THE
STATUS AND RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW:
THE QUEST FOR EQUALITY
by
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ABSTRACT

My thesis is that Indigenous peoples, as distinct people, are entitled to the full affirmation and explicit recognition of the right to self-determination in the context of the draft UN Declaration on the Rights of Indigenous Peoples and in international law generally. The international community, and in particular, the nation-state members of the United Nations must uphold their legally binding international obligations in this regard.

My methodology has been to utilize the human rights framework and approach, as well as rights discourse to advance this thesis. In addition, I am relying upon my direct participation in this important standard setting process, as well as the writings of various publicists.

The right of peoples to self-determination is considered by numerous international authorities to be jus cogens or a peremptory norm. Similarly, the prohibition of racial discrimination is considered by numerous authorities to be a peremptory norm.

Throughout the draft Declaration debate, a number of states have proposed wording that would dramatically alter the scope and content of the right to self-determination, thereby limiting, qualifying or modifying this right in the context of indigenous peoples.

Any state proposals to qualify, limit or modify the right of indigenous peoples to self-determination would be racially discriminatory. If Article 3 of the draft Declaration were to be altered – even to include the same or similar notions as might currently exist under international law – it would invite interpretations to be applied to indigenous peoples’ right to self-determination that are different from those of other peoples. It might also have the effect of wrongfully freezing the interpretation of this indigenous human right, in such a manner as to prevent or otherwise stifle its natural evolution under international law.

If there is no equality of application of the rule of law in the context of international law and states succeed in introducing discriminatory double standards in connection to indigenous peoples and their fundamental right to self-determination, then the failure of the human rights framework, the United Nations system and nation-states themselves will seriously erode the very concepts of democracy, human rights and the rule of law.
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Too many Inuit have come and gone without respect for and recognition of their basic and fundamental human rights. It is only through our individual and collective efforts that we will arrive at a day when Inuit, along with other indigenous peoples, will actually realize and enjoy their individual and collective human rights.
"Eurocentric thinkers automatically assume the superiority of their worldview and attempt to impose it upon others, extending their definitions to encompass the whole world. Typically this quest for universal definitions ignores the diversity of the people of the earth and their views of themselves."\(^1\)


"Can cultural differences ever be reconciled in the legal domain?\(^2\)

A) Introduction

1) My personal and professional role

The Inuit\(^3\) of the northwest coast of Alaska are my ancestors.\(^4\) I often think of the lives they must have led, when peace and security had very different meanings. I think of my great grandmother who cleaned skins with a handmade scraper in an effort to prepare them for the making of beautiful but utilitarian clothing to survive in the harsh Arctic environment. I think of my grandfather. A man who ensured that no one in the community went hungry despite the laws and fish and game regulations conceived of far away from the village. A man who did not like being inside buildings and who grew furious and frustrated at the thought of his grandchildren going to college "to learn."

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\(^3\) Inuit or the "real people" are the indigenous peoples settled in the Arctic and sub-Arctic regions of Alaska, Canada, Greenland and the Russian Far East, which now number some 150,000. See generally D. Dumond, "Prehistory: Summary," and D. Anderson, "Prehistory of North Alaska," in Handbook of North American Indians, Vol. 5, ARCTIC (Washington, D.C.: Smithsonian Institute, 1984) at 72-94.
\(^4\) Ticasuk (E.I. Brown), The Roots of Ticasuk: An Eskimo Woman's Family Story (Anchorage: Alaska Northwest Books, 1981). Ticasuk documented the oral history and genealogy of my maternal family and extended family, going back fourteen generations to Alluyagnak I, hereditary Chief of Unalakleet, which is the traditional village of my people.
I think of my mother, whose youth disappeared in the Bureau of Indian Affairs boarding school at Mt. Edgecumbe, where she learned "home economics," and was swiftly punished for speaking her own language. I think of my late father's struggle to raise a Native family in a white, urban area, and the BIA Relocation experiment, resulting in a very brief stay in snow-free California. I think of my maternal uncle and his alcoholism and the fact that he was one of many faceless, voiceless Alaska Natives who died in a downtown alley of Anchorage, to this day, of "unknown causes." I think of the times when my siblings and I were the only Native family in the entire neighborhood and sharing some quiet, vague connection to the one African American family there. I think of my late brother, and the many times that he was incarcerated for no legitimate reason, only to be beaten and then released with his scars, bruises, contempt, and anger.

At times, I feel like a scraped skin. My story is the story of many Inuit women and men of my generation, who have grown up in an urban setting, where we have been scraped like skins. The dominant society working to cleanse, stretch, make more pliable, to tan us through public education and other institutions in vain attempts to make us more presentable or useful in their society. In the end, though I may be more presentable, I am still a skin -- I am still an Inuit woman.

On many occasions, like my grandfather, I ask myself what have I learned? Sometimes I regret not having had more of an opportunity to learn from him. However, as more time passes, I realize our place in society and our very real potential to express the things that make our lives worth living, especially as we are now more prepared for the harsh political and legal environment that we know today. Despite my personal experiences, and the resulting surges of anger over what I've learned about law and its
impact upon indigenous peoples, I remain optimistic and hopeful. The analogy of preparing skins that I use is one that can also be viewed in a positive light. I am a skin that has been scraped, stretched, tanned and am ready for use. By this, I mean that I take my status and position in life very seriously. I have worked to demonstrate the beauty, legitimacy, and reality of Native peoples in modern society. Each of us, as Native people, are an integral part of our overall survival as indigenous peoples. Each of us is sewn with intricate, ingenious designs that no others have imagined, created or demonstrated. Each of us has a role; each of us promotes or protects some aspect of our collective identity. Some of us may sew our skins together, to make a larger shelter for many. I do believe that we can and will be able to take all that we are as indigenous peoples and proudly achieve a place as distinct members of humankind, internationally, and in many other places and settings.

The design sewn throughout my being at a young age is one of ability to speak, to articulate why Native people want what they want. Furthermore, consistent with Inuit values, I feel a sense of responsibility to share my experiences and the perspectives I have gained from the human rights work that I have done, at the international level, in particular, with other indigenous peoples. I have involved myself in this work because I believe that it is possible to establish minimum international human rights standards that indigenous peoples, individually or collectively, can use as a tool to safeguard our rights. Though standards alone are insufficient, they can be used along with other Inuit tools, to protect us from the harsh political and legal environment that we face, to ensure that there will always be Inuit. It is through this thesis that I would like to share my perspectives about my work and attempt to demonstrate that indigenous peoples, internationally, are
sewing their skins together by adapting and using existing tools and fashioning new ones in order to create a shelter for indigenous peoples through international human rights law.

This thesis is largely confined to the work of the United Nations. I personally have been afforded the opportunity to participate in this work due to the many Inuit individuals who have gone before me. My role in this work and this writing would not be possible if it had not been for the determination and foresight of Inuit leaders to organize themselves throughout the vast Inuit homelands of the Arctic and sub-Arctic regions of present day Alaska, Canada, Greenland and the Russian Far East through the Inuit Circumpolar Conference (ICC).

As an Inuit (of Alaska), I have been an advocate for the rights of Inuit in Alaska as well as on behalf of the ICC. Personally and professionally, I have played an active role in this work and this writing due to the many Inuit individuals who have gone before me. My role in this work and this writing would not be possible if it had not been for the determination and foresight of Inuit leaders to organize themselves throughout the vast Inuit homelands of the Arctic and sub-Arctic regions of present day Alaska, Canada, Greenland and the Russian Far East through the Inuit Circumpolar Conference (ICC).

5 In particular, I owe a debt of gratitude to the late Eben Hopson, an Inupiat from Barrow, Alaska, who was the first Mayor the North Slope Borough, and is regarded as one of Alaska’s few elder statesman. Recognized as the Founder of the Inuit Circumpolar Conference, Eben Hopson, was a forthright visionary, who was patient, inclusive and one who shared his political vision with me and many others.

6 The Inuit of the Arctic circumpolar region organized themselves internationally through the Inuit Circumpolar Conference (hereinafter ICC) founded in 1977 in Barrow, Alaska. The goals of the ICC are: To strengthen unity among Inuit of the Circumpolar region; To promote Inuit rights and interests on the international level; To ensure and further develop Inuit culture and society for both the present and future generations; To seek full and active participation in the political, economic, and social development in our homelands; To develop and encourage long-term policies which safeguard the Arctic environment; and To work for international recognition of the human rights of all Indigenous Peoples. The organization has an internationally elected President and an Executive Council with two elected Inuit from each of the four regions. In addition, ICC has staff and offices in all four nation-states, as well as a number of Commissions and Working Groups that assist in carrying out their four-year mandates. These mandates are established through their General Assembly, which is held every four years and involve elected delegates from across the entire Inuit territory. The ICC gained United Nations Non-Governmental Organization (NGO) status in 1983 and has been active in the UN’s work as a leading and well-respected indigenous NGO. See generally D. Sambo, “Inuit Assert Control Over Arctic,” Arctic Policy Review, July/August 1977, Arctic Coastal Zone Management Newsletter, August 1983; and A. Lynge, Inuit (Nuuk: Attuakkiorfik, 1992).

7 By seeking out issues that I felt had more relevance to my life, I created on-the-job training schemes to gain high school credit in order to graduate. One such scheme was to serve as a staff person and volunteer for the North Slope Borough, assisting with conference coordination of the first gathering of Inuit in Barrow, Alaska, in June 1977. In addition to being staff for the 1977 conference, I held the position of film crewmember for the 1980 ICC gathering in Nuuk, Greenland, wherein Inuit formally organized themselves as the ICC. I subsequently served as the Director of the Alaska Office of the ICC and Special Assistant to...
and direct role in the development of the draft United Nations Declaration on the Rights of Indigenous Peoples. (Hereinafter draft Declaration). Through this thesis, I hope to raise awareness about the issues facing indigenous peoples and to demonstrate the legitimacy of indigenous legal perspectives in the context of international human rights law. Because of my direct role in the work and the personal and professional interest that I have in the work, I have chosen to develop this thesis from my perspective. Therefore, it has been difficult to balance my first person, singular views with more conventional, third person legal writing.

the President from 1982-1989. During this tenure, I was responsible for the ICC’s human rights program and participated as the ICC representative to the United Nations Working Group on Indigenous Populations, the International Labor Organization, the Organization of American States and numerous other international fora. I was also responsible for the Alaska Native Review Commission project, which conducted a comprehensive review of the impact of the Alaska Native Claims Settlement Act of 1971. Canadian jurist, Thomas R. Berger, sole Commissioner, authored the report Village Journey: The Report of the Alaska Native Review Commission (New York: Hill & Wang, 1985), which is considered one of the most important studies of Alaska Native rights ever concluded. I remain involved with the ICC as a representative to the various UN sessions and through their newly established Working Group on United Nations Issues.

8 The text largely prepared by the United Nations Working Group on Indigenous Populations (hereinafter WGIP). U.N. Economic and Social Council Resolution 1982/34 of May 7, 1981, created the WGIP, with the mandate of giving special attention to the evolution of standards concerning the rights of indigenous peoples and to review the status and conditions of indigenous peoples worldwide. From 1984-present, I have participated in the annual WGIP sessions, usually held in late July-early August. In 1993, the WGIP completed the task of preparing a draft declaration. However, the members continue to meet to review the status and conditions of indigenous peoples. In addition, they have begun to deal with special focus topics, such as health, lands, cultural heritage, education, development and other issues. The WGIP forwarded the text to the full Sub-Commission on Prevention of Discrimination and Protection of Minorities, which subsequently adopted the draft Declaration in Resolution 1994/45 of August 26, 1994 as an annex, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 105 (1994). Hereinafter "draft Declaration." Through the same resolution, the Sub-commission transmitted the draft Declaration text to its parent body the Commission on Human Rights (CHR) for review and consideration, where it is presently being considered by an open-ended inter-sessional working group to elaborate a draft Declaration on the Rights of Indigenous Peoples, UN CHR Resolution 1995/32 of March 3, 1995. Hereinafter CHRWG.
B) Theoretical Constructs

1) My struggle with establishing a "theoretical framework," Critical Race Theory and Indigenous Legal Theory

As will be discussed in this thesis, the Declaration is a unique document addressing unique peoples. The standard setting work of the draft Declaration itself bears out the inadequacy of traditional legal discourse and mainstream legal thought in relation to accommodating the unique status and rights of indigenous peoples. The draft Declaration and its development both illustrate the existence of a deep chasm between indigenous peoples and the dominant society in the area of law, legal theory and legal thought. Coterminous with the fact that traditional legal discourse and mainstream legal thought are inadequate, I myself have also struggled with conventional legal writing and the notion of a "legal theory" to support my thesis. I am not one for "fancy theories" nor am I very abstract. I also have great difficulty with writing, especially if it is to be regarded as "scholarly work." Rather, I tend to deal with real life situations and face facts with a straight face and blunt words.

Throughout my Ph.D. coursework, I was required to read writings that covered a wide range of diverse legal theories. During our seminar sessions, I would advance my indigenous perspective or experiences and hold them up against the backdrop of most theories, and the result was often unnecessary perplexity and the blurring of what I considered fairly straightforward matters. I found some approaches useful but, in large part, most remained too western in their grounding. In particular, the focus upon individualism and the value laden rhetoric drawn from the reality of the property regimes
introduced by the invaders. In addition, concepts such as coercive force or authority centered in the state or the relationships between a sovereign and its subjects, the social contract and notions of superiority, obedience all appear to be pivotal features of western legal theories. Few approaches address inequality and most are absent the distinct perspectives of indigenous peoples, who view rights more as responsibilities to the collective than individual interests to be protected.

It is becoming clear to most indigenous peoples, including myself, that a very different framework or legal theory is needed to transform or change indigenous/state relations that are largely based on European or these western dominated frameworks and values. Individuals such as Mick Dodson, former Social Justice Commissioner of the Aboriginal & Torres Strait Islanders Commission have reiterated this fact throughout the discussions at the United Nations, as well as at home in Australia. In his 1995 presentation, Dodson stated that there has been a "collision of two systems of law" and urges the reconciliation of such systems within the framework of human rights standards. He argues that a cultural context must be included in the discourse of human rights and the interpretation of domestic law concerning indigenous peoples' status and rights by the courts.

There is a growing recognition of the need for a different "conceptual framework," by both indigenous and non-indigenous scholars. For example, Professor Robert A. Williams suggests:

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9 R.A. Williams, "Vampires Anonymous and Critical Race Practice," 95 Mich. L. R. 741 (1997), who discusses critical race theory, his personal experience in mainstream law schools and his academic activism as a "critical race practioner."
"Pushed to the brink of extinction by the premises inherent in the West’s vision of the world and the Indians’ lack of a place in that world, contemporary tribalism recognizes the compelling necessity of articulating and defining its own vision within the global community."

Author Mai van Lam, writes:

"Indigenous peoples have been subordinated and injured by the modern state. Politically, and often physically as well, they live at its edge. Conceptually, however, they may be turning that edge into a cutting one as they construct new paradigms of the rightful structure, function, and relationship of states to constituent peoples. Certainly, few seem anxious to appropriate or reproduce the unreconstructed state."

Similarly, leading international legal scholar, Richard A. Falk writes:

"The first truly intercivilizational critique of the prevailing human rights discourse and its world order implications emerged, somewhat surprisingly, from the concerted struggle of indigenous peoples in the 1980s and 1990s. This struggle took shape against a background (and foreground) of exclusion, discrimination, and persecution, even extermination, assimilation, and marginalization – all factors expressive of confusing admixtures of arrogance, racism, and ignorance. These extraordinary efforts of indigenous peoples to protect the remnants of their shared civilizational identity, an identity that was coherent and distinct only in relation to the otherness of modernity, achieved two results ... : first of all, it exposed the radical inadequacy of a civilizationally "blind" approach to human rights, by which is meant the utter failure of the modernist instruments of human rights to address in any satisfactory way the claims, values, grievances, and outlooks of indigenous and traditional peoples; and second, transnational activism by indigenous peoples in the last decades has given rise to an alternative conception of rights.

12 M.C. Lam, At the Edge of the State: Indigenous Peoples and Self-Determination (Ardsley, N.Y.: Transnational Publishers, 2000), at xxvi; and at 211: "Indigenous peoples today share complex boundaries with non-indigenous peoples, but not a system of meaning that permits a mutually intelligible recognition and limited transgression of those boundaries. They look now to international law to supply such a system of meaning, the contours of which they have outlined in their vision of their self-determination. But the interstate system, captured as it is by the method of positivism and the history of statism, fails to trust the ambivalence and pliability inherent in the indigenous vision. It is a pliability that springs from the common human experience, unknown to or forgotten only by the most dominant of societies, of negotiating contested, contingent, layered, and adaptive modes of survival as well as of meaning."
that has been put forward after a long process by previously excluded
civilizational representatives."\textsuperscript{13}

A complete synthesis of various legal theories is not possible here. However, a
quick survey of issues in legal theory will reveal the gaps that exist for indigenous
peoples. Many approaches do not have the capacity to respond to the contemporary
aspirations nor the rights of indigenous peoples. Yet, indigenous peoples are
unconsciously reformulating, re-conceptualizing, and modifying existing approaches to
advance their various efforts at the international level. For example, use of natural law
conceptions, law and norms, or rights discourse, law and language, realism, critical legal
studies, feminist approaches are all being utilized.

It is safe to say that, at the international level, indigenous peoples have
contributed to the expansion of the various schools of legal thought by introducing their
own values and practices into the ongoing human rights standard setting activities. Such
development reflects the creation of new norms and new approaches to the role of law in
society and relations between distinct peoples and others. Hence a new legal theory may
be evolving, which is more consistent with the values, practices and institutions of
indigenous peoples. Indeed, Richard Falk further notes that:

"...this recent authentic expression of indigenous peoples' conception of
their rights contrasted with that of earlier mainstream human rights
instruments claiming universalism....Such comparisons confirm the
contention that participatory rights are integral to a legitimate political order,
as well as to a reliable clarification of grievance, demand, and aspiration. This
alternative conception has been developed by indigenous peoples in an
elaborate process of normative reconstruction that has involved sustained and

\textsuperscript{13} R. Falk, \textit{Human Rights Horizons: The Pursuit of Justice in a Globalizing World} (New York/London:
Routledge, 2000) at pp. 151-152.
often difficult dialogue among the multitude of representatives of indigenous traditional peoples." \textsuperscript{14}

There is no question that the views of indigenous peoples expressed at the international level are legitimate views, and may form the basis of a new theoretical framework or a "reconstruction" of norms. However, unfortunately, little thought has gone into legal theory and legal studies by indigenous peoples, with the exception of the efforts of the small but deep (and growing) pool of indigenous legal scholars who are attempting to take stock of our place in the world of legal theory in a formal, academic fashion. Such efforts are few and far between, primarily because of the urgent nature of the issues that face indigenous communities and the powerful and dominant social, economic, political and cultural forces that surround indigenous communities.

Therefore, I am still grappling with the notion of the "theoretical underpinnings" of this thesis or any other writing that attempts to advance our worldviews. However, I must confess that the only theoretical framework that I can \textit{temporarily} embrace is Critical Race Theory (CRT). I have begrudgingly accepted that it may be the best theoretical framework for examining indigenous legal perspectives and propelling them into the spotlight.

I recognize that Critical Race Theory provides a useful measure of the limitations of traditional legal discourse. In addition, the use of storytelling and counter-storytelling and the overarching proactive notion or objective of Critical Race Theory to effect change make it an attractive and likely more constructive theoretical framework for indigenous peoples.

\textsuperscript{14} Ibid.
After some further thought, I now understand the role that scholar Robert A. Williams plays and describes as Critical Race Practice. I, too, am playing a role through my own Critical Race Practice, working to effect change in the traditional legal discourse by bringing forward the perspectives of Inuit to the work of the draft Declaration.\(^{15}\) When viewed in this way, I am the practice. Myself and other indigenous representatives, scholars and advocates involved in the draft Declaration work are the storytellers advancing our perspectives in order to effect change at the international and national level. In fact, the goal of the Declaration process is to recognize the distinct place of indigenous peoples in the context of international human rights law and thereby uplift the status and conditions of indigenous peoples through the principles of equality and the rule of law.

Above, I use the term "temporarily" because Critical Race Theory, upon closer inspection remains yet "another Western theoretical framework."\(^{16}\) Though I understand the basic objectives of Critical Race Theory\(^{17}\) and its emphasis on exclusion, subordination and use of "racial power" in international and American law, I cannot help being disturbed by the negative connotations of race and difference. For example, references to people of color as "outsiders" or from the "bottom" or use of terms such as "out groups." These terms chafe at me because I don’t always feel like an "outsider," or that I’m operating from the "bottom" or as a representative of an "out group." My natural inclination or response is to advance indigenous peoples by emphasizing indigenous

\(^{15}\) Ibid.
culture and difference in a positive fashion, to promote notions of indigenous peoples as "real people." This is particularly important in my work for and within indigenous communities where they are the majority and culturally intact, and incrementally gaining ground in terms of the legitimacy of their life ways, values and perspectives by advancing their understanding of how law operates within their societies, as well as in their interactions with "outsiders." Furthermore, many of the activists that have advanced Critical Race Theory come from a different historical, legal and cultural background quite distinct from indigenous peoples. In particular, many do not share the concept of sovereignty or the political right to self-determination, or the relationship to their homelands (or lands, territories and resources), which indigenous peoples regard as fundamental to their identity and being.

Indigenous scholar and now Saskatchewan Provincial Court Judge, Mary Ellen Turpel seems to sense this tension as well and urges the use of the term "cultural differences" rather than "racial difference" because of the more "expansive" nature of the former. She states that "cultural differences should be understood more as manifestations of differing human (collective) imaginations, of different ways of knowing." She adds that "cultural differences are differences between ways of knowing, describing, or understanding." Turpel asserts that the efforts of indigenous peoples, in their use of "human rights terminology" is actually a "plea for recognition of a different way of life, a different idea of community, of politics, of spirituality, differences that have

17 Ibid. R. Gordon summarizes CRT as a means "to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America" and to not only "understand the connection between racial power and law, but to change that relationship."
existed...since time immemorial, but have been cast as differences to be repressed or transformed since colonization." 18

Turpel’s assertions identify the limitations of the term "race" in the context of indigenous peoples, who are distinct political entities. This point adds to the argument that the existing approaches, including Critical Race Theory, do not adequately respond to the status, rights, characteristics and attributes of indigenous peoples. The term "race" is now being disputed by modern science as well. However, when it comes to the common or popular usage of this archaic term in international law, the emphasis has been upon identification of perpetrators of racism and racial discrimination and not upon those arguing for recognition of the rights of peoples that comprise distinct cultures. For example, the 1948 Genocide Convention 19 and the 1978 United Nations Educational, Scientific and Cultural Organization (UNESCO) Declaration denouncing theories of racial superiority 20 both place emphasis upon the "persons committing" such acts or the State practicing racial discrimination. Scholar W. Schabas attempts to elucidate such an understanding:

"From a purely scientific standpoint, the value of the term ‘race’ is now disputed by modern specialists. As a way to classify humans into major subspecies based on certain phenotypical and genotypical traits (e.g., Negroid, Mongoloid, Caucasoid), race has become virtually obsolete. Indeed, efforts to...

20 United Nations Educational, Scientific and Cultural Organization (UNESCO) Declaration on Race and Racial Prejudice (1978), which declares, inter alia, that "all human beings belong to a single species...all individuals and groups have the right to be different...any theory which involves the claim that racial or ethnic groups are inherently superior...has no scientific foundations and is contrary to the moral and ethical principles of humanity...any form of racial discrimination practiced by a State constitutes a violation of international law..."
define these so-called races have in themselves a racist connotation, in that generally they aim to demonstrate not only some common denominator of physical characteristics, such as type of hair and skin colour, but also purportedly scientific justifications for slavery and colonialism. ... Apart from references to ‘human race’ as a unified group, ‘nearly all social scientists only use "race" in [the] sense of a social group defined by somatic visibility’. Nevertheless, in popular usage the concept of racial distinctions continues to have ‘tremendous social significance’ because ‘we attach meaning to them, and the consequences vary from prejudice and discrimination to slavery and genocide’.

Thus, although the term ‘racial group’ may be increasingly antiquated, the concept persists in popular usage, social science and international law. Understandably, progressive jurists search for a meaning consistent with modern values and contemporary social science."²¹

Clearly, indigenous peoples are seeking recognition and meaning consistent with their distinct status, rights, values and contemporary conditions as particular cultural groups. However, due to the fact that indigenous peoples collectively are the subject of inequality in treatment based upon their cultural distinctions and qualities, which results in a disability, the term "race" and its common usage have been important in identifying the discriminatory actions being taken by States against indigenous peoples. Therefore, I am not making a parallel between race and indigenous peoples. On the contrary, I utilize Critical Race Theory to demonstrate the limitations of existing theories and frameworks and, where appropriate, I utilize the term "race" to point out the discriminatory actions of States. This dynamic will be discussed further in the context of the right of indigenous peoples to self-determination.

My role in defining the rights embraced by the draft Declaration and my advocacy work or "storytelling" at the United Nations can be characterized as a combination of

Critical Race Theory and rights discourse, in very real terms. My efforts and those of other indigenous advocates have not been abstract discussions concerning theory and rights. Rather, we have been sharing our experiences of colonization, domination, subjugation and exploitation and how attitudes of superiority practiced by so-called "civilized" peoples have affected our indigenous communities, nations and peoples. Like other Critical Race Theory proponents, scholars, and practitioners, we are sharing our perspectives in an effort to reconstruct relationships that genuinely will accommodate our place in society, a society where the equal application of the rule of law will have concrete effect upon our ability to exercise and enjoy our human rights, day in and day out. Indigenous peoples are actively seeking to end the rhetoric concerning rights and to change the social structures and perspectives that breed the racism and racial discrimination that we continue to face in our homelands and in the context of our fundamental rights.

The methodology can be summarized as a very direct, personal account of my participation in the human rights standard setting process. I have taken my story, my experiences and the history of my people to the international arena. Through such participation, I have sharpened my understanding of the human rights framework and gained additional tools to expand rights discourse into the field of indigenous human rights development. Furthermore, the theoretical construct of the right of indigenous peoples to self-determination (within a human rights framework) plays a central role in the analysis of the capacity of international law to accommodate indigenous peoples and

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to ensure equality. I have also relied upon the writings of various publicists who have contributed to the continuing dialogue on the right to self-determination in international law. Though numerous articles and volumes exist on the topic of indigenous peoples at the United Nations and in the context of the right to self-determination, there is virtually no literature on the work in the Commission of Human Rights Working Group on the draft Declaration. Therefore, throughout the course of writing this thesis, I have found my experiential account to be essential and by utilizing the most recent debates as a starting point, I have tried to make a contribution to the ongoing and future dialogue.

2) Indigenous unity and Indigenous diversity

Here is another example of an abstract concept and my more layperson view of it. While explaining the topic of my thesis to a friend, I was asked the question of how do you intend to "essentialize" indigenous peoples? First, I’ll confess that I was not even sure what was meant by "essentialize." After some discussion about the topic, it was clear that I was not going to "essentialize" indigenous peoples.

There is no question that there is great diversity amongst indigenous peoples, nations and communities and their respective identities, oral histories and political, social, cultural, economic and environmental contexts. As stated by scholar Vine Deloria:

See generally the UNESCO Universal Declaration on Cultural Diversity, Resolution 25, adopted by the General Conference at its 31st session, and based upon the report of Commission IV at the 20th plenary meeting, November 2, 2001, which states in Article 1: "Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations." Article 4 states: "The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, or to limit their scope."
"American Indians are a unique branch of the human family possessing a wide variety of cultural expressions, origins, and traditions. The very diversity of Indian tribes has dampened efforts to treat Indians as a monolithic group although historians have often struggled to bring meaning and understanding to what the non-Indian community views as "the Indians." Almost all generalizations that been constructed to explain the nature of Indian life have dissolved when the particularities of tribal existence have been noted."{23}

Among Inuit alone, there is immense economic, social, cultural, linguistic and political diversity. However, in the context of this thesis, my specific focus is upon our collective work at the United Nations, where certain concepts have emerged in the human rights discourse that are universal or at least unanimous amongst those who have played a consistent and active role in the work. This has been expressed through not only the procedures used by indigenous peoples to organize themselves at the international level but also through the collective decisions made by indigenous peoples on substantive matters. In my view, it is significant that very diverse indigenous peoples and organizations from across the globe are united in the objective of attaining a strong United Nations Declaration on the Rights of Indigenous Peoples.

Though extraordinary cultural diversity exists, indigenous peoples have repeatedly affirmed this common objective, which has resulted in a united agenda or platform. This phenomenon has infused the standard setting process with real flavor and richness in what would otherwise be a somewhat drab exercise. Despite our colorful and deeply rooted diversity within the indigenous world, a number of universal themes have emerged, some based upon our shared experience of colonialism but moreover based upon long-standing indigenous values, rules or methods of social control. Many of the universal aspects of indigenous law reflect the relationships between individuals, kinship

and collective relationships, as well as responsibilities toward others and all living things. Such worldviews are preserved and promoted through indigenous languages and our spiritual customs and practices, legends and stories. In other settings, they are often simply referred to as "values" such as respect, cooperation, consensus decision-making, sharing and the importance of family, kinship and future generations.

Though I discuss the work of indigenous peoples at the United Nations with terms such as the "indigenous peoples' position," I do not mean to create a pan-indigenous world of homogeneity nor peaceful relations amongst all concerned. In contrast to the stereotypical ideal of the peaceful and harmonious Native peoples, we are not all one big happy family. On the contrary, the gradual politicization of the so-called "Indigenous Caucus" has spawned a wide-range of opposing indigenous viewpoints.

Heated differences have emerged over strategy, tactics, interpretation, dialogue with states or no dialogue with states, negotiation of the text or no negotiation of the text, no changes, amendments and deletions to the original Sub-Commission text or

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24 There are far too many volumes by indigenous peoples and others to list here, which describe the social, cultural and spiritual relationships between indigenous peoples and "all living things." However, see generally Our Land is Our Life: Land Rights—Past, Present and Future, G. Yunupingu, ed., (St. Lucia: University of Queensland Press, 1997); T. Berger, Village Journey: The Report of the Alaska Native Review Commission, supra note 7; and Will the Time Ever Come: A Tlingit Source Book, A. Hope & T. Thornton, eds., (Fairbanks: University of Alaska Press, 2000).

25 J.S. Henderson, "Micmaw Tenure in Atlantic Canada," 18 Dalhousie L. J. 2 (1995) at 196, where he uses the term "langscape" to describe an "Aboriginal vision of land."

26 For example, see R.A. Williams, "Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace," 82 California Law Review (1994) at 996. This article discusses the need to "listen to each other's stories" and the importance of "traditions and language," which "defined the political and cultural aspects of Iroquois life: familial, societal, and constitutional."

27 For example, the Inupiat of the north and northwest coast of Alaska have interpreted a number of concepts crucial to collective relations within Inuit communities: Qiksiksaautiqagniq (respect) for elders, others, and nature; Ilagiigniq (family kinship and roles); Sigunatinniq (sharing); Inupiuraallaniq (knowledge of language); Paammasiigniq (cooperation); Piqpakkutiqagniq (love and respect for one another); Quvianainiq (humor); Anuniagniq (hunting traditions); Naglikkutiqagniq (compassion); Qinuinniq (humility); Paaqtaaktuainnq (avoidance of conflict); and Ukpiqqutiqagniq (spirituality).
willingness to review and consider state proposed changes, amendments or deletions to
the draft text, and so on. Despite the reality of differences and diversity, the objective of
a strong Declaration remains unanimous amongst the "Indigenous Caucus."

At the moment, there appear to be some indigenous peoples who hold the view
that if we insist upon no changes to the text, governments will end their work at the
Commission level and the 1994 Sub-Commission text will somehow remain unscathed
yet still be regarded as the Universal Declaration on the Rights of Indigenous Peoples.
Another group of indigenous peoples have espoused a program for "ethical
engagement"\textsuperscript{28} to review proposed state changes, and thereby maintain the right to
denounce the text if we are ultimately not satisfied with the result. Another group of
indigenous peoples, nations and organizations are prepared to "negotiate" with states
under a set of indigenous advanced "terms of reference to develop the strongest text
possible within the United Nations.\textsuperscript{29} And, yet another approach has emerged: to
establish an indigenous advisory group to provide technical and legal assistance to
indigenous peoples in their article-by-article consideration of state proposed changes.\textsuperscript{30}

The diversity of indigenous peoples and views, as well as the diversity of
individual personalities, ideologies and politics has been compounded by the recent
hyper-politicization of the Indigenous Caucus, making this work the most painful work
that I’ve been engaged in. Increasingly, these sessions are far removed from indigenous
processes and values, which normally operate consistently with principles such as

\textsuperscript{29} Statement by Inuit Circumpolar Conference, 2002 Session of the CHRWG. On file with author.
respect, consensus, and honorable relations. Nevertheless, they are our sessions and our ways and means of gathering and uniting to influence the one document that we believe to be a culmination of universal minimum standards to protect and preserve our distinct peoples, nations and communities.

3) Universality of International Law

Again, throughout my research and discussion with John Borrows, an early Committee member, I came upon the perplexing concept of "universalism" when I thought the matter was pretty straightforward. Here's my understanding of the "universal" nature of international law.

Amongst members of the international legal academy at least, there is general consensus that international law is universal. I understand this to mean that international law is a body of law that applies to all peoples regardless of race, culture, values, beliefs, religion, or political institutions. I do not mean the universalization or globalization of the extreme positivist interpretation of international law nor do I support the notion that international law is confined to states and state actors. It may be that, the emergence of international law in the nineteenth century as a body of law confined to relations amongst and between states is the prevailing view. However, more recently, in the area of international human rights law and in particular, questions relating to the right of self-

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30 Memorandum by Maori lawyer, Tony Sinclair, outlining the proposed advisory body was circulated at the 7th session of the Commission on Human Rights working group on the draft Declaration. On file with author. To be discussed below.

31 Though international law generally has been confined to a system for the regulation of affairs between states, by virtue of the fact that individuals and peoples collectively were involved, international law has always been infused with political and human ideals.
determination, it is "peoples" that are of concern and not merely "states." It is in this context that I assert that international law does not include the perspectives of indigenous peoples and therefore, at present, it is not universal. The ongoing reality of colonization and the "Age of Empire," has limited the universal reach of international law, and it is such attitudes that continue to shape and inform the current positions of state actors involved in the draft Declaration process.

It is the exclusion of indigenous perspectives, the denial of rights and the persistent attitudes of colonialism exposed by the ongoing debates taking place within the United Nations Commission on Human Rights working group on the draft Declaration (hereinafter CHRWG) that compels me to write this thesis and to focus upon the contribution of indigenous peoples to this work. The persistent colonial attitudes of states has been revealed and demonstrated through their attempts to maintain an old world view of international law, even within the human rights processes of the United Nations. Such actions have led states away from their obligation to genuinely fulfill the objective of contributing to the progressive evolution of human rights standards to favor the maintenance of the status quo. This thesis intends to advance from this point – to use the present debate of the CHRWG as a point of departure. This thesis aims to contribute to the realization of the "universality" of international law: a body of law that will, through word and deed, be universal by including indigenous peoples' worldviews and perspectives.

33 See E. Hobsbawm, The Age of Empire: 1875-1914 (1987) at 8. This historian asserts that imperial expansion for economic and political expansion was the primary force behind the universalization of international law.
Again, I use the term *universal* in the sense that international law must be common to all yet still adaptable to particular and distinct cultural contexts and differences. In this way, international law should not be hierarchal but rather applicable to all peoples. Though state government representatives presently do not use the same vocabulary of earlier times (i.e. savages, barbarism, civilized and uncivilized), the fact remains that there is a "cultural bias in international law" and the true diversity of humankind is therefore not reflected in international law. Given this absence or exclusion of indigenous legal perspectives, the Law of Nations is presently not universal.

4) Dominant legal theories and the need for an indigenous perspective

If one undertakes even a cursory review of the application of international law to indigenous peoples, it is clear that the dominant legal theories and doctrines developed by non-indigenous actors have often resulted in the demise and continuing deterioration of indigenous societies.\(^{34}\) The evolution and development of legal doctrines and legal thinking by members of the dominant society\(^{35}\) have shown little capacity to respond to the rights, status and aspirations of indigenous peoples.\(^{36}\) The basic assumptions of superiority and other colonial attitudes upon which international law is built, heavily

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\(^{35}\) See R.A. Williams, *American Indians in Western Legal Thought*, supra note 11, which discusses the western legal school of thought and its interpretation of indigenous rights.

\(^{36}\) The United Nations working definition of "indigenous peoples" can be found in the final report of the Jose Martinez Cobo, Special Rapporteur, *Study on the Problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 at para. 379. Cobo was the Special Rapporteur for the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities. His comprehensive and voluminous study reviews the status and conditions of indigenous peoples worldwide, and further provides conclusions and recommendations for concrete responses to such conditions by the United Nations. (Hereinafter *Martinez Cobo Study*). The definition and term will be discussed further in Chapters IV and V.

Furthermore, the narrow interpretation of international law by national governments and domestic courts and the often-discriminatory nature of internal laws and policies have contributed to the intolerable conditions that many indigenous communities continue to face.\footnote{Such intolerable conditions have been surveyed in texts such J. Burger, Ibid, at 17-30, which includes statistics on employment, health, education, and further discusses discrimination and marginalization. See D. Sanders, "The Legacy of Deskaheh: Indigenous Peoples as International Actors" in C. Price Cohen, ed., Human Rights of Indigenous Peoples, ed. (N.Y.: Transnational Publishers, 1998) at 73, which briefly describes resistance to "domestic law" status and early efforts for international redress.}

Due to this reality, indigenous peoples have persistently sought international recognition or acceptance of their unique place in world society.\footnote{Though the Iroquois Confederacy engaged in international relations with Great Britain, France, and other indigenous nations, it was not until the creation of the League of Nations that they attempted to gain access to a formal international organization to resolve a conflict. See generally Akwesasne Mohawk Counselor Organization, Deskaheh: Iroquois Statesman and Patriot (1984); and also D. Sanders, "Remembering Deskaheh: Indigenous Peoples and International Law" in I. Cotler & F.P. Eliadis, (eds.), International Human Rights Law [:] Theory and Practice (Montreal: Canadian Human Rights Foundation, 1992) at 485.}

With the formalization of a new "family of nations" through the establishment of the League of Nations, Deskaheh, a Chief of the Iroquois Confederacy, visited Geneva, Switzerland in 1922 to seek out justice and to bring forward the views of his nation concerning future relations between his peoples and the newcomers.\footnote{Though Deskaheh did not gain access to the League of Nations as a representative of a sovereign Indian people, his journey has had a lasting impact. Indigenous peoples of a sovereign Indian people, his journey has had a lasting impact. Indigenous peoples...}

Though Deskaheh did not gain access to the League of Nations as a representative of a sovereign Indian people, his journey has had a lasting impact. Indigenous peoples...
have continued to embark on similar journeys as that of Deskaheh, \(^{41}\) compelled by many of the same problems: persistent abrogation and non-fulfillment of treaties; non-recognition of the distinct status of indigenous peoples; and lack of respect for their fundamental rights and values. \(^{42}\)

In dramatic contrast to the early blatant acts of genocide perpetrated against indigenous peoples and later imposition of "domestic law" status over indigenous peoples, generally speaking, some advances have taken place on domestic fronts. In addition, international action was prompted due to severe violations of indigenous human rights in Latin America. \(^{43}\) However, conflicts such as the Chiapas uprising and other armed skirmishes continue.

