with all decisions affecting them on a continuous basis. Constitutive self-determination, furthermore, requires that such political institutions in no case be imposed upon indigenous peoples but rather be the outcome of procedures that defer to their preferences among justifiable options.⁸⁴

Accordingly, there is a budding scholarly literature articulating emerging rights of 'political participation' and a nascent 'democratic entitlement' under international law.⁸⁵ Closely linked with modern precepts of democracy is the idea that, consistent with values promoted by patterns of political integration, decisions should be made at the most local level possible, an idea reflected not only in Western societies but also in indigenous communities that traditionally have maintained decentralized systems of governance.⁸⁶

2. The right to Effective Political participation under Article 27 of the ICCPR

Although Article 27 of the International Covenant on Civil and Political rights is a provision on the protection of the culture, language and religion of persons belonging to ethnic, linguistic and religious minorities, the Human Rights Committee has in General Comment 23 concluded that the enjoyment of the cultural rights under Article 27 may,

⁸⁴ Thomas, M.F., 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992) 46

⁸⁵ Gregory, H.F., Op-cit, 539.

⁸⁶ UN Doc. E/CN.4/Sub.2/1989/33 (1989)

especially in the case of indigenous peoples, require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions, which affect them.⁸⁷

References to a similar right of effective participation are found in other instruments of international law on the rights of persons belonging to minorities as well.

In December 1992, the United Nations General Assembly adopted the declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.⁸⁸ The rights set forth in the Declaration are those of persons belonging to minorities, not of minorities as such. Although some of its provisions have a collective dimension, no reference to the terms of autonomy, self-determination or self-government is found in the Declaration. The text of the declaration speaks consistently of participation. Article 2 of the Declaration mentions specific participatory rights of persons belonging to minorities:

1. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, and economic and public life.

2. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they

⁸⁷ General Comment 23(50), Op-cit, para.7.

⁸⁸ General Assembly Resolution 47/135, 18 December 1992.

belong or the regions in which they live, in a manner not incompatible with national legislation.

Paragraph 2 and 3 of article 2 expressly require that persons belonging to minorities should participate effectively in public life and in decisions on the national and regional level concerning the minority to which they belong or the regions in which they live.

What is, then, exactly meant by the expression to participate effectively? For instance, should persons belonging to minorities have special quota in legislative and other organs of public decision-making? Or does it follow from this requirement that minorities should have a right of veto in certain questions? The text of the Declaration leaves many questions open.

It has been observed above that article of the Declaration speaks of the right of political participation and not of the right to autonomy or self-government. Nevertheless, persons belonging to minorities have the right under the provision to participate effectively in decisions concerning the minority to which they belong or the regions in which they live. This is a right that obviously goes beyond the individual right of persons belonging to minorities to vote and elected at national elections.

However, which decisions are decisions that concern a minority or the region in which it lives? Such decisions are at least those, which relate to the common language, culture and religion of a particular minority. A requirement of the right of veto on the part of minority groups seems, even so, to fall outside the concept of participation even in case a matter concerns their language, culture or religion.

Article 27 seems to reflect as a minimum a principle according to which persons belonging to minorities, including those belonging to indigenous peoples in a minority position, have the right to effectively express their opinion in matters which concern their common identity or the region in which they live, and that due consideration is given to the

opinion expressed. At a more concrete level, this principle may include at least the following political rights:

1. The right of persons belonging to a minority to fair political representation in elected decision-making bodies, taking into account their number and proportion as well as access, on general terms of equality, to public service in their countries;

2. The right of minorities to have their own representative and non-representative institutions;

3. The right of these institutions to receive subsidies from public funds, if necessary;

4. The right of these institutions to be consulted by the authorities before they take any legislative or administrative measures that may affect the minority directly;

5. The right of minority to anticipate that the objective of such consultations is to achieve agreement or to receive their consent.

It can nevertheless be postulated that members of indigenous peoples are generally able to draw on both individual human rights and minority rights, 'without prejudice to whatever further or special rights or institutions exist or may be developed to accommodate the interests of the (se) groups'.⁸⁹ The HRC also accepts that article 27 of the ICCPR applies to indigenous peoples, which is revealed by several of its views.⁹⁰ Martinez Cobo, a Special Rapporteur of the UN Sub-Commission, who was asked to make a study on the discrimination of indigenous peoples, has formulated a well-known working definition according to international law of the concept 'indigenous peoples'.⁹¹

⁸⁹ Nowak, N., 'The evolution of Minority Rights in International Law' in C. Brolmann et al(eds), *Peoples and Minorities in International Law*, (1993), 104-117

⁹⁰ *Lovelace v Canada*, Communication No 24/1977, UN Doc. Supplement No 40 A/36/40 at 166 (1981); *Kitok v Sweden* Communication No 197/1985, UN Doc. A/43/40 (1981), 221-230

⁹¹ UN Doc. E/CN.4/ Sub.2/L.556

The similarities with the working definition of the concept 'minority' espoused in this work are quite remarkable.⁹² They concern the non-dominant status, the separate characteristics as compared to the rest of the population and the subjective aspect of the will to retain these separate. Own characteristics. A clear difference though is the absence of a numerical requirement for qualification as an indigenous people, which implies that an indigenous people could also be a majority in a given country.

It should, finally, be underlined that the draft declaration on the rights of indigenous peoples tends to recognize group rights for indigenous peoples in a firm way. That feature is already apparent in the title which formulated in terms not of 'rights of persons belonging to members of ...' but in terms of 'rights of indigenous peoples'. A similar remark applies to the articles of the draft declaration dealing with the right to self-determination and with political participation.⁹³

⁹² UN Doc.E/CN.4/Sub.2/1996/21

⁹³ Draft Declaration on the Rights of Indigenous Peoples, Articles 3, 19, 20, 31.