In the course of the last forty years or so, indigenous peoples have had greater ability to organize themselves to improve their conditions and to increase recognition of their rights through law and policy, litigation, national dialogue and enhanced leadership opportunities. Examples of national laws and policies, which protect and promote indigenous self-government, land rights and other rights can be cited. Yet full accommodation of indigenous rights remains elusive. Domestically, remnants of the same colonial approaches have been applied with nuance and subtlety and, therefore,

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\(^{41}\) For example, the International Non-Governmental Organization Committee on Human Rights had been holding a series of meetings on human rights issues that they deemed relevant. In 1977, the Committee chose to focus on indigenous peoples and racism in the Americas. In collaboration with a number of indigenous organizations, they convened the International Non-Governmental Organization Conference on Discrimination Against Indigenous Populations in the Americas, held in September 1977 at the Palais des Nations, in Geneva, Switzerland. For a discussion of the early efforts of indigenous peoples within the United Nations system see R.T. Coulter, "Les Indiens Sur la Scene internationale, Les Premiers Contacts Avec l'Organisation des Nations Unies," in Destins Croises 333 (UNESCO, 1992).

\(^{42}\) For a full discussion of the effects of colonialism see R.A. Williams, American Indians in Western Legal Thought, supra note 11, which discusses the history of colonialism and racism towards indigenous peoples and its persistence in modern international law and domestic law.

\(^{43}\) See Foreword to Indigenous World, Vol. 3/98.
have become difficult to specify or identify. Despite encouraging advances domestically, indigenous peoples have renewed their efforts to secure their place within the international community. Indigenous peoples and others\(^44\) have been working at the international level to shift the assumptions away from Eurocentric\(^45\) or dominant thinking and definitions and move them closer to the realities of the indigenous world. Indigenous peoples are struggling to achieve cross-cultural understanding and respect. In this way, we are seeing an important synergy develop between domestic arenas and international politics, which may ultimately ensure indigenous peoples their rightful place within the international community and create new tools to reconstruct or reshape their political and legal relationships with nation-states and others.

In large part because of this synergy and the linkage between the domestic and international arenas, more recently, the international community's response to indigenous peoples and their interpretation of human rights has become more promising than past experience.\(^46\) We are now witnessing the construction of a new phase of norms and mechanisms through the "international hearing" of indigenous voices, languages, and

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\(^{44}\) For example, the International Work Group for Indigenous Affairs (IWGIA), which "is an independent, international organization which supports indigenous peoples in their struggle against oppression." IWGIA provides financial support to indigenous representatives through their Human Rights Fund, and they publish extensive and comprehensive documents covering indigenous issues in both English and Spanish. In addition to IWGIA, there are numerous other non-governmental organizations, churches, academics, publicists, human rights advocates, foundations, and individuals assisting in the efforts at the United Nations and other international venues.

\(^{45}\) R. Gordon, "Saving Failed States: Sometimes a Neocolonialist Notion," 2 Am U. J. Int'l. L. & Pol'y 903 (1997) at 935-937. Gordon describes the notion that only European states were fully sovereign, and thus, non-European states did not have the standing to challenge Europeans through international law. Hence, the problem of Eurocentric or nationalist nation building, Hindu-centric or Javanese-centric views as well.

worldviews, which explicitly and distinctly recognize and protect the rights and status of indigenous peoples. This, in turn, is opening up more effective domestic and international recourse for the violations of our fundamental human rights and ultimately expanding the range of international human rights law.

In many respects, the world community is witnessing dramatic changes in the nature of political and economic relationships between states, as well as changes in the international legal order due to the emergence of new states. In addition to the changes brought about by the expansion of capitalism, such changes are also the result of the international community’s realization of the need to accommodate and recognize the manifestation of diverse interpretations of human rights.

To be sure, there remains a reticence on the part of states to embrace minorities and indigenous peoples. And, many indigenous peoples remain concerned about the role and power of the dominant society even within this sphere. Yet, Mary-Ellen Turpel’s assertion about the "interpretive monopoly" of the dominant society is one of the compelling reasons for indigenous peoples to dismantle or deconstruct that monopoly in order to ensure that "cultural difference" is recognized rather than repressed. Hence,

48 As will be discussed below, there is a growing movement of international action amongst indigenous peoples, nations and communities, as well as a growing number of indigenous peoples organizing and pursuing international agendas to safeguard their rights and interests, ranging from the Inuit Circumpolar Conference to the Aino Association of Hokkaido to the Aboriginal peoples of Australia.
"[t]he diversity of the people of the earth" is finally gaining some acceptance or currency within the international community.\

Throughout the course of the indigenous human rights standard setting process at the United Nations, indigenous peoples have been consciously and unconsciously contributing to the development of "indigenous legal theory" and legal perspectives. Legal theory in this context can be described as a distinct legal school of thought, "distinct worldviews," philosophy or ideology. We are effectively introducing, to the international community, our conceptions of law or a legal school of thought by expressing and further defining our values, customs and practices. There are a growing number of fundamental indigenous "values" or concepts being addressed and discussed in a universal fashion.

Regardless of whether the terms "Indigenous Legal Theory" or indigenous legal perspectives are used formally, indigenous peoples have always had their own legal theory. The pre-existing methods of social control and relations within and between indigenous communities, as well as their organized societies, are evidence of procedures and institutions for collective decision-making. These organized societies were not chaotic and arbitrary (which would be a contradiction of terms). It is clear that indigenous societies were highly organized, with established customs, practices and

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51 Battiste and Henderson, supra note 1.
52 J.S. Henderson, "Micmac Tenure in Atlantic Canada," supra note 25, at 198, wherein the author addresses "different legal consciousnesses" and the "distinct worldviews and linguistic traditions" of the Micmac.
53 These expressions range from descriptions of indigenous measures for social control and relations to self-government and long-standing indigenous values, such as respect, cooperation, consensus decision-making, sharing, and the importance of family, kinship and future generations.
institutions, which have been recognized by judicial institutions and others.\textsuperscript{54} Most, if not all, indigenous communities have demonstrated that they are organized societies, with a legal foundation, whether written or unwritten, which range from extremely intricate methods of government and control to simple but useful rules regarding interaction and inter-relations. It defies logic to come to an opposite conclusion. Without such organization, collective decision-making and measures for social control would not have been possible.

In fact, the denial of social control and legal order by non-indigenous peoples contributed to the stereotyping and mythology. Such stereotyping and the "mythology of conquest,"\textsuperscript{55} propped up law and legal pedagogy and repeatedly distorted and misrepresented indigenous peoples. Thereby allowing the dominant society to legitimize their "systems of control" and justify colonial conquest by believing that "an indigenous legal order did not have to be respected if it was deemed not to exist."\textsuperscript{56} For example, European concepts of property were linked to race and notions of civilized versus "uncivilized," thereby, justifying conquest by identifying indigenous peoples as savages and barbarians, and therefore, different or backwards, and "inferior" in rights.

\textsuperscript{54} Recent examples of judicial recognition of indigenous perspectives include the \textit{Delgamukw v. British Columbia} decision by the Supreme Court of Canada, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193, [1998] 1 C.N.L.R. 14, 37 I.L.M. 268 [hereinafter \textit{Delgamukw}], where the court ruled that Aboriginal peoples' oral histories should be placed "on an equal footing" with other forms of historical evidence, and that the "collective right to land" attaches to "all members of an aboriginal nation." In regard to recognition of the usefulness of indigenous perspectives in other areas, "Wellness" and "Drug" courts being used in Canada and the United States are growing in popularity in addition to "Circle Sentencing."


\textsuperscript{56} S. Weissner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis," supra note 47 at 72, who writes, in the context of Australian Aboriginal peoples: "Since indigenous inhabitants of a settled colony had no recognized sovereign, they were considered to be without laws, and the English common law was imposed. The occupier's law did not recognize the aboriginal inhabitants' proprietary interest in land."
Some may argue that it is inappropriate to label the thinking or the worldviews of indigenous peoples a "legal theory." Indeed, it has often been difficult to illustrate or fully articulate the cultural differences and perspectives of indigenous peoples. Again, I do not intend to lump indigenous peoples together or to present a monolithic, single, identifiable "indigenous world view." However, this thesis contends that if indigenous peoples themselves do not actively affirm their pre-existing values, perspectives, laws and legal orders, in the context of the draft Declaration, then the doctrines and legal theories of the dominant society will overwhelm the text and result in undesirable assimilationist language,\(^5\) stifling opportunities for and aspirations of indigenous peoples to fully achieve a truly multi-national "post-colonial" state.

C) Structure Of Dissertation

This dissertation intends to illustrate the emergence, as well as the importance and legitimacy of indigenous legal perspectives within international human rights law. Chapter II will introduce the growing international trend to include Indigenous Peoples in various international processes.

Chapter III will address the international human rights framework and in particular, the status and rights of indigenous peoples within the United Nations human rights standard setting process and the necessity to accommodate indigenous legal

\(^5\) In regard to the assimilationist policies in the Indigenous and Tribal Populations Convention, 1957 (No. 107), see "Extracts from the Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)" (Geneva, 1-10 September 1986), in International Labour Office, Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Report VI (1), Geneva, 1987, Annex, para. 46: "... the integrationist language of Convention No. 107 is outdated, and that the application of this principle is destructive in the modern world. ... [Integration] had become a destructive concept, in part at least because of the way it was understood by governments."
perspectives and indigenous peoples status and rights within the draft Declaration. It is
safe to say, that this work is at the heart of the international indigenous movement of
resistance to assimilation, to engage in dialogue and to gain respect for and recognition of
their distinct rights. In this context, Chapter IV of this thesis will focus upon and
highlight the significant advances made, and the contentious issues that have arisen, due
to the dynamic of direct participation of indigenous peoples, nations, and organizations.

The United Nations arena has allowed for the free expression of indigenous world
perspectives, and specifically our conception of our place in both the political and legal
realms of society. This international stage allows one to spotlight indigenous legal
perspectives within the scope of normative development of human rights. This forum
also offers some useful benchmarks concerning the transformation or incremental change
in the dynamics of relationships between indigenous peoples and states, as well as the
return of Indigenous Peoples to the international stage.

Chapter V will survey the right of indigenous peoples to self-determination and
the ongoing challenges facing indigenous peoples and will focus upon those states that
have been most resistant to recognizing and advancing indigenous perspectives of
international law and international human rights standards. The Chapter will close with
the argument that the world community, and in particular the United Nations, must fully

58 As agreed upon by the members of the United Nations Working Group on Indigenous Populations at its
eleventh session, Geneva, July 1993. Adopted by the U.N. Subcommission on Prevention of
59 The United Nations process has attracted more indigenous participation than any other arena. However,
the International Labor Organization and the Organization of American States also have respectively
concluded and initiated indigenous human rights standard-setting activities, to be discussed below.
60 Anaya, Indigenous Peoples in International Law, supra note 46 at 45, discusses the contemporary
international movement to accommodate indigenous peoples' rights within a human rights framework.
embrace and include indigenous legal perspectives in order to uphold their own principles, obligations and values. This chapter will advance the argument that even the western construction of human rights law is intended to apply to all peoples, on the basis of equality, non-discrimination and consistent with the absolute prohibition against racial discrimination.

Finally, Chapter VI will offer a brief discussion of the denial of the right to self-determination in the context of my own peoples in Alaska. In addition, the conclusion will succinctly address how the emerging international indigenous human rights standards can contribute to genuine change within indigenous communities and in the re-shaping of political and legal relationships with local and national governments.

It is important to underscore, at the outset, that a full transformation has not taken place -- indigenous peoples continue to have difficulty in gaining recognition of and respect for our distinct rights, both nationally and internationally. The national governments that have subsumed indigenous peoples have repeatedly violated our fundamental human rights\textsuperscript{61} and maintain traces of the same colonial attitudes of their predecessors. These same states are the controlling actors of the United Nations, an international organization that maintains a constant political charge.\textsuperscript{62} We must all be cognizant of this fact. The most active states continue to make proposals that would significantly dilute the emerging international standards and they are often unwilling to

\textsuperscript{61} Examples include the Government of Brazil, which has violated the rights of the Yanomami peoples while continuing their active participation in the work of the U.N. Working Group on Indigenous Peoples, the Sub-Commission, and the Commission on Human Rights.

\textsuperscript{62} The composition of the United Nations Commission on Human Rights is limited to member nations of the U.N. Not only the 53-member states of the Commission have been actively involved in the indigenous human rights standard setting work to date but it also includes those nation states that have direct interests by virtue of the high number of indigenous peoples living within their borders.
engage in a substantive dialogue at home.\footnote{63} In many areas, Nation-state reluctance or reticence has remained. However, there are some exceptions. For example, several Latin American states, over the course of their involvement have come to understand indigenous peoples' perspectives and modified their positions. Furthermore, the international debates have prompted domestic and regional change and illustrate a greater willingness for open dialogue in both arenas.

At all levels, indigenous peoples have taken the lead and are making increased efforts to achieve the goal of a strong Declaration.\footnote{64} Largely, and with the help of the United Nations agencies and organs, states are being propelled toward this goal. If indigenous peoples can generate real dialogue and enhance understanding about their rights, status and values, they will gain greater respect for and recognition of indigenous rights as human rights.\footnote{65}

The ultimate goal for indigenous peoples is survival as distinct peoples and communities. Indigenous peoples have made a conscious decision to resist assimilation.

We have not chosen to succumb to, or fit into, the legal order and worldview of the

\footnote{63} The United States government has been the most draconian in this regard. While proposing the most regressive positions internationally, they have all but avoided any substantive consultations with Indian tribes and tribal leaders domestically.


dominant society. In recent years, it has become increasingly apparent to nation-states that the human rights framework does have the capacity to accommodate indigenous peoples' rights as human rights. Once states come to better understand the meaning and effect of our distinct human rights, they may be more likely to conclude that they can, and indeed have an obligation to, support such norms. More importantly, states should recognize that they have international legal and moral obligations to respect, recognize and uphold the human rights of indigenous peoples.

At a minimum, the international community must broaden the scope of existing western constructs of international human rights law to ensure our distinct cultural context. In the end, the real measure will be the extent to which states and others domestically recognize and apply such standards in very real and specific ways. The measure cannot merely be abstract or politically charged discussions that take place in Geneva, far away from indigenous homelands and communities.

Despite the fact that the draft Declaration took over a decade to gain widespread support amongst indigenous peoples, it is safe to say that the document has the universal support of the international indigenous community. The document holds

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66 J. Carrillo, "Disabling Certitudes," supra note 55, where she also states "Yet, whether they are credited or not, indigenous peoples have always insisted upon their right to survive as peoples, as well as upon their right to resist or to participate in the imagining of the nation that now surrounds them."
67 For example, the governments of Mexico, Guatemala, Denmark, Norway, Finland and others have all made constructive contributions to the dialogue and believe that by accommodating indigenous peoples' rights within the human rights framework will assist in the overall enjoyment of such rights and will greatly improve domestic relations as well.
68 Upon the completion of drafting of the Declaration by the WGIP, a number of indigenous organizations were concerned about the text and the fact that it was being rushed through the process. Concern was largely focused upon the issue of self-determination because of the last minute addition of Article 31 concerning self-government and autonomy. Indigenous representatives thought that the intent was to confine self-determination to the operative forms of self-government elaborated upon throughout Articles 31 and the remainder of Part VII of the text. And, all of this came during the penultimate drafting session
commonly shared concepts reflecting views from all parts of the world. The methodology used to create the declaration has made it a common declaration.\textsuperscript{69} As such, this universal instrument will help to inform all other instruments, existing and emerging documents or those yet to come. It should be noted, that we are not really introducing anything new or different. For example, the exercise of the right to self-determination by peoples is one of the oldest concepts in modern international law.\textsuperscript{70} Through the declaration, we are introducing an indigenous cultural context to the right of self-determination. Similar to regional instruments and organizations such as the Arctic Council\textsuperscript{71} and the Inuit Circumpolar Conference\textsuperscript{72}, which are expressions of unique regional conditions, so to the draft Declaration is an expression of an appropriate cultural context for the exercise and enjoyment of collective and individual human rights of indigenous peoples.

Finally, all cultures contribute to the common heritage of humankind.\textsuperscript{73} Therefore, the answer to Mary Ellen Turpel's question concerning the reconciliation of cultural differences in the legal domain must be yes. To conclude the opposite would

\textsuperscript{69} The Indigenous Peoples' Caucus, numerous indigenous Non-Governmental Organizations, indigenous community and regional organization representatives have repeatedly stated that they regard the draft Declaration as a statement of the minimum standards necessary to safeguard the status and rights of indigenous peoples worldwide. For example, dating back to September 1984, the World Council of Indigenous Peoples in Panama declared: "These principles constitute the minimum standards which States shall respect and implement." More recently, at the 1995 session of the Commission working group, the Inuit Circumpolar Conference stated: "It is essential that this working group consider the draft declaration as it reflects minimum standards in order to gain respect for and survival of Indigenous Peoples."


\textsuperscript{72} A. Lynge, Inuit, supra note 6, which chronicles the history and establishment of the ICC.
suggest cultural superiority or imperialism\textsuperscript{74} of one culture over another, which is inconsistent with established principles and peremptory norms\textsuperscript{75} of international law. For states to avoid violation of their own norms and to avoid denial of their own obligations\textsuperscript{76} they must, first and foremost, recognize the legal, political and historical reality of indigenous peoples. This reality includes indigenous legal perspectives, which are manifested on an ongoing basis in their relationships with others, as well as in their values, perspectives, customs, practices, and laws. Once recognized, I believe, we will have begun the path toward reconciliation of cultural differences in the legal domain and elsewhere.

Through greater recognition and sensitivity we could avoid discrimination and double standards, such as the denial of recognition of traditionally oral cultures and their governments, where no written "constitution" exists, in the same way that we accord such recognition to unwritten laws and policies of non-indigenous peoples. As Robert A. Williams writes in the context of achieving peace with others, "literally, we must enter

\textsuperscript{73} In regard to the notions of cultures as the common heritage of humankind, see Declaration of Principles of International Cultural Cooperation, proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization, fourteenth session, 4 November 1966, Art. 1, para. 3.


\textsuperscript{75} In particular, the right of peoples to self-determination, the prohibition of racial discrimination and prohibitions against genocide, torture, slavery, and trading in human beings are all considered by numerous international authorities to be \textit{jus cogens} or peremptory norms. \textit{Jus cogens} is defined as a body of norms or standards "accepted and recognized by the international community of States as a whole ... from which no derogation is permitted and which can be modified only by subsequent norm[s] of general international law having the same character." [See \textit{Vienna Convention on the Law of Treaties}, art. 53.] To be discussed below.

\textsuperscript{76} This is especially true for those states that have agreed to the terms of the United Nations Charter and other United Nations instruments agreeing to uphold their own norms and principles of equality, non-discrimination and the prohibition of racial discrimination.
into their designs, and make our own thoughts known to them." Ultimately, this is what indigenous peoples have been doing throughout the last 20 years of the United Nations standard setting work.

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CHAPTER II

INTERNATIONAL PROCESSES TOWARDS INCLUSION OF INDIGENOUS PEOPLES

A) The United Nations Working Group on Indigenous Populations and the draft Declaration

The preceding chapter briefly discussed how international law has subsumed indigenous peoples through its narrow, state-centered framework. Though international organs began to focus upon the suffering of indigenous peoples and responsive initiatives began surfaced in the 1920's and 1930's, attitudes of superiority remained. This fact is evidenced by the early inter-governmental institutional attention given primarily due to the widespread poverty and other socio-economic indicators concerning the status and conditions of indigenous peoples by the International Labor Organization and the Inter-American Indian Institute of the Organization of American States. Despite what may have been good intentions, both of these entities have been characterized as undertaking

78 See S. Venne, Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights (Penticton, BC: Theytus Books Ltd., 1998) at 32-34, which provides a succinct history of the International Labor Organization’s “Action on Indigenous Peoples,” and comments upon conclusions of a 1930 ILO study by stating: “The ILO expressed the view that the ‘ultimate aim of transforming the presently existing primitive society into a producer and consumer society like that of the white man presupposed the introduction in the colonies of the white man’s methods and means of labour.’ The ILO was supporting the model of colonization. Indigenous Peoples could not be allowed to exist in their territories. The intent was to change Indigenous Peoples and their rights rather than respecting their rights.” In addition, see H. Hannum, “New Developments in Indigenous Rights,” 28 Va. J. Int’l L. 649 (1988) at 657-58, which briefly addresses the early history of the ILO and its activities concerning indigenous peoples.

79 Convention Providing for the Creation of an Inter-American Indian Institute, Nov. 1, 1940, T.S. No. 978, 3 Bevans 661.

extreme integrationist and assimilationist policies towards indigenous peoples. The supposed aim being to safeguard indigenous individuals while bringing them into mainstream society. Even on the domestic front of the United States, this period has been referred to as a period of "allotment and assimilation."  

Prompted by a number of factors, dynamics began to slowly transform such policies away from assimilation and integration of indigenous "objects" toward indigenous peoples becoming "subjects" in the dialogue concerning their status and conditions, and eventually bringing into focus the concept of fundamental human rights.


82 In this context, the term "allotment" means to distribute or apportion land, by lot, to individuals. The United States General Allotment Act of February 8, 1887, 24 Stat. 388 and commonly referred to as "the Dawes Act," transferred title of lands to Indian "heads of household" in direct contradiction to the communal or collective land tenure systems of indigenous peoples in North America. Some of these lands were held in trust until the rightful owners were deemed "competent" to hold them without restrictions. In many cases, "trust" land was leased to developers, and those lands held by Indian families were subject to pressures from settlers seeking to obtain or expand their farms. This act resulted in the loss of Indian ancestral lands and territories and fragmentation of tribal collectivities. See V. Deloria and C.M. Lytle, American Indians, American Justice, supra note 23 at 9, in describing the Allotment and Assimilation period of U.S. policy, the authors write: "It goes without saying that the president generally found it was to the advantage of the Indians to allot their lands. A period of twenty-five years was established during which the Indian owner was expected to learn proper business methods; at the end of this time the land, free of restrictions against sale, was to be delivered to the allotee. With a free and clear title the Indian became a citizen and came under the jurisdiction of the state in which he or she resided. Through this simple formula and rather naive expectation federal officials believed they could solve the problems of the Indians in one generation. Private property, they believed, had mystical magical qualities about it that led people directly to a 'civilized' state."

83 See Editorial page of Indigenous Affairs, Vol. 3/98, which discusses the formation of the International Work Group for Indigenous Affairs as prompted by "the horrifying information" about the "atrocities being carried out against indigenous peoples in Brazil, Colombia, Peru and Venezuela."; Sunday Times, February 23, 1969, published an article written by travel writer Norman Lewis, entitled "Genocide," which documented the violent destruction of Brazil's original inhabitants and is cited as the rallying call to create "an international organization to raise funds and provide practical support for the Amazon Indians." See also D. Sanders, "Indigenous Peoples and Human Rights," paper presented in Kolata, March, 2002, which states: "The specific impetus for seeking international action on indigenous issues came from concerns with Latin America, concerns focused on the isolated indigenous populations in the Amazonian and forest interior areas, largely in Brazil and Paraguay. Concerns with those peoples led, in the late 1960s, to the formation of the pioneering European-based international support groups - Survival International and the International Work Group for Indigenous Affairs."

84 See Anaya, Indigenous Peoples in International Law, supra note 46 at 61, ff. 41, wherein he describes the growing number of educated Indian leaders of the 1960's, the founding of the National Indian Youth
This era was followed by the constantly growing movement of indigenous peoples as direct actors in the human rights discourse of the United Nations and other international fora.

In addition to the changes within the indigenous world and those of regional and international organizations, during the past three decades, there have been significant advances in international law generally, allowing a shift away from positivist, state dominated dialogue toward a more inclusive framework that is much more responsive to the ideals enshrined in the United Nations Charter. For indigenous peoples, this shift has created a space for them to move an agenda of "promoting and encouraging respect for" their human rights within this formal international organization. This groundswell of positive progress has had a contagious effect upon other international and regional, intergovernmental institutions, including the International Labor Organization, the World Council, and the connection between Indian rights and civil rights. Also, the history of the American Indian Movement and the creation of the International Indian Treaty Council are also relevant indications of a growing awareness and empowerment of Indian peoples with regard to their rights and status both domestically and internationally.

In particular, the Purposes and Principles embraced by Article 1 of the UN Charter:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends. (Emphasis added).
Bank, Commission for Sustainable Development, the Organization of American States and numerous others. These more recent initiatives have also expanded the indigenous human rights dialogue and discourse originating in the Americas, to Europe, the Arctic, Asia, the Pacific Basin and Africa. This is attested to by the fact that the numbers of indigenous representatives participating at the United Nations has been steadily growing since the 1970's. In addition to Tribes, First Nations and numerous indigenous organizations and peoples of Latin America, today, we are seeing the regular participation of representatives of the Maori of New Zealand, the Aboriginal and Torres Strait Islanders of Australia, representatives from the Chittagong Hill Tracts, the Cordillero Peoples Alliance of the Philippines, Ainu of Japan, the Masai of Kenya, the various Small Nations of the Russian North, and many others. Though not all indigenous peoples are represented in these dialogues, the fact that every continent and region has at least some representation is quite significant.

Such positive developments have been the result of persistent efforts by indigenous peoples at every stage. Much credit is due to indigenous peoples and their communities and organizations for opening doors that have previously been shut. At the same time, it is essential to honor those others, who with conviction and courage have

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86 The 1977 conference held at the Palais des Nations in Geneva, Switzerland around 150 indigenous peoples represented. The most recent session of the WGIP had just over 900 indigenous participants registered.


88 It is important to note the indigenous leaders who came before us and made direct contributions to the human rights work at the United Nations. Not only Deskaheh and the Maori Chief who visited the League of Nations but also by those who participated in the 1977 Non-Governmental Organization Conference on Racism Against the Indigenous Peoples of the Americas.
helped to push the doors open from the inside and made an important contribution to the much-needed bridge building between indigenous peoples and states.\textsuperscript{89}

It is also important to note that prior to and throughout the establishment of the U.N. Working Group on Indigenous Populations, a number of trans-national indigenous initiatives were simultaneously emerging. In particular, the founding of the World Council of Indigenous Peoples (WCIP),\textsuperscript{90} a worldwide indigenous peoples organization, and the International Indian Treaty Council (IITC)\textsuperscript{91} took place. The WCIP subsequently collapsed in a midst of political divisions and corruption. However, the IITC continues to play an active role in international developments. Also, as mentioned in the introductory chapter, the Inuit of the circumpolar region organized the Inuit Circumpolar Conference in 1977, a pan-Arctic Inuit organization established to respond to a number of threats to their traditional territory.\textsuperscript{92} The ICC has maintained their interest and has played a consistent role in the standard setting and other relevant international initiatives. These international indigenous organizations subsequently gained United Nations Economic and Social Council Non-Governmental Organization (NGO) status. The creation of these various international indigenous-controlled organizations should be recognized as the

\textsuperscript{89} Individuals such as Erica Irene A. Daes and the four other member of the United Nations Working Group on Indigenous Populations, established by United Nations Economic and Social Council (ECOSOC) Resolution 1982/34, May 7, 1981, who provided leadership, advocacy and immeasurable assistance in this effort.


\textsuperscript{91} The following information was downloaded from the http://www.treatycouncil.org: "The IITC was founded in 1974 at a gathering by the American Indian Movement in Standing Rock, South Dakota attended by more than 5000 representatives of 98 Indigenous Nations, which supports grassroots Indigenous struggles through information dissemination, networking, coalition building, technical assistance, organizing and facilitating the effective participation of traditional Peoples in local, regional, national and international fora, events and gatherings. In 1977, the IITC became the first organization of Indigenous Peoples to be reorganized as a Non-Governmental Organization (NGO) with Consultative Status to the United Nations Economic and Social Council."

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trumpeters for the growing trend toward the internationalization of indigenous issues. On numerous domestic fronts, a number of land claim "settlements" and agreements,\(^93\) as well as favorable policy development, litigation and dialogue had also been accomplished by this time.

1. Working Group on Indigenous Populations

At the international level, the more recent history has been challenging yet encouraging. Within the United Nations, which represents the pinnacle of institutions for the promotion of human rights, the first substantive foray into indigenous matters was the initiation of a study on the problem of discrimination against indigenous populations, in order to identify measures and make recommendations for eliminating such discrimination.\(^94\) This voluminous study is commonly referred to as the Martinez Cobo report after the Special Rapporteur appointed by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.\(^95\) Though the report was not yet complete, one important decision stemming from this work was the establishment of the Working Group on Indigenous Populations (hereinafter WGIP) by the Sub-Commission\(^96\) on the Prevention of Discrimination and Protection of Minorities. The mandate of the WGIP was to review the status and conditions of indigenous peoples worldwide and to "give attention to the evolution of standards concerning the rights of indigenous

\(^{92}\) "INUIT," a publication by the North Slope Borough describing the first meeting of the Inuit Circumpolar Conference, 1977. On file with author. See also A. Lynge, \textit{Inuit}, supra note 6.

\(^{93}\) For example, the Alaska Native Claims Settlement Act of 1971 and the James Bay and Northern Quebec Agreement of 1975 had both been drafted and adopted.

\(^{94}\) U.N. Economic and Social Council (ECOSOC) Resolution 1589 (L), 21 May 1971, para. 7.


\(^{96}\) ECOSOC Resolution 1982/34, May 7, 1982.
populations, taking account of both the similarities and differences in the situations and aspirations of indigenous populations throughout the world."

The WGIP is a panel of five independent human experts appointed from its parent body, the Sub-Commission. The members are to serve in their individual capacity and are not to hold any allegiance toward any nation-state member or particular region. The first WGIP session took place in 1982 and they have met annually in late July/early August. One exception was the 1986 cancellation due to lack of funds to support their one-week meeting.

The earliest discussions amongst the five-member WGIP concentrated on the review of developments and the hearing of interventions by indigenous peoples about the conditions within indigenous communities, primarily in the Americas. Due to the urgent and harsh realities facing indigenous peoples, many representatives spoke about the human rights violations taking place within their communities and against their members. Some may recall, for example, a 1985 intervention that was so gruesome that the official U.N. interpreters could not even bear to translate the words of the indigenous speaker, who was subsequently gaveled and admonished by the Chair for accusing a government of brutal killings and removal of indigenous peoples from their homelands.

In response to such interventions, the Chairperson clearly stated that the WGIP was not a body with the capacity to hear human rights "complaints" and indigenous representatives were often interrupted by gavel and requested to proceed with their remarks but to refrain from accusations and in particular, the naming of nation-state perpetrators of genocide and other gross violations of human rights. Such a response was
often frustrating and left some early indigenous participants disillusioned by the capacity and intent of the forum.\textsuperscript{97}

In regard to early nation-state member participation, this too was limited to those states that, first of all, agreed that indigenous "populations" existed within their borders and had had substantive dealings with such peoples. Other states maintained that matters related to indigenous peoples were solely of a domestic nature and that the world community had no standing to determine, define or pronounce upon the status, conditions, let alone the rights, of "their" indigenous populations.\textsuperscript{98}

There was general agreement amongst the WGIP members that their reviews were useful in terms of gaining an understanding of the content and form of indigenous human rights standards. Therefore, the reviews were necessary to achieve their mandate. In 1985, the WGIP agreed to begin the preparation of "a Draft Declaration on Indigenous Rights" for eventual adoption by the United Nations General Assembly.\textsuperscript{99} After brief experience with the formal sessions of the WGIP, it became clear that further indigenous-initiated preparation should take place. In direct response to this need, the World Council of Indigenous Peoples, who held their annual General Assembly in Panama City, Panama in September 1984, made the WGIP draft Declaration a topic of discussion. The assembly participants agreed that indigenous peoples themselves should prepare a declaration for delivery to the WGIP, and a small committee was immediately organized

\textsuperscript{97} See generally the reports of the WGIP contained in UN Documents E/CN 4/Sub 2/1982/33; E/CN 4/Sub2/1983/20; and E/CN4/Sub 2/1984/20.

\textsuperscript{98} In this regard, Japan first insisted that there were no indigenous peoples within Japan, later they acknowledged the Ainu as culturally distinct peoples within Japan. However, the government then stated that matters related to the Ainu were for the government of Japan to deal with and not the international community.

\textsuperscript{99} UN Doc E/CN4/Sub 2/1985/2, Annex II.
to draft such a text. The assembly participants unanimously adopted the seventeen-point text and delivered it to the 1985 session of the WGIP and requested that it be annexed to the official U.N. report of the WGIP. This text makes explicit reference to the right of indigenous peoples to self-determination and mirrors the language found in the International Covenants.

Also, a number of international indigenous non-governmental organizations, which recognized the limitations of the one-week sessions of the WGIP and being cognizant of the fact that they were not member nations of the U.N., determined that it would be constructive to hold "indigenous peoples' preparatory" meetings to introduce newcomers to the process and furthermore, discuss strategy and develop unified positions to influence the WGIP agenda.

The first Indigenous Peoples' Preparatory Meeting took place in 1985 and was hosted by a number of international indigenous Non-Governmental Organizations: the Indian Law Resource Center, the National Aboriginal and Islanders Legal Service, the Inuit Circumpolar Conference, the National Indian Youth Council, the Four Directions Council, and the International Indian Treaty Council. These meetings proved to be a tactical success in that the unanimous positions amongst indigenous peoples influenced

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100 On behalf of the ICC, the author attended the WCIP meeting, in order to conduct fact-finding to determine if the ICC should join the WCIP. I subsequently became a member of the drafting committee formed and played an active role in the WCIP 1984 declaration drafting.
102 Principle 1 of the text reads: "All indigenous peoples have the right of self-determination. By virtue of this right they may freely determine their political status and freely pursue their economic, social, religious and cultural development."
103 The language is borrowed almost verbatim from Article 1(1) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.
104 Coulter, "Les Indiens," supra note 41.
the course of action of the WGIP members and had a direct bearing upon their decision-making in terms of their scope of work and future agenda setting.

2. The draft Declaration

At the 1985 indigenous peoples' preparatory meeting, leaders determined to adopt a Declaration of Principles on the Rights of Indigenous Peoples as another method to influence the work and agenda of the WGIP. The twenty-two-point declaration, like that of the WCIP, emphasized the importance of the right of self-determination. The document was also more informed by other human rights instruments. The indigenous text was annexed to the report of the WGIP, which decided that year to begin the drafting process albeit quite differently from the methodology indigenous peoples had envisioned.

Because of the strong and unified positions of indigenous peoples, on a number of occasions, the WGIP Chairperson had to carefully and diplomatically encourage the ongoing participation of states and indigenous peoples. In this way, the standard setting

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105 On behalf of the ICC, I participated in both the preparatory meeting and chaired a large number of the indigenous peoples' sessions that led to the declaration text adopted by all indigenous representatives and organizations present.
107 Paragraph 2 reads: "All indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine their political status, freely pursue their own economic, social, religious and cultural development, and determine their own membership and/or citizenship, without external interference."
108 Examples of this include reference to "permanent control" and enjoyment of renewable and non-renewable resources, right to participate in the life of the state if they so desire, reference to indigenous peoples as subjects of international law, treaties and other agreements being accorded the same status as other treaties in international law, and specific reference to the International Bill of Human Rights and other United Nations instruments.
109 Though indigenous peoples were active and direct participants in the WGIP plenary sessions, the WGIP member-led drafting of text was done behind closed doors. To date, the internal negotiation that may or may not have taken place amongst the five members has not been shared publicly. Hence, it is difficult to
process could continue, despite the regressive positions of the few active states present. The first draft principles tabled at the WGIP contained only six principles, which were considered by its Chairperson to be "non-contentious" and therefore palatable to state participants. Needless to say, indigenous peoples criticized the cautious approach of the WGIP members\(^\text{110}\) and reiterated the unified position of indigenous representatives: the foundational principle of the right of indigenous peoples to self-determination must be dealt with squarely by the WGIP in order to provide a suitable context for the consideration of all other indigenous human rights.

The period from 1988 to 1993 is the time frame wherein the text of the draft Declaration really began to take shape. Informed readers will note that this is approximately the same period in which the International Labor Organization (ILO) decided to revise the 1957 Convention on Indigenous and Tribal Populations (No. 107), to be discussed below. Following the revision of Convention No. 107, the painful experience that indigenous peoples had at the ILO was a constant undercurrent in the debate on the right to self-determination and the principles concerning lands, territories and resources in the WGIP draft Declaration.

In 1990 and 1991, a series of informal drafting groups were organized, which included the WGIP members, and indigenous and state government representatives. This was a critical turning point for indigenous peoples in terms of the advancement of the paramount right of self-determination and was primarily due to the tripartite dialogue that took place in these informal sessions. In particular, the informal drafting group led by

\(^{110}\) guess what happened both procedurally and substantively between the WGIP members and their drafting process. Furthermore, the level of state or Secretariat involvement is unknown.
then WGIP member Danilo Turk, focused on self-determination and the changing interpretations of the right against the backdrop of the break up of Yugoslavia, the homeland of Mr. Turk. This group also included indigenous scholar, S. James Anaya, who made a convincing contribution to the dialogue by elaborating upon the exercise of self-determination by indigenous peoples.

In addition, the Grand Council of the Crees and other First Nation representatives were in the midst of the growing Canadian national debate over the Charlottetown Accord. This debate propelled Aboriginal leaders and organizations to the forefront of the "nation-building" effort, which necessitated the sharpening of indigenous arguments, in a constitutional framework, to support the distinct rights of Aboriginal peoples in the face of demands of unfettered exercise of the right to self-determination by the Francophone population of Quebec. The Crees and others echoed their arguments at the United Nations, furthering the exploration of the right to self-determination within the 1991 WGIP informal drafting group. The persistent efforts by indigenous peoples culminated in the inclusion of explicit reference to the right of self-determination, as well as a number of references to the principle of the right of self-determination in the Preamble of the draft Declaration.

111 The Grand Council of the Cree of Eeyou Astchee (Quebec), Canada, commissioned a legal brief, which they later published as Sovereign Injustice[:] Forcible Inclusion of the James Bay Crees and Cree Territory Into a Sovereign Quebec (Nemaska, Eeyou Astchee: Grand Council of the Crees, 1992). The text has been cited by academics and scholars worldwide and has had a tremendous impact on both international and domestic dialogue concerning the indigenous perspective of the right to self-determination.
In 1993, the WGIP completed its work and transmitted the text for approval to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1994. The Sub-Commission adopted the draft Declaration by passage of Sub-Commission Resolution 1994/45. The full text of the draft Declaration is set out in Appendix A of this thesis. The document is divided into a Preamble and eight Parts that cover general principles; life, integrity and security; cultural rights; education, information, and labor rights; development, decision making, and economic and social rights; lands, territories and resources; self-determination and indigenous institutions; and implementation.

3. The Commission on Human Rights working group on the draft Declaration

In 1994, the document was then delivered to the Commission on Human Rights, who adopted Resolution 1995/32 wherein they decided to "establish an open-ended inter-sessional working group... with the sole purpose of elaborating a Draft Declaration, considering the draft contained in the annex to resolution 1994/45 of 26 August 1994 of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, entitled draft 'United Nations declaration on the rights of Indigenous peoples' for consideration and adoption by the General Assembly within the International Decade of the World's Indigenous Peoples."\textsuperscript{114}

\textsuperscript{113} UN Doc E/CN4/Sub 2/1994/2/Add 1
At the time, many indigenous peoples and organizations expressed concern over the language adopted by the WGIP\textsuperscript{115} and criticized the "closed door" work of its members, especially in light of their last minute inclusion of Article 31 addressing autonomy and self-government. This article was immediately interpreted by indigenous peoples as potentially capping the self-determination text of Article 3 thereby freezing indigenous rights. However, the draft Declaration has since been heralded by indigenous peoples as a statement of the minimum standards necessary to safeguard the rights and status of indigenous peoples, nations and communities. Others were more focused upon the future path of the draft Declaration, knowing that it had to climb the ladder of the United Nations.\textsuperscript{116} In hindsight, the success within the WGIP in both the procedural aspects of the work, as well as gaining specific language on the right of self-determination emboldened indigenous peoples in terms of setting the bar quite high for the future challenges that the text would face.

There were numerous important spin off effects generated by the WGIP drafting exercise. The unifying effect upon indigenous peoples, the organizing of the preparatory meetings, and the early signs of cracks in the U.N. rules of procedure concerning participation are among a few of the significant developments prompted by the process. For example, on a number of occasions indigenous representatives spoke in their own

\textsuperscript{115}For example, the statement of the National Congress of American Indians and the Indian Law Resource Center, Twelfth Session of the WGIP, July 26, 1994: "From our own experience in this process, we know that there are provisions that do not fully accommodate the aspirations of indigenous peoples everywhere. We know that the diverse conditions of indigenous peoples have not been completely responded to by the Declaration."

\textsuperscript{116}Statement of the Inuit Circumpolar Conference, Twelfth Session of the WGIP, July 25, 1994: "The need to preserve the integrity of the entire text is going to be a very important issue when the member States start the process of redrafting the various provisions. Serious consideration will have to be given by Indigenous Peoples whether the Draft Declaration can be supported after the governments have completed their analysis and made revisions."
languages, offered prayers or in the case of the Maori delegation, broke out in song, to be immediately gavelled by Chairperson Daes, who would state that the United Nations was a legal and political organ and not a place for worship or to show favoritism to one culture over another. However, by 1994, in the days leading up to the adoption of the draft Declaration, WGIP members, indigenous peoples, and even state government representatives were not only observing prayers in indigenous languages but they were also holding hands, chanting and dancing in a large circle around the plenary hall. One of the more important results is the fact that the most active and influential WGIP members have become indigenous rights "advocates," who appear to feel personally charged to defend the text they drafted and to lead the agenda for indigenous peoples within the U.N. system. 117

The early criticism of the WGIP, which was and continues to be a largely democratic forum in terms of open and direct participation of indigenous peoples, 118 may be somewhat unfair, especially in light of its dramatic contrast to the present circumstances that indigenous peoples are encountering in the context of the draft Declaration in the CHRWG.

One example of the WGIP's more democratic leanings pertains to indigenous participation: in the CHRWG, governments have the opportunity to review and approve the applications and credentials for indigenous organizations that seek accreditation to

117 Namely former Chairperson Daes and Miguel Alfonso Martinez, who have both actively pursued a number of issues within the human rights arm of the United Nations, ranging from resolutions that have arisen in the Commission on Human Rights to the Permanent Forum, to be discussed.
118 I use the term "democratic" in the context of social equality and respect for the individual. There was equal participation of indigenous peoples within the WGIP forum, with every indigenous representative and organization having the ability to participate through interventions, state lobbying, and so forth. Also,
participate under Commission Resolution 1995/32. In contrast, the WGIP has been open to all indigenous peoples, organizations, leaders and representatives and the members have been much more willing to discuss topics of relevance to its indigenous constituency.

The CHRWG has been meeting annually since 1995, with the exception of 2001, when the September 11th terrorists attacks delayed the session until February 2002. Commission Resolution 1995/32 allows those indigenous organizations without ECOSOC NGO status to apply for accreditation to attend the Commission working group sessions. The sessions attract most of the CHR members with significant numbers of indigenous peoples living within their borders and those who have a vested interest in the standard setting work. The CHRWG annually elects a Chairperson. Since its inception, the meetings have been chaired by a Latin American state representative: first Jose Urrutia of Peru, who was followed by his protégé and fellow countryman, Luis Enrique Chavez. The former was minimally effective but not as engaged as the present Chair, who has taken to summing up the sessions and offering his own views on the procedural and substantive matters before the CHRWG.119

Procedural and substantive issues plague the CHRWG, with the former drawing much debate throughout the course of the working group’s sessions, prompting walkouts by indigenous peoples, as well as closed-door meetings of government representatives intent on re-drafting the text. In regard to substantive debate during these sessions, the indigenous peoples, though not voting "members" of the UN were the "majority" in this forum in terms of ability to influence the WGIP agenda, as well as the content and form of the draft Declaration.
agenda is largely dictated by what states seek to discuss rather than what is suggested by indigenous peoples as urgent or fundamental matters. Similar to the substantive problems related to the various standard setting initiatives, which will be discussed fully below, there continue to be problems with the procedural aspects of the U.N. Declaration work as well (in particular, the participation of indigenous peoples).

At the U.N., one of the first hurdles to clear was to increase indigenous participation in Commission level discussions beyond ECOSOC non-governmental organizations. This was accomplished in Commission Resolution 1995/32, which adopted procedures for application to the Coordinator of the International Decade (or more specifically the staff person responsible at the Office of the High Commissioner for Human Rights for indigenous affairs). The procedures dictate that the Coordinator must contact the respective State concerned for review of the application, as well as the ECOSOC’s Committee on Non-Governmental Organizations for its decision. In this way, states are allowed to review and approve or disapprove of participation of individual indigenous peoples’ organizations. Thus far, there has been one case where a government has attempted to bar the participation of an organization. However, this organization was able to gain participation through an ECOSOC approved NGO.

A second procedural matter that continues to hinder indigenous involvement in the work is the development of the agenda and organization of work, which has been inconsistent in all sessions of the CHRWG. At every session this matter has prompted an opening debate about the "modalities of participation" of indigenous peoples, with the

\[119\] For example, see draft report of the February 2002 CHRWG session, UN Document E/CN.4/2002/., dated February 15, 2002, which contains a number of paragraphs reflecting the Chair’s summary of debate.
pivotal point being whether or not indigenous peoples participate effectively in the
decision making of the body. Though voting is highly unusual within the Commission
forum, which prefers decision making by consensus, indigenous peoples to some extent
have a veto over the outcome of the debates by virtue of their ability to voice their
concerns and objections, and stall "consensus." Indigenous peoples have capitalized
upon this leverage in order to increase their participation and influence the organization
of work. To date, there has been no formalization of the role, procedures or "modalities
of participation" of indigenous peoples and this may be both a blessing or later become a
disaster.

There is also difficulty in building a record of the debate at the CHRWG sessions
due to the fact that so many different types of sessions take place. For example, there are
formal plenary sessions used to adopt the agenda, appoint the Chairperson and adopt the
working group report. And, the informal plenary sessions to engage in general debate of
overarching issues and specific discussion of the draft Declaration articles, where no
formal record exists. Later, because very little constructive dialogue was taking place in
the informal sessions, the idea of "informal informal" meetings was introduced. The
purpose of such sessions was to allow for state government representatives and
indigenous peoples to speak frankly about their views and positions, and to elaborate or
expand upon them informally, with no record of the debate and no attribution of
government positions. These were useful to the extent that government representatives
were willing to speak freely, not to mention the need to be prepared to do so. The
CHRWG reports are hastily prepared, with no attribution of positions and they are not an

on procedural and substantive matters.
official record of the informal plenary sessions. Furthermore, there is no official record of any of the "informal informal" sessions.

In addition to the plenary meetings, both government only and indigenous only delegations have been holding closed door sessions outside of the plenary hall. It is a known fact that the government only sessions have been focused upon re-drafting the articles of the Declaration and such sessions have generated alternate text, which have been subsequently delivered to the Chairperson and eventually annexed to the report. This action raised numerous objections from indigenous peoples. However, the Chair has facilitated the procedure rather than make any effort to bring all dialogue back to the plenary hall. More recently, the government of Canada has been facilitating and paying for inter-sessional government-only gatherings to wholly re-draft the text. Through the leak of a document from a government consultation held in Ottawa in October 2001, indigenous peoples learned the extent of the government re-drafting efforts and moved to head off any effort to legitimize the document through its annexation to the CHRWG report at this past February 2002 session. Not all governments concerned participated in the inter-governmental, inter-sessional meeting and therefore, they, too, objected to its use at the CHRWG. Following additional government only sessions, the government document became obsolete during the session.

The indigenous side of the table is fraught with inconsistency as well. Divergent views remain and little is done to carefully analyze positions, develop strategy and tactics to advance the agenda of safeguarding the draft Declaration, and remain unified throughout the course of the two-week sessions. Though indigenous peoples are afforded the opportunity to influence the organization of work and the outcome of the draft report,
this is done somewhat haphazardly. There is no formal procedure of selection of indigenous spokespersons, chairpersons, report committee selection, etc.

In summary, it is difficult to analyze indigenous peoples' participation or for that matter state government participation in the process as both are so inconsistent. Both procedural and substantive matters are compounded by the fact that every session attracts different indigenous participants and representatives, as well as different diplomats posted to the Geneva-based state missions. Each session must be reviewed and analyzed to understand the dynamics of these very unique gatherings. One positive conclusion that can be made, however, is the fact that indigenous peoples have greatly influenced how the Commission working group operates. The presence of indigenous peoples in the room itself cannot be underestimated. The only other certainty is the fact that no other United Nations Commission-level working group operates in the fashion that the CHRWG on the draft Declaration operates. This can only be attributed to the fact that indigenous peoples have forced open the doors of the United Nations and have been able to constructively change the dynamics of their participation.

Since 1995, it has become clear that this is the most critical stage for indigenous human rights standard-setting work due to the highly political nature of the Commission and the increased level of state control over the forum. To date, only two of the 45 articles have been adopted: Article 5 which states "Every Indigenous individual has the right to a nationality" and Article 43 which provides "All the rights and freedoms recognized herein are equally guaranteed to male and female Indigenous individuals." The work before the CHR is where indigenous peoples are facing the greatest test in advancing indigenous legal perspectives, and reconciling cultural differences. More in-
depth analysis of a number of the substantive provisions, which illustrate such difficulties, will be discussed below.

B) Other United Nations Initiatives

Following the standard setting work, a wide range of other initiatives concerning indigenous peoples has been launched by the United Nations. To a large degree, these activities were triggered by the WGIP work and the review of the conditions of indigenous peoples. In 1989 the United Nations hosted a seminar on the "Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States" in Geneva, Switzerland. In an unprecedented move, Ted Moses (Ambassador of the Grand Council of the Cree) was elected as the Rapporteur for the gathering, which was chaired by Ndary Toure of Senegal. The report and the meeting itself, helped to propel the dialogue and debate within the WGIP on the draft Declaration. In particular, the Conclusions of the Seminar address the "principle" of self-determination, rather than the right to self-determination. Such a reference was intended to make the concept more palatable to states in the context of the draft Declaration. To what degree such a characterization of the right had any effect upon states remains difficult to quantify. Unfortunately, many of the seminar Recommendations remain outstanding. However, the fact that an indigenous person was elected to report on the session is still significant in the course of United Nations gatherings.

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121 This is another example of changes in procedural aspects and rules of the United Nations that a growing number of participants in other U.N. fora and working groups are commenting upon.
In 1991, another United Nations Meeting of Experts took place in Nuuk, Greenland, to discuss Self-Government of Indigenous Peoples. Here again, the meeting contributed to the larger discussion of self-determination and self-government within the draft Declaration dialogue. The experts gathered in Nuuk concluded that "indigenous peoples are historically self-governing, with their own languages and cultures, laws and traditions, and that self-determination is a precondition for freedom, justice and peace, both within States and in the international community." And, in 1992 the preparations for the World Conference on Environment and Development prompted a gathering on "the role of indigenous peoples in the practice of sustainable development" focusing upon self-development by indigenous peoples consistent with their concepts of sustainable, equitable development, while enjoying their right to own, control and utilize their own resources and institutions in the context of the right to development.

Then in 1996, the Government of Canada hosted an Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims in Whitehorse. The conclusions and recommendations emphasized the linkage between indigenous rights to lands, the right to development and cultural survival. In addition, indigenous representatives underscored the need for direct, full and meaningful participation in

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123 This seminar was chaired by the former Premier of Greenland, Mr. Jonathan Motzfeldt. Ms. Maria Lorenza Dalupan from the Philippines served as Rapporteur.
124 This United Nations Technical Conference was chaired by José Bengoa of Chile and Ingmar Egede, a representative of the Inuit Circumpolar Conference, served as Rapporteur.
125 The seminar was chaired by David Keenan, of the Yukon Council of First Nations, and the Rapporteur was the Chilean government representative, José Aylwin Oyarzun.
decision-making processes not only in the context of co-management regimes but throughout all decision-making, which may affect them and their homelands.

Equally as significant and often underutilized are the various studies that have been completed by the members of the WGIP. Specifically, the United Nations "Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations" completed by WGIP member and Special Rapporteur, Miguel Alfonso Martinez, in 1999. The seed for the study was planted in the Sub-Commission authorized Martinez Cobo study (discussed earlier) in the form of a recommendation for such a study due to the "paramount importance for indigenous peoples and nations in various countries and regions of the world of the treaties concluded with present nation-states or with countries acting as colonial administering powers at the time in question." 

It is significant that the United Nations felt that the matter of treaty-making powers and capacity of indigenous peoples, as well as the solemn treaty obligations and the substance of treaties between indigenous peoples and states, were worthy of in-depth study by the UN. The study surveyed the origins of treating with indigenous peoples in the context of European expansion, the contemporary status of such treaties, as well as other "constructive arrangements." In addition, Miguel Alfonso Martinez, Special Rapporteur, highlighted "situations lacking specific bilateral legal instruments," and finally the use of such instruments as a guide for future relationships between indigenous peoples and states," which suggests that there is much unfinished business concerning the

127 UN Document E/CN.R/Sub.2/199/20, paragraph 1.
legal and political relations between these two distinct communities. For those First Nations, Tribes, indigenous peoples and communities that concluded treaties with nation-States, this work was important in advancing and validating, on the international plane, the status of their respective treaties. Many of them provided the under-funded Special Rapporteur with substantial support, resources, and documentation.\textsuperscript{128}

In the wake of the release of the final report, this work came under attack due to the highly political position taken by Miguel Alfonso Martinez on the "definition" of "indigenous peoples." Unfortunately, his views on the topic were interpreted as an exclusion of indigenous peoples in Asia and Africa. The swift response of a large number of indigenous peoples was bordering on complete denunciation of the study, leaving those few indigenous peoples who had concluded treaties, embracing the report.

In June 1997, Special Rapporteur Erica-Irene A. Daes was appointed to conduct a study on "Indigenous Peoples and Their Relationship to Land," which was completed in 2000.\textsuperscript{129} This report surveys the distinct relationship that indigenous peoples have to their lands, territories and resources, and the history of dispossession. The report also outlines a framework for analyzing contemporary problems regarding indigenous land rights, and offers various conclusions and recommendations to resolve indigenous land issues and problems. The report is especially useful in identifying the range of discriminatory policies applied to indigenous peoples in order to legitimize the

\textsuperscript{128} UN Document E/CN.4/Sub.2/1999/20, paragraphs 29-32 list a wide range of "indigenous organizations and institutional bodies," which all contributed to the substance and completion of the study.

dispossession of their lands. Again, such an analysis was intended to further the discussion of these crucial matters within the context of the draft Declaration dialogue. Yet, at the same time, the report has been utilized in a number of other human rights and domestic contexts as well.\footnote{For example, the complaints and briefs brought before the Inter-American Commission on Human Rights, Organization of American States, by the Awas Tingni community in Nicaragua. On file with author.}

Other complements to the ongoing debate concerning the draft Declaration are the activities of the WGIP focusing upon particular issues, such as the "Report of the seminar on the draft principles and guidelines for the protection of the heritage of indigenous people," which was concluded in 2000. This work resulted in a set of principles and guidelines for the protection of the heritage of indigenous peoples, which has been considered preliminarily by the World Intellectual Property Organizations (WIPO), who feels that it is the appropriate agency within the United Nations to deal with such matters. Furthermore, the United Nations General Assembly proclaimed 1993 the International Year of the World’s Indigenous People.\footnote{General Assembly Resolution 45/164 of December 18, 1990, which states that "one day of every year shall be observed as the "International Day of Indigenous People" (para. 3).} Also, in 1993, the World Conference on Human Rights, held in Vienna, Austria, attracted numerous indigenous peoples’ representatives, who were able to contribute to the Declaration and Programme of Action, which specifically recognized the "inherent dignity and the unique contribution of indigenous people to the development and plurality of society;" and reaffirmed "the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development." The conference also called upon States to "take concerted positive steps to ensure respect for all human rights
and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization.\textsuperscript{132} The Conference recommended that an the International Decade of the World's Indigenous People be declared, wherein the United Nations specialized agencies and organs are to devote resources and energy to indigenous peoples issues and concerns under the banner of "partnership" between governments and indigenous peoples.\textsuperscript{133}

However, likely the most dramatic decision made in Vienna was to urge the United Nations to consider the establishment of a Permanent Forum on Indigenous Issues. The idea stemmed from Conference remarks made by Henriette Rasmussen, an Inuit woman from Greenland. Ms. Rasmussen also participated in the Nuuk Seminar on Indigenous Self-Government (and after some time at the International Labor Organization), where she shared her frustrations concerning the need for a permanent mechanism within the United Nations to deal with indigenous peoples' rights, issues and concerns. The idea was latched onto by the Government of Denmark, who worked in close cooperation with the Greenland Home Rule Government and the Danish-based support group IWGIA, to realize the establishment of the Permanent Forum.\textsuperscript{134}

In order to develop and crystallize the idea, a number of meetings and two working group sessions on the particular topic of a Permanent Forum were organized. In

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\textsuperscript{132} The Vienna Declaration and Programme of Action, [Part I, para. 20]. The conference also called upon States to "take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization."
\textsuperscript{133} General Assembly Resolution 48/163 of December 21, 1993. The decade runs from 1995-2004, and its activities are, to some extent supported by the Voluntary Fund for the International Decade of the World's Indigenous People, established by the General Assembly.
\end{flushleft}
July 2000, a General Assembly resolution established the forum as a subsidiary organ of the Economic and Social Council, with sixteen representatives: eight appointed by Governments and "eight members to be appointed by the President of the Council following consultations with the Bureau and the regional groups through their coordinators, on the basis of broad consultations with indigenous organizations...." \(^{135}\)

The General Assembly resolution broadly defines the purpose of the Permanent Forum by stating that it "shall serve as an advisory body to the Council with a mandate to discuss indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights." \(^{136}\) In this regard, the Permanent Forum will operate within the established rules of procedure for subsidiary organs of the Council, and like the WGIP before it, the Permanent Forum will also serve as a repository of information from the various U.N. agencies and organs. \(^{137}\) It is difficult to know the present level of government or U.N. agency political will and commitment to the Forum from the rocky road traveled to establish it. However, the resolution makes clear that the new entity will be funded out of the "regular budget of the United Nations and its specialized agencies and through such voluntary contributions as may be donated." Though the members of the Permanent Forum have been elected, \(^{138}\)


\(^{135}\) Ibid.

\(^{136}\) Ibid.

\(^{137}\) For example, in preparation for its first public meeting, the following agencies furnished updates and made progress reports concerning their various activities relating to indigenous peoples: FAO, UNDP, UNITAR, UN-HABITAT, ILO, UNEP, CBD, World Bank, WHO, UNFPA, UNICEF, UNESCO, CHR, and the Pan American Health Organization.

\(^{138}\) The following is excerpted from the ECOCOC decision: In accordance with its resolution 2000/22 and decision 2001/316, the Council elected the following members by acclamation to the newly established Forum for a three-year term beginning on 1 January 2002; Njuma Ekudanyayo (Democratic Republic of the Congo), Yuji Iwasawa (Japan) and Yuri Alexandrovitch Boitchenko (Russian Federation). The Council
there are many unanswered questions concerning these uncharted waters.\textsuperscript{139} The high level of indigenous expectations for the Forum, lukewarm nation-State member support, and the lack of financial resources do not bode well for a productive first term for the new body. The first public meeting of the Permanent Forum took place from May 13 – 24, 2002 at the United Nations in New York, with Ole Maaga Henrik, a Sami representative, being elected as the first Chairperson of the Forum.\textsuperscript{140} The members were inundated with proposals from indigenous peoples\textsuperscript{141} but were primarily consumed with

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\textsuperscript{139} For example, in February, 2002, I had the opportunity to meet with three of the indigenous members of the Permanent Forum in Geneva. At this meeting, it was quite clear that each of them had different perceptions about what should be done at the first meeting, selection of chairpersons, agenda, time frame, etc. It was also unclear as to whether or not the Permanent Forum had sufficient funding to carry out their vague mandate.

\textsuperscript{140} In addition, Parshuram Tamang, Mililani Trask, Antonio Jacanamijoy, and Njuma Ekundanayo were elected Vice-Chairpersons, and Wilton Littlechild was elected Rapporteur.

\textsuperscript{141} Indigenous organizations such as the ICC proposed the establishment of a permanent and separate Secretariat for the Forum, a World Conference of Indigenous Peoples to be scheduled at the conclusion of the International Decade, the declaration of a second Decade, and the adoption of the draft Declaration on the Rights of Indigenous Peoples by 2004 provided that it was acceptable to indigenous peoples.
the fact that they have insufficient funds to operate on an annual basis and no concrete operational guidelines, nor a firm work plan.142

Furthermore, indigenous peoples (and the WGIP members) have expressed concern over the probability of phasing out of the WGIP due to the creation of the Permanent Forum. There are a number of arguments for and against such action. On the indigenous side of the table, many feel that the WGIP should remain, as it has been constructive in focusing on critical indigenous issues. Consistent with expectations of indigenous peoples, the Forum was understood to be a "system-wide" mechanism to saturate or infuse all of the relevant United Nations agencies and organs with indigenous concerns and perspectives, including matters related to peace and security; environment and development; as well as indigenous human rights. The WGIP has, until recently, only had responsibility for the latter. State government representatives have asserted that the WGIP’s continuation would be a budgetary drain and a duplication of U.N. initiatives. Possibly, the upcoming annual session of the WGIP (late July-early August) will reveal the future path of the WGIP.

Finally, the Commission on Human Rights, at their 57th Session in 2001, adopted a resolution establishing a "Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people," with the following functions:

"(a) To gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous people themselves and their communities and organizations, on violations of their human rights and fundamental freedoms;

142 The members were focused on the development of guidelines under which to operate and a realizable work plan for their coming three year term. Neither of which were concluded by the end of their first public meeting on May 24, 2002.
(b) To formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous people;

(c) To work in close relation with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights and of the Sub-Commission on the Promotion and Protection of Human Rights, taking into account the request of the Commission contained in resolution 1993/30; "

Despite the unhelpful role and resistance of the U.S. in nearly every debate concerning indigenous peoples, it is remarkable that they: 1) supported the idea of a Commission level Rapporteur; and 2) supported the candidacy of S. James Anaya, an indigenous person, scholar and long-time advocate of indigenous rights, for the Special Rapporteur position. A number of other individuals were identified and nominated, which made for an interesting dialogue on the question of the appointment of an indigenous versus a non-indigenous person, indicative of the fact that the present milieu of the United Nations represents both old and new world ideals about the status and place of indigenous peoples.

The recent heated campaign concluded with the appointment of Rodolfo Stavenhagen, a scholar with a history of work concerning indigenous peoples in Mexico and other parts of Latin America.\textsuperscript{143} The Special Rapporteur has completed his first report to the Commission on Human Rights, which provides a concise "panorama of the main human rights issues besetting indigenous people at the present time" and sets "out a framework and agenda for his activities in the future."\textsuperscript{144} As a newly appointed Rapporteur, it is interesting to note that he has offered commentary on a number of the

\textsuperscript{143} R. Stavenhagen has published widely in Spanish and has served as a Researcher at the El Colegio de Mexico, advisor/consultant to the Inter-American Indian Institute of the Organization of American States, and other institutions.
difficult issues that have surfaced in the draft Declaration debate. For example,
Stavenhagen writes in his first report that "[w]hile debates continue over questions of a
definition of indigenous people, the Special Rapporteur notes that the right of indigenous
persons and peoples to self-definition is the most accepted form of identification
consistent with a human rights approach."\textsuperscript{145} There is no doubt that the Special
Rapporteur's work will be closely monitored by both indigenous peoples and
governments.

Though indigenous peoples may be at the lowest rung of the ladder in
socioeconomic status and politically marginalized within most nation-states, in a
relatively short period of time at the United Nations, indigenous peoples have gained a
voice within the UN system: from a low-level working group to the establishment of the
Economic and Social Council level Permanent Forum that includes eight indigenous
members (who serve with equal status with eight state elected members). All of these
activities have taken place in the span of only two generations. The foregoing illustrates
the fact that albeit slow, there have been many constructive and substantive activities
specifically focused upon the plight of indigenous peoples within the United Nations. Let
us now turn our attention to other important international developments that help to
illustrate this growing international trend.

\textsuperscript{145} Ibid, 6\textsuperscript{th} paragraph of Executive Summary. The Special Rapporteur is making reference to various
cultural criteria for consideration of a "peoples," and the element of self-identification in the context of the
right to self-determination, as well as the need for recognition of the value and diversity of distinct
identities, cultures and social organization. Furthermore, the Special Rapporteur has noted that despite
absence of a definition this "should not prevent constructive action in the promotion and protection of the
human rights of indigenous peoples."
C) Growing International Trend to Accommodate Indigenous Status

1) Environment and Development

(a) World Bank

In addition to the human rights standard setting activities, diverse international standards are being developed in relation to indigenous peoples and the environment in a number of international instruments. Some of the most significant (yet still inadequate) are those policies being adopted by development banks. The World Bank expressed an early concern for the protection of "small, isolated tribal societies (many of them forest-dwelling tribes in the lowlands of South American)" from the "negative impacts of development" conducted by its Borrowers, and urged the active participation of "indigenous peoples in the development process." This action was taken primarily as the result of the early fieldwork conducted by Robert Goodland of the Environmental Unit of the Bank. Goodland, throughout the course of his environmental assessment work, was motivated by personal views about the ethical position of the Banks' actions in development projects, which were adversely impacting indigenous peoples in Brazil. He subsequently published *Amazon Jungle: Green Hell to Red Desert*, which examines some of these issues more comprehensively.

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In February 1982, the World Bank adopted *Operational Manual Statement 2.34* (OMS 2.34) entitled "Tribal Peoples in Bank-Financed Projects." Unfortunately, this policy was oriented towards integration and state measures to "effectively safeguard the integrity and well-being of the tribal people" resulting in the treatment of indigenous peoples as objects rather than subjects of the Statement. The *OMS 2.34* definition of "tribal peoples" is based on very western standards of quality of life. In part, reference is made to being "unacculturated" or "partially acculturated" in the dominant society and being "non-monetized, or only partially monetized." However, the definition did accurately characterize indigenous peoples by recognizing cultural differences and the fact that indigenous peoples are ethnically and linguistically distinct from the national society, identifying with one particular territory, and having an economy dependent upon the land and resources. The World Bank’s definition makes no specific reference to any measure of historical contact with the dominant society with exception of distinction of category of indigenous "property rights."

Although the policy of the *OMS 2.34* was inadequate and somewhat behind the international trend towards accommodating indigenous rights and status, it does represent a minimal effort by a financial institution to establish guidelines to curb the adverse effects of development projects affecting indigenous communities. This development was followed by an implementation review conducted by the Environmental and Scientific Affairs Office of the Bank, which consisted of an appraisal of Bank-financed

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151 *OMS 2.34,* paragraph 2.
projects affecting indigenous communities and homelands. The review made clear that the OMS 2.34 was inadequate in terms of overall implementation of the policy statement.

Then in 1991, the World Bank adopted Operational Directive 4.20 (OD 4.20)\textsuperscript{152} concerning indigenous rights and interests.\textsuperscript{153} Some claim that this policy change was largely the result of actions by tribal peoples in India in their opposition to the Narmada River dam project.\textsuperscript{154} The subsequent report \textit{Sardar Sarovar: The Report of the Independent Review},\textsuperscript{155} written by Co-Commissioners Bradford Morse and Thomas R. Berger, criticized the Bank and the Government of India for inadequately addressing issues relating to resettlement, rehabilitation and environmental protection in the context of the rights and interests of the tribal peoples concerned. Aware of developments in the area of indigenous human rights standards, Commissioners Morse and Berger cited relevant provisions of the \textit{outdated} ILO Convention No. 107, which India ratified in 1958.

\textsuperscript{152} \textit{World Bank Operational Directive 4.20, Indigenous Peoples, September 17, 1991.}

\textsuperscript{153} Paragraph 6 of O.D. 4.20 provides: The Bank's broad objective towards indigenous people, as for all the people in its member countries, is to ensure that the development process fosters full respect for their dignity, human rights, and cultural uniqueness.... And para 8: The Bank's policy is that the strategy for addressing the issues pertaining to indigenous peoples must be based on the informed participation of indigenous peoples themselves."

\textsuperscript{154} See E.K. MacDonald, "Playing by the Rules: The World Bank's Failure to Adhere to Policy in the Funding of Large-Scale Hydropower Projects," 1011 Environmental Law Fall 2001, who writes: "The Sardar Sarovar project on the Narmada River in India became a catalyst for the reform of World Bank policy. Although not among the worst Bank-funded hydropower project, the Sardar Sarovar project gained attention because of the "remarkable alliance of determined villagers, local activists, and international groups that fought it." In response to the public opposition of numerous environmental and human rights groups, the Bank agreed to commission an independent review of the Sardar Sarovar project, asking Bradford Morse to lead the review team. For the first time, the Bank requested an outside critique of an entire Bank project."

The OD 4.20 does exhibit a slight progression from the integrationist language of OMS 2.34 by requiring that "the development process fosters full respect for their dignity, human rights, and cultural uniqueness" and goes further to address the need for "informed participation of the indigenous peoples themselves," which is a departure from previous attitudes of the Bank and governments. Also, OD 4.20 contains a very broadly formulated definition of indigenous peoples, recognizing that "no single definition can capture their diversity."

Presently, the Bank is revising their OD 4.20, consistent with their overall objective of transforming their directives into comprehensive "policies" that combine "mandatory policy, Bank procedures, and good practice." Their initial step in this

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156 OD 4.20, paragraph 6.
157 OD 4.20, paragraph 8.
158 The following paragraphs from OD 4.20 were downloaded from the World Bank website at http://www.worldbank.org: 3. The terms "indigenous peoples," "indigenous ethnic minorities," "tribal groups," and "scheduled tribes" describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, "indigenous peoples" is the term that will be used to refer to these groups.
4. Within their national constitutions, statutes, and relevant legislation, many of the Bank's borrower countries include specific definitional clauses and legal frameworks that provide a preliminary basis for identifying indigenous peoples.
5. Because of the varied and changing contexts in which indigenous peoples are found, no single definition can capture their diversity. Indigenous people are commonly among the poorest segments of a population. They engage in economic activities that range from shifting agriculture in or near forests to wage labor or even small-scale market-oriented activities. Indigenous peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:
   (a) a close attachment to ancestral territories and to the natural resources in these areas;
   (b) self-identification and identification by others as members of a distinct cultural group;
   (c) an indigenous language, often different from the national language;
   (d) presence of customary social and political institutions; and
   (e) primarily subsistence-oriented production.
Task managers (TM) must exercise judgment in determining the populations to which this directive applies and should make use of specialized anthropological and sociological experts throughout the project cycle.
159 In addition, the World Bank is pursuing the following, according to their website (http://www.worldbank.org): "(a) revision of OD 4.20 on Indigenous Peoples, including broad consultation within the Bank and with indigenous peoples' organizations, Borrower country governments and NGOs; (b) development of regional guidelines on Indigenous Peoples; (c) establishment of partnerships with private foundations, NGOs and UN system agencies working on programs relating to Indigenous Peoples and
process has been to hold consultations with representatives from borrower governments, indigenous peoples’ organizations, non-governmental organizations and academics. An "Approach Paper" was utilized to prompt discussion during the consultations.\textsuperscript{160} The direct participation of indigenous peoples in such a process may help to move the Bank away from a "protective measures" approach to one of direct, meaningful and genuine participation of indigenous peoples in policy development to ensure that the Bank’s future activities do not violate the basic rights of indigenous peoples.

The Bank will likely have difficulty in tackling the same issues that have plagued the United Nations, namely the scope and application of the Operational Directive and land and resource rights. However, because of the level of impact that the Bank’s activities can have upon indigenous communities, and their current willingness to gain direct participation by indigenous peoples, the ongoing revision process signals an important step in the right direction. Hopefully, through this work indigenous peoples and others can effectively strengthen the text and make it more reflective of the rights, needs and aspirations of indigenous peoples in the context of development.

\textit{(b) Asian Development Bank and Inter-American Bank}

The World Bank’s indigenous work has sparked initiatives within the Asian Development Bank (ADB). The ADB intended to establish policy and practices for their

\begin{quote}
\textit{(d) sponsorship of training courses, most recently in the area of Indigenous Peoples and Human Development Project Design; (e) development of an internal and external Web Site on Indigenous Peoples; (f) conducting of a review of the role of Indigenous Peoples in Bank-financed Forestry Projects; (g) design of specific development interventions in support of indigenous peoples; and (h) monitoring and evaluation of development interventions in relation to indigenous peoples.”}
\end{quote}

interventions consistent with a set of elements that they have identified to date. The elements include consistency with needs and aspirations of indigenous peoples; compatibility in substance and structure with affected indigenous peoples' cultural, social and economic institutions; development with the informed participation of affected communities; equitable development; and ensuring compensation for any adverse effects of development. Yet these elements would not replace or supersede existing Bank policies but would somehow operate simultaneously with them. They are to be implemented in the context of national development policies and practices. Given the latter point, it appears that the ADB has not begun to grapple with the complex nature of indigenous rights to lands, territories and resources let alone their distinct political rights.

In another region, the Inter-American Bank has established the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean (or the Indigenous Peoples Fund). The Indigenous Peoples’ Fund was created in 1992 in order to facilitate dialogue concerning the preparation and financing of indigenous development initiatives and policy in areas such as resettlement.

There is no question that these minimal steps are inadequate, from an indigenous peoples perspective. However, as noted, such moves on the part of these very powerful institutions signal a growing awareness of the status and rights of indigenous peoples.


2) United Nations Conference on Environment and Development

The work of the World Bank, ADB and the Indigenous Peoples Fund all hint at the potential conflicts between indigenous peoples and national development policy. For these reasons, the U.N. has also attempted to respond directly on these matters. For indigenous peoples, development has generally put the world out of balance. In the U.N. context, the early linkage of "development" to the State assertions of "permanent sovereignty over natural resources" and the rights of States "to freely utilize and exploit" such resources began to take on a more human rights orientation by the elaboration of the International Covenant on Economic, Social and Cultural Rights, which addresses the right of self-determination and the pursuit of "economic, social and cultural development." However, this conception of development is limited solely to an economic development framework. This assertion is evidenced by the link made between the right to development and the Declaration on the Establishment of a New International Economic Order (NIEO), which spells out the need for cooperation and furthering international economic relations with emphasis upon the economic needs of peoples in "least developed" or developing countries. Also, the Charter of Economic Rights and Duties of States makes mention of "promoting the economic, social and

cultural development" of peoples but here again only within the context of economic development.

In 1977, the United Nations began to shift its orientation away from a purely state driven notion of development when they began studying the right to development in the context of human rights. Subsequently, the U.N. adopted the Declaration on the Human Right to Development. Though some scholars have referred to the right to development as "something of a mantra for states seeking to justify the privileging of economic development over human rights and to legitimize repressive or authoritarian policies," indigenous peoples and others have seized upon it as one possible tool for the promotion and protection of their rights and environment. The Declaration, to some extent, provides the backdrop for indigenous peoples' interpretation of the right to development as a human right and has helped to increase sensitivity to cultural diversity and different human conditions and needs.