CONCLUSION

The road towards the recognition of the rights of indigenous peoples has been long and steep. The United Nations Draft Declaration on the Rights of Indigenous Peoples is not perfect; no legal instrument ever is. But it contains, as article 42 states, "minimum standards for the survival, dignity and well-being of the indigenous peoples of the world". Some of those minimum standards, as we have seen, are potentially controversial even contradictory. The contradiction, it is submitted, is a result of the Working group having at times to reconcile irreconcilable interests. In the end, therefore, it is submitted that the world has to contend with some controversy and contradiction if that is what it takes to right the wrongs of history.

The declaration in itself will not make a greater difference to the lives of indigenous peoples, unless states ratify it and conduct their affairs according to its dictates. As we have seen, governments have not lost a moment in pointing out some of the contradictions most of the time correctly, it must be conceded. The contradictions or inconsistencies must be noted, however, with a view to finding a solution, rather than to stultifying the movement towards recognizing the rights of indigenous peoples.

Admittedly it is virtually impossible to find a definition that is airtight. It is submitted that indigenous peoples themselves may have to live with the possibility that some non-indigenous people will cash in on the failure to produce an adequate airtight definition. However, as long as the definition does not exclude genuinely indigenous peoples, other inadequacies may well have to be accepted.

Article 3 of the draft Declaration on the Rights of Indigenous Peoples on the right of indigenous peoples to self-determination has already for some years been controversial issue in the Working Group within the United Nations Commission on Human Rights.

Article 3 uses the language of common Article 1 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. It is the opinion of the significant majority of the indigenous peoples representatives that the right of self-determination of indigenous peoples shall be respected as equivalent in every respect with the right of self-determination of all other peoples, and that the best way to assert this right is to use the formulation in the Covenants. After many years of isolation and exclusion from the state building as well as from the government of their countries, indigenous peoples now require that the governments recognize, in principle, their status as peoples entitled to self-determination under international law.

It is a fact that most governments are reluctant to comply with this request. The government's main argument is that the inclusion of the right of self-determination in the Declaration as applying specifically to indigenous peoples may imply a right to full independence for these peoples. Again, according to indigenous representatives, independence is not the general aim of indigenous peoples, and the right to self-determination should, in the first place, be interpreted as the right of indigenous people to freely negotiate their political status and representation in the states in which they lives.

From the point of view of international law, the governments' main objection against the inclusion of a provision on the right to self-determination of indigenous peoples seems more or less unfounded. United Nations and state practice show that the right of all peoples to self-determination does not primarily imply the right to secession and independence for other

peoples than colonial peoples. In particular, the 1970s Friendly Relations Declaration and the 1993 Vienna Declaration and Programme of Action show that there is no general unilateral right in international law to secession and independent statehood by part of the population of an independent and democratic state. In other words, indigenous peoples, be they peoples under international law or not, do not normally have the right to unilaterally decide to secede from their states.

The so-called territorial autonomy or ethno-territorial autonomy is not, at least not yet a right of indigenous peoples under international law. For instance, it is not a right under the 1989 ILO Convention (169) concerning Indigenous and Tribal Peoples in Independent Countries. Accordingly, recognition of the right of indigenous peoples to self-determination in the draft Declaration, in conjunction with the right to autonomy or self-government under Article 31 of the draft, would therefore be of importance in order for the right to be extended to indigenous peoples in the future.

Although the 1989 ILO Convention does not encompass the right to territorial autonomy, it nevertheless embodies a number of relevant political rights and principles of a collective character, such as the right of indigenous peoples to have their own representative institutions as well as the right to receive public subsidies for such bodies. As relatively few countries have ratified the Convention with indigenous peoples, not very many indigenous peoples benefit from its rights in practice.

It is further concluded above that at least some of the rights, which may be included under the right to internal self-determination, are rights emerging under international law. By virtue of the internal aspect of the right of all peoples to self-determination, a people have the right to a government that represents the entire people belonging to the territory of the state

without distinction of any kind. Internal self-determination may also include, as suggested, inter alia, by the Committee on the Elimination of Racial Discrimination and the Human Rights Committee, the right of persons of ethnic or linguistic groups to play their part in the government of their country and to engage in such activities which are particularly relevant to the preservation of the identity of such persons or groups, in addition to the right of indigenous peoples to freely dispose of their natural wealth and resources.

Apart from certain recommendations adopted by international law bodies such as the Committee on the Elimination of Racial Discrimination and some experts, there is no much evidence that indigenous peoples would have special political participatory rights under international law. The right to effective participation, as set forth, for instance, in the 1992 UN Declaration on the Rights of Minorities, is a right that is particularly specific to persons belonging to national, or ethnic, linguistic and religious minorities.

Many indigenous peoples strongly deny that they would be minorities even if they were in a minority position in their country. They are, of course, at full liberty to do so. However, objectively speaking, many indigenous peoples in a minority position in their state are beneficiaries of minority rights. Even though the right to effective political participation as defined in the 1992 Declaration on the Rights of Minorities and Article 27 of the ICCPR elaborated by the Human Rights Committee may not extent to what most indigenous peoples view as a system of a real power-sharing between the indigenous peoples and other parts of the population in their countries, some indigenous peoples may nevertheless benefit from them.

Although recognition of the right of indigenous peoples to self-determination in the UN draft Declaration under preparation would not put them on an equal footing with the governments of the nation-states, such recognition would be of great symbolic value to them.

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