The adverse impacts of large scale economic and industrial development, which has taken place without recognition of and respect for the fundamental rights of indigenous peoples, especially land and resource rights, has left many indigenous peoples adamantly opposed to the whole notion of "development." Most large scale development schemes have had untold consequences for indigenous communities.

In 1987, the World Commission on Environment and Development warned governments of the adverse impact of continuing to exclude indigenous societies in North America and elsewhere from the processes of development\(^{171}\) and stated, in the context of "empowering vulnerable groups" that:

"These communities are the repositories of vast accumulations of traditional knowledge and experience that links humanity with its ancient origins... The starting point for a just and humane policy for such groups is the recognition and protection of their traditional rights to land and the other resources that sustain their way of life—rights they may define in terms that do not fit into standard legal systems. These groups' own institutions to regulate rights and obligations are crucial for maintaining the harmony with nature and the environmental awareness characteristic of the traditional way of life. Hence the recognition of traditional rights must go hand in hand with measures to protect the local institutions that enforce responsibility in resource use... In terms of sheer numbers, these isolated, vulnerable groups are small. But their marginalization is a symptom of a style of development that tends to neglect both human and environmental considerations. Hence a more careful and sensitive consideration of their interests is a touchstone of a sustainable development policy."\(^{172}\)

Simultaneously with the assertions of "Third World" countries having a direct role in the discussions concerning development, the international indigenous movement was developing and beginning to take shape. In particular, the Inuit Circumpolar Conference had begun to take up consideration of the Declaration on the Human Right to Development in the context of their *Principles and Elements for a Comprehensive Arctic Policy*\(^{173}\) and also became active in international organizations addressing sustainable development.\(^{174}\) Furthermore, the WGIP process and the ILO revision of Convention 107


\(^{172}\) Ibid.


\(^{174}\) To a large extent, off-shore and on-shore oil development provided the impetus for the organization of Inuit on a transnational to advance our rights and interests, as well as views about development. In
were both forums in which this discussion was propelling the concept of and linkage between indigenous peoples, environment and development. For example, the language of Articles 6 and 7 of the ILO Convention 169, though not entirely adequate, supports the notion of self-determination with respect to development.\textsuperscript{175}

Also, one of the conclusions of the 1990 Global Consultation on the Realization of the Right to Development, prepared by the Secretary-General stated: "A development

\textsuperscript{175} ILO Convention 169, Article 6: "1. In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them; (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose. 2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."

Article 7: "1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly. 2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement. 3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities. 4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit."
strategy that disregards or interferes with human rights is the very negation of development."

Simultaneously with these developments and increased indigenous involvement internationally, indigenous representatives began to focus on the 1992 United Nations Conference on Environment and Development (UNCED), which was held in Rio de Janeiro. In preparation for the Conference, indigenous peoples and non-Indigenous support groups began organizing caucus meetings to discuss strategy as to how to influence the state driven UNCED agenda. Indigenous peoples became involved in the various "Prep Comms" and held sessions of their own in New York and elsewhere.

Though their efforts were under-funded and poorly organized, as well as taken over by a more powerful environmental organization agenda, the formal plenary did adopt the Rio Declaration on Environment and Development, which includes the commitment by States to recognize and duly support indigenous peoples’ identity, culture and interests and enable their effective participation in the achievement of sustainable development. In addition, the more substantive Chapter 26 of Agenda 21 includes express provisions relating to indigenous peoples and their "historical relationship with their lands." The document further states that governments in "full partnership" with indigenous people and their communities should develop or strengthen consultation with indigenous people in order to incorporate their values, knowledge and practices into national policies and programs related to natural resource management, conservation and

177 For full text, see UN Document A/CONF. 151/26, (Vol. 1-3), August 12, 1992. Chapter 26 is entitled "Recognizing and Strengthening the Role of Indigenous People and their Communities".
development, including sustainable development. The provisions also call for greater indigenous control over their lands and resources. Outside of the state dominated UNCED gathering it is significant that indigenous peoples united in Rio and adopted the Kari Oca Declaration, which affirms the inherent right of indigenous peoples to self-determination and their inalienable rights to lands, territories and resources. This brief indigenous Declaration is a distinct voice in an area fraught with power struggles between powerful and often faceless forces of capitalism and greed.

The Convention on Biological Diversity (CBD) was also adopted in Rio de Janeiro and contains preambular language and three different articles specifically

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178 The Kari Oca Declaration states:

We, the Indigenous Peoples, walk to the future in the footprints of our ancestors.

From the smallest to the largest living being, from the four directions, from the air, the land and the mountains, the creator has placed us, the Indigenous Peoples upon our mother the earth. The footprints of our ancestors are permanently etched upon the lands of our Peoples.

We, the Indigenous Peoples, maintain our inherent rights to self-determination. We have always had the right to decide our own forms of government, to use our own ways to raise and educate our children, to our own cultural identity without interference.

We continue to maintain our rights as peoples despite centuries of deprivation, assimilation and genocide.

We maintain our inalienable rights to our lands and territories, to all our resources -- above and below -- and to our waters. We assert our ongoing responsibility to pass them on to the future generations.

We cannot be removed from our lands. We, the Indigenous Peoples, are connected by the circle of life to our lands and environments.

We, the Indigenous Peoples, walk to the future in the footprints of our ancestors.

addressing indigenous peoples' concerns and interests.\textsuperscript{180} Unfortunately, the CBD narrowly focuses upon "traditional knowledge" of indigenous peoples in the context of conservation and sustainable uses of biological diversity. The language is far from rights language, and the safeguarding and use of indigenous knowledge is subject to national legislation. Furthermore, the soft language to "encourage the equitable sharing of the benefits arising from the utilization of such knowledge" is certainly not a guarantee of rights to the intellectual property of indigenous peoples. In addition, Article 10(c) of the CBD could be subjectively problematic if indigenous communities themselves want to exploit their biological resources and use their knowledge in a fashion that may not be in accordance with their cultural practices. Finally, the exchange of information noted in Article 17(2) may not allow for the protection of "traditional knowledge" from an indigenous perspective. Yet, here again, these provisions are a first step in an area of extreme importance to indigenous peoples.

\textsuperscript{180} \textit{Convention on Biological Diversity}, Preambular paragraph: "Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components,"

Article 8(j): "Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;"

Article 10(c): "Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;" and

Article 17(2): "Such exchange of information shall include exchange of results of technical, scientific and socio-economic research, as well as information on training and surveying programmes, specialized knowledge, indigenous and traditional knowledge as such and in combination with the technologies referred to in Article 16, paragraph 1. It shall also, where feasible, include repatriation of information."
Despite the narrow, soft language of the CBD, the Secretariat has been actively engaging indigenous peoples in making the limited articles contained in the Convention more relevant to indigenous communities. The outcome of these meetings has been the establishment by the Conference of the Parties (COP) of a Working Group responsible for guiding the CBD Secretariat toward implementation of Articles 8(j) and 10(c). With the emphasis on implementation, much has been done to encourage indigenous peoples and others to submit case studies in order to assess how provisions of the CBD are being implemented within indigenous communities. The CBD Secretariat has also been engaged in the development of guidelines for implementation of the relevant articles, as well as a recent decision to undertake an assessment of existing sub-national, national and international instruments relevant to the protection of traditional knowledge, innovations and practices with a view to identifying synergies between these instruments and the objectives of Article 8(j). Further, the CBD has involved indigenous and local community representatives on Expert panel meetings and Liaison group meetings in all areas of the Convention, such as Marine and Coastal, Forest, Access and Benefit Sharing, Inland Waters, Alien Species/Taxonomy and so forth.\textsuperscript{181} Though a small pool of academics and scientists have focused energy in this field, these limited provisions have contributed to a growing network and roster of indigenous peoples efforts in the area of "traditional knowledge" and intellectual property.

\textsuperscript{181} See "Traditional Knowledge, Innovations and Practices," Note by the Executive Secretary, Secretariat of the Convention on Biological Diversity, presented at the UNCTAD Expert Meeting on Systems and National Experiences for the Protect of Traditional Knowledge, Innovations and Practices.
D) World Intellectual Property Organization

The World Intellectual Property Organization (WIPO) has also recently taken an interest in indigenous issues and has convened a series of meetings to identify their international role in the development of policies and standards concerning the intellectual property of indigenous peoples. In 1998, WIPO convened a Roundtable on Intellectual Property and Indigenous Peoples, which initiated a new program of outreach to those communities that have not had access or exposure to the so-called "intellectual property system." In immediate response to this statement, the Nordic Saami Council proposed three concrete recommendations at the WIPO roundtable:

1. That indigenous intellectual property rights must be recognized and given effective protection in national legislation and in international legal instruments, and that international legal instruments in this field must be developed as soon as possible;

2. That WIPO should undertake a comprehensive global study on indigenous intellectual property rights, with the aim to (a) identify the nature and scope of indigenous intellectual property rights, and (b) to identify possible practical and legal ways of promoting and protecting indigenous intellectual property rights; and

3. That WIPO should establish a working group or committee on indigenous intellectual property rights with the full and effective participation of indigenous peoples.183

There is much that this international institution can do to assist indigenous peoples, especially in light of the fact that WIPO is one of the most financially flush agencies of the United Nations, garnering their budget from copyrights and patents. However, to date, few indigenous peoples have been involved in their work because of the other urgent issues facing them and the lack of understanding about the nature and

182 Opening Address by Mr. Roberto Castelo, Deputy Director General of WIPO, Geneva, July 23, 1998.
content of "intellectual property," as well as the fear of exploitation by more powerful entities if traditional and indigenous knowledge is shared. Furthermore, there has been little intersection between the work of WIPO and the studies and seminar initiatives of the U.N., with the exception of concern that the Draft Principles and Guidelines on Protection of Indigenous Heritage (prepared by the WGIP) not include matters that WIPO officials feel they have sole competence to deal with, namely folklore. This tension, however, may be beneficial as WIPO has a unique opportunity to begin the process of standard setting with a clean slate. And, especially if they genuinely desire to promote and protect indigenous peoples' rights to intellectual property by combining their role as "custodians" of human creativity and ingenuity and enforcement of policies to patent and safeguard such information and knowledge.

In the context of intellectual property, it must be noted that indigenous peoples themselves, in June 1993, on the occasion of the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, adopted a declaration concerning their understanding of such rights. The Maatua Declaration\textsuperscript{184} affirms the right to self-determination and the exclusive ownership of cultural and intellectual property of indigenous peoples. Furthermore, the Declaration affirms the ability of indigenous peoples as capable actors in the managing, protection, promotion and holders of cultural and intellectual property. These affirmations are followed by a series of

recommendations to indigenous communities, national governments, and the United Nations and its various institutions. 185

E) Arctic Council

Turning to regional initiatives, in 1987, Mikhail Gorbachev made reference to the need for a circumpolar environmental plan because of the integral role that the Arctic region plays in global climactic conditions and the increasing threats to the region. Since then, the Arctic states have heeded this call. 186 The Arctic Environmental Protection Strategy (AEPS), 187 the establishment of the Arctic Council, 188 and the development of a Code for Polar Navigation followed years of dialogue amongst the "Arctic Eight." 189 The Arctic Council has been welcomed as an important first step in furthering international circumpolar cooperation that directly includes indigenous peoples as Permanent

185 The recommendations to the United Nations state: "In respect for the rights of indigenous peoples, the United Nations should:

3.1 Ensure the process of participation of indigenous peoples in United Nations fora is strengthened so their views are fairly represented.
3.3 Monitor and take action against any States whose persistent policies and activities damage the cultural and intellectual property rights of indigenous peoples.
3.4 Ensure that indigenous peoples actively contribute to the way in which indigenous cultures are incorporated into the 1995 United Nations International Year of Culture.
3.5 Call for an immediate halt to the ongoing 'Human Genome Diversity Project' (HUGO) until its moral, ethical, socio-economic, physical and political implications have been thoroughly discussed, understood and approved by indigenous peoples.

186 An article in the New York Times of 22 July 2001 documented numerous sites in the Russian North that are major contributors to circumpolar pollution.
188 See Declaration on the Establishment of the Arctic Council, supra note 71.
Participants. Presently, indigenous peoples collectively do not have sufficient political influence in this process.\textsuperscript{190} Hopefully, this will change over time. The distinct political, social, cultural and economic rights that indigenous peoples have to the circumpolar territory or those elaborated in the draft Declaration at the United Nations are far from being accommodated in the existing Arctic Council. Despite the shortcomings of the regime, it is important to note that, like other international developments, this circumpolar initiative has been open enough to include the peoples indigenous to the Arctic region as participants and direct stakeholders in the territory. Certainly, there may be additional regional arrangements which include indigenous peoples as direct participants and in areas where there are none, possibly the Arctic Council can serve as a model for responding to critical issues such as environment, development, militarization and other matters.

F) Human Rights Treaty Bodies

In regard to accommodating the human rights of indigenous peoples, we are seeing a striking difference in the more recent comments and Concluding Observations of the human rights treaty bodies as well.\textsuperscript{191} These treaty bodies are providing for an indigenous cultural context in the interpretation of the existing international instruments, such as the Human Rights Committee under the International Covenant on Civil and

\textsuperscript{189} The eight circumpolar states are commonly referred to as the Arctic Eight and they are the United States, Canada, Iceland, Norway, Sweden, Finland, Denmark/Greenland, and the Russian Federation.\textsuperscript{190} See generally D. S. Dorough, "Indigenous Peoples and the Law of the Sea: The Need for a New Perspective," in Order For the Oceans at the Turn of the Century (The Hague: Kluwer Law International, 1999) at 407. The representatives of the Inuit Circumpolar Conference, the Association of Small Nations of the Russian North (RAIPON), Nordic Saami Council, the Arctic Athabascan Council, Gwich’in Council International, and the Aleut International Association are all "Permanent Participants" in the Arctic Council. However, they do not have voting status nor do they have a veto over any decision-making.
Political Rights\textsuperscript{192} (ICCPR) and the Committee on the Elimination of Racial Discrimination\textsuperscript{193} (CERD) under the International Convention on the Elimination of All Forms of Racial Discrimination.\textsuperscript{194} Though each of the treaty bodies have had the opportunity to review cases emerging from indigenous individuals, on behalf of their communities, the more recent work of the treaty bodies are evidence of a much more expansive and inclusive interpretation of human rights and their attachment to the distinct circumstances of indigenous peoples.

An early example is the Mikmaq Case of 1984, wherein the authors of the communication, Grand Chief Donald Marshall, Grand Captain Alexander Denny and Adviser Simon Marshall, as officers of the Grand Council of the Mikmaq tribal society, alleged violation of Article 1(1) of the ICCPR as a result of refusal by the Canadian government to allow the Mikmaq to participate directly in the national constitutional debate where other actors, such as the Assembly of First Nations, were direct participants. The Committee did not admit the case on the grounds of violation of the right of the Mikmaq peoples to self-determination. However, they did discuss the merits of the communication in the context of Article 25(a) which provides that: "Every citizen shall have the right and the opportunity, without any of the distinction...to take part in the conduct of public affairs, directly or through freely chosen representatives." Despite the

\textsuperscript{191} There is increasing awareness and use of the treaty-based human rights bodies by indigenous peoples, as well as greater sensitivity toward indigenous peoples' rights and issues being shown by their respective members.


\textsuperscript{193} For a description of the Committee's work in regard to indigenous peoples, see S.J. Anaya, *Indigenous Peoples in International Law*, supra note 46 at 100-101 and 162-166..
conclusion of the Committee, which was generally in favor of the Government of Canada, it is important to note that the Committee members did concern themselves with the issues raised by the Mikmaq peoples.

In the Lubicon Case, the Human Rights Committee heard a petition on behalf of the Lubicon Lake Band, filed by an individual, Chief Ominayak, alleging that the Government of Canada violated the Band's right to self-determination due to Provincial expropriation of land for development. Again, though the Committee did not undertake the issue based upon a violation of the right to self-determination as contained in Article 1(1) of the ICCPR, they ruled that "[historical inequities... and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of Article 27 so long as they continue." This was an interesting way for the Committee to deal with the group rights of the Lubicon Lake Band while sidestepping the issue of the collective right of all peoples to self-determination. The Committee stated:

"3.2 The enjoyment of the rights to which Article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article for example, to enjoy a particular culture may consist in a way of life, which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority....

7 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

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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."

Through these cases, the Committee began to enlarge their interpretation of the existing human rights standards to deal with the special circumstances of indigenous peoples. To a large extent, these cases represent a starting point for the emerging jurisprudence of the human rights treaty bodies to specifically acknowledge indigenous peoples as a special or unique category of peoples.

In the context of the International Convention on the Elimination of All Forms of Racial Discrimination, a number of communications concerning racial discrimination against indigenous peoples in Latin America received the attention of the Committee on the Elimination of Racial Discrimination (CERD), including Peru, Mexico, Chile, Ecuador, Panama, Argentina, Venezuela, El Salvador and Brazil. In 1997, the CERD adopted a General Recommendation concerning indigenous peoples, which stated that "the Committee has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination." They further made a number of important recommendations to State parties to ensure respect for indigenous peoples. In this

\footnote{See M. Banton, \textit{International Action Against Racism}, (Oxford: Oxford University Press, 1999) at 230-248, which addresses indigenous peoples and state reporting in the CERD.}

\footnote{General Recommendation XXIII (51) concerning Indigenous Peoples, adopted at the Committee's 1235th meeting, August 18, 1997, U.N. Document CERD/C/51/Misc.13/Rev.4. The Recommendation states: "4. The Committee calls in particular upon States parties to: a. recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation; b. ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity; c. provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics; d. ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights}
context, in 1998, the CERD reviewed developments concerning Aboriginal peoples in
Australia. The Committee raised concern about the disappearance of the post of Social
Justice Commissioner of the Aboriginal and Torres Straits Islanders Commission, and
the further marginalization of Aboriginal peoples in Australia. In addition, the
Committee expressed concern over the amendments to the Native Title Act and the
"extinguishment" of Aboriginal peoples' rights to land. The Committee called upon the
government to provide further information and to meet with them. Because the
government of Australia did not welcome the Committee's proposal of a visit by the

and interests are taken without their informed consent; e. ensure that indigenous communities can exercise
their rights to practice and revitalize their cultural traditions and customs, to preserve and to practice their
languages.

5. The Committee especially calls upon States parties to recognise and protect the rights of
indigenous peoples to own, develop, control and use their communal lands, territories and resources and,
where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or
used without their free and informed consent, to take steps to return these lands and territories. Only when
this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair
and prompt compensation. Such compensation should as far as possible take the form of lands and
territories.

6. The Committee further calls upon States parties with indigenous peoples in their territories to
include in their periodic reports full information on the situation of such peoples, taking into account all
relevant provisions of the Convention.”

198 Summary of Record of the Committee on the Elimination of Racial Discrimination, Fifty-third Session,
199 The following information was downloaded from the web site http://www.humanrights.gov.au: "In
1993 the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner was established
by the Federal Government in response to issues of discrimination and disadvantage highlighted by the
Royal Commission into Aboriginal Deaths in Custody and HREOC's National Inquiry into Racist Violence.
The Commission's goal is to achieve the practical enjoyment of human rights by Indigenous Australians.
The Office was formed by an amendment to the Human Rights and Equal Opportunity Commission Act
1986. The major functions of the Commissioner are to: monitor the enjoyment and exercise of human
rights by Aboriginal and Torres Strait Islander peoples and to report annually on those findings to the
Attorney-General; promote discussion and awareness of the human rights of Aboriginal and Torres Strait
Islander people, and to promote respect for, and enjoyment of, those rights through research, educational
and other programs; to examine enactments and proposed enactments to see whether they recognise and
protect the human rights of Aboriginal and Torres Strait Islander people and to report to the Attorney-
General the results of any such examination. The Aboriginal and Torres Strait Islander Social Justice
Commissioner Dr. Bill Jonas also has responsibilities under the Native Title Act 1993 to report annually on
the operation of the Act and its effect on the exercise and enjoyment of human rights of Indigenous
Australians. The Commissioner's annual reports are tabled in federal Parliament.”

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Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, the Committee initiated an early-warning and urgent action procedure to obtain further information. These observations have been used by not only Aboriginal peoples but by other indigenous peoples internationally and nationally.

More recently, under Article 40 reporting requirement of the ICCPR, the government of Canada has been subjected to scrutiny by the United Nations Human Rights Committee, which noted that:

"as the State party acknowledged, the situation of the aboriginal peoples remains 'the most pressing human rights issue facing Canadians.' In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by 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 recommendations 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."^200

In 1999, the Committee stated:

"The Committee, while taking note of the concept of self-determination as applied by Canada to the aboriginal peoples, regrets that no explanation was given by the delegation concerning the elements that make up that concept,

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^200 Concluding Observations of the Human Rights Committee, April 1999, paragraph 8, where the Committee requested that the Government of Canada address the implementation of the right to self-determination in the context of Aboriginal peoples. In the same paragraph, the Committee further concluded that "the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant." U.N. Document CCPR/C/79/Add.105, April 7, 1999.
and urges the State party to report adequately on implementation of Article 1 of the Covenant in its next periodic report." 201

Finally, regional institutions, such as the Inter-American Human Rights Commission, have also been important reporting and complaint mechanisms, especially when and where they advance concrete domestic changes in the political and legal dynamics and relations between states and indigenous peoples. 202

G) Intersecting approaches and positions: the revision of ILO Convention 107, the OAS Proposed American Declaration on the Rights of Indigenous and the draft U.N. Declaration on the Rights of Indigenous Peoples

1) International Labor Organization

There can be no doubt about the linkage between the standard setting work at the U.N. and the processes of the ILO and the OAS. This brief section will address the latter two standard setting efforts to illustrate the intersection of government positions and strategies being used by states in an attempt to construct a ceiling for the rights of indigenous peoples. The ILO process will serve as an example of how state government positions have not improved over time. The discussion of the OAS process is an example of how state governments have initiated a particular strategy by which they hope to arrive at the lowest common denominator in one arena and point to this as a precedent in order

201 Ibid, paragraph 7.
to influence the outcome of text in another arena. First, we will cover the ILO, then the OAS.

The ILO was established in 1919 as an autonomous institution associated with the League of Nations. Its original constitution formed part of the Treaty of Versailles. In 1946, the ILO became the first specialized agency associated with the United Nations. The ILO provides a forum for the discussion of social and labor questions, with social justice as the primary objective of the organization. Its motto is "poverty anywhere constitutes a danger to prosperity everywhere." The headquarters are located in Geneva, Switzerland, and this is where the annual conferences are held.

The ILO is primarily an intergovernmental agency, however, it allows for representation of employers and workers as well. Its tripartite structure is unique and at first glance difficult to understand. The International Labor Conference is the final decision-making body and is comprised of two government representatives, one worker representative, and one employer representative from each Member State. There are currently 150 member States. The Conference sets international labor standards in the form of conventions and recommendations and also elects the Governing Body of the International Labor Office. One of the most important functions of the ILO is standard setting in such areas as freedom of association, wages, hours of work, minimum ages for employment, industrial safety, and so forth. The Governing Body also appoints Committee's of Experts to examine specific areas of concern to the ILO, for example, the Committee on the Application of Conventions and Recommendations.

The ILO is one of the few intergovernmental organizations to concern itself with indigenous and tribal peoples and the issues facing them. In 1921, the ILO conducted a
study on the conditions of indigenous workers. In 1926 and much later in 1962 the ILO appointed a Committee of Experts to discuss the possible adoption of conventions and recommendations dealing with indigenous peoples and their conditions. In 1953, after an extensive study by the ILO, the United Nations initiated the Andean Indian Program. The ILO was given responsibility for the oversight of the program, in cooperation with the U.N. It was, for all intents and purposes, a program of integration, which eventually transferred its responsibilities to national governments.

In 1957, the ILO adopted Convention 107 — *Indigenous and Tribal Populations*. Convention 107 deals with general policy; lands and resources; recruitment and conditions of employment; vocational training, handicrafts and rural industries; social security and health; education and means of communication; and administration. This Convention has been ratified by only 27 States and came into force in June 1959.

The Convention does not deal with political matters and the ILO has made it clear that these matters fall outside the "competence of the ILO," and that as an international organization, they cannot deal with political rights in the context of the Convention or otherwise. Convention 107 is limited to social, economic, environmental and cultural considerations. These elements form the boundaries of Convention 107. Matters such as self-government and other political dimensions of self-determination, have been clearly identified to be outside the scope of a revised Convention and indeed of the competence of the ILO as an organization.

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The 1957 Convention was, at the time, the only existing international instrument that specifically addressed indigenous peoples. The 1957 instrument encourages the gradual integration of indigenous individuals into national societies and economies, thus legitimizing the gradual extinction of indigenous peoples as such. Moreover, the Convention presupposes complete state control over the affairs of indigenous peoples. As one might guess, many indigenous peoples have strongly criticized the ILO and their early interest in the area of indigenous conditions, which was quite "paternalistic" in its approach to "protecting these groups." The ILO itself has acknowledged this approach and explained it as follows:

"The problem with the Convention stems from the ethos of the period in which it was adopted, i.e. at the height of the paternalistic era of the United Nations system, the heyday of the "top-down" development approach...the ILO did something perfectly acceptable at the time...but they omitted to ask the underprivileged themselves what they thought of the idea."\(^{204}\)

The Convention has therefore attracted broad criticism for its ethnocentric conceptions. Indigenous peoples, non-governmental organizations working on behalf of indigenous peoples, scholars and the ILO itself, recognized the need to be more responsive to the current state of indigenous affairs and the true aspirations of indigenous peoples.\(^{205}\) The criticism could not be withstood any longer and the ILO decided to conduct a "partial revision" of the Convention.\(^{206}\)


\(^{205}\) R.L. Barsh, "Revision of ILO Convention No. 107," 81 Am. J. Int'l L. (1987) at 756 discusses the early ILO preparations to revise ILO Convention No. 107, the general contours of that Convention and the initial recommendations concerning the revision process. In regard to aspirations of indigenous peoples, the ILO Convention No. 107 was lacking any explicit affirmation of fundamental land rights, significance of indigenous institutions and self-determination in the context of a wide range of economic, social and cultural rights.

\(^{206}\) At the 1987 WGIP session an informal meeting took place to discuss the ILO revision process. There were a number of indigenous peoples' organizations that refused to even discuss the ILO because of their
In addition to the criticism, the ILO was "competing" with the WGIP standard-setting process. It appeared that the ILO representatives, when discussing their plans to revise Convention No. 107, wanted to accomplish their work before the WGIP set international standards concerning indigenous peoples. There was clearly an institutional/territorial, almost tribal, turf protection air to the statements being made. This competition and "turf protection" contributed to the ILO's decision to revise Convention 107. However, one will never find an individual within the U.N. system who would publicly acknowledge the competition. In addition, the Martinez Cobo study had recommended the revision of Convention 107. In summary, all of these dynamics created an opportunity to uplift indigenous human rights standards. The two-year revision process took place in 1988 and 1989, and was difficult work for the few indigenous peoples involved. In regard to the procedural and substantive issues raised during the two-year revision process, see Annex B of this thesis.

The revised International Labor Organization's *Indigenous and Tribal Peoples Convention, 1989,*\(^{207}\) is the only legally binding international instrument *that* substantiates and reinforces indigenous rights and remains open for state ratification.\(^{208}\)

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208 The full text of the Convention No. 169 can be found on the ILO website at iloexpress.ilo.ch:1567/cgi-express/convde.pl?query=C169&query0=169&submit=Display.
At present, the following states have ratified Convention No. 169: Argentina, Bolivia, Columbia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, Mexico, Norway, Netherlands, Paraguay, and Peru.

In hindsight, and with the ongoing standard setting at the U.N., it is important to ask whether or not the ILO fulfilled its mandate and intentions for the revision process? Governments feel that the process went too far in recognizing land rights and customs. Indigenous peoples feel that it established minimum standards that are in many instances far too low. Because of the nature of the so-called "negotiation," the outcome did not strike the necessary balance and many feel that the document is poorly drafted.

At the end of the day, there were numerous issues that were not even dealt with that are at the heart of the integrationist approach that the ILO intended to rid the Convention of in the first place. Most assimilationist provisions were substantially altered, however, significant remnants are evident in relation to indigenous customary law and practices. For example, Articles 8[2] and 9[1] read:

Article 8 ...

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

Article 9

1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected. (Emphasis added).
The key element of indigenous peoples' relations with States was virtually ignored. Such omissions give the impression that indigenous concerns were simply being addressed, without actually achieving adequate "standards." Furthermore, the issue of the use of the term "peoples," was erroneously seized upon by governments as the road to chaos and has been seized upon by both states and indigenous peoples in the United Nations context. This will be discussed further in Chapter V. For the present discussion, however, it is safe to say that though the ILO doesn't have the competence to deal with the political right to self-determination, state governments attempted to advance their position within the ILO in an effort to curb the explicit reference to the right in the draft U.N. Declaration.

Again, Conventions 107 and 169 are the only legally binding international treaties that deal specifically with indigenous rights and furthermore, include a recourse mechanism: the Committee of Experts on the Application of Conventions and Review of Recommendations. If the Committee is actively used, it is an effective method for oversight of government behavior and actions toward indigenous peoples in those countries where the Convention has been ratified. This aspect of the ILO Convention 169 cannot be underestimated. Because of the efforts of trade unions and support groups like Survival International and Amnesty International, even the application of the outdated Convention 107 has saved lives.

For example, in 1988 and 1989, the government of Brazil blatantly disregarded the gross human rights violations being perpetrated by gold miners and others against the

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209 In regard to Canada's attempt to add a disclaimer, see H. Berman, 87 Am. Soc. Int'l L. Proc. 190, (1993) at 193.
Yanomami Indian peoples despite their obligations under ILO Convention No. 107.\(^{210}\) In this context, the British Trade Union and other unions, who furnished information about human rights violations from organizations such as Amnesty International, were able to take the government of Brazil to task for its disregard and violation of their international legal obligations under the Convention. The ILO Committee was able to demand the Brazilian government to answer and respond to these substantiated allegations and further recommend the amendment of the Brazilian Constitution for consistency with their international legal obligations under the Convention.\(^{211}\) The Brazilian government eventually heeded such demands but only after a range of political machinations and pressure created by indigenous peoples reporting these matters to the WGIP also.

Again, from an indigenous perspective there are serious problems with Convention 169. However, if taken in context, there are many possibilities to interpret the language in a positive fashion. At the moment, the Convention is what indigenous peoples have to rely upon in the case of positive juridical interpretation. More specifically, Convention 169 provides certain updated protections and standards relating to environmental protection, development, and direct participation in decision-making that affects indigenous rights, lives, and territories. Setting aside the criticisms about Convention No. 169,\(^{212}\) it has proven useful to indigenous peoples in domestic policy

\(^{210}\) The author attended the meetings of the Committee to observe the proceedings involving the government of Brazil and the violations of Convention No. 107 in the context of the Yanomami Indians.
development\textsuperscript{213} and litigation,\textsuperscript{214} as well as in formal human rights complaints to the Inter-American Commission on Human Rights.\textsuperscript{215}

In regard to the latter, the Inter-American Court of Human Rights affirmed that indigenous peoples have, as a matter of international law, collective rights to the lands and natural resources that they have traditionally used and occupied in its decision of the \textit{Awas Tingni Case}. The Court's decision took into consideration Articles 4, and 13 through 18 of the ILO Convention 169 when determining that the Government of Nicaragua violated the property rights of the indigenous peoples of Awas Tingni when

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213 The following information was downloaded from the ILO website at http://www.ilo.org: "Prior to its submission to the Committee of Experts of the ILO, the Government of Norway sent its latest report on the implementation of Convention No. 169 to the Sami Parliament for its comments. These comments form an integral part of the report, under the terms of an agreement entered into between the Norwegian Government and the Sami Parliament. This co-operation is established as a permanent procedure to ensure the inclusion of the opinion of the Sami Parliament in the formal reporting procedure on Convention No. 169. The Sami Parliament has indicated its willingness to enter into an informal dialogue with the Committee of Experts, together with the Norwegian Government, to facilitate the implementation of the Convention. The Government has stated that it shares the wish to facilitate the implementation of the Convention in this way, believing that open co-operation between governments and representative indigenous bodies may contribute effectively to the international promotion of indigenous rights and cultures, and the Government therefore fully supports the suggestion of a supplementary dialogue."

214 The following information was downloaded from the ILO website at http://www.ilo.org: "With regard to the environment, the Norwegian Ministry of Culture has instructed the regional board responsible for managing crown land in Finnmark to ask the opinion of the Sami Assembly before taking any decision concerning land-use projects. The reindeer herding districts are legally entitled to be consulted, have the right to be compensated, in the event of economic damage, and may bring lawsuits before the courts if they consider a project inadmissible." In this case, the provisions of ILO Convention 169 were invoked and utilized by the Sami peoples. Such use of the language of the Convention is only available to those whose respective state members have ratified the treaty.

215 \textit{Case of the Mayagna (Sumo) Awas Tingni Community vs. Nicaragua}, Judgement of August 31, 2001. In regard to Counsel of Record assertions, see the Petition by The Mayagna Indian Community of Awas Tingni and Jaime Castillo Felipe, on His Own Behalf and on Behalf of the Community of Awas Tingni Against Nicaragua, re-printed in 9 St. Thomas L. Rev. 164 (1996). This petition was prepared by S. James Anaya, Counsel of Record, and invokes various provisions of I.L.O. Convention 169, as well as the United Nations draft Declaration on the Rights of Indigenous Peoples, the draft Inter-American Declaration on the Rights of Indigenous Peoples [to be discussed below], and the American Convention. See also the Petition by the Western Shoshone; Mayan Cultural Council of Belize; and the First Nation of Carrier Sikone of British Columbia, Canada, complaint filed by S. J. Anaya and R. A. Williams, Jr., on their behalf. See also S. J. Anaya, "Maya Aboriginal Land and Resource Rights and the Conflict Over Logging in Southern Belize," 1 Yale Hum. Rts. Dev. L.J. (1998) at 1.
\end{quote}
they granted a timber concession to a Korean company without consulting the community or obtaining its consent.

Legal counsel for the indigenous community advanced the relevant provisions of the ILO Convention 169 and those of other international instruments in the context of the collective land rights of the Mayagna (Sumo) Indian community, as well as their right to be consulted about and to consent to development affecting their lands, territories and resources. Furthermore, the Court held that the government violated the rights of the indigenous peoples concerned when they failed to take affirmative action to protect and enforce the property rights of the indigenous peoples. This is an important example of how both existing, legally binding treaties and emerging, "aspirational" instruments, such as the draft Declaration, can be effectively utilized by indigenous peoples, nations, and communities.

Such information should be proactively used by indigenous peoples and can be done so outside of the formal legal framework and institutions. For example, use of the ILO Convention and other relevant instruments to inform indigenous leaders and communities, local and national governmental representatives can advance dialogue and policy and law reform without resorting to formal legal action or human rights complaints.

In addition to the ILO Convention, Counsel of Record invoked relevant provisions of the American Convention of Human Rights (Articles 1.1 [obligation to respect right]; 2 [domestic legal effects]; 21 [everyone has the right to the use and enjoyment of his property]; and 25 [right to judicial protection]); the American Declaration on the Rights and Duties of Man [Article XXIII]; the International Convention on the Elimination of all Forms of Racial Discrimination [Article 5(d)(v)]; the Universal Declaration of Human Rights [Article 17(1)]; the African Charter on Human and Peoples' rights [Article 14]; the Proposed American Declaration on the Rights of Indigenous Peoples [Article XVIII]; and the Draft United Nations Declaration on the Rights of Indigenous Peoples [Articles 2, 4, 6, 7, 7(b), 8, 9, 10, 19, 20, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 39, and 40].
For those States who took a more anti-indigenous view in the revision process, it will be difficult to convince them of a positive interpretation of the provisions. In 1989, the Committee and the Plenary Conference also adopted measures that may help to ensure adequate input of indigenous peoples in supervising, monitoring and implementing the new Convention. For example, the Report Form that countries must complete suggests that they consult with indigenous organizations to prepare their reports to the ILO. Furthermore, indigenous organizations can send “verifiable information” directly to the ILO and the Committee of Experts can use the information throughout their country reviews. Though not entirely adequate these minimal avenues help to facilitate access of indigenous peoples to supervisory and complaint mechanisms and may prove to be useful.

2) Organization of American States

On a regional basis, the Organization of American States (OAS) has a history of dealing with indigenous peoples' issues dating back to the first Inter-American Indian Congress, held in Patzcuaro in 1940.\(^\text{217}\) In this regard, Rodolfo Stavenhagen writes:

"The first Inter-American Indian Congress was held in Patzcuaro 55 years ago. There the governments of the region pledged to pursue indigenist policies that would benefit the indigenous peoples. After so many years these objectives have still not been fulfilled, although some local projects and experiments have had some very constructive results. On the whole, indigenous policies have been criticized for being paternalistic or assimilation-oriented, for not taking into account the opinions and suggestions of the indigenous peoples themselves and, most importantly, for the utter

\(^{217}\) Created under the 1940 Patzcuaro International Convention, the basic objectives of the Inter-American Indian Institute are to assist in coordinating the Indian affairs policies of the member States and to promote research and training of individuals engaged in the development of indigenous communities. The Institute has its headquarters in Mexico City.
insufficiency of the resources that the states put toward the realization of these objectives.\footnote{218}

Since that time, the Institute has become one of the specialized agencies of the OAS and has played primarily an advisory role to the OAS on matters concerning indigenous peoples. Their advisory role includes the work of the Inter-American Commission on Human Rights,\footnote{219} which is currently considering a \textit{Proposed American Declaration on the Rights of Indigenous Peoples}.\footnote{220} This development emerged in early 1989 and was surely prompted by both the revision of ILO Convention No. 107 and the elaboration of the draft Declaration by the United Nations.\footnote{221} The OAS took the first step of completing an initial study by Rodolfo Stavenhagen about the demographics, status and conditions of indigenous peoples in the Americas. Internal staff and committee work followed the study, by initiating the Declaration process, and later by the establishment of a Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Populations by OAS General Assembly resolution.

\footnote{218} R. Stavenhagen, "The Challenges of Indigenous Development," presentation made during the 1995 Seminar on Indigenous Development: Poverty, Democracy and Sustainability, organized on the occasion of the First General Assembly of the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean. At the time, Stavenhagen was the Chairman of the Board of Directors of the Fund, discussed previously in relation to the Inter-American Bank, ibid.


\footnote{220} See Inter-American Commission on Human Rights Annual Report 1988-9, at 245-52. As an ICC representative, I participated in a number of consultations leading up to the OAS decision to prepare this "juridical instrument." See also Hannum, supra note 49, which discusses the overall Inter-American system and the "protection of indigenous human rights" through the Inter-American Court of Human Rights, country reporting procedures and the proposed Declaration.

At the moment, one of the most difficult matters within the OAS context is one of procedure. To date, the OAS and the Inter-American Commission on Human Rights, which is responsible for seeing this document through the OAS process, has been heavily criticized for insufficient efforts to genuinely consult with indigenous peoples and to ensure their direct and meaningful participation in the standard setting process. In fact, few indigenous peoples have been involved in the OAS Declaration work.

More recently, in the February, 1999 meeting of Experts of the OAS, indigenous representatives "secured permission to participate in a meeting of the Committee on Political and Juridical Affairs of the OAS Permanent Council." The meeting was intended for "government experts" only. The change came after long-standing criticism by the subjects of the Proposed Declaration: the indigenous peoples of the Americas. The issue of lack of direct participation in the process has triggered the development of a larger discussion within the OAS to develop a "civil society" accreditation system modeled after the UN's non-governmental organization system. Like the changes of indigenous participation within the United Nations, this is a significant turning point in the history of the OAS.

Though the procedural aspects of the OAS Proposed Declaration work is seeing dramatic changes, unfortunately a high pressure system still remains over the substantive aspects of the Proposed Declaration, which remain clouded by regressive positions of member states on the fundamental matters of self-determination, lands, territories and resource rights, and a host of other articles. Like the U.N., the OAS does have the competence to deal with political rights. Therefore, one of the most troubling issues to emerge is the potential for language that would limit the term peoples similar to that of
the ILO Convention 169. This issue has incensed many indigenous peoples in the Americas, who are now unwilling to engage in the process. In 2001, a new President of the Working Group (on the Proposed Declaration) was identified, and was expected to give "new rhythm to the process." In addition, an April 2001 special meeting was a good testing ground for the new rules of indigenous participation. It appears that the re-drafting of the text has begun in earnest. States have not only decided to consider language to limit the right of indigenous peoples to self-determination as they have introduced the bracketing of the terms "peoples/populations." This approach was employed at the ILO and is now being introduced by some states in the U.N. discussions as well.

In preparation for the April 2001 meeting, indigenous representatives gathered in late March at an Indigenous Peoples Summit in Ottawa to discuss strategy and positions for the Summit of the Americas, which took place on April 12-18, in Quebec City, Canada. Those Indigenous representatives and leaders gathered unanimously adopted a Declaration concerning their views on the Proposed American Declaration, as well as their demands for the remaining dialogue on this regional agreement. The Summit of the Americas is the final hurdle that the Proposed American Declaration must clear in terms of review and adoption by the OAS nation-state members.

One important recommendation in the indigenous statement is to ensure that the Proposed American Declaration is finalized only after the adoption of the United Nations Declaration. This decision is due in large part to their serious concerns over the

222 Telephone interview with Osvaldo Kreimer of the Inter-American Commission on Human Rights, Washington, D.C.
inadequacy of the draft Proposed American Declaration and state government strategies and tactics to weaken the OAS text in order to point to its "precedent" and so influence the outcome of the U.N. text. For many reasons, it is felt by indigenous peoples that the United Nations draft Declaration, with universal application, should be adopted first, and followed by the regional juridical instrument. In particular, the threshold issue of recognition of the right of indigenous peoples to self-determination should be sorted out on the worldwide stage of the United Nations, rather than the regional setting of the OAS.

Needless to say, the OAS member states that have been actively lobbying and participating in the United Nations work have also been active in the OAS. Many of the same, regressive policies and positions are being echoed within the OAS process. In particular, the United States and Canada have unfortunately played a leading role in determining the agenda for the OAS initiative, as well as the content of the articles being discussed. The most recent developments are truly alarming. The already low standards of the Proposed American Declaration are being completely redrafted. More specifically, the Government of Canada has introduced a proposal on the right to self-determination, which they state is for purposes of both the U.N. and OAS Declarations. The Canadian government position at the OAS is what most indigenous peoples feared was in the works after the 1996 Canadian Government statement on the draft U.N. Declaration. In particular, the Canadian proposal attempts to prescribe or confine the right to self-determination to autonomy and self-government in order to respect the "political,
constitutional and territorial integrity of democratic states.\textsuperscript{223} The United States has also proposed very narrow language supporting "internal self-determination."\textsuperscript{224}

With work remaining it is difficult to even speculate upon the final product that will emerge and whether or not an OAS Declaration will be a contribution or hindrance to indigenous peoples of the Americas, especially with the introduction of limitations in the Proposed American Declaration with regard to the right to self-determination. The right to self-determination is just one area in which there is an intersection between state government approaches and positions in international and regional standard setting. There are more to come. Because of this, indigenous peoples must be alert to these events and must ready themselves for all arguments in every arena. Nonetheless, this is another strand that can be woven into the overall trend of the international community’s willingness to visit or re-visit the rights, issues and concerns of indigenous peoples.

Conclusion

These various initiatives demonstrate that indigenous peoples have been able to transform their status in the international community and build upon their international legal personality. This growing international indigenous movement is consistent with the principles of participation and democracy that have been heralded or exalted by nearly every nation in the world. Institutions such as the Permanent Forum are a step in the right direction – the Forum helps to reinforce the fact that indigenous peoples have an


\textsuperscript{224} U.S. Intervention to the OAS Special Session on the Proposed American Declaration on the Rights of Indigenous Peoples, Section Four, March 14, 2002, Washington, D.C.
international legal status and capacity. Yet, indigenous peoples must continue in this
vein and fill the many gaps that presently are not informed by indigenous perspectives,
values and concerns.

In a domestic context, indigenous peoples must re-double their efforts to ensure
that they have a role in national, constitutional, judicial, legislative and other policy
institutions. In this regard, indigenous international legal personality and the exercise of
the right to self-determination -- on an equal footing as non-indigenous peoples and
without discrimination under international law -- should not be viewed as a threat.
Rather, recognition of and respect for the basic status and rights of indigenous peoples
should serve to enrich the international legal and political systems and institutions. They
are essential for democracy to flourish domestically and internationally.

This survey of the significant international legal and political developments
illustrates the impact that indigenous peoples' have had on the human rights system of the
United Nations and other international and regional organizations. Their participation
has resulted in the development of various unique dimensions of human rights law. Such
developments help to "open the door" for the inclusion of indigenous legal perspectives
and bring the world closer to a framework based upon the principles of equality and non-
discrimination. Yet, the ongoing regressive positions of states suggest that there is much
more work to do.

The work of these various international and regional organs will be important for
the overall advancement and legitimization of such legal perspectives in the context of
human rights law, as well as other areas. These developments also demonstrate the
external self-determination of indigenous peoples through their direct participation in fora
which are external to their communities and involve international legal and political
discourse that concerns them directly. Such participation allows indigenous peoples to
maintain and develop necessary "relationships in the international sphere."\(^ {225} \) This is true
not only in the area of human rights, but also in the area of peace and security,
environment and development of the United Nations. Indigenous peoples cannot be
segregated out of the ongoing dialogue in these inter-related yet distinct areas. The basic
rights and values of indigenous peoples touch upon every aspect of human concern.
However, it is through the human rights framework and rights discourse that indigenous
peoples can create the necessary elements to guide the dialogue and developments in
other areas.

The foregoing also illustrates that there is room to accommodate indigenous
peoples and their perspectives within the human rights framework. Indigenous peoples
are contributing to the transformation of international law and becoming a part of the
international political and legal framework of the United Nations.\(^ {226} \) Certainly,

\(^ {225} \) S. Pritchard, *Setting International Standards: An Analysis of the United Nations Draft Declaration on
the rights of Indigenous Peoples* (Woden: ATSIC and Faculty of Law, University of New South Wales,
1998): "Equating external self-determination with secession or independence obscures the external
dimension necessary if the choices made by peoples in the ongoing...exercise of their right to self-
determination are to be meaningful. In many instances, the external dimension of self-determination will
address opportunities for indigenous peoples to enjoy independent relationships in the international sphere.
These include possible international supervision of decisions by indigenous peoples about their political
status as well as a role for States and the organs and agencies of the United Nations system in the provision
of financial and technical assistance to indigenous peoples."

\(^ {226} \) See W.A. Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada,"
79 Can. Bar Rev. 174 (2000) at 195: "The discipline of international law has been radically transformed in
the past twenty-five years, from a State-centred approach focussing on reciprocal rights in the field of
nationality, immunities and territory, to a people-centred approach concerned with the human security of
the individual and vulnerable groups. The Supreme Court of Canada's case law in the field of international
law faithfully reflects this evolution." See also R. Falk, *Human Rights Horizons*, supra note 13 at 144:
throughout all of these international and regional developments, indigenous peoples have made a tremendous contribution to the procedural rules concerning civil society participation within the United Nations and other international institutions. Beyond procedure, there is more to learn and more to contribute substantively.

The purpose of this Chapter has been to survey the developments that have taken place within various international and regional organizations that specifically address the status, rights, concerns and aspirations of indigenous peoples that are evidence of the growing trend to include such peoples and their distinct perspectives. From an indigenous perspective, shortcomings remain in all areas and in all documents. Those related to the ILO Convention No. 169 and the OAS Proposed Declaration have been

"Over the years the [United Nations] has moved away from its initial war-prevention focus toward a broad undertaking ... One notable area of evolution has been the extension of protective concern to several categories of vulnerable people: refugees, disaster victims, the very poor, and other individuals and groups deprived of basic human rights, including the primary concern of indigenous peoples to enjoy a right to maintain a traditional way of life distinct from the dominant culture of the state. This sense that protecting the most vulnerable lies at the core of justice has helped the United Nations manifest a sympathetic interest in the plight of indigenous peoples....Can the United Nations go further in the future? Will a strong statist backlash soon ensue? ... The struggle of the Working Group on Indigenous Populations just to stay alive and to sustain a fairly independent line of activity is emblematic of the push and pull of political forces on these matters of group claims. These factors are further complicated by the various agendas and priorities of global market forces."

227 See, for example, the UN Commission on Human Rights Resolution 1995/32 regarding indigenous organization accreditations for participation in the U.N. CHR working group.
discussed. In regard to other initiatives, though the institutional steps taken may not be
the best first steps, at least such entities have begun to concern themselves with the views
and perspectives of indigenous peoples themselves.
CHAPTER III
CAPACITY OF THE HUMAN RIGHTS FRAMEWORK TO ACCOMMODATE
INDIGENOUS PEOPLES

"We the peoples of the United Nations determined...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small..."228

A) International Human Rights Framework

The human rights movement largely grew out of natural law conceptions and the notion of duties imposed by God, and later the blending of natural law and man-made law in the context of the national or internal plane of social relations and government.229 National constitutional and other internal legal frameworks contributed greatly to the early conceptualization of international human rights.230 However, the present body of international human rights law owes its origins to the end of the Second World War and the drafting of the United Nations Charter.231 The United Nations, both as an institution and a membership organization, has become the center for development of international norms concerning human rights. Through the chronology of the United Nations' actions concerning human rights came the so-called first, second and third "generations" of

228 Charter of the United Nations, second preambular paragraph.
229 See generally L. Henkin, et al, supra note 74 at 16, which provides a concise history of the development of human rights in the eighteenth century.
230 See P. Alston, "Conjuring Up New Human Rights: A Proposal for Quality Control," 78 Am J Int'l L (1984) at 607. The author writes: "From the Magna Carta, through the British Bill of Rights of 1688 and the great American and French texts of the 18th century, to the Communist Manifesto of 1848 and the Atlantic Charter of 1941, manifestos, charters, and declarations of various kinds have succeeded both as catalysts to reform or revolution and as a means of confirming and perhaps even entrenching concessions on matters of basic principle already made by the established forces in society. In a number of obvious respects, the international law of human rights, particularly as it has evolved within the United Nations framework, is one of the main heirs to this tradition."
231 See generally H.J. Steiner & P. Alston, International Human Rights in Context: Law, Politics, Morals (Oxford University Press, 1996) at 57, wherein the authors discuss the human rights movement following
rights. This gradual development also illustrates the constant evolution of norms and the need for adaptation of such norms for particular times and factual and historical circumstances.

This chapter will focus upon the consistent strands of the human rights movement and framework, which must be woven into the normative developments concerning indigenous peoples. Therefore, the chapter will not provide a detailed history of human rights. Rather, it will deal with those areas of human rights most relevant to indigenous peoples and the ongoing standard setting work of the United Nations.

Though the Charter of the United Nations does not specify the scope and content of human rights, as a constitutive and organic document its reference to human rights in Article 1(3), Article 13(1)(b), Articles 55 and 56, Article 62(2) and Article 68 have major significance for our contemporary understanding of such rights. Through accession to the Charter and their membership within the United Nations, states are obligated to "promote...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion...." They also "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth...." Consistent with the Charter provisions, the United Nations Economic and Social Council, through establishment of

World War II and the emergence of the international human rights declarations, conventions and institutions for monitoring human rights.


233 Charter of the United Nations, Article 55(c).

234 Ibid, Article 56.
the Commission on Human Rights,235 undertook the drafting of the Universal Declaration of Human Rights (UDHR).236

Even in its earliest days, the Commission was comprised of individuals who were representatives of nation-state members of the United Nations. Though the UDHR is aspirational in form and was intended only to influence or guide states in the observance and promotion of human rights, it has become the "constitution of the entire movement."237 Despite the non-binding character of the UDHR, the larger legal and political context by which the Declaration came into being should not be overlooked. The fact that states made solemn commitments to uphold the Charter of the United Nations, as well as the fact that they were active participants in the adoption of the UDHR as voting members of the General Assembly both contribute to the exalted and critical status of the UDHR as a pivotal document in human rights law.

Here, it is important to make specific mention of the adoption of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,238 one day before the UDHR. The Genocide Convention makes specific reference to the right of any "national, ethnical, racial or religious group" to protection against destruction. (It is a significant human rights instrument for indigenous peoples for numerous of reasons, and therefore, it will be discussed below).

235 Ibid, Article 68, which outlines the procedure of the Council, and states that the "Council shall set up commissions in the economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions."
237 Steiner & Alston, International Human Rights In Context, supra note 231 at 139.
In the intervening period from the 1948 adoption of the Universal Declaration to the completion of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), in 1966, the Commission had been entrusted with the drafting of a binding instrument to address the full range of rights now covered in the two Covenants. However, due to ideological and political differences between the then 56 member-states of the United Nations, the Commission was unable to complete this task. As described by Steiner and Alston:

"The Universal Declaration was meant to precede more detailed and comprehensive provisions in a single convention that would be approved by the General Assembly and submitted to states for ratification. After all, within the prevailing concepts of human rights at that time, the UDHR seemed to cover most of the field, including economic and social rights (see Articles 22-26) as well as civil and political rights. But during the years of drafting – years in which the Cold War took harsher and more rigid form, and in which the United States strongly qualified the nature of its commitment to the universal human rights movement – these matters became more contentious. The human rights movement was buffeted by ideological conflict and the formal differences of approach in a polarized world." 

At the time of drafting of the International Bill of Rights there were just over a quarter of the present number of state members of the U.N. Though few in number, there was extraordinary diversity among them.

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239 Charter of the United Nations, Article 62, paragraphs 2 and 3 respectively provide that the Economic and Social Council "may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all" and "may prepare draft conventions for submission to the General Assembly, with respect to matters falling within in competence."
240 International Covenant on Civil and Political Rights, supra note 192.
241 International Covenant on Economic, Social and Cultural Rights, supra note 165.
242 Steiner & Alston, International Human Rights In Context, supra note 231 at 139.
243 Henkin, et al, supra note 74 at 73: "the Declaration and the two covenants...have earned the appellation 'the International Bill of Rights'."
In regard to ideological conceptions, in the West the natural law conception of human rights generally remains, and the central role of the human person, as an individual, in the larger society is the basis for the state and its relations. It is the autonomy, freedom or independence of the individual that is at the core of society, allowing for the establishment of structures, which are to guarantee the enjoyment of human rights. In many socialist countries, the view is that human rights are enjoyed by the community of individuals, who are focused on production, in total equity, with the state, acting for the community, with the power to prescribe human rights and to limit them.

Also, those in the West (Nordic states and Western Europe in particular) are more open to an international versus a statist conception of human rights. This generally holds true in regard to monitoring of human rights (especially where gross and persistent violations occur and threaten peace and security), possibly with the exception of the United States, which uses such mechanisms if and when it feels it needs to advance their agenda or a particular issue.

In contrast, socialist states have held on to the notion of non-intervention and once international human rights have been agreed to, a largely top-down approach to implementation of human rights domestically. And, if domestic implementation of rights follows, state sovereignty is maintained and there is no need to be concerned about the important link between human rights and peace because security will not be an issue. Many Western states hold human rights paramount even if it causes conflict. Though the

244 Like the diversity within the indigenous world, there is diversity in the political, ideological and philosophical approaches, as well as cultural beliefs and values, of the 189 state members that now make up
United States has been seen as quite hypocritical in its use of the Commission on Human Rights, they have used the forum to demand universal respect for human rights, for example, from China, resulting in extreme tensions and lengthy heated plenary debate between the two countries.

Even more complex are those associated with cultural or spiritual differences, especially those found in Asian and African countries, which have been influenced by Buddhism, Confucianism, Hinduism, Islamic and tribal traditions. Many of the different social and cultural ideologies expressed throughout the course of the drafting of the UDHR and later the two Covenants, are reflected in the continuing debates concerning the emerging human rights, to be discussed below.

1) Civil and Political Rights

The Declaration was utilized as a starting point for the codification of first and second generation rights, namely civil and political rights contained in the ICCPR and economic, social and cultural rights contained in the ICESCR. Here, in this context, the notion of social contract is that of individuals sacrificing a measure of autonomy for the good of the larger whole in the form of government. It also included safeguards or protection from government. Therefore, the term civil pertains to the person or citizen\textsuperscript{245} and "retained rights included rights of personhood."\textsuperscript{246} Civil rights pertain to the person and their liberty, and relate to the political life of the state and those related to government and safeguard from government. The ICCPR catalogs such rights, utilizing the Declaration as a guide and in particular, Articles 2-21 of the UDHR.

\textsuperscript{245} Merriam-Webster’s on-line dictionary.
2) Economic, Social and Cultural Rights

Throughout the cataloging of civil and political rights, it became clear that such rights couldn’t be fully enjoyed without the assurance of economic, social and cultural rights, especially in contemporary society. For the purposes of drafting of the ICESCR, again the Declaration was a guide for drafting. The "second generation" rights of the ICESCR, some suggest, originate from the socialist and human welfare traditions, and the desire for social equality.\(^{247}\) Certainly, the debates concerning two separate covenants versus a single covenant lend some credence to such a view.\(^{248}\) The ICESCR borrows from Articles 22-27 of the Declaration and addresses economic and social rights, which can be characterized as those rights ensuring a certain quality of life, social welfare or decent living, and range from standards of physical health, education, to working conditions. Many felt that without securing economic and social rights, civil and political rights would be merely symbolic and never fully enjoyed by individuals.\(^{249}\) It is interesting to note that some of those engaged in the process grappled with the fact that civil and political rights and economic, social and cultural rights were interdependent,\(^{250}\) a matter to be discussed later.

\(^{246}\) Henkin, et al, supra note 74 at 81.
\(^{248}\) Steiner & Alston, *International Human Rights In Context*, supra note 231 at 17. The Annotation makes reference to the tension between the western-dominated Commission and the views of more socialist countries involved in the drafting of the covenants.
\(^{249}\) Steiner & Alston, *International Human Rights In Context*, supra note 231 at 244.
\(^{250}\) Steiner & Alston, *International Human Rights In Context*, supra note 231 at 245. The authors re-printed the "Annotations on the Text of the Draft International Covenants on Human Rights," UN Doc. A/2929 (1955), referenced and most notably include: "[Between 1949 and 1951 the Commission on Human Rights worked on a single draft covenant dealing with both of the categories of rights. But in 1951 the General Assembly, under pressure from Western-dominated Commission, agreed to draft two separate covenants]...to contain ‘as many similar provisions as possible’ and to be approved and opened for signature simultaneously, in order to emphasize the unity of purpose....Those who were in favor of drafting a single covenant maintained that human rights could not be clearly divided into different categories, nor..."
Common to both the ICCPR and the ICESCR is the fact that they are binding upon State parties to the Covenants – creating international legal obligations, which relate to the very principles and purposes of the United Nations Charter. It is important to underscore also the common Article 1(1), which recognizes the right of peoples to self-determination. Article 1(1) is clearly a collective right of "peoples" to self-determination, which contrasts with the overall individual rights orientation of the two Covenants. Both the ICCPR and the ICESCR also outline state party obligations for the fulfillment of these basic human rights. Finally, in regard to implementation and monitoring, the treaty-based bodies established by the Covenants are significant not only to the realization of such human rights by individuals and the monitoring of violations of human rights by state governments but also to the understanding of the content of such rights to both individuals and groups.

The discussion of the ICCPR and the ICESCR is important to indigenous peoples for a number of reasons. First of all, indigenous communities also cherish many of the same values reflected in the covenants. Each individual within a community enjoys a range of rights or privileges. However, the notion of social contract is where indigenous peoples begin to diverge from the western approach to government. One of the main differences being the formal creation of government with "police powers," which is distinct from an indigenous understanding that each individual maintains certain responsibilities to the community as a whole. Certainly there was order and structure within indigenous communities but there was not the sense that one required rights in
order to be protected from government. Rather government was genuinely government of the peoples, guided by custom, practice, tradition, language and other forces, as well as the roles and responsibilities of individuals within indigenous societies. The absence of such an understanding of inter-relationships, duties, roles and responsibilities in non-indigenous societies, makes understandable the critical and explicit reference to the right of self-determination through common Article 1(1) of the Covenants. Without Article 1(1) and the direct reference to self-determination of the peoples as parties to the so-called social contract, the enjoyment of human rights by individuals would be highly dependent upon the policies and practices of that state. And, specifically, whether or not they are possessed of a democratic government that does in fact and law respect their fundamental human rights.251

Setting aside the values and the significant human rights embraced by the Covenants, the manifestation of the "social contract," as understood today, did not include indigenous peoples, nations or communities – indigenous peoples were not parties to the contracts that grew up around them nor were they parties to the creation of present day states. Indigenous peoples were not included within the broad ideological purely nominal in character; without civil and political rights, economic, social and cultural rights could not be long ensured...."

251 M. Freeman,"National Self-Determination, Peace and Human Rights," Peace Review, Vol. 10, No. 2 (1 June 1998), where the author states: "The concept of human rights accords fundamental value to individual self-determination. This value rests on the belief that individuals cannot live in safety and dignity if their lives are controlled by others. They should, therefore, be guaranteed a set of rights that protect their freedom to choose their way of life and their capacity to live it....The idea of human rights, therefore, appears to entail the endorsement of democratic political institutions....The concept of human rights is designed to protect certain fundamental interests of individuals against the actions of governments. The concept of democracy legitimates a particular form of governmental power. Democratic government does not necessarily respect human rights. Where democratic government is informed by strong nationalist sentiments, it is more likely to violate the human rights both of its own dissident citizens and of foreigners."
assumptions of the unified political community that agreed to state powers under the notion of "social contract." For example, as Louis Henkin writes:

"Note a glaring (and unhappy) omission. The original U.S. Constitution did not ordain equality. Some of the early state constitutions did declare the equality of all men, but such declarations had no normative significance. States that declared equality maintained slavery. (The Indians also enjoyed less than equality, although their situation was more ambiguous since in many respects they were autonomous and not part of U.S. society.)" 252

Furthermore, indigenous peoples were not parties to the drafting of the early human rights instruments, where those of the West had substantial influence. Despite the gross violations of the fundamental human rights of indigenous peoples and their vulnerable state, they were not afforded the opportunity to infuse these important instruments with their distinct values and perspectives. 253 However, the rights enshrined in the Declaration and the Covenants should no less attach to indigenous individuals and collectivities, which also strive for human dignity and enjoyment of their natural rights as human beings. Though indigenous peoples, nations and communities have remained distinct from existing governments, this statement is even more critical because the creation of states is a historical, legal and political reality that indigenous peoples must deal with.

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252 Henkin, et al, supra note 74 at 12.
253 R. Falk, "Forward" in M.C. Lâm, At the Edge of the State: Indigenous Peoples and Self-Determination, supra note 12 at xiii: "Undoubtedly, the most vulnerable of all categories of vulnerable peoples is that of 'indigenous peoples.' Ravaged by colonial and settler oppression often verging on tactics of eradication, these peoples have also been denied the benefits of 'decolonisation.' Furthermore, their distinctive outlook has been overlooked or distorted by most understandings of human rights, and their ways disvalued and cast aside by the modernization consensus embraced by every sovereign state. The specific identities and grievances of indigenous peoples played literally no role in the influential formulations of the provisions of the Universal Declaration of Human Rights. Amazing as it may seem, indigenous peoples were simply not treated as 'human' by the Universal Declaration, despite its drafters being among the most eminent idealists of their day."
3) **Emerging Human Rights**

Let us now turn to the matter of "third generation rights." The "third generation of rights," often referred to as "solidarity rights,"\(^{254}\) include the right to development, the right to peace, the right to a safe and healthy environment, the rights to communicate, the right to benefit from the common heritage of humankind, and the right to humanitarian assistance. The main characteristic of third generation rights is the collective dimension and importance of such rights to groups. Without downplaying the significance solidarity rights have for groups, these particular rights are important to individuals as well.

(a) **Right to Development**

In order to illustrate the significance of third generation rights to indigenous peoples and others let us focus upon the right to development.\(^{255}\) As previously discussed, the early concept of development was largely couched in terms of economic development from an entirely statist point of view.\(^{256}\) The concentration of extensive political and economic control in the state through the various United Nations resolutions\(^{257}\) and Declarations\(^{258}\) confine almost exclusively the exercise of the right to


(economic) development to states. Even throughout the U.N. Commission on Human Rights discussion on the right to development and the eventual adoption of the Declaration on the Right to Development,\(^{259}\) the core of the discussions were confined to economic development, under-development, and the need to improve the overall economic conditions of peoples at the national level.

In the context of post-war developments, throughout the 1960’s, the least developed countries insisted that the notion of sovereign equality of states was tied to the distribution of the world’s resources and without a more equitable distribution of such resources, the concept of sovereign equality was hollow. These debates contributed to the divide between the North (or more specifically the industrialized world) and the South (or more specifically the least developed countries).\(^{260}\) The divide is exacerbated by the developing nations asserting an absolute or unfettered exercise of the right to development, without limitation or particular standards, with the developed nations resisting such an assertion. Also, the Third World, along with socialist countries, latched on to economic, social and cultural rights, as critical rights to bring about development and to decrease the economic gap existing between the developed and developing countries of the world. In contrast, Western states emphasized civil and political rights in

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\(^{259}\) Declaration on the Right to Development, G.A. Resolution 41/120 (1986), adopted by a vote of 146 to one (the United States) with six abstentions.

\(^{260}\) Y. Ghai, “Human Rights and Governance: The Asia Debate,” 15 Australian Year Book of International Law (1994) at 1, where he writes that the right to development has been “a matter of considerable contention internationally, with developing countries arrayed on the side supporting it, and most developed countries united in their opposition to it.”
order to safeguard individuals from the ever-expanding state structures and the powers of the market economy.

In regard to indigenous societies, generally speaking, the impact of most economic development has been negative and compounded by adverse impacts on their lands, territories and resources.\textsuperscript{261} In fact, it is no coincidence that economic development schemes have triggered many of the contemporary land claim "settlements," agreements\textsuperscript{262} and litigation.\textsuperscript{263}

In order to counter this long-established value system originating primarily from the industrialized world and to move away from purely state or corporate driven economic development, the objectives of the Declaration on the Right to Development, when interpreted from a group rights perspective, would allow for the further elaboration of other forms of development, above and beyond economic development. The realization and implementation of the \textit{human right} to development requires such an elaboration. Furthermore, sensitivity to social and cultural diversity and a wider range of different human conditions can be addressed. There is a continuing necessity to speak of a human right to development and not merely the right to development.

\textsuperscript{261} R. Hitchcock, "International Human Rights, The Environment, and Indigenous Peoples," Colorado J. of Int'l Env. L. 1 (1994), which contains a table of various "Development Projects that Have Had Negative Impacts on Indigenous Peoples."

\textsuperscript{262} Examples include the Alaska Native Claims Settlement Act of 1971 (to be discussed in Chapter VI), prompted by the discovery of oil on the lands of the Inupiat of the North Slope, who claimed the whole of the territory. Their claim and the interests of the state and federal governments and the motivation of the oil industry resulted in this congressional legislation. The James Bay and Northern Quebec Agreement of 1976 is another example of the large scale development triggering the resolution of land claims of the Aboriginal peoples.

\textsuperscript{263} There are numerous examples of litigation over development projects and the address of the rights of indigenous peoples to lands, territories and resources. One recent international judgement is that of the Awas Tingni community, supra note 202.
Indeed, the Global Consultation on the Right to Development as a Human Right concluded that "[t]he struggle for human rights and development is a global one that continues in all countries, developed and developing, and must involve all peoples, including indigenous peoples, national, ethnic, linguistic and religious minorities, as well as all individuals and groups. International implementation and monitoring mechanisms must be of universal applicability."\(^{264}\) These matters continue to concern the United Nations in the context of how to implement the Declaration on the Right to Development.\(^{265}\) And, the United Nations Development Programme has combined efforts with the High Commissioner for Human Rights for "enhancing the human rights dimension in development activities."\(^{266}\) Though the United Nations Development Program efforts are largely focused upon economic development, the agency has more recently concerned itself with a wide range of conditions, which relate directly to the enjoyment of basic human rights.\(^{267}\) For example, their program focuses upon hunger


\(^{265}\) U.N. Document A/53/150, August 17, 1998: "1. In adopting resolution 52/136 of 12 December 1997, the General Assembly, inter alia, reaffirmed the importance of the right to development for every human person and for all peoples in all countries, in particular the developing countries, as an integral part of fundamental human rights, as well as the potential contribution its realization could make to the full enjoyment of human rights, and fundamental freedoms....4. By the same resolution, the General Assembly called upon the Commission on Human Rights to continue to make proposals to the General Assembly, through the Economic and Social Council, on the future course of action on the question, in particular on practical measures for the implementation and enhancement of the Declaration on the Right to Development, including comprehensive and effective measures to eliminate obstacles to its implementation, taking into account the conclusions and recommendations of the Global Consultation on the Realization of the Right to Development as a Human Right, the reports of the Working Group on the Right to Development and the report of the Intergovernmental Group of Experts to elaborate a strategy for the implementation and promotion of the right to development."

\(^{266}\) Ibid, at paragraph 16(a).

and poverty, education, gender equality, health and mortality of children, maternal health, combating HIV/AIDS, malaria and other diseases, and environmental stability.\textsuperscript{268}

In this regard, the influence of indigenous peoples in international human rights standard setting has furthered the group rights dimension, as well as the multi-faceted nature of the human right to development. As addressed earlier, the World Bank has been a prime mover in large-scale development in "developing" countries and more recently, they have shown greater sensitivity by adoption and revision of their various operational directives concerning indigenous peoples specifically.

More substantially, ILO Convention No. 169 affirms that "[t]he peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use and to exercise control...over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly."\textsuperscript{269}

In the context of the U.N. Declaration on the Rights of Indigenous Peoples, here again, the ability of indigenous advocates to push the envelope on the interpretation of the human right to development, as a collective right, is evident in Articles 21 and 23.\textsuperscript{270}

"Article 21: "Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their international human rights debate has changed radically over the last five years. In relation to both sets of rights, and their relevance to the broader development debate, the possibilities for open discussion and effective promotion are dramatically improved from the position five years ago."\textsuperscript{268} See un.org/milleniumgoals/index.html

\textsuperscript{267} ILO Convention No. 169, supra note 207, Article 7.

\textsuperscript{270} U.N. Draft Declaration on the Rights of Indigenous Peoples, see Annex "A" of this thesis.
own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation."

"Article 23: "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions."

This brief discussion on the right to development helps to illustrate the metamorphosis of the right in international law from one couched in terms of states' rights to one of a human right\(^{271}\) and eventually to a human right in the context of indigenous peoples specifically.

Despite the ongoing debate about whether or not the right to development as a human right has any legal foundation,\(^{272}\) it is difficult to deny the fact that the world community has a moral duty to affirm entitlements to individuals and groups in order for the United Nations itself "to promote social progress and better standards of life in larger freedom."\(^{273}\) Like the International Bill of Rights, the goal of development is not only economic growth, but it also includes social, cultural, and political progress. It is not possible for people who live in poverty to enjoy basic rights. To live in poverty is to be vulnerable to many other larger, more powerful, oppressive forces and institutions,

\(^{271}\) A. Orford, "Globalization and the Right to Development" supra note 169 at 135. Orford writes: "it is thus fair to say now that the right to development is not merely a dangerous 'delusion of well-meaning optimists'... but rather a secure part of the framework of international human rights at the turn of the century."


\(^{273}\) Charter of the United Nations, fourth preambular paragraph.
including governments. Hence, the importance of the interrelated nature of human rights, development and peace, to be discussed below.

Many critical issues remain unresolved. For example, the questions of who are the beneficiaries or subjects of the right to development and how is the right actually implemented and by whom. In regard to beneficiaries, clearly, indigenous peoples, who have specific and distinct rights in addition to their other basic human rights, must be able to exercise both an individual and collective right to development. As the world community has seen, indigenous peoples have been consistently denied or hindered in the exercise of the right to economic, social, cultural, political and spiritual development. In addition, the concept of "sustainable" development has been addressed. However, little has been done to address the notion of equitable development in the context of indigenous peoples. Elements of equitable development include encouraging development initiatives by indigenous peoples themselves and ensuring significant and accessible opportunities that may include government support and assistance. Furthermore, development should only take place at a rate and pace compatible with the local communities affected, with indigenous peoples participating equitably in the benefit of development, in a manner acceptable to them. Essentially, "equitable" means equal opportunity, equal access, and removal of any inequalities or disparities that may exist, potentially including decentralization of decision-making.

However, such issues should not stifle the further elaboration of this human right and its realization by indigenous peoples, nations and communities. For indigenous peoples, the international standards related to development must be implemented for
meaningful use at the national, regional and local level. Furthermore, national "development" policies would have to conform to international standards. Such national policies must then have an actual positive effect at the grassroots level within indigenous communities and territories.

The history of deterioration of distinct indigenous communities, in the face of mounting environmental and cultural assaults, is sufficient evidence to show that state governments acting alone (in development schemes) has resulted in the violation of fundamental human rights of indigenous peoples. Through self-development and self-reliance, and the realization of collective rights such as the human right to development, indigenous peoples (and others) can enhance their security and the future of their communities. In this way, the human right to development can add a new qualitative dimension to the existing international human rights framework - a dimension that appropriately integrates environmental, social, political, cultural, and economic elements.

(b) Right to Peace

Like the human right to development, the right to peace has evolved as a third generation or solidarity right. 275 Though the Charter of the United Nations 276 and the UDHR support the objective of peace and security, there is no explicit reference to the

275 S. Marks, supra note 254 at 446.
276 Charter of the United Nations, Article 1, para. 1, which states "The purposes of the United Nations are to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace." Also, Article 2, para. 3 and 4 respectively: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."; and "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
right to peace. However, Article 23(1) of the African Charter\textsuperscript{277} makes explicit reference by stating that:

"All peoples shall have the right to national and international peace and security...."

Though some scholars have asserted that the human right to peace has not attained any legitimacy due to the lack of rigorous procedural and substantive study or debate and consideration at the international level,\textsuperscript{278} this third generation right has also emerged in the form of a United Nations Declaration.\textsuperscript{279} Advocates for peace and security have contributed to the elaboration of this third generation right by building upon the essence of Article 28 of the UDHR, which states that "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."\textsuperscript{280} The Declaration on the Right of Peoples to Peace is brief and gets right to the point by identifying:

"the principal aim of the United Nations is the maintenance of international peace and security.... Convinced that life without war serves as the primary international prerequisite for the material well being, development and progress of countries, and for the full implementation of the rights and fundamental human freedoms proclaimed by the United Nations.... Recognizing that the maintenance of a peaceful life for peoples is the sacred duty of each State, ...Solemnly proclaims that the peoples of our planet have a sacred right to peace..."\textsuperscript{281}

Certainly, one cannot overlook the overwhelming evidence of suffering, extinction, dispossession, exploitation, subjugation and domination experienced by

\begin{footnotesize}
\begin{enumerate}
\item Steiner & Alston, \textit{International Human Rights in Context}, supra note 231, at 612.
\item Universal Declaration of Human Rights, Article 28.
\item Universal Declaration on the Right of Peoples to Peace, first preambular para. and Operative para. 1.
\end{enumerate}
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indigenous peoples as a result of war and armed conflict. In the Arctic alone, the
ongoing threats to peace and security due to militarization has been the focus of
indigenous organizations such as the Inuit Circumpolar Conference since their inception
in 1977. The persistent presence of nuclear-powered ballistic missile submarines,
bombers, long-range cruise missiles, air launched cruise missiles, military bases, and
other armed marine vessels and aircraft all pose serious threats to Arctic indigenous
peoples and their lands, territories and resources. These concerns are not unfounded;
there are very real and serious threats to indigenous peace and security. Therefore, the
collective human right to peace is critical to indigenous peoples. Not only for its specific
focus upon peace and security within indigenous territories and for indigenous
communities but also because of its value in the larger context of the inter-dependence of
human rights and fundamental freedoms. For the framers of the right, as well as for
indigenous peoples, peace is not merely the absence of war but rather it includes a fair

282 S. Weissner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal
Analysis", supra note 47. The author states: "Wounded Knee, the Trail of Tears, the Siege of Cusco
[Spanish killing of all captured Indian women] – these words, vessels of meaning, capture only a tiny
fragment of the history of suffering, actual and cultural genocide, conquest, penetration, and
marginalization endured by indigenous peoples around the world."
283 For example, see the 1977 Inuit Circumpolar Conference Resolution calling for the Arctic to be
established as a "nuclear free zone." In addition, the ICC adopted a chapter concerning "Principles and
Elements on Peaceful and Safe Uses of the Arctic" and "Principles and Elements on the Emerging Rights of
Peace and Development" contained in their 1992 document "Principles and Elements for a Comprehensive
Arctic Policy" On file with author.
284 Incidents such as the U.S. B-52 bomber accident near Thule, Greenland, in 1968, involved four
hydrogen bombs. There have also been numerous nuclear disasters at sea. Nuclear weapons are routinely
present on all U.S. and Russian aircraft carriers, logistics support ships, submarines, and surface warships.
In April, 1989, a nuclear powered attack vessel carrying two nuclear torpedoes sank in the Norwegian Sea.
From the period of 1945 to 1989, 50 nuclear weapons and 11 nuclear reactors have been lost at sea. During
this same period, 212 confirmed accidents worldwide involving nuclear powered vessels took place. For
more detailed accounts see generally D. Sambo, "Sustainable Security: An Inuit Perspective," in Politics
and Sustainable Growth in the Arctic, Kakonen, J., ed. (Brookfield: Dartmouth Publishing Co., 1993) 51
and W. Arkin & J. Handler, "Nuclear Disasters at Sea, Then and Now", Bulletin of the Atomic Scientists,
July/August (1989).
and inclusive system of international relations, based on principles of mutual cooperation
in order to achieve commonly shared goals.

In this regard, there is an important relationship between human rights, peace and
development. None of these objectives are truly realizable in isolation from one another.
As has been recognized by the drafters of the Declaration on the Right of Peoples to
Peace, peaceful co-existence and peace are generally vital factors in striving towards
social progress and development. In addition, the Declaration on the Right to
Development makes the linkage between peace and security "as essential elements for the
realization of the right to development."285 Furthermore, severe economic disparities and
human rights violations can pose a threat to world peace.286 Though both the right to
development and the right to peace have not been fully recognized287 or implemented,
they may eventually gain international acceptance by usage. Like other forms of
customary international law, the absence of binding instruments does not keep states
from undertaking positive actions or behavior in regard to observing human rights or
achieving the ultimate objectives of a particular human right.

Similar to state reluctance elsewhere, it is highly likely that states have not fully
advanced the rights to peace and development because of the corresponding duties that
states should bear in regard to these rights, as well as the need to ensure the direct

286 M.C. Lam, At the Edge of the State: Indigenous Peoples and Self-Determination, supra note 12 at 150,
where the author makes the linkage between self-determination as a pre-condition of peace and not a cause
of disruption or violence: "The animating impulse behind the principle of self-determination is the free
realization by a people of its sense of self. While the principles sometimes provokes the disruption of
peace, it more often than not also constitutes its pre-condition." See also R. Stavenhagen, "Self-
Determination: Right or Demon?" in D. Clark & R. Williamson, eds., Self-Determination: International
Perspectives (New York: St. Martin's Press, 1996) at 8: "The violence we see around us is not generated
by the drive for self-determination, but by its negation."
participation of the beneficiaries of such rights in decision-making concerning peace and
development.\textsuperscript{288} The individual rights identified in the International Bill of Rights and
the collective nature of third generation rights are all critical to indigenous peoples. To a
large degree, the draft Declaration can be seen as an attempt to build upon the
International Bill of Rights by combining indigenous values, customs and practices with
these fundamental collective and individual human rights. However, the draft
Declaration is taking one step further by adding the important cultural context of
indigenous peoples to such rights and thereby positively contributing to the overall
human rights framework.

\textbf{B) Nature of Human Rights}

In 1948, the authors of the UDHR must have recognized the interrelated nature of
the human rights included in this hallowed text. Otherwise, they would not have included
reference to civil, political, economic, social and cultural rights in the document. In
addition, the drafters of the International Covenants who argued for a single covenant
understood the importance of interrelationship of the basic human rights that form the
ICCPR and the ICESCR.

Similarly, indigenous peoples recognize the interrelatedness and interdependence
among all human rights.\textsuperscript{289} They do so in large part because of their worldview about the

\textsuperscript{287} Steiner \& Alston, \textit{International Human Rights In Context}, supra note 231.
\textsuperscript{288} One example is the United States, who had opposition to the drafting of the ICESCR and presently has
general opposition to the creation of any state obligations in the context of the draft Declaration on the
Rights of Indigenous Peoples.
\textsuperscript{289} In regard to indigenous statements concerning the interrelatedness and interdependence among all
human rights, see \textit{Geneva Declaration on the Health and Survival of Indigenous Peoples}, adopted at a 1999
World Health Organization health consultation, Preambular paragraphs 11 and 12 state:
holistic nature of their relations and inter-relationships with all other beings and all living things. This translates to their perspectives concerning human rights as well. From their earliest interventions at the U.N. Working Group, indigenous peoples have seen the text of the draft Declaration as a whole and have affirmed the view that human rights are interrelated, interdependent and indivisible.

Though some may view the language adopted by State government representatives, representatives of NGO's, indigenous peoples and others gathered at the World Conference on Human Rights through the Vienna Declaration and Programme of Action as a compromise, the Conference did, in the end, affirm that:

"All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

Also, in 1997, United Nations Secretary General Kofi Annan stated that:

"Reminding the international agencies and other bodies of the UN system of their responsibility, and the obligation of States, towards the promotion and protection of Indigenous Peoples' status and rights, and that a human rights approach to indigenous health and survival is based on the said international responsibility and obligation to promote and protect the universality, indivisibility, interdependence and interrelation of the rights of all peoples; and finally;

Reaffirming the indivisibility of human rights with regard to the health and survival of Indigenous Peoples as essential to an effective and meaningful response to the health needs of Indigenous Peoples."

290 Ibid, Part II: "Indigenous Peoples' concept of health and survival is both a collective and individual inter-generational continuum encompassing a holistic perspective incorporating four distinct shared dimensions of life."

291 Numerous statements have been made by indigenous peoples about the provisions of the draft Declaration being dependent upon one another, and that the text must be read in context and as a whole. For example, the 1997 Statement of the Indian Law Resource Center to CHR working group indicating "that the Declaration must be read as a whole, the principles are inter-related and inseparable, including the preamble." And, the 1997 Statement of the Inuit Circumpolar Conference to the CHR working group in relation to the preamble, as the "philosophical framework for the specific articles and a call to states to read the document in such a context." Statements on file with author.
"Human rights are foreign to no culture and native to all nations.... the universality of human rights that gave them their strength...it endows them with the power to cross any border, climb any wall, defy any force."293

It may be said that such language emerges in order to achieve "consensus" over documents heavily influenced by the western evolution of human rights, and to curb the different political stances on the enjoyment of human rights expressed by the Western bloc and those of socialist influence and others respectively aligned with them. However, within the United Nations, the aim to achieve consensus, sometimes through compromise, is the practice for nearly every one of its decision-making forums. Though many divergences of opinion amongst nation-states remain, there are a growing number of international instruments that make a specific reference to this important aspect of human rights.294 In addition, this interpretation of human rights has been embraced by numerous scholars295 and advocates.

The point of such declarations and pronouncements is the need to recognize the dynamic inter-play between cultural diversity and universal principles or ideals. Furthermore, such language helps to motivate respect for certain minimum standards and to promote the actual enjoyment of basic human rights, which may be taken for granted.

294 For example, the Inter-American Democratic Charter, adopted by acclamation by the Hemisphere's Foreign Ministers and signed by the 34 countries of the Americas at the 28th special session of the OAS General Assembly, Lima, Peru, September 11, 2001, Article 7: "Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in inter-American and international human rights instruments." Also the United Nations Declaration on the Right to Development, Article 6.2 acknowledges that all human rights are indivisible and interdependent.
295 Henkin, et al, supra note 74: "A holistic perspective on human rights is not merely faithful to the intellectual and political history of the human rights idea; it reflects the relationship in principle, in law and in fact, between national and international human rights in today's world."
in the West and elsewhere. There is no question that each state will (and must) take into consideration its "national and regional particularities and various historical, cultural and religious backgrounds." However, they must do so in a fashion that is consistent with the fact that the international human rights instruments outline the minimum standards, which are considered to be of a universal nature. Finally, there is a need to further the comprehensive nature of human rights rather than segregating and ordering them or to focus upon the differences that may exist. There is a growing understanding of the interconnectedness of civil and political rights and their effective enjoyment through the exercise of economic, social and cultural rights. This interdependence and indivisibility is stated implicitly in the Charter of the United Nations, the UDHR, and the International Covenants.

These fundamental principles of the human rights framework cannot be overstated, especially from an indigenous perspective. It is quite elementary but important to state and re-state that it is undesirable and inconsistent with the human rights framework, to establish a "hierarchy" of rights,296 inviting discussion over rights which may be derogable and those which are non-derogable. Consistent with the indivisibility of human rights and their interdependence, State governments have both specific and general duties to promote human rights and are not in a position to determine which rights they may or may not limit.297

296 See T. Meron, "On a Hierarchy of International Human Rights," 80 Am. J. Int'l L. 1 (1986), which addresses the notion of a hierarchy of norms in international law.
297 See generally, Article 5 of the International Convenants, which addresses actions aimed at the destruction of any rights of freedoms recognized, and the purposes and principles of the United Nations.
The universality of human rights must also be addressed in order to fully illustrate the nature of human rights. The very term "universal" means "including or covering all or a whole collectively or distributively without limit or exception; present or occurring everywhere; existent or operative everywhere or under all conditions." The constitution or Charter of the United Nations may be considered the starting point for the internationalization of human rights. In particular, Article 1(3) establishes a central purpose of this international organization as one of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Though there was a tension between the West and primarily Asian countries as to the value systems embedded in the early human rights instruments, the objective was to ensure that all peoples, worldwide, enjoyed fundamental human rights. The purpose was not to replace national constitutions or internal laws but rather to establish minimum standards at the international level to be guaranteed by every state to its peoples. Furthermore, there was no intention to create homogeneity.

298 Merriam-Webster's on-line dictionary.
299 Henkin, et al, supra note 74 at 16: "The Western origin of rights was a source of some political resentment after the end of colonialism and became a political issue towards the end of the Twentieth Century, leading, for example, to the invocation of 'cultural relativism.' 'Asian values,' in particular, were invoked to challenge the universality of rights."
300 See also Mabo v. Queensland (1992), 107 A.L.R. 1 at 29, 175 C.L.R. 1 (H.C. Australia), per Brennan J: "[I]nternational law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration."
301 R. Falk, supra note 13, at 93: "[T]he interplay of different cultural and religious traditions suggests the importance of multicultivizational dialogue involving the participation of various viewpoints, especially those with non-Western orientations. The world does not need a wholesale merging of different cultures and civilizations; rather, it simply needs to foster a new level of respect and reconciliation between and among its ever changing and ever diverse peoples and nations."
The concept of cultural context\textsuperscript{302} is significant in order to reinforce the positive purposes of international human rights instruments. Dependent upon regional or cultural particularities and conditions, the manifestation of every right will require different weighting. This is also true in the context of the exercise of collective or group rights and those of an individual nature.

The U.N. Charter itself recognizes that regional organs and arrangements were anticipated by the United Nations\textsuperscript{303} in order for accommodation of regional differences. In fact, various regional arrangements have emerged and have been complementary to the international human rights framework. For example, the Organization of American States is a regional arrangement, with a corresponding Inter-American Human Rights Court and institutions to "enforce" and monitor a variety of regional human rights instruments.\textsuperscript{304} Similar to these regional arrangements, the work of the United Nations to prepare a Universal Declaration on the Rights of Indigenous Peoples reinforces the need for instruments and processes to accommodate cultural diversity. Indeed, this is the objective of the exercise at the United Nations concerning indigenous peoples. Such an approach is a necessary element to ensure the effectiveness of universally recognized human rights. Furthermore, cultural diversity is preferable to cultural imperialism and

\textsuperscript{302}Steiner & Alston,\textit{ International Human Rights In Context}, supra note 231 at 374, which includes the "American Anthropological Association, Statement on Human Rights," 49 Amer. Anthropologist No. 4, 539 (1947): "Today the problem is complicated by the fact that the Declaration must be of worldwide applicability. It must embrace and recognize the validity of many different ways of life."

\textsuperscript{303}Charter of the United Nations, Chapter VIII.

\textsuperscript{304}H. Hannum,\textit{ Autonomy, Sovereignty and Self-Determination}, supra note 49.
homogeneity, which would be antithetical to the objective of respecting and promoting international human rights.\textsuperscript{305}

International legal scholar, Richard Falk, sums up a number of the significant tensions and factors that led to earlier narrow interpretation of human rights and the exclusion of particular groups from these important human rights developments:

"To put it bluntly, the plight of indigenous and minority peoples was virtually invisible as an international issue when the United Nations was founded, and remained so for twenty-five years thereafter. A number of factors explain this circumstance, especially as it relates to indigenous peoples:

1. the exclusion of issues related to the treatment of indigenous peoples from international political consciousness, an exclusion reinforced by the general failure of indigenous peoples to participate or even gain adequate representation in most national political systems; their consequent demoralization, passivity, and resignation; a lack of politically savvy indigenous leadership that could advance a political cause on the stage of international diplomacy; the frequent suppression of increasingly vocal and sophisticated indigenous leadership;

2. assimilationism and the homogenizing effect of modernism and consumerism; a sense that indigenous cultures are outdated, if quaint, remnants of the past that will naturally be swept away by the forward march of history;

3. the absence of global weight on the part of indigenous peoples and minorities, their lack of transnational constituencies, networks, and representatives capable of mounting significant international protests or exerting leverage;

4. the shared statist interest of most UN members in keeping issues involving indigenous peoples and minorities well hidden behind the shield of domestic jurisdiction;

5. the special concern of postcolonial states in Africa and Asia to safeguard their territory against the genuine risk of dismemberment and civil warfare

\textsuperscript{305} L. Henkin, et al, supra note 74 at 107, which re-prints Donnelly, J., "Universal Human Rights in Theory and Practice": "Cultural relativity is an undeniable fact; moral rules and social institutions evidence an astonishing cultural and historical variability. The doctrine of cultural relativism holds that at least some such variations cannot be legitimately criticized by outsiders. But if human rights are literally the rights everyone has simply as a human being, they would seem to be universal by definition. How should the competing claims of cultural relativism and universal human rights be reconciled? I defend an approach that maintains the fundamental universality of human rights while accommodating the historical and cultural particularity of human rights...."
arising from tribally based autonomy and secession claims—or from any self-
determination movements outside the context of colonialism;
6. the special concern of the Soviet Union in avoiding the internationalization
of a variety of autonomy and secessionist claims from "captive nations"
located within both its bloc and its national territorial boundaries; and
7. the strong developmental and financial interest of dominant elites in
appropriating land and resources owned or managed by indigenous
peoples.  

This view echoes those of indigenous peoples, who have articulated similar points
both domestically and internationally, and who have used the human rights discourse to
advance their legitimate claims and perspectives. The international human rights system
has been designed to ensure that certain minimum standards are internationally
recognized; the system provides checks and balances, as well as recognizing the inter-
relationships that exist between rights. The opposition to indigenous advocates for the
equal application of all human rights is focused upon control, power and domination.
Indigenous peoples, as vulnerable groups, are not asserting their rights in order to control,
overpower or dominate others. Indigenous peoples and others recognize that there is no
room for cultural imperialism in the context of human rights. Rather, such groups are
demanding that human rights are interpreted fairly, holistically, and consistent with the
peremptory norms of international law. Ultimately, the balancing of universality of
human rights and the accommodation of distinct cultural contexts are necessary to ensure
diversity of humankind.

C) Human Rights, Democracy and the Rule of Law

Like the interrelatedness and interdependence among all human rights, there is an
important relationship between human rights, democracy and the rule of law.  

Increasingly, the world community has recognized the importance of this relationship.\textsuperscript{308} For any government institutions to have a measure of integrity, they must ensure access, participation and representation. In this way, democracy is not merely about one person, one vote. In order to exercise the human right to self-determination without any threat to territorial integrity or political unity of sovereign and independent states, governments must guarantee effective representation of all.\textsuperscript{309} Without such effective participation and accommodation, and without recognizing the rights of distinct peoples within their borders, states cannot possibly claim to respect social justice and democracy. Hence, democracy and the rule of law are necessarily interrelated. In 1991, the Conference on Security and Co-operation in Europe noted:

"The participating States emphasize that issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order. They categorically and irrevocable declare that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States."

\textsuperscript{307} Steiner & Alston, \textit{International Human Rights In Context}, supra note 231 at 387, which re-printed Pannikar, "Is the Notion of Human Rights a Western Concept?" 120 Diogenes 75 (1982): "Human rights are tied to democracy. Individuals need to be protected when the structure which is above them (Society, the State or the Dictator – by whatever name) is not qualitatively superior to them, i.e. when it does not belong to a higher order. Human rights is a legal device for the protection of smaller numbers of people (the minority or the individual) faced with the power of greater numbers...."

\textsuperscript{308} Steiner & Alston, \textit{International Human Rights In Context}, supra note 231 at 1314, which re-printed H. Steiner, "Do Human Rights Require a Particular Form of Democracy" in E. Cotran and A. O. Sheriff (eds.), \textit{Democracy, the Rule of Law and Islam} (1999) at 202: "...the rule of law, so vital to the growth of liberalism and democratic government, is invoked to urge greater predictability in the application of laws bearing on foreign investment and on business generally....In turn, it is argued, heightened business investment and activity under such a legal regime will ultimately strengthen the rule of law with respect to civil and political rights as well. Foreign investment and the development of the local economy in a broad western model thus will contribute importantly toward, if not make inevitable, the realization of democratic and human rights culture....The causal flows are argued to be reciprocal, as global business activity both inspires and responds to the growth of democratic rule and its associated rule of law...."

States and do not belong exclusively to the internal affairs of the State concerned."[310] [Emphasis added.]

And, in 1992, United Nations Secretary General B. Boutros-Ghali stated:

"Democracy within nations requires respect for human rights and fundamental freedoms, as set forth in the [U.N.] Charter...This is not only a political matter."[311]

More recently, the state members of the OAS adopted the Inter-American Democratic Charter in Lima, Peru, coincidentally on September 11, 2001, and affirmed, both in the preamble and operative paragraphs of the Charter, the fundamental connection between human rights, democracy and the rule of law.[312] In particular, Articles 7, 9, and 11 read:

312 Inter-American Democratic Charter, adopted by acclamation by the Hemisphere’s Foreign Ministers and signed by the 34 countries of the Americas at the 28th special session of the OAS General Assembly, Lima, Peru, September 11, 2001. Preambular paragraph 6: CONSIDERING that solidarity among and cooperation between American states require the political organization of those states based on the effective exercise of representative democracy, and that economic growth and social development based on justice and equity, and democracy are interdependent and mutually reinforcing; Paragraph 8: BEARING IN MIND that the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights contain the values and principles of liberty, equality, and social justice that are intrinsic to democracy; Paragraph 9: REAFFIRMING that the promotion and protection of human rights is a basic prerequisite for the existence of a democratic society, and recognizing the importance of the continuous development and strengthening of the inter-American human rights system for the consolidation of democracy; Article 1 The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it. Democracy is essential for the social, political, and economic development of the peoples of the Americas. Article 2 The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States. Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order. Article 3 Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the
Article 7

"Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in inter-American and international human rights instruments."

Article 9

"The elimination of all forms of discrimination, especially gender, ethnic and race discrimination, as well as diverse forms of intolerance, the promotion and protection of human rights of indigenous peoples and migrants, and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation."

Article 11

"Democracy and social and economic development are interdependent and are mutually reinforcing."

In addition, scholars have studied the interrelated nature of human rights, democracy and the rule of law and have noted the critical linkage between the three.\(^{313}\)

For example, J. Habermas states:

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soverainty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.

Article 4

Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy.

The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy.

Article 6

It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.

Article 26

The OAS will continue to carry out programs and activities designed to promote democratic principles and practices and strengthen a democratic culture in the Hemisphere, bearing in mind that democracy is a way of life based on liberty and enhancement of economic, social, and cultural conditions for the peoples of the Americas. The OAS will consult and cooperate on an ongoing basis with member states and take into account the contributions of civil society organizations working in those fields.

\(^{313}\) H.W. MacLaughlan, "Accounting for Democracy and the Rule of Law in the Québec Secession Reference," 76 Can. Bar Rev. 155 (1997) at 157, writes: "If mature, democratic countries like Canada can be dismembered by a simple majority vote of an internal unit, and in particular if independence were to derive juridically from international recognition by other states, without the consent of the existing state, any concept of an international rule of law would be lost. Borders would no longer be secure. Nation states would be fragile. International relations would be impossible. And there would be a net loss for human rights."
"Democracy and human rights form the universalist core of the constitutional state ..."\textsuperscript{314}

In the case of A. Cassese, he has written:

"What is meant by democracy? Opposition by many non-Western States to the Western model leads one to believe that only some features of that model are now widely accepted: representative governance based on \textit{regular, free, and fair elections}, and accountable to the electorate; \textit{respect for human rights}; \textit{rule of law}."\textsuperscript{315}

This conception also relates directly to the right to self-determination and is slowly emerging as an international norm. As T. Franck elaborates:

"Self-determination is the historic root from which the democratic entitlement grew. Its deep-rootedness continues to confer important elements of legitimacy on self-determination, as well as on the entitlement's two newer branches, freedom of expression and the electoral right....

Since self-determination is the oldest aspect of the democratic entitlement, its pedigree is the best established. Self-determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement."\textsuperscript{316}

It is the underlying principles or norms of democracy or the elements upon which democracy hinges that are necessarily and intimately tied to the exercise of human rights by, and the equal application of the rule of law to, indigenous individuals and groups. In addition to the need to be comprehensive in the discussion of human rights, this is essentially what concerns indigenous peoples in their advancement of the arguments concerning the interrelatedness, inter-dependence, indivisibility and universality of human rights.

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D) Capacity to Accommodate Indigenous Rights within the Human Rights Framework

Due to the nature of human rights, it should be clear to the reader that the United Nations does have the capacity to accommodate indigenous rights within its human rights framework. Not only does the United Nations as an institution, within its human rights framework, have the obligation as well as capacity to advance the individual human rights of indigenous persons, the system also has the capacity to advance and embrace the collective rights of indigenous peoples. As stated, the entire standard setting process of the United Nations specifically concerning indigenous peoples represents the human rights movement toward this goal.

The international human rights framework not only has the capacity but more importantly, the United Nations (as the agent or organ of the community of nation-states), and its nation-state members have an undeniable duty to accommodate indigenous peoples’ rights. In order to respect equality, non-discrimination and the absolute prohibition of racial discrimination, states have little choice but to accommodate indigenous peoples rights and they must do so by taking into consideration the full scope of diversity of indigenous peoples, nations and communities.

In addition to their existing international legal obligations, states have a compelling duty to recognize, without qualification or limitation, the fundamental rights of indigenous peoples as human rights. Not only is it important to remedy the vulnerable condition of indigenous peoples caused by genocide, marginalization, exclusion, and the

317 Henkin, et al, supra note 74: "Like the human rights movement, both national and international laws of human rights have focused on the rights of the individual, but, increasingly, the idea of rights has been
Euro-centrism of courts, but also to contribute to the development of law through the international community's "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." More importantly, state governments have a heightened duty as fiduciaries, as well as perpetrators of human rights violations, to accommodate the status and rights of indigenous peoples in order to remedy these conditions and allow for the full enjoyment of fundamental human rights. The likely result of such accommodation would be greater benefits for all of humankind.

recognized as applying to individuals as members of groups and has been extended to the groups themselves."
CHAPTER IV
ONGOING CHALLENGES FACING INDIGENOUS PEOPLES

Over the last 20 years indigenous peoples have made significant advances by asserting that the framework of international human rights law must embrace and uphold the rights of indigenous peoples in order to address the systemic discrimination and racism to which they have been subjected. However, far from addressing and redressing such discrimination, some states, including those most heavily involved in the colonization process, have continued to advance positions that reflect colonial attitudes.  

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These attitudes are manifested in positions such as the denial of the status of Indigenous peoples as "peoples," the resistance to collective rights and the double standards expressed on the right of indigenous peoples to self-determination in the


320 Throughout the debate on Article 3 of the draft Declaration, Argentina, Brazil, New Zealand and the United States all objected to the use of the term "peoples." However, many other states who remained silent on the matter have made it clear in private discussions and regional consultations that they do not favor use of the term in the draft Declaration. See also the Report of the Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, U.N. Doc E/CN4/10096/84 (1995), para 3, which sums up the range of views amongst states: "This report is solely a record of the debate and does not imply acceptance of either the expression 'Indigenous Peoples' or 'Indigenous people'. In this report both are used without prejudice to the position of particular delegations, where divergences of approach remain." Each subsequent report of the CHR working group contains the same language. See UN Doc E/CN4/1997/102 (1996) para 3; UN Doc E/CN4/1998 para 3.

321 The United States, Japan, and France denied the existence of group or collective rights during the Commission working group in 1995. More recently, the government of France has somewhat retreated from such a position. However, the United States still insists that the draft Declaration make no specific or direct reference to "peoples" and collective rights. The U.S. has argued "only individual human rights are guaranteed under international law."
context of the draft Declaration. The fact that these debates have even taken place is evidence of the inability on the part of states to imagine a post-colonial world where cultural differences are celebrated and where all peoples, including indigenous peoples, are able to enjoy their fundamental human rights, on the basis of equality and without discrimination.

For those following international indigenous peoples' developments, it is common knowledge that one of the major ongoing debates over the language of the draft Declaration is centered on the use of the term "peoples" and its definition, the scope of the document once adopted by the General Assembly, collective rights, and the Declaration's political and legal implications. Though these matters are intimately linked to one another and in particular to the right to self-determination, this Chapter intends to cover the topics of the definition of the terms "peoples" and "indigenous peoples," the distinct status of indigenous peoples, indigenous collective rights, and the important matter of genocide and cultural genocide.

A) The lack of a definition of the term "peoples"

To a lay person, the terms "people" or "peoples" would likely be understood in their common or popular usage, generally referring to persons who share a common culture, language or inherited condition of life and with little or no emphasis upon the notion of political units or the international legal usage of the term. Without an in-depth analysis of the views of those state representatives involved in the drafting of the various

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322 Numerous states have attempted to advance positions denying the equal application of the right of self-determination to indigenous peoples throughout elaboration of their respective positions on the term "peoples."
early international legal instruments, most people would understand the term consistent with its popular usage.

Despite the use of both terms in numerous international instruments,\(^{323}\) including the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960\(^ {324}\) and the International Covenants, there is presently no accepted definition of the term "people" or "peoples." As stated by Rodolfo Stavenhagen in 1990:

"There is no legal definition of a people. There is not even an accepted sociological or political definition of a people. The United Nations carefully avoided to define 'people', even as it has conceded all peoples have the right of self-determination."\(^ {325}\)

Though the 1970 Declaration on Friendly Relations,\(^ {326}\) which is aimed at affirming non-interference and safeguarding territorial integrity, refers to the "whole people" of a state nowhere in the text does it define the term. The same is true for early regional constitutive instruments such as the Charters of the OAS and the Organization of African Unity, which both include the term. Even those international instruments that affirm rights which attach to distinct groups or minorities are absent a definition.\(^ {327}\) In order to clarify various issues as they have arisen, a number of scholars have focused upon the usage of the terms "people" and "peoples" at the United Nations and have

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\(^{323}\) For example, the Charter of the United Nations and the Universal Declaration of Human Rights.


\(^{326}\) Declaration Concerning Friendly Relations, supra note 309.

concluded that the terms "people" and "nation" are synonymous. In particular, H. Johnson writes:

"In the discussions in the United Nations concerning the definition of the terms 'people' and 'nation' there was a tendency to equate the two. When a distinction was made, it was to indicate that 'people' was broader in scope. The significance of the use of this term centred on the desire to be certain that a narrow application of the term 'nation' would not prevent the extension of self-determination to dependent peoples who might not qualify as nations."\(^{328}\)

Furthermore, A. Cassese notes, in regard to the ICCPR, that:

"Special references were made to peoples of federated republics and of multinational states generally. ... In the latter stages of the drafting, moreover, the Soviet representative stressed that he had voted for the Article "because it had been clear from the debate that the word 'peoples' included nations and ethnic groups."\(^{329}\)

Clearly, there are a range of economic, social, cultural and political implications that could emerge in the event that the United Nations defined the terms. Therefore, the international community has avoided the matter.

**B) The term "Indigenous Peoples"**

1) **United Nations**

In regard to the term "indigenous peoples," the recent history can be summed up in a survey of the practice and continuing debates within the United Nations and the International Labor Organization.

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As a working definition, the Martinez Cobo study, referenced in Chapter II of this thesis, offered the following definition of "indigenous peoples":

"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. 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. This historical continuity may consist of the continuation for an extended period reaching into the present, of one or more of the following factors:

(a) Occupation of ancestral lands, or at least of part of them;
(b) Common ancestry with the original occupants of these lands;
(c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
(d) Language;
(e) Residence in certain parts of the country, or in certain regions of the world;
(f) Other relevant factors."

This definition has been viewed by the United Nations and others as more of a set of guidelines and has never been adopted or formalized in any fashion. Despite the comprehensive nature of this early working definition, one may note that thereafter the term "populations" was consistently used by the United Nations. For example, it was utilized in the title of the Working Group on Indigenous Populations, indicative of an early concern about the political and legal implications of the term. Needless to say, because the term "populations" was being employed in early United Nations documents and meetings, there were persistent statements made by indigenous peoples'
representatives who objected to the use of the term "populations." Many indigenous peoples' organizations refused to employ the term and referenced it by quotations marks in both written and verbal statements of opposition to it. Others informed the members that they would refer to the body only as the Working Group on Indigenous Peoples. It was not until the WGIP members resolved the issue of self-determination, that the term "Indigenous peoples" was included in the draft Declaration. However, their title maintains the term "populations."

Like U.N. practice concerning the terms "people" or "peoples" elsewhere, from the earliest days of drafting of the Declaration text by the WGIP, there has been reluctance to advance a definition of the term "indigenous peoples." To date, the WGIP itself, has not advanced a definition. However, former WGIP Chairperson Daes made her views known in 1988 when introducing the draft articles of the text and through various published articles. Her approach and that favored by indigenous peoples maintains flexibility but more importantly ensures the fundamental element of self-identification.

In the early sessions of the WGIP, a number of states expressed the desire to define the term and appear to be motivated by concern over the scope and application of the draft Declaration to peoples within their territorial boundaries as well as the political implications of the right to self-determination. In particular, the Government of China has been the most persistent in their requests to develop a precise definition to ensure that draft Declaration does not apply to China at all. They have been joined by other Asian

331 Statement that the author delivered on behalf of the Inuit Circumpolar Conference, to the 1989 WGIP session: "Inuit and other indigenous peoples worldwide are not and have never been mere "populations."
states, including Malaysia, India and Bangladesh, who all favor reference to European colonization as a specific criteria. On the other hand, a majority of states are of the view that a definition is unnecessary and recognize that self-identification is fundamental. In addition, states such as the United States, have focused upon the universal nature of the draft Declaration, primarily in response to the views of China. Because of these opposing views, there has been intermittent discussion of the issue of definition at the CHRWG, with the most recent joint intervention by Asian states in 1998, wherein they indicated that they want to discuss the matter at a later date. This suggests that they have not relinquished their positions, which will certainly be dependent on the outcome of the article-by-article debate. Participants in the CHRWG should not be surprised if they come back to the matter with fervor.

The present United Nations practice regarding the term "indigenous peoples" in the context of human rights standard setting is consistent with the position of WGIP members, who quite rightly, put forward the best approach to deal with this contentious matter through the formulation of Articles 6 and 8 respectively of the draft Declaration:

"Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples...." 333 (Emphasis added).

"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 be recognized as such." 334

In fact, self-identification, as a fundamental element of the right to self-determination, is the assertion that indigenous peoples have put forward in response to the potential entanglement in the discussion concerning a definition. Furthermore, there

333 Draft UN Declaration, Article 6.
334 Draft UN Declaration, Article 8.
is a multiplicity of possibilities and to prescribe or specify the meaning could potentially deny the rights of peoples, as expressed by the Chairperson for ATSIC in 1994:

"Self-determination for the member states of the United Nations has taken many forms. The same will happen, I believe, in the evolution of self-determination for indigenous peoples. There is not a single future to which we must conform, there are multiple futures. And multiple futures within the same environment..."³³⁵

Like the previous discussion concerning diversity, there is no single solution for determining who a "people" is for purposes of self-determination, or for the purpose of exercising group or collective rights. The underlying view of the Asian states that expressed a desire to narrowly define the term indigenous peoples and furthermore, pre-determine the scope and application of the draft Declaration were motivated by their own domestic concerns and agendas. However, these matters are the business of the peoples concerned and should not be left to state prescription or confined to national policy and legislation. The minimum standards embraced by the draft Declaration should apply universally and where issues arise, they must be handled on a case-by-case basis.

2) International Labor Organization

The ILO's usage of the term "peoples" has varied somewhat. For example, in 1953, the ILO published a text entitled: "Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries."³³⁶ However, up until 1989, subsequent conventions and recommendations use the term "populations." In the debate surrounding revision of ILO Convention 107 on Indigenous and Tribal

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³³⁵ Statement by ATSIC Chairperson to the WGIP, Twelfth session, July 1994.
the first and most contentious issue was the use of the term "peoples" versus the term "populations." Within the ILO, indigenous representatives asserted that the Convention must recognize indigenous peoples as "peoples" and further stated that:

"(w)e are not and have never been mere populations...the ILO revision process...would be severely undermined should the terminology of the Convention continue to depict us, the world's indigenous peoples, in inaccurate and inadequate terms." 338

Throughout the ILO revision process, governments expressed concern about the use of the term "peoples" by suggesting that it would imply a right of secession, as well as self-determination. The government of Canada, in response to the request for comments stated:

"(t)he meaning of the term in international law is unclear. Its use in this text may imply rights that go beyond the scope of the revised Convention, such as the right to self-determination...consequently, any use of the term "peoples" would be unacceptable without a qualifying clause which would indicate clearly that the right to self-determination is not implied or conferred by its use." 339

Because this was a matter of heated debate, with resolution seemingly impossible within the two year revision process, a working group was set up to specifically discuss options or compromise. This working group (as well as the one covering lands and resources) was closed to indigenous peoples, and there is no record of the formal creation of the group because of its eventual demise due to the flurry of "corridor" negotiations and the vast numbers of proposals to limit the use of the term "peoples" in the Convention.

337 Indigenous Peoples Working Group of Canada, ILO, report 4(2A), International Labour Conference, 76th Session, 1989: "Indigenous and tribal peoples are distinct societies that must be referred to in a precise and acceptable manner. Continued use of the term 'populations' would unfairly deny them their true status and identity as indigenous peoples."

The Secretariat and the ILO Legal Advisor were also major players in the working group activities. The Office appeared to favor governments and did not provide impartial guidance with a view to achieving the revision objectives, which was to remove the integrationist, assimilationist orientation discussed above. When the Legal Advisor was asked to provide his opinion regarding the use of the term "peoples" in international law for the full Committee, indigenous peoples felt that his opinion was not objective and they asserted that he played into the hands of those governments seeking to ensure that the term "populations" was used or to those who wanted to limit the meaning of the term for purposes of the Convention and in international law generally.

In 1988, the issue of "peoples" and "populations" achieved no consensus and left the Secretariat in a peculiar state of indecision. The final decision, as suggested by the Secretariat, was to draft text of the Convention with the terms "peoples/populations" in parenthesis and italicized throughout. It is ironic that these two decisions, prompted by lack of consensus, were made by consensus. The final report of the Committee (1988), prepared by the Rapporteur, contained the ambiguous use of the terms "[peoples/populations]". Before final adoption of the session report, governments amended it extensively by re-writing history and their statements regarding their national policies. They wanted to ensure that the formal record would not characterize them as being negative or oppressive. The governments of India and Japan submitted the most extensive re-writes of their interventions.

In 1989, the second and final year for the revision process, the "peoples" - "populations" issue had to be resolved. Again, a closed (to indigenous peoples) working group was created, and like the 1988 working group, it eventually deteriorated because of the large number of proposals. At one point, there were 21 different drafts floating around the corridors. The only caucus that had a copy of each draft was the indigenous rights group (and this was due to their sheer determination to defeat state efforts as well as the fact that they asserted themselves as the beneficiaries of the treaty and therefore, demanded the relevant texts). This created an impossible atmosphere for resolution of the issue. Coalitions were being formed and broken up as immediately as they were formed. Every government with a real stake in the issue was courting the employer Vice Chair. The ILO Legal Advisor was being called upon to provide whatever interpretation was needed to convince governments to join a particular coalition. It was chaos and despite the threat of a walk out by the Worker's delegation and an actual walk out by indigenous peoples, the result was the poorly drafted language that eventually was voted on by the Committee and is now a part of the Convention. Even then states immediately made statements and issued reservations about the final language of Article 1(3) of the text:

"1. 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;"

340 For the text of the full reports of both the 1988 and 1989 sessions, see the Report of the Committee on Convention No. 107, Provisional Record 25, International Labour Conference, 75th (1988) and 76th (1989) session.
(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.

2. 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.

3. 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.¹³⁴¹ (Emphasis added).

Some feel that although the language is more limited than that which appears in the draft Declaration, at least the ILO dealt with the matter in an intellectually honest fashion. In this regard, the tripartite membership of the ILO recognized that they did not have the capacity or standing to deal with the political rights of indigenous peoples. Therefore, they did not deal with the subject matter of the right of indigenous peoples to self-determination.¹³⁴² The wording that appears in Article 1(3) of ILO Convention 169 was intended to leave the issue neutral and not limit any existing definition.¹³⁴³ The use of the term "peoples" – coupled with other provisions, which state that indigenous peoples have the full right to enjoy and exercise fundamental human rights, could be interpreted to include the right to self-determination in a practical sense, if not in the legal and political sense.

¹³⁴² International Labour Organization, Report of the Committee on Convention No. 107, International Labour Conference, Provisional Record, 76th Session, Geneva, 1989, No. 25, p. 8, para. 42: The Chairman considered that the text was distancing itself to a certain extent from a subject which was outside the competence of the ILO. In his opinion, no position for or against self-determination was or could be expressed in the Convention, nor could any restrictions be expressed in the context of international law. (emphasis added).
¹³⁴³ L. Swepston, "A New Step in International Law," supra note 207, discusses this specific issue.
Unfortunately, this intention is being misinterpreted and misconstrued by both indigenous peoples and governments in the United Nations standard setting work.\(^{344}\) Both believe that attaching such language somehow limits the exercise of the inherent right to self-determination and self-government of indigenous peoples, nations and communities.\(^{345}\) Such beliefs are prevalent, even though Article 3 of the ILO Convention affirms the full enjoyment and exercise of all human rights, without discrimination. As discussed above, there is no consensus over the language contained in ILO Convention No. 169, and without further, careful analysis it is unhelpful for indigenous peoples to persist with negative interpretations of the language.

It is critical for indigenous peoples to be aware of the fact that the U.N. does have competence to deal with political rights, and because of this there will be an entirely different legal effect if states insist on a similar clause in the draft Declaration. In other words, the intention would not be neutrality but rather to narrowly prescribe the right in the context of indigenous peoples. Though the language inserted in Article 1(3) of ILO Convention No. 169 was to maintain a neutral position, States are now abusing this understanding by invoking similar wording in a prejudicial manner in other contexts,

\(^{344}\) M.C. Lâm, *At the Edge of the State: Indigenous Peoples and Self-Determination*, supra note 12, at 45: "Some have concluded, from [Article 1(3)], that Convention 169 denies indigenous peoples a right of self-determination. The language quoted clearly does not support this conclusion. Nor does the legislative history. Indeed, at the final conference at which Convention 169 was adopted, Canada, acting in concert with other states, tried but failed to have a disclaimer added which would have explicitly refused the right of self-determination to indigenous peoples. In fact, the ILO staff present specifically advised that, self-determination being a political rather than a cultural question, the issue was best deferred to the WGIP [Working Group on Indigenous Populations] to resolve."

\(^{345}\) Swepston, "A New Step in International Law," supra note 207 at 17: "What does this mean for self-determination? In itself, it means nothing in the context of deciding what "self-determination" actually implies. ... The Convention takes no position whatsoever on the question of political autonomy outside the boundaries of existing States; this is a question for the United Nations in a larger political context." (p. 22) [new para.] "... Another criticism is that Article 1(3) somehow limits the rights of indigenous peoples to self-determination. Again, this patently is not so. Convention No. 169 simply refers the decision on the content of this right to the United Nations, where it rightly belongs." (p. 23)
such as the Arctic Council and the World Conference Against Racism. In addition, some have suggested the inclusion of such language in the draft Declaration. Therefore, careful analysis and development of arguments to counter any similar state proposals in the draft Declaration process is imperative.

3) Other practice

Like other international and regional organizations, state domestic practice varies widely and reflects a range of different terms to describe or define indigenous peoples, nations and communities. It is interesting to note that the 1977 indigenous peoples gathering at the United Nations, in the context of "recognition of indigenous nations" declared:

"Indigenous peoples shall be accorded recognition as nations, and proper subjects of international law, provided the people concerned desire to be recognized as a nation and meet the fundamental requirements of nationhood, namely:

(a) Having a permanent population

346 Even the ILO [website information found at http://www.ilo.org] describes its usage of the term in the following way: "The term 'indigenous' refers to those who, while retaining totally or partially their traditional languages, institutions, and lifestyles which distinguish them from the dominant society, occupied a particular area before other population groups arrived. This is a description which is valid in North and South America, and in some areas of the Pacific. In most of the world, however, there is very little distinction between the time at which tribal and other traditional peoples arrived in the region and the time at which other populations arrived. In Africa, for instance, there is no evidence to indicate that the Maasai, the Pygmies or the San (Bushmen), namely peoples who have distinct social, economic and cultural features, arrived in the region they now inhabit long before other African populations. The same is true in some parts of Asia. The ILO therefore decided, when it first began working intensively on these questions shortly after World War II, that it should refer to indigenous and tribal peoples. The intention was to cover a social situation, rather than to establish a priority based on whose ancestors had arrived in a particular area first. In addition, the description of certain population groups as tribal is more easily accepted by some governments than a description of those peoples as indigenous. The Convention makes no distinction in the way in which indigenous groups and tribal groups are treated. Both have the same rights under ILO Convention No. 169."

347 The Organization of American States for example historically has used the term "Indian" but more recently they have begun to employ the term "indigenous peoples."

348 Domestic state usage of terms varies widely and ranges from use of American Indian, Native American, Indian, Natives, and Tribes in the United States to Aboriginal Peoples and First Nations in Canada to Aborigines in Australia, to use just a few examples.
(b) Having a defined territory
(c) Having a government
(d) Having the ability to enter into relations with other States

No other subsequent indigenous peoples' declaration includes such specific and Western influenced references, which would be highly problematic for a wide range of indigenous peoples who have not chosen to model their relations after western, colonial precepts. Haudenousaunee Faithkeeper Oren Lyons addressed the issue of "indigenous peoples" by stating:

"The principle of our nation is peace. As a result, authority over the activities of the entire population was transferred from the power of the individual into the hands of the people. The people came forward, and it was they who determined who would be the leaders and what was the law. Apparently, we were swimming in democracy at the time, but we did not know the term, and it has been that way for other indigenous peoples as well. In 1975 we met on Vancouver Island, in one of the first meetings of North, central and South American indigenous peoples. We decided at that time to use the term "indigenous." We discussed the use of the terms "aboriginal" and "native," and we finally decided that when we refer to ourselves we would do so as the indigenous peoples of the Western Hemisphere. The people from South America agreed to use the term as it related to law and to the international body, but they asked that when we speak of them we call them "Indians," because much blood has been spilled over that term. We are proud, they said, to be called Indians — indios—because we have died, they have branded us, they made us, and so we will keep it. And so, as we said we would we kept the name for them, right now, I am passing it on to you. So we understand."

International legal scholar S. James Anaya provides a historical and comprehensive definition of indigenous peoples:


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"As empire building and colonial settlement proceeded from the sixteenth century onward, those who already inhabited the encroached-upon lands and who were subjected to oppressive forces became known as indigenous, native or aboriginal. Such designations have continued to apply to people by virtue of their place and condition within the life-altering human encounter set in motion by colonialism. Today, the term indigenous refers broadly to the living descendants of preinvasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest. The diverse surviving Indian communities and nations of the Western Hemisphere, the Inuit and Aleut of the Arctic, the Aborigines of Australia, the Maori of New Zealand, the tribal peoples of Asia, and other such groups are among those generally regarded as indigenous. They are indigenous because their ancestral roots are imbedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Further, they are peoples to the extent they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past."

As one might recognize, there is an inherent danger in setting out black and white definitions or criteria. Any definition may erroneously include illegitimate or exclude legitimate indigenous peoples, nations or communities, and have much more far-reaching legal and political implications than are presently imaginable. Therefore, a human rights approach, which embraces the important element of self-identification of a people or peoples should be maintained within the draft Declaration.

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351 S.J. Anaya, Indigenous Peoples in International Law, supra note 46 at 3.

352 In this regard, A. Cassese, Self-Determination of Peoples: A Legal Appraisal (Cambridge: Cambridge University Press, 1995), at 326-327 writes: "To provide a legal definition [of 'peoples'] in this volatile area would simply lead to bad legal draftsmanship."

353 See R. McCorquodale, "Self-Determination: A Human Rights Approach," 43 Int'l & Comp. L.Q. 857 (1994) at 867: "...the element of self-identification by a group as a 'people' was recognized as a 'fundamental criterion' of the definition of peoples' in the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries 1989 and is the main reason that no permanent and universal objective definition of 'peoples' can be discerned."
C) **Important elements of the status and rights of Indigenous Peoples as distinct peoples**

First of all, it is critical to point out that Indigenous peoples have existed as distinct peoples for thousands of years. The original character of indigenous peoples is based upon their self-defined societies, which have functioned for millennia in territories that many still refer to as their homelands.\(^{354}\) The legal character of indigenous peoples is "not derived nor devolved from the legal systems" of others.\(^{355}\) Indigenous peoples have made the assertion of their distinct status as indigenous peoples throughout North America for generations.\(^{356}\) More recently, indigenous peoples in other regions of the

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\(^{354}\) See Dumond, "Prehistory," supra note 3 at 73; and Dorough, "Indigenous Peoples and the Law of the Sea," supra note 190 at 410: "There is much evidence and written information documenting the habitation of the Arctic dating back to 25,000 BC. The more active 'pan-Arctic' Inuit cultural movement took place between about 2200 and 1900 BC. Further, evidence of seasonal and year-round coastal hunting and fishing dates back 4,500 and 4,200 years ago, when the seal levels stabilized. From this time forward, the Arctic coastal territories have been inhabited continuously. The effectiveness of cultural and technological adaptations by indigenous peoples to Arctic environmental conditions have been re-affirmed by the fact that these aboriginal communities still exist and many of them continue to depend upon the coastal areas and sea ice for their sustenance....Some Inuit legends, still recited today, recall the flooding of the Bering Strait and the separation of the present day territory of Russia and the United States."


\(^{356}\) See V. Deloria, "A Walk on the Inside," 71 U. Colo. L. Rev. 397 (2000) at 402: "Indian tribes always regarded themselves as sovereign nations, although until the coming of Europeans, they simply thought of themselves as distinct peoples, without the clumsy trappings of European formal political structures."; J.W. Zion and R. Yazzie, "Indigenous Law in North America in the Wake of Conquest," 20 B.C. Int'l & Comp. L. Rev. 55 (1997) at 74 n. 114, wherein the authors discuss the long-standing validity and legitimacy of indigenous law of the Navajo peoples as distinct peoples; and R.B. Porter, "Decision and Order of the Court," 10-SPG Kan. J.L. & Publ. Pol'y 456 (2001), and citing the U.S. Supreme Court decision in *Scott v. Sandford*, 60 U.S. 393, 403 (1856): "To be sure, in 1886, there was little doubt in the minds of either the Indians or the Americans that Indians were 'distinct' peoples separate from the 'ordinary citizens' of the United States. Indians were not American citizens and they viewed themselves -- and were viewed by Americans -- as citizens of their own nations without allegiance to any other. The U.S. Supreme Court even acknowledged this historic political status: 'These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government."
world have articulated their perspective on this important element of their status.\textsuperscript{357} This pre-existing status cannot be diminished or denied by the United Nations or member states. Indeed, many national or domestic laws and policies recognize this important factor, which distinguishes indigenous communities, nations and peoples from others in society.\textsuperscript{358}

Another important aspect of the status of indigenous peoples is the fact that they are not merely "racial entities" or ethnic minorities,\textsuperscript{359} indigenous peoples, nations and communities are political entities,\textsuperscript{360} with extensive political rights that are quite distinct from others.\textsuperscript{361} The right to self-determination, sovereignty and self-government exercised by indigenous peoples in numerous domestic contexts is quite significant to

\begin{itemize}
\item \textsuperscript{357} Declaration on the Rights of Asian Indigenous/Tribal Peoples, adopted in Chiang Mai, Thailand, May 1993: "We Asian indigenous peoples know who we are. We are the descendants of the original inhabitants of territories which have been conquered; and we consider ourselves distinct from the rest of the prevailing society. We have our own languages, religions, customs and worldview and we are determined to transmit these to future generations. We do not have centralized political institutions but organized instead at the level of the community and have highly developed methods for arriving at decisions by consensus. Asian indigenous peoples represent a variety of cultures and histories. We share in common a struggle to be free from Western or Japanese colonialism in the last centuries and more recently a struggle to be free from forms of Asian colonialism."
\item \textsuperscript{358} Worcester \textit{v. Georgia}, 31 U.S. (6 Pet.) at 561: "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress."
\item \textsuperscript{359} R. Tsosie, "Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values," 31 Ariz. St. L.J. 583 (1999): "Indigenous groups have asserted a similar right to cultural integrity, though they have framed their claims as 'distinct Peoples' rather than mere 'ethnic minorities,' in recognition of their concomitant political claims."
\item \textsuperscript{360} R. \textit{v. Van der Peet}, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at para. 30: Lamer C.J.C. stated that "[i]t is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status."
\end{itemize}
such status. Few other peoples exercise self-determination in the way that indigenous peoples hold and exercise this right. In the United States, for example, there is long-standing acceptance of the fact that three orders of government exist: tribal, state and federal. There is also growing evidence of recognition of the distinction between indigenous peoples and minorities by both nation-states and within the United Nations system. Further, indigenous peoples are exercising their right to self-determination through their direct participation in the work of the international and multilateral regimes such as the United Nations and its recently established Permanent Forum, the Organization of American States, the International Labor Organization, the Arctic Council and other international fora. Such direct participation as political actors serves to enhance their international legal personality, as well as their distinct status as indigenous peoples.

363 There are numerous examples of use of the terms indigenous peoples and Aboriginal peoples in the practice of states, including constitutional guarantees, legislative enactments, judicial decision, negotiated treaties and agreements, and national and local policy. Specific examples include Australia's 1993 Native Title Act; the Constitution of Bolivia (Article 171); the Popular Participation Law of Bolivia; INRA Law of Bolivia; the Commission on Indigenous Peoples of the National Congress of Peru, 1999; Section 35 of the Canadian Constitution Act, 1982; the Constitution of Colombia (Article 246); the Agreement on Identity and Rights of Indigenous Peoples of Guatemala, 1994; the Constitution of Malaysia (Article 151); the Government of Denmark's 1994 Strategy for Support to Indigenous Peoples; the Political Constitution of the Republic of Ecuador (Article 83); the Constitution of Mexico (Article 4); the Constitution of Nicaragua (Article 5); the Constitution of Paraguay (Article 62); Germany's 1996 Policy for Indigenous Peoples in Latin America; Netherlands' 1993 Policy on Indigenous Peoples; Panama's environmental law; the Philippines 1997 Indigenous Peoples' Rights Act; the United Kingdom's 1995 Guidance on Ethnicity, Ethnic Minorities and Indigenous Peoples; Spain's 1997 Strategy for Cooperation with Indigenous Peoples; and the following United States Code provisions: 7 U.S.C. Section 1738k(d)(1); Title 22; 72 U.S.C. Section 11701(17) and the United States S. Con. Res. 44, 103d Cong., 1st Sess. (1993).
364 See S.J. Anaya, Indigenous Peoples in International Law., supra note 46 at 100 [emphasis added]: "International practice... has tended to treat indigenous peoples and minorities as comprising distinct but overlapping categories subject to common normative considerations. The specific focus on indigenous peoples through international organizations indicates that groups within this rubric are acknowledged to have distinguishing concerns and characteristics that warrant treating them apart from, say, minority populations of Western Europe. At the same time, indigenous and minority rights issues intersect substantially in related concerns of nondiscrimination and cultural integrity."
365 Arctic Council Charter, supra note 71.
A most fundamental and significant distinction between indigenous peoples and minorities is that related to the rights of indigenous peoples to lands, territories and resources. Scholar J. Duursma pinpoints the relationship between territory and status as a people in the following statement:

"One of the main differences between a minority and a people is the fact that in the definition of minorities no relationship with a territory is demanded. A minority may well be long established in the territory of a State, but it need not have a particular attachment to a specific area....The longer a minority is established in a given territory, the more chance there is that it will develop a particular attachment to the territory. If a relationship exists, a minority could well constitute a people." \(^{367}\)

The central role of land and territory in exercising the right to self-determination and self-government is not the only critical factor to indigenous peoples -- this unique relationship is important for the exercise of other essential human rights as well. Therefore, indigenous peoples have expressed the nature of their profound relationship to their environment and homelands in a number of ways: emphasizing the collective nature of the land ownership; ancestral and historical significance; the various essential physical, cultural and spiritual elements to such a relationship; the importance of subsistence or harvesting activities; \(^{368}\) and their comprehensive understanding of the personality for indigenous peoples, so that they can present their claims and grievances in arenas outside the national legal system. Achieving international standing seems a very important goal."

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\(^{368}\) R.J. Miller, "Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling," Am. Indian L. R. 2000-2001 Articles at 209: "Equally surprising is the strength of the Makah whaling culture and their exercise of an internal will to keep alive the desire to practice whaling, after a seventy-year hiatus. The Tribe has the will and strength to fight the external battle to restore this cultural aspect. The Makah effort demonstrates to other nations, cultures, and peoples that if they want to maintain their distinct cultures that they must fight for the culture, practice their cultures, keep them alive within their own group, and pass them on to succeeding generations. If this effort and success is not maintained, the Makah and other distinct peoples will not remain peoples and societies separate and unique from the dominant society."
notion of territory including surface and subsurface rights, inland and coastal waters, sea ice, renewable and non-renewable resources and air. No other peoples have expressed or demonstrated such a profound and multi-faceted relationship to their lands, territories and resources. This relationship has significant economic, social, cultural and spiritual elements and is a critical dimension of the right of indigenous peoples to be different. Therefore, the various dimensions of this important relationship has been captured and specifically identified in numerous articles within the draft Declaration, the United Nations land rights study, and the 1991 Nuuk Meeting of Experts on self-government.

Like the other aspects of the distinct status of indigenous peoples and their international legal personality, their capacity to treat with other nations is also unique. Such diplomatic engagement and international relations are evidenced in the numerous juridical instruments negotiated with indigenous peoples, which further attests to the distinct political and legal status of indigenous communities, nations and peoples. To enter into treaties with foreign nations signifies the political independence of indigenous peoples as well as their right to consent to negotiate the terms and ratify the agreements reached through such treaties. Not only are the historical examples of treaty-making with Indians significant but so too are the modern day examples. The fact that treating with non-indigenous peoples and governments has been inconsistent and the reality of repeated betrayal by governments, does not in any way diminish the distinct status, powers and authority of indigenous peoples to enter into lateral or multilateral treaties.

370 S. Weissner, supra note 47 at 62: "...for a brief time after independence, Indian nations were often considered useful allies in the fight against other contestants for their land. As a consequence, they were implicitly recognized as so-called 'subjects of international law,' and solemn treaties, mostly of friendship
It should be clear to the reader that there are many economic, social, cultural, spiritual and political dimensions to the status of indigenous peoples as distinct peoples – too many to illustrate in the context of this thesis. The point of this section has been to focus upon the distinct status of indigenous peoples because of the age-old ploy to deny status in order to deny rights. For example, the case of Edwards v Canada,\(^{372}\) or commonly referred to as the "Persons Case,"\(^{373}\) illustrates this point very well. The case concerns the eligibility of any person to run for public office and the denial of the status of women as "persons" in order to deny them eligibility for appointment to the Senate. In this same way, states are attempting to deny the status of indigenous peoples as "peoples" in order to deny us the right to self-determination. Another important aspect of the Persons Case is the introduction of the notion that the Canadian Constitution should be viewed as a "living tree capable of growth and expansion within its natural limits."\(^{374}\)

Furthermore, the "living tree doctrine" recognizes that law is always evolving in order to accommodate new and different circumstances. The fact that the Charter and the

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\(^{371}\) Examples of indigenous peoples as parties to modern day treaties was addressed extensively in the U.N. Treaty study and numerous other volumes. I use the term "inconsistent" due to the fact that international law recognized the capacity of indigenous peoples to treat with other nations, then, seemingly did not recognize this capacity. In addition, domestic law in the U.S. recognized this capacity, then in 1871, the U.S. Congress adopted a policy to terminate treaty-making with Indians. In Canada, as well, the Royal Proclamation of 1763 recognized the existing pattern of treaty making, which continued until after World War II, however, in the 1970's the government did not refer to the James Bay and Northern Quebec Agreement as a treaty. At present, the government of Canada will negotiate treaties, which are recognized under Section 35 of the Constitution.


\(^{373}\) C. L’Heureux-Dube, "The Legacy of the ‘Persons Case’: Cultivating the Living Tree’s Equality Leaves," 63 Sask. L.R. 389 (2000) at 390: "As you know the Persons Case established that women were ‘persons’ for the purposes of the Canadian Constitution and its provision on appointments to the Senate. It is important to underline, however, that Lord Sankey’s reasons made virtually no mention of what was really at issue: discrimination against women."
International Bill of Rights apply to all peoples, states and the world community now recognize that the human rights framework can also accommodate the different circumstances of indigenous peoples. The United Nations’ human rights framework is not meant to be static, fixed, closed or stagnant. It is meant to be responsive to political, economic, social, and cultural circumstances of all peoples. In this way, the international human rights framework is evolving to accommodate the different status and rights, and circumstances of indigenous peoples. Therefore, states and others must recognize the right to self-identification of indigenous peoples and the right to maintain their distinct identities and characteristics in order to ensure that they will be able to benefit from the standards being advanced by the draft Declaration

D) Concept of the right to be different

Directly relevant to the status of indigenous peoples as distinct peoples is the right to be different, which has been largely ignored throughout the recent CHRWG debates. During the early sessions of the WGIP, a number of states advanced arguments against indigenous peoples and their distinct rights by asserting that state populations were homogeneous and that indigenous peoples did not exist within their borders. For example, the Government of Japan refused to acknowledge or recognize the Ainu peoples as distinct peoples in Japan. They asserted that all peoples of Japan were Japanese people. Only after persistent interventions by the Ainu Association of Hokkaido representatives has the Japanese government has finally recognized the Ainu as cultural minorities. 375 However, Japan and many other Asian states have remained largely silent

374 Edwards, supra note 372 at 136.
375 Supplementary Report on the Seventh Session of the Working Group on Rights of Indigenous Peoples, Ainu Association of Hokkaido, February, 2002. This report addresses the references to Ainu peoples made
at the U.N. meetings concerning indigenous peoples. Therefore, it is difficult to know the
views of such states and how many of them have concerns, as well as how deeply held
those concerns are.

Like the preambular language of the draft Declaration, indigenous peoples have
stated that they "have the right to be different, to consider themselves different, and to be
respected as such." This particular element of indigenous peoples' status is relevant to
their social, economic, political, cultural and spiritual rights as well as their rights to
lands, territories and resources. The right of indigenous peoples to be different, in very
elementary terms, sums up the objective of the unique standard setting exercise of the
draft Declaration, which is to respond to the distinct characteristics of indigenous
peoples, nations and communities.

The right to be different, and to be respected as such, is directly related to the
matter of racial discrimination against indigenous peoples. States, like the United States,
while trying to appear as the defenders of the principles of equality, have attempted to
diminish the status of indigenous peoples by advancing positions based on the notion of
"equality" without a cultural context. Specifically, the United States government has

by Japan both in policy and also in the 1997 Law for the Promotion of the Ainu Culture and for the
Dissemination and Advocacy for the Traditions of the Ainu and the Ainu Culture.
376 The first preambular paragraph of the draft Declaration on the Rights of Indigenous Peoples states:
"Affirming that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing
the right of all peoples to be different, to consider themselves different, and to be respected as such."
377 R. Falk, Human Rights Horizons, supra note 13 at 93: [Western] intervention on behalf of human rights
resembles the Mississippi River, it only flows from North to South. Human rights activism that is
associated with the foreign policy of big states and particularly the United States, is therefore seen as a
postcolonial kind of interventionary politics that uses the banner of human rights, often to the detriment of
people in the target societies.
378 For example, the suggested language of the U.S. Government (italicized) in regard to Article 17 of the
UN draft Declaration read as follows: "[Persons belonging to indigenous groups/communities,] [on the
same basis as other members of the national community,] have the right to establish their own media in
their own languages...." In contrast, Article 17 of the text provides: "Indigenous peoples have the right to
proposed language for the term "peoples," such as "persons belonging to indigenous groups/communities" or "on the same basis as other members of the national community" as alternative language to ensure an individual rights orientation to the draft Declaration. In this regard, the need for "substantive equality" is critical to ensuring that the existing and emerging human rights standards of the United Nations are in fact open to cultural context to ensure equality. In order to have substantive equality in the international human rights system, the international community must accommodate indigenous legal perspectives and more importantly, indigenous peoples' status and rights.

The intentional non-recognition of the right to be different in the context of indigenous individual and collective rights contributes to the systemic racism and racial discrimination being manifested towards indigenous peoples. The United States government attempts to rationalize such a position by claiming that they do not want to create "special privileges" with respect to recognizing indigenous rights. They further complicate such arguments by using terms such as "give," "special" or "privileges," which not only denies the distinct status of indigenous peoples but also distorts the historical and legal facts -- no one has "given" indigenous peoples anything, rather states have denied the recognition of the fundamental human rights of indigenous peoples.

The position of the United States' is actually contrary to the principle of equality and would negate indigenous peoples' right to be different. Furthermore, in the event of

establish their own media in their own languages. They also have the right to equal access to all forms of non-indigenous media."

379 P. Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle," 22 Dalhousie L. J. 5 (1999) at 38: "the most important aspect of the concept of substantive equality is the taking into consideration the differences among people which might require different treatment in order to achieve equality. This aspect highlights the distinction between substantive and formal equality, that is, between
such actions, States would be failing to abide by the specific and ongoing U.N. mandate. From the outset, this mandate has authorized the elaboration of a Declaration giving "special attention to the evolution of standards concerning the rights of indigenous peoples, taking account of both the similarities and differences in the situations and aspirations of indigenous peoples throughout the world" and "emphasizing the importance and special nature of the draft declaration as a standard-setting exercise specifically for indigenous peoples."  

There is a dynamic and fundamental relationship between the right to be different and the right to choose, especially in regard to the right to self-determination. By way of illustration, indigenous peoples must have the ability to determine their own institutions, which are different from the institutions of others and in particular, those of the dominant society. For example, land tenure systems or judicial systems within indigenous communities are dramatically different from those of others. In order to exercise self-determination, indigenous peoples must be free to choose and develop their own land tenure systems and judicial systems and practices, as well as institutions. In this way, choice and difference go hand in hand. Without the right to choose different institutions, the right of the peoples concerned to self-determination would be infringed or violated.  

emphasizing difference and emphasizing sameness....The notion of 'affirmation of difference' captures the essence of substantive equality."  


381 E.-I. Daes, "Some Considerations on the Right of Indigenous Peoples to Self-Determination," 3 Transnat'l L. & Contemp. Probs I (1993) at 5: "The right to self-determination is best viewed as entitling a people to choose its political allegiance, to influence the political order under which it lives, and to preserve its cultural, ethnic, historical, or territorial identity."
E) Collective Rights

One of the unique characteristics of indigenous societies is the communal or collective element of their status and rights, which are essential to the functioning and survival of indigenous peoples, nations and communities. Because of this dynamic, the term "indigenous peoples" does not have significance solely for purposes of the collective exercise of the right to self-determination; it is also crucial to all other collective or communal aspects of their distinct societies. Though there is a need to maintain a balance between individual and collective rights, the latter are fundamental to an overall articulation of indigenous legal perspectives. Therefore, it is vital to highlight this aspect of the status and rights of indigenous peoples.

Though the international community is still grappling with the notion of group rights, there is increasing flexibility to move beyond the Western liberal political philosophy of individual rights. This is certainly true in the area of discrimination and minority rights, as discussed above, where the exercise of distinct rights by distinct peoples manifest themselves only within a group context. International law recognizes the concept of "collective" rights, including the right to self-determination and the physical protection of the group as such through the prohibition of genocide. The following international instruments affirm collective or group rights:

- International Covenant on Civil and Political Rights, Art. 1;
- International Covenant on Economic, Social and Cultural Rights, Art. 1;
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Arts. 2, 4(a), and 14;

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As noted and discussed above, the collective rights of Indigenous peoples are already recognized in the *Indigenous and Tribal Peoples Convention, 1989*, No. 169. The Convention generally makes reference to the rights of the "[Indigenous and tribal] peoples concerned", and only uses the term "members of the peoples concerned" when it specifically addresses the rights of individuals. In addition, when emphasizing the special importance of the relationship that Indigenous peoples have with their lands or territories, reference is made to the "collective aspects" of this relationship. Also, the United Nations Global Consultation on the Right to Development affirmed that:

"The right to development is related to the right to self-determination, which has many aspects, both individual and collective."

In 1993, Secretary General B. Boutros-Ghali made an important statement to the U.N. General Assembly, on the occasion of the inauguration of the International Year of the World’s Indigenous People by affirming that:

"... the situation of indigenous people must surely prompt us to ponder more deeply human rights as they are today. Henceforth, we must realize that

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384 It is worth noting that the *African Charter of Human and Peoples’ Rights* contains more peoples’ right than any other human rights instrument. In particular, Article 19 (equality); Article 20 (self-determination); Article 21 (free disposal of natural resources); Article 22 (economic, social and cultural development); Article 23 (peace and security); and Article 24 (satisfactory environment).

385 *Indigenous and Tribal Peoples Convention, 1989*, ILO Convention No. 169, 76th Sess., reprinted in (1989) 28 I.L.M. 1382, Article 13(1): "In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship."

human rights are not only the rights of individuals. They are also collective rights - historic rights."

Furthermore, numerous domestic constitutions, legal decisions, legislation and policies affirm the collective rights of indigenous peoples. Increasingly, international human rights experts and other legal scholars are commenting upon and confirming the existence of internationally recognized collective human rights. Commentator I. Shearer writes:

"... a number of important human rights are not rights of individuals, but collective rights, i.e. the rights of groups or of peoples. This is clear so far as concerns the right of self-determination. Apart from this right, there is the right of an ethnic group or of a people to physical existence as such, a right that is implicit in the provisions of the Genocide Convention of December 1948. Then also there is the collective right of certain groups or minorities to maintain their own identity [Art. 27 ICCPR] ... A further illustration is that of the emerging principle that states should co-operate in the relief of peoples affected by disasters or disaster situations, such as those due to volcanic eruptions, drought and the shortage of food supplies."\(^{389}\)

Scholar M. Shaw notes:

"Some rights are purely collective, such as the right to self-determination or the physical protection of the group as such through the prohibition of genocide ..."\(^{390}\)

Also, W. F. Felice writes:

"Economic, social, and cultural rights are collective rights based upon the rights of human beings in their various group and social roles. Meeting these rights often depends upon positive action on the part of the state. These rights call for the fulfillment of basic human needs and social equality. ...Not only


\(^{388}\) For example, U.S. Executive Orders, legislation of the U.S. Congress, and policy initiatives all make reference to Native Americans, Alaska Natives and Federally-Recognized Indian Tribes and their collective status, as well as their collective powers and authority.


self-determination, but the rights of minorities, the rights of the
underprivileged peoples to an equitable share in the world's resources,
women's rights, the right to development, and the right to peace were put on
the world's agenda as collective human rights.\textsuperscript{391}

And, J. Crawford states:

"Minority rights, as spelt out in Article 27 of the International Covenant on
Civil and Political Rights, are equivocal as between individual and collective
rights, although I would argue that they do in fact qualify as peoples' rights.\textsuperscript{392}

Consistent with this trend, legal commentators recognize the collective human
rights of indigenous peoples as a category of international human rights law. For
example, I. Cotler states:

"...a ninth category [of human rights], one distinguishably set forth in the
Canadian Charter – and increasingly recognized in international human rights
law – is the category of aboriginal rights.\textsuperscript{393}

A. Buchanan recognizes the contribution that indigenous peoples have made to
enlarging the area of international human rights law by stating that:

"... the indigenous peoples' movement's emphasis on collective rights,
including collective land rights, enriches, rather than undermines,
international human rights law.\textsuperscript{394}

And, scholar P.R. Baehr makes a similar point:

"But not only is there a growing interest among non-western actors in
individual rights, the idea of collective rights is increasingly being accepted in
the West and in the East. That is not only true for the right of self-

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Throughout the world, indigenous peoples have spoken of the importance of the collective dimension of their societies. In the context of the draft Declaration, since the establishment of the WGIP in 1982, indigenous representatives have consistently asserted the critical collective dimension of indigenous rights as peoples. They have reiterated their distinct collective rights in relation to their historical, political, social, cultural and spiritual identities and characteristics in order to express the collective dimension of their rights. Furthermore, they have emphasized the collective exercise of self-determination as the paramount right in which their languages, laws, values, customs, practices, traditions and institutions are maintained and manifest themselves. They have also advanced the need for a dynamic balance between collective and individual rights, and the significance of such a balance for continued practice of indigenous spirituality, and the maintenance of the inter-generational nature of their rights.

396 W.F. Felice, supra note 272 at 36-40. See also Henderson, supra note 25: states that "A cognitive recognition and acceptance of the interrelations of the shared space inform their languages, thus creating a shared worldview, a cognitive solidarity, and a tradition of responsible action...sacred order itself is never individualized...Mikmaq see no distinction between collective or individual interests. The goal of creating a sustaining space and a sharing and caring community in which everyone can participate and belong is the ultimate interest." M.E. Turpel, supra note 2, she uses the term "collective imagination" to capture the concept of collective rights. She further reinforces this "collective" dimension of indigenous societies in her discussion of the limitations of the non-indigenous law of "property rights." R.A. Williams, supra note 26, the author reviews the Iroquois clan system, which "served to organize and sustain reciprocal relations of kinship, interdependence, and communication across Iroquois culture." He quotes Anthony Wallace in that Iroquois "children were carefully trained to think for themselves but to act for others." The principle that Iroquois leaders spoke with "one voice, one mind and one heart," is also indicative of the collective and communal nature of indigenous communities.
397 Statement by Inuit Circumpolar Conference, the International Organization of Indigenous Resource Development and the Grand Council of the Cree, 1990 session of the WGIP.
At one point, during the 1985 Indigenous Peoples' Preparatory Meeting, there
was a lively debate about whether or not indigenous peoples should support the reference
to individual rights in the draft Declaration because of strong beliefs and insistence upon
the need for recognition of the collective rights of indigenous peoples, nations and
communities. The outcome of the debate was a consensus on the need for a balance
between collective and individual rights and that appropriate reference to both should be
ensured. In 1989, the Indigenous Peoples' Preparatory Meeting delivered the following
statement concerning collective rights:

"The concept of indigenous peoples' collective rights is of paramount
importance. It is the establishment of rights of peoples as groups, and not
merely the recognition of individual rights, which is one of the most important
purposes of this Declaration. Without this, the Declaration cannot adequately
protect our most basic interests. This must not be compromised." \(^{399}\)

At the United Nations, "indigenous peoples have sought to document the massive
failure of existing international law to protect their collective rights to survival as distinct
peoples." \(^{400}\) In order for any emerging international instrument concerning indigenous
peoples' rights to accurately reflect the worldviews of indigenous peoples, the
terminology used to affirm their basic rights must be both collective and individual in
nature, as expressed by indigenous peoples to the WGIP:

"Collective and individual rights: The central importance of collective rights
of indigenous peoples should be emphasized. Unless the meaning of a
provision dictates otherwise, all of the right in the draft declaration should be
understood to include both collective and individual dimensions." \(^{401}\)

\(^{398}\) The author served as the Chairperson of this particular session of the Indigenous Peoples' Preparatory
Meeting, 1985.


\(^{400}\) R.A. Williams, "Encounters on the Frontiers," supra note 64.

\(^{401}\) Statement of the Inuit Circumpolar Conference, the Grand Council of the Crees (Quebec) and the
International Organization of Indigenous Resource Development, 1990 Session of the WGIP, UN
Indigenous peoples have also highlighted the key element of indigenous collective rights in regard to their profound relationship with their lands, territories, resources and environment. In addition, the distinct characteristics of indigenous land tenure has been expressed by indigenous peoples and recognized domestically as well. In addition, group or collective dialogue, decision-making and other forms of political relations have been specified as a necessity in the context of the exercise of the collective right of self-determination and self-government. The collective nature of decision making as a society would not be possible if indigenous communities and societies could not exercise self-government or other collective human rights.

402 As recognized in Article 13 of the ILO Convention No. 169, and the Preamble and Articles 25 of the draft Declaration. Also, General Comment No. 23 (50) of the Human Rights Committee makes specific mention of indigenous peoples land use activities: "C]ulture manifests itself in many forms, including a particular way of life associated with the use of land and resources, specially in the case of indigenous peoples. That right may include such traditional activities as fishing and hunting and the right to live in reserves protected by the law."

403 Delgamuukw v. British Columbia, supra note 54 at para. 115: "A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is sui generis and distinguishes it from normal property interests." See also R. v. Gladstone, [1996] 2 S.C.R. 723, at p. 818, per McLachlin J.: "To demonstrate that an aboriginal right has been interfered with, an aboriginal person must establish a prima facie right to engage in the prohibited conduct at issue. However, the Crown may rebut the inference of infringement if it can demonstrate that the regulatory scheme, viewed as a whole, accommodates the collective aboriginal right in question."; and R. v. Sparrow, [1990] 1 S.C.R. 1075, at p. 1078: "Fishing rights are not traditional property rights. They are held by a collective and are in keeping with the culture and existence of the group."

404 Statement of the Four Directions Council, 1989 Session of the WGIP, UN Document E/CN4/Sub.2/1989/33/Add.1: "[A]ll the rights of indigenous peoples have both individual and collective aspects. Individuals are the beneficiaries of these rights, but individuals exercise them through participation in their own collective institutions, such as tribal, social, political and religious organizations."

405 Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (S.C.C.), (1998) 37 I.L.M 1342, para. 124. Mr. Justice Lambert at 268, has commented that "since Delgamuukw decided that aboriginal title was a communal right ..., there is an implied recognition that the aboriginal society must have at least the degree of self-government necessary to allocate the use of the land to which aboriginal title extends". See also K. McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5 Tulsa J. Comp. & Int'l L. 253 at 285ff. (relationship between communal nature of Aboriginal title and self-government) [hereinafter "Aboriginal Rights in Canada"]. See also B. Slattery, "The Definition and Proof of Aboriginal Title" (The Supreme Court of Canada Decision in Delgamuukw, Pacific Business & Law Institute—Vancouver, B.C., 12-13 February 1998) [conference materials] 3.1 at 3.6: "Since decisions
In 1995, under the collective rights discussion at the CHRWG, the United States, Japan, and France denied the existence of group or collective rights during the Commission working group. The United States still insists that the draft Declaration make no specific or direct reference to "peoples" or collective rights. The U.S. has argued "only individual human rights are guaranteed under international law." To those familiar with long-standing doctrines of federal Indian law, which date as far back as the decisions of the Marshall Court, it is readily apparent that this position is inconsistent with domestic law, contemporary legal interpretations, and policy.  

Again, in 1996, the United States, France, Sweden, and Japan each made statements denying the existence of collective rights in international law and advocated for a strict individual rights orientation of the text. Despite efforts at dialogue and explanation of the perspectives, values, customs and practices of indigenous peoples, this attitude has persisted. However, more recently the French delegation has retreated from such a position.

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about the manner in which lands are to be used must be made communally, there must be some internal mechanism of communal decision-making. This internal mechanism arguably provides the core for the right of aboriginal self-government". See further L. Mandell, "The Delgamuukw Decision" (The Supreme Court of Canada Decision in Delgamuukw, Pacific Business & Law Institute—Vancouver, B.C., 12-13 February 1998) [conference materials] 10.1 at 10.7-10.8.

406 Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), at 559 per Marshall C.J.: "The Indian nations had always been considered as distinct, independent political communities, retaining their original rights, as the undisputed possessors of the soil, from time immemorial...The very term 'nation,' so generally applied to them, means 'a people distinct from the others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning." [Emphasis added.]

407 During the 1996 session of the CHR working group, the governments of Japan, Sweden and the United States stated that collective rights do not exist and that only the rights of individuals are guaranteed under international law.
In 1999, as a result of reviewing state government tactics of annexing their proposed amendments to the draft Declaration in the CHRWG report and in order to minimize violence to the Declaration text, indigenous peoples drafted and proposed their own Annex to the report. The proposed Annex substantiated the position of indigenous peoples by citing a range of arguments for use of the term "peoples" in the draft Declaration. The following year, 2000, the United States used the rationale that the collective rights of indigenous peoples will be used to infringe upon the rights of individuals and characterized themselves as the protectorates of indigenous individuals from mob rule, and proceeded to become even more active in terms of offering a range of alternatives to advance their position.

Fortunately, there are a growing number of governments that support the concept of collective rights and in recent years, more of them have verbally expressed their support for collective rights, including Denmark, Norway, Finland, Canada, Guatemala, Mexico, New Zealand, Peru, Ecuador, and other Latin American states. There is no question amongst indigenous peoples and many state government delegations that an individual rights orientation, like that being promoted by the United States, would be assimilationist and contrary to the basic objectives of the standard setting process, which is to provide for a progressive evolution of standards, and not a regression.

408 After some consideration, the author proposed the idea and actively participated in the small drafting committee appointed by the Indigenous Peoples' Preparatory meeting, which consists of those indigenous peoples and organizations in attendance at any given meeting or session of the Commission working group. It is not a formal or official nor democratically organized institution. This drafting committee prepared a text and delivered it to the meeting for consideration. Document on file with author.

409 Statement by Indian Law Resource Center, 1996 CHR working group, addressing the need for the "progressive evolution of human rights standards" as the objective of the standard setting process.
For States to seek to deny Indigenous peoples the collective nature of their fundamental rights runs directly counter to the objectives, purposes and principles of the draft Declaration itself. Furthermore, denial of indigenous peoples' collective rights in the draft Declaration would serve to perpetuate highly destructive strategies and effects concerning the rights, cultures and societies of indigenous peoples.

F) **Important matter of genocide**

Directly related to the potential for the destruction of indigenous communities by virtue of denying the collective dimension of the rights of indigenous peoples is the matter of genocide and cultural genocide. The 1948 Genocide Convention is quite significant because it makes explicit reference to the right of *groups* to physical existence. The definition or origin of genocide can be traced to Raphael Lemkin, a jurist recognized as coining the term. Lemkin defined genocide as "the criminal intent to destroy or to cripple permanently a human group. The acts are directed against groups, as such, and individuals are selected for destruction only because they belong to these groups." The most widely accepted definition is that contained in the United Nations

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410 Draft Declaration: "... indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such ..." (preamble); "Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law." (Art. 1); and "The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world." (Art. 42)


Convention on the Prevention and Punishment of the Crime of Genocide. The Convention defines genocide in the following way:

Article II
"...[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(e) Killing members of the group;
(f) Causing serious bodily or mental harm to members of the group;
(g) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(h) Imposing measures intended to prevent births within the group;
(i) Forcibly transferring children of the group to another group.

Article III
The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

"to declare the destruction of racial, religious or social collectivities a crime under the law of nations."

In light of the history of indigenous peoples, the Genocide Convention is particularly relevant, especially because of its emphasis on the obligations of possible perpetrators. Though the Genocide Convention does not use the term "peoples," there is no question that it is a collective rights instrument. In the present discussion, it is important to recall that the issue of "cultural genocide" arose when the Genocide Convention was considered for adoption. Although it was ultimately decided not to

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include cultural genocide in the Genocide Convention, Western States made a commitment to address the issue in the *Universal Declaration on Human Rights*. To date, this promise has remained unfulfilled.\textsuperscript{414}

In regard to the ECOSOC discussions in 1948, Venezuelan delegate Mr. Perez Perozo indicated that while acts of cultural genocide did not present "the horrifying aspects of mass murder, acts of brutality against the spirit and culture of a human group were one of the surest ways of exterminating it."\textsuperscript{415} Furthermore, in 1948, the link between genocide and cultural genocide were emphasized by other State delegates.\textsuperscript{416} It has been recognized, as well, that in many instances, acts of cultural genocide have preceded or accompanied acts of genocide. As noted by J. Morsink:

\begin{quote}

\textsuperscript{414} J. Morsink, "Cultural Genocide, the Universal Declaration, and Minority Rights," 21 Human Rts. Q. 1009 (1999) at pp. 1009-1010: "Having witnessed Hitler's act of ethnic cleansing first-hand, the Western delegates understood the connection between cultural genocide and physical genocide, which the communist and Arab delegations were making. They argued, however, that the right place to make that connection was in the Universal Declaration and not in the Genocide Convention itself. Therefore, they voted to delete the cultural genocide prohibition from the Convention on the promise that they would support a similar measure for the Universal Declaration. However, when the time came, they chose (for reasons having to do with the rhetoric and reality of the Cold War) not to make good on those promissory notes."


\textsuperscript{416} Statement by Czechoslovak representative, Mr. Zourek, *Summary Record of Meetings*, U.N. GAOR 6\textsuperscript{th} Comm., 3\textsuperscript{rd} Sess., at 202, U.N. Doc. A/C.6/SR. (1948): "All those acts of cultural genocide [by the Nazis] had been inspired by the same motives as those of physical genocide: they had the same object, the destruction of racial, national or religious groups." See also Statement by Pakistan delegate, Mr.Sadar Bahadur Khan, *Summary Record of Meetings*, U.N. GAOR 6\textsuperscript{th} Comm., 3\textsuperscript{rd} Sess., at 193, U.N. Doc. A/C.6/SR. (1948): "[Biological and cultural genocide were] complementary crimes insofar as they had the same motive and the same object, namely, the destruction of a national, racial or religious group as such either by exterminating its members or by destroying its special characteristics."
\end{quote}
"History has born out the point that, more often than not, acts of cultural genocide are but a prelude to acts of physical genocide."417

Directly relevant to the concept of cultural genocide are the historical facts and tragedy of contact with Europeans as "500 years of premeditated genocide"418 perpetrated against indigenous peoples. Historical examples of dramatic population decline include that which occurred during the first two generations of Russian domination of indigenous communities, from 1762 to 1800, in the Aleutian Chain area of Alaska, where there was a population decline of 80 to 90 percent.419 In the United States generally,420 it has been

417 J. Morsink, "Cultural Genocide, the Universal Declaration, and Minority Rights," supra note 414 at 1054.

418 G. Goodwin, "Indigenous Rights and the Case of the Yanomami Indians in Brazil," in Human Rights of Indigenous Peoples, C.P. Cohen, ed. (Ardsley: Transnational Publishers, 1998) at 186. See also J. Tully, Strange Multiplicity: Constitutionalism in an age of diversity (Cambridge: Cambridge University Press, 1995) at 19: "The near extermination of the Haida by European imperial expansion is entirely typical of how Aboriginal peoples have fared throughout the Americas and wherever Europeans settled. The population of the Americas at the time of contact and invasion is estimated by historical demographers to be 80 to 100 million people. (The population of Europe was 60 to 70 million people.) They lived in a wide variety of complex and interrelated societies, some over thirty thousand years old. Ninety to ninety-five percent of the Indigenous population was destroyed by European diseases, war, starvation and cultural destruction. ... The Aboriginal population of what is now commonly called the United States and Canada was reduced from 8 to 12 million in 1600 to half a million by 1900, when the genocide subsided." And at 197: "Every imaginable means of destruction of their cultures and assimilation into uniform European ways has been tried. Yet, after five hundred years of repression and attempted genocide, they are still here and as multiform as ever. ... The suppression of cultural difference in the name of uniformity and unity is one of the leading causes of civil strife, disunity and dissolution today."


420 See J. Nagel, American Indian Ethnic Renewal: Red Power and the Resurgence of Identity and Culture, citing C. Matthew Snipp, American Indians: The first of this Land 48-49 (1989). Nagle wrote: "The decimation of the American Indian population in the decades and centuries following Columbus's arrival threatened the very existence of many, if not most, Indian communities. At issue were the lives of individual members as well as the continuation of groups as distinct peoples and cultures. Indeed, many ethnographically unique American Indian societies simply disappeared (e.g. the Natchez, the Pennacock, the Niantic, the Susquehanna) ... Threats to community survival like those faced by the [extinct] Yanas were not unique. In varying degrees, most Indian tribes confronted the threat of extinction from disease, slavery, war, and forced removal. And virtually all Indian communities faced major assaults on traditional social and cultural organization by the religious proselytizing of various missionary groups and the 'civilizing' educational and assimilation programs of the federal government."
estimated that the indigenous population, upon first contact, exceeded 12 million and there are now only some one and a half million.\(^{421}\)

In contemporary terms, Brazil and the case of the Yanomami reflect the blatant capitalistically driven forms of cultural genocide against indigenous peoples. In particular, the gold mining done under the Calha Norte project in the late 80’s has had horrific impacts upon the Yanomami Indians, their cultural fabric and their traditional lands. The state felt that the lands were so "under populated" that the Indians "should not seriously be considered an obstacle" to development. In response to criticism, the Governor of the State of Roraima replied: "An area as rich as this, with gold, diamonds and uranium, cannot afford the luxury of preserving half a dozen Indian tribes who are holding back development."\(^{422}\) Such an attitude demonstrates complicity. Rather than focus on prevention, the government of Brazil is part of the problem. The resulting impact on the Yanomami communities has been devastating. Overall deaths were estimated at approximately fifteen percent of the total population – one out of six. In some areas, the death toll was much higher. Whole villages have disappeared. Health workers who visited the region stated that they saw no children under the age of two. These actions have been recognized as a direct assault on the Yanomami Indian communities. The social fabric was worn thin and the governments’ attitude appears to have been akin to the view that now that we have ruined the Yanomami, we may as well continue with our development activities.\(^{423}\) Despite the belated action on the part of the government of Brazil, the United Nations, and local initiatives by Yanomami leaders

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\(^{421}\) J. Tully, _Strange Multiplicity_, supra note 418 at 19.

\(^{422}\) _Indigenous Peoples: A Global Quest for Justice_, supra note 34 at 44.

\(^{423}\) D. Sambo, "The Indigenous Human Right to Development", supra note 170 at 174.
themselves, these indigenous communities continue to feel the impact of genocide. Such cultural and ethnic genocide visited upon the Yanomami peoples cannot be undone – it has had a lasting impact. These distinct indigenous communities may not survive such acts of aggression. Surely, this example falls within the scope of the 1948 statements by the governments of Venezuela, Czechoslovakia and Pakistan.

Another example of blatant disregard of cultural genocide is the past and present Australian government policies towards the peoples indigenous to the territory. The past history includes the decimation, at the hands of English soldiers, of the Aboriginal peoples of Tasmania. More recently, it has been acknowledged by even members of Australia’s Human Rights Commission that the removal of Aboriginal children from their mothers and communities "was attempted genocide." This government policy, which was in effect from the 1880’s to the 1960’s, has been referred to as a "Nazi-style policy of assimilation" and destruction. However, when the Stolen Generation issue is raised locally, nationally or internationally, and is rightfully referred to as genocide, the response is to compare the suffering of Aboriginal peoples to the Holocaust as though no other peoples in the world could suffer from the effects of genocidal policies.

426 J. Burger, Report from the Frontier, supra note 37.
427 Report of the Social Justice Commissioner of the Australian Human Rights Commission, Mick Dodson, issued a 700-page report of the 'Stolen Children' National Inquiry entitled "Bringing Them Home," which was tabled in Federal Parliament on 26 May 1997, detailing the concerted efforts of the Australian government to remove Aboriginal children from their parents and place them in non-Aboriginal homes.
There are numerous other historical and contemporary examples of the crime of genocide being committed against indigenous peoples throughout the Americas\textsuperscript{428} and elsewhere. Due to this reality indigenous peoples have raised such matters at a range of international gatherings.

At the recent meeting entitled "Indigenous Peoples Summit of the Americas," held in March 2001, in Ottawa, Canada (and discussed above), indigenous representatives adopted a strong Declaration, which included reference to genocide as well as racism and racial discrimination. The 9\textsuperscript{th} preambular paragraph of the Declaration provides:

"...Recognizing that Indigenous Peoples are subjected to racism and racial discrimination, and have been and continue to be the victims of genocide, ethnocide, colonization, exclusion, marginalization and the dispossession of our lands, territories and resources."

The 6\textsuperscript{th} operative paragraph of the Declaration states:

"Crimes committed against Indigenous Peoples, including crimes of genocide, ethnocide and crimes against humanity, must be investigated, prosecuted and punished by governments and international criminal justice bodies. Such crimes include crimes committed against our Peoples in Guatemala, Colombia, Peru, Mexico and other States, the targeted physical elimination of

\textsuperscript{428} M. Lam, \textit{At the Edge of the State}, supra note 12 at 14: "Where, as in Australia, Aotearoa/New Zealand, Canada, and the United States, and, to a lesser extent, Latin America, that colonial contact metamorphosed over time into the successful full-scale implantation of Western society on extra-European soil, consequences to pre-existing societies were catastrophic. The settler society, able now to satisfy its labor needs from its own ranks or from imported humanpower, came to see the indigenous population as mere impediment to its expansionist destiny, to be removed by any means necessary, genocidal or otherwise." And at 29: "That genocide occurred in the course of the European incursion into the New World is now beyond debate. The decimation of North America has already been alluded to. Figures for South America are even starker. The anthropologist Darcy Ribeiro estimates that the indigenous population of South America plummeted from at least 70 million at contact to 3.5 million in the mid-17\textsuperscript{th} century." See also J. Drinan, \textit{Facing West: The Metaphysics of Indian-Hating and Empire-Building} (Minneapolis: Minnesota University Press, 1980); D. Brown, \textit{Bury My Heart At Wounded Knee: An Indian History of the American West}, (New York: Holt, Rinehart & Winston, 1970); M. Minow, \textit{Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence} (Boston: Beacon Press, 1998); E. Barkan, \textit{The Guilt of Nations: Restitution and Negotiating Historical Injustices} (New York: W.W. Norton, 2000); and G. Goodwin, supra note 412, which addresses Guatemala, Peru, and Bolivia.
our leaders, the sterilization of our women against their will, and the taking of our children from our homes and communities."\(^{429}\)

In regard to indigenous communities, genocide, as an act of the state, has manifested itself in a variety of forms.\(^{430}\) The linkage between Article II(c) of the Genocide Convention and the fact that many indigenous individuals and communities live in extreme poverty and "are deprived of access to basic necessities, such as educational and health services or shelter"\(^{431}\) cannot be overlooked as a persistent form of cultural genocide.

There is no question that the drafting and adoption of the Genocide Convention and the Nuremburg trials were both important international responses to "crimes against humanity." More recently, the world community responded with similar moral outrage and action in the wake of the genocide, which took place in Rwanda. Such moral outrage expressed by individuals and governments is critical to the identification, punishment and more importantly, the prevention of such acts. However, when genocide occurs against indigenous peoples, states behave as though it never happened. And, no fair inquiry is allowed. This distorts any rights discourse, leaving indigenous individuals and/or communities without any opportunity to try or charge governments as perpetrators of the crime of genocide. There is no opportunity to even pose the question of who committed such a crime let alone discuss damages or other measures of recourse.

Indigenous peoples must take the view that no comparison should take place and that each case of genocide should be understood within their own historical, political,


\(^{430}\) J. Tully, *Strange Multiplicity*, supra note 418 at 197.
cultural and social context. Without pressing such claims and identifying the historical facts, as well as assessing the blame and responsibility, no solutions will ever be found. Presently, states have the upper hand by controlling the definition of genocide and the interpretation of the provisions of the Genocide Convention. Such cushioning by the United Nations and the international community only results in measures to further safeguard states: genocide did not take place, there is no entitlement, no legal recourse, no responsibility and therefore, no human rights responsibilities.

During the 2002 session of the CHR Working Group, Article 7 concerning "cultural genocide" or "ethnocide" was under consideration and few indigenous representatives were prepared to deal with the state efforts to eliminate any reference to this important notion and to significantly alter its elements. Article 7 reads as follows:

"Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;

(e) Any form of propaganda directed against them."

There are significant reasons as to why Article 7 was added to the draft Declaration by the members of the WGIP. The elements of "cultural genocide" were

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formulated, in light of past and contemporary actions suffered by Indigenous peoples in all regions of the world. Again, because of the acts perpetrated against indigenous peoples, the draft Declaration intends to be responsive to the requirement of giving "special attention to the evolution of standards concerning the rights of indigenous peoples." Therefore, the concept of cultural genocide should remain an integral part of the Declaration. As noted by scholar S. Pritchard:

"... the WGIP has always considered that the review of "real-life experiences" of Indigenous peoples can assist the clarification of relevant concepts and the formulation of standards. The review of developments contributed to a greater understanding in the WGIP of the historical experiences and contemporary aspirations of Indigenous peoples. This understanding provided the framework for the elaboration of standards on the rights of Indigenous peoples."

In addition, F. Chalk & K. Jonassohn have commented upon such acts toward American Indians in the United States:

"In our view, ethnocide was the principal United States policy toward American Indians in the nineteenth century, but the federal government stood ready to engage in genocide as a means of coercing tribes when they resisted ethnocide or resorted to armed resistance. Ethnocide was at the core of the Indian removals, the reservation system, the Dawes Act, and the schemes for educating native children at boarding schools far from their parents after the Civil War.

Genocide, when it was practiced, could take several forms. The most important was genocide through famine. By encouraging the destruction of the buffalo and driving Native Americans on to marginal agricultural land, the federal government made them more vulnerable to disease, raised their

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mortality rate, lowered their birth rate, and intimidated those who survived. Tribes that resisted with arms or were thought to be considering resistance were subjected to terrorizing genocides and genocidal massacres intended to teach the lesson that resistance was futile.\(^{434}\)

Cultural genocide can be so devastating to distinct peoples or groups that it is not surprising that a Meeting of Experts indicated in 1981 in the Declaration of San José that "cultural genocide, is a violation of international law equivalent to genocide":

"Ethnocide means that an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language, whether collectively or individually. This involves an extreme form of massive violation of human rights and, in particular, the right of ethnic groups to respect for their cultural identity, as established by numerous declarations, covenants and agreements of the United Nations and its Specialized Agencies, as well as various regional intergovernmental bodies and numerous non-governmental organizations. ... We declare that ethnocide, that is cultural genocide, is a violation of international law equivalent to genocide, which was condemned by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948.\(^{435}\)"

In 1997, the government of Canada – while not using the term "cultural genocide" or "ethnocide" – in effect recognized the devastating effects of such acts committed against Aboriginal peoples in Canada. In its "Statement of Reconciliation," the government declared:

"Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices. We must recognize the impact of these actions on the once self-sustaining nations that were disaggregated, disrupted, limited or even destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some provisions of the Indian Act. We


must acknowledge that the result of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations.\textsuperscript{436}

Given the history of such states,\textsuperscript{437} especially those who play a highly influential role in the CHR working group,\textsuperscript{438} and who have committed acts of cultural genocide or genocide against Indigenous peoples, it is a sad commentary that they are now seeking to undermine the provision on cultural genocide in the draft Declaration.\textsuperscript{439} In regard to cultural genocide, it is the damaging effects to the collectivity and to the integrity\textsuperscript{440} of the Indigenous peoples, their rights, cultures and societies that are of critical concern.\textsuperscript{441}

Most often, it is the quest of States to get hold of the territories and resources of Indigenous peoples that has been the motivation to commit acts of cultural genocide or genocide against indigenous peoples. This quest to deny Indigenous peoples their rights

\textsuperscript{436}Indian Affairs and Northern Development, \textit{Gathering Strength - Canada's Aboriginal Action Plan} (Ottawa: Minister of Public Works and Government Services, 1997), "Statement of Reconciliation".
\textsuperscript{437}H. Hannum, "New Developments in Indigenous Rights," 28 Virginia J. Int'l L. 649 (1988) at 649: "Genocide has been committed against indigenous, Indian or tribal peoples in every region of the world, and it is this context that any discussion of indigenous rights must occur. The general perspective of the state toward indigenous peoples - that they are to be conquered or converted to the beliefs of the dominant, more "advanced" society - has remarkable similarities, whether the state is found in North, Central, South America; the Caribbean; the Pacific; Asia, from Bangladesh to China; Africa, with respect to groups such as the pygmies; or northern Europe."; and R. Wright, \textit{Stolen Continents: The "New World" Through Indian Eyes Since 1492} (Toronto/New York: Penguin Group, 1992) at 345: "The Delawares are gone from Delaware, the Massachusetts from Massachusetts. There are no Ottawas in Ottawa, nor Manhattans in Manhattan. A name on the map is often the only tombstone of a murdered people. In many places, from Newfoundland to Patagonia, even the names are dead. But as the voices that speak in this book make clear, there are also millions who survive. To ignore their experience and their wishes is to become accessories to murder. They are too many to die."
\textsuperscript{438}Namely Canada and the United States, who both made interventions and proposals to significantly alter and weaken the text of Article 7, CHR Working Group 2002 session.
\textsuperscript{439}Canada and the United States wanted to convert the rights in Article 7 to refer solely to individuals, as well as remove the term "integrity."
\textsuperscript{440}\textit{Indigenous and Tribal Peoples Convention, 1989}, No. 169, Art. 2, para. 1: "Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity."; and (Art. 5(b): "In applying the provisions of this Convention: (b) the integrity of the values, practices and institutions of these peoples shall be respected ..."
\textsuperscript{441}S. Wiessner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis," supra note 47 at 57.
to resources is also evident in the current position of the United States and other States in regard to the right to self-determination.\textsuperscript{442}

State government representatives also attempted to weaken the language of Article 7 in relation to the question of "intent." It was proposed by some States that the requirement of proving State "intent" be added to Article 7. On the contrary, the right not to be subjected to cultural genocide must be sufficiently broad in the draft Declaration, so as to legitimately accommodate a diverse range of circumstances. In the international human rights context, the application of this right must be reasonably determined by the facts and circumstances in each case.

It is also worth noting that the requirement of "intent" has contributed significantly to the ineffectiveness of the Genocide Convention. As a result, it has been proposed that acts of "advertent omission" be included in the list of acts of genocide.\textsuperscript{443}

\textsuperscript{442} F. Chalk & K. Jonassohn, \textit{The History and Sociology of Genocide: Analyses and Case Studies}, supra note 434 at 36: "In the modern period, genocides of this type [i.e. commitment to acquire \textit{economic wealth}] were associated with the discovery and settlement of the New World and the establishment of colonial dependencies by several European powers. Europe's expansion into the Americas, Asia, and Africa produced a number of genocides intended to acquire and keep economic wealth \ldots, usually in the form of land. There are strong similarities among the fate of the Pequots of New England (1637), several of the Indian tribes of Virginia (seventeenth and eighteenth centuries), and the Hereros of South-West Africa (1904-07). \ldots Extensive killings resulted from European expansion when frontier settlers embarked on campaigns to destroy the native occupants of the land. Such devastations were often opposed by governments, but their feeble efforts to protect the natives were overwhelmed by the settlers' persistence attempts to annihilate their aboriginal neighbors. These were cases of genocidal massacre. Among its victims were the Caribs, the Tasmanians, the Beothuks of Newfoundland, several Indian tribes of California, and some of the tribes of the Brazilian Amazon."

\textsuperscript{443} F. Chalk & K. Jonassohn, \textit{The History and Sociology of Genocide: Analyses and Case Studies}, supra note 434 at 203: "In addition to the clear instances of genocide committed by the U.S. government against American Indians in the nineteenth century, one must also consider those instances of "advertent omission" in which the government showed criminal neglect of the natives' welfare. U.S. leaders signed treaties binding them to protect the Indians, to guarantee them their lands, and to keep them supplied with food and blankets. By failing to honor these promises, the government did more than dishonor itself and cause untold suffering among the natives: when it tolerated the near annihilation of the Round Valley Yuki in California and abetted the killings [of the Cheyennes] at Sand Creek, it became an accessory to genocide by
For a number of reasons, the Genocide Convention has been described as being inoperative and ineffective. Therefore, in the context of the draft Declaration, it is all the more important to avoid similar problems. Furthermore, states were rejecting the terms "cultural genocide" and "ethnocide" since they "are not terms that are generally accepted in international law" despite their own reference to the 1981 Declaration of San José, mentioned above, which was in fact prepared by experts on ethnodevelopment and ethnocide. However, at the same time state representatives failed to note that the U.N. Commission on Human Rights specifically requested that the Working Group on Indigenous Populations take the views of experts into account.

It may be that the international community is prepared to hear from indigenous peoples and allow such outstanding claims to be tried. The first such serious and concrete response are the genocidal cases from Guatemala now being heard by the displaying wanton negligence for the lives and safety of the Indians it had sworn to protect. See also B. Whitaker, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, E/CN.4/Sub.2/1985/6, 2 July 1985 (recommendation that the U.N. include acts of advertent omission in its list of acts of genocide).

444 L. Kuper, "The United States Ratifies the Genocide Convention", issued by International Alert, Los Angeles and London; reprinted from Internet on the Holocaust and Genocide, no. 19 (February 1989), Special Supplement: "The Genocide Convention has been ratified by almost one hundred states, yet it is totally inoperative, and has been inoperative from its very inception. If it has been honored at all, it is in the breach, not the observance. The Convention is described as a Convention on the Prevention and Punishment of the Crime of Genocide, but there have been so many genocides since the adoption of the Convention, and almost no punishment. The problem lies in part in the provisions of the Convention, but more particularly in the nature of the body entrusted with its enforcement."

Indigenous peoples must state the facts and demand recourse, assess responsibility and go from there. If no such claims are made, it will be difficult, if not impossible, to reverse the trends established by colonial thinking and attitudes. This whole discussion is symbolic in terms of the interpretation of definitions of genocide and continuing colonial attitudes of superiority and control.

Finally, it is important to recognize the dynamic between transnational obligations and norms and the national context – there is a clear relationship between the two. States cannot shirk their responsibilities domestically and behave as though their legal and moral obligations internationally are of no consequence or significance within their borders. For historical and current purposes, the significance of genocidal acts against indigenous peoples are important for states to acknowledge, especially in the context of creating a respectful place for indigenous peoples within the contemporary human rights framework. The elaboration of the Genocide Convention and the above listed instruments embracing collective rights, all help to illustrate an increasing willingness to embrace rights that are exercised and enjoyed by individuals collectively or as groups.

446 A case was filed in Spain by the Rigoberta Menchú Foundation against a number of former Guatemalan officials for crimes against humanity committed in Guatemala between 1962 and 1996 and are presently being heard by the Spanish courts. Further information can be found at http://www.amnesty.org.
447 V. Van Dyke, Human Rights, Ethnicity, and Discrimination (Westport, Connecticut: Greenwood Press, 1985) at 81: “Originating in the horror of the Holocaust, the Genocide Convention is relevant to the indigenous peoples of the world. Many of them were victims of genocide before anyone thought to coin the word. The American Indians are a case in point, as indicated by the notion that there is no good Indian but a dead Indian and as indicated by Wounded Knee and other massacres.”
G) Conclusion

This Chapter has sought to focus upon fundamental elements of the distinct status and rights of indigenous peoples that are critical to their continued survival: the recognition of their distinct status and rights as peoples; the right to be different; indigenous collective rights and how these distinct characteristics relate to the history of genocide and the continuing threats to the survival of indigenous peoples, nations and communities. There is general agreement that indigenous peoples are "peoples" in the classical sense of the term: indigenous peoples share common ancestry, language, culture, identity, and a historical continuity with pre-invasion and pre-colonialism.

In view of the position of the United States and a few other states, which have taken substantive positions with little or no basis in law, former Chairperson of the WGIP, Erica-Irene Daes succinctly and bluntly summarizes the present debate at the CHRWG on the matter of the term "peoples" and the status of indigenous peoples:

"I believe that discrimination and racism are at the heart of the indigenous issue, whether this is expressed in the reluctance of many States to recognize the right of self-determination of indigenous peoples – a right recognized for all other peoples – or in the absurd denial of the use of the term "indigenous peoples", contradicting all logic of language and pretending in so doing that the different indigenous peoples of the world do not have a language, history or culture unique to them, or in the insistence by the dominant world that indigenous peoples do not have their own long-established and dynamic systems of knowledge and law."449

Despite the United States’ regressive position, recent developments within the U.N. and in particular, the treaty bodies, the international legal commentary and discourse and the international engagement of indigenous peoples themselves all suggest that indigenous peoples are "peoples" in the legal sense of the term as well. This
important distinction is absolutely fundamental to the discussion on the right of indigenous peoples to self-determination: the right that may be the single most important element to the survival of indigenous peoples, nations and communities.
CHAPTER V

THE ONGOING DEMAND FOR EQUALITY

"'All peoples have the right of self-determination.' That clear statement should be sufficient. But certain states in their endless quest for further enrichment, and their continued belief in racial superiority, claim that the indigenous peoples are not ‘peoples’ at all within the meaning of international law." 450

Ted Moses, Grand Council of the Crees

As noted in the previous chapter, the term "peoples" has been central to the draft Declaration debate because of its relationship to the status of indigenous peoples and collective rights. However, the term has also been at the heart of the debate concerning the right to self-determination of peoples. In regard to the latter, indigenous peoples have asserted and established that they are the "self" or the subjects, as peoples, who are free to determine their political status and pursue their economic, social and cultural development. Let us now turn our attention to the right of self-determination in the context of international law and indigenous peoples in particular.

A) The right to self-determination

The United Nations Charter speaks of the "principle" of self-determination, whereas, Article 1(1) of the International Human Rights Covenants, provides 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." (Emphasis added).

It may be said that the context for the emergence of such language was solely for colonized peoples, specifically, those in non-self-governing and trust territories as referred to the 1960 Declaration on the Granting of Independence to Colonial Countries
Certainly, this era of decolonization gave rise and contributed to the understanding of the content of the right to self-determination for such peoples and the international community in general. However, by the time that the 1970 Declaration Concerning Friendly Relations, was adopted and made similar reference to the right to self-determination, it was construed as a right not necessarily confined to colonial conditions.\footnote{452} The relevant language of the 1970 Declaration states:

"The principle of equal rights and self-determination of peoples
By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
...
Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." [Emphasis added.]

In 1975, the Conference on Security and Cooperation in Europe adopted the following language with regard to self-determination:

"VIII. Equal rights and self-determination of peoples
The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.
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 the elimination of any form of violation of this principle.\textsuperscript{453}

To further the previous discussion on indigenous peoples and their status and the linkage to self-determination, to date, the United Nations has been reluctant to specifically define the term \textit{peoples} in order to maintain flexibility. General debate concerning whether a particular collectivity constitutes a "people" has prompted some scholars to advance a number of objective and subjective criteria most used for the purposes of applying the right to self-determination. The types of objective elements often considered include such indicators as common language, history, culture, race or ethnicity, way of life, and territory. The objective criteria identified are not essential or exhaustive yet they provide a list of elements, which may be useful in determining whether a particular collectivity constitutes a "people." In the case of indigenous peoples, the elements identified by various scholars (as noted in the previous Chapter), as well as those contained in the Martinez Cobo study are examples of such indicators.

In contrast, the subjective criterion is essential: there must be the presence of a subjective element, namely, the will to identify and assert its existence as a people.\textsuperscript{454}

The latter certainly applies to the case of indigenous peoples, who have, for generations

\textsuperscript{453} Final Act of the Conference on Security and Cooperation in Europe, August 1, 1975. Reprinted in (1975) 14 I.L.M. 1295, Principle VIII.

\textsuperscript{454} Y. Dinstein, "Collective Human Rights of Peoples and Minorities," 25 Int'l & Comp. L. Q. 102 (1976) at 104: "Side by side with the objective element, there is also a subjective basis to peoplehood. It is not enough to have an ethnic link in the sense of past genealogy and history. It is essential to have a present ethos or state of mind. A people is both entitled and required to identify itself as such."
expressed a cohesive disposition and set of fundamentals values that can be defined as self-determination.

B) The term "Indigenous Peoples" and the right to self-determination

Though indigenous peoples have been able to gain recognition of their status as "human beings" within the U.N. and seemingly have put to rest the term "populations" in their specific context, the pivotal issues related to their distinct collective rights and status and in particular, the political right to self-determination remain outstanding. In this regard, state governments have equated the term "peoples" with the right to secede and therefore, have asserted arguments for alternate language to the term "peoples," as well as self-determination and collective rights. This myopic view is echoed in nearly every agency and arm of the U.N., as well as regional arrangements and initiatives.455

Specifically, throughout the recent debates on Article 3 (on the right to self-determination) of the draft Declaration in 1995 at the Commission Working Group, Argentina, Brazil, New Zealand and the United States all objected to the use of the term "peoples." These state governments held the view that the term "peoples" applies strictly to the "whole people" of a territory and it is the whole people who comprise the nation-state, as the sole self-determining actor on the international plane.456 They advance such

455 For example, the view of the United States’ government has been reiterated within the OAS Proposed American Declaration process and the Arctic Council Charter. In addition, states successfully advanced their views in the Declaration of the World Conference Against Racism, Durban, South Africa, 2001.

456 Statement by U.S. government, First session of the CHRWG, 1995: "As a threshold matter, however, there seems to be no international practice or international instrument that accords indigenous groups everywhere the legal right of self-determination under the UN Charter and common Articles 1(1) of the Covenants. The United States has consistently stated its understanding that the "peoples" entitled to self-determination under international law are the entire peoples of a state or those that could constitute themselves as a sovereign independent state, and not particular groups within an existing state."
self-serving views simply to deny indigenous peoples the distinct right under Article 1 of the Covenants.  

For example, the United States government representative has stated:

"the "peoples" entitled to self-determination...has been understood to be the entire peoples of a State, or those who could constitute themselves as a sovereign independent State, and not particular groups within an existing state. To date, international law and practice has not applied the term "self-determination" to "sub-national" groups nor has the term been interpreted to mean the right to redraw existing international borders."  

Numerous other states have remained silent on the matter but make it clear in private discussions and regional consultations that they do not favor use of the term in the draft Declaration. In order to adopt the CHRWG report, which is to be a reflection of the debate in formal plenary session only, and due to the fact that indigenous peoples and a growing number of state government representative’s use and support the term "peoples," a small minority of state governments have insisted that the following paragraph be included in the early CHRWG reports:

"This report is solely a record of the debate and does not imply acceptance of either the expression 'Indigenous Peoples' or 'Indigenous people'. In this report both are used without prejudice to the position of particular delegations, where divergences of approach remain."  

Recently, a number of states, including Guatemala and Mexico, have become more aggressive both in the formal and informal sessions as well as "government only" meetings and this has created an interesting dynamic with regard to this explanatory paragraph. In 2002, because of the minority view driven by the United States and the compelling arguments put forward by Guatemala for example, the Chairperson (a fellow

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457 E.-I. Daes, supra note 332 at 5: "Governments often have sought to narrow the definition of 'peoples' in order to limit the number of groups entitled to exercise a self-determination claim."

458 United States government intervention to the 1995 CHRWG session.

Latin American state representative) had to agree to a much more accurate, comprehensive and expansive "Explanatory Note" in the report:

"Explanatory Note [Proposed by States]: "There was no consensus on the term ‘indigenous peoples’ at the working group on the draft declaration (WGDD). Some States can accept the use of the term ‘indigenous peoples’. Some States can accept the use of the term ‘indigenous peoples’ pending consideration of the issue in the context of discussions on the right to self-determination. Other States cannot accept the use of the term ‘indigenous peoples’, in part because of the implications this term may have in international law including with respect to self-determination and individual and collective rights. Some delegations have suggested other terms in the declaration, such as ‘indigenous individuals’, ‘persons belonging to an indigenous group’, ‘indigenous populations’, ‘individuals in community with others’, or ‘persons belonging to indigenous peoples’. In addition, the terms used in individual articles may vary depending on context. Some delegations have suggested that if the term ‘indigenous peoples’ is used, reference should also be made to Article 1.3 of the ILO Convention 169. Hence, the bracketed use of the term ‘indigenous peoples’ in the draft declaration is without prejudice to an eventual agreement on terminology."

Though the United States made an interesting statement in the OAS Proposed American Declaration session, they have made it clear that they believe that acceptance of the term peoples in that context is not "translatable" to the worldwide stage of the United Nations. The new Explanatory Note is troubling and suggests, despite


461 Opening Statement of U.S. Delegation, Working Group on the Proposed American Indigenous Rights Declaration, April 3, 2001, Organization of American States, Washington D.C.: "This starting point also recognizes that many of the rights of indigenous peoples are recognized through their ability to act as a collective. U.S. domestic experience has demonstrated that collective and individual rights can co-exist in the indigenous context without undermining the individual rights that are firmly rooted in international human rights law. Thus the U.S. can accept some collective rights of indigenous peoples that we would normally, for reasons of equal protection under the Constitution, not recognize as group rights....That raises another difficult point. The U.S. is aware that the decisions taken concerning the Americas Declaration may well be seen as a global model. However, in some ways our shared experience in the Americas is not easily translatable to the world at large. We will be cognizant of this as we discuss issues of scope here and in the UN context. In many parts of the world, the key issue is self-identification. In the Americas, our shared pre-colonial history makes aboriginal status a viable factor for identifying indigenous peoples. The U.S. is also concerned about States deciding who is and who is not indigenous, absent identification of indigenous peoples by States undertaken through a fair and open process."
indigenous opposition, that many other terms or approaches are being formulated by state
governments.

Compounding the difficult position of indigenous peoples in their efforts to
advance dialogue, some states have agreed to the term "peoples" in the Declaration, but
are going along with lesser proposals simply to enable a possible "consensus" to be
reached on the Declaration. It must be noted that the government of Canada was taking a
lead role in this highly prejudicial strategy, while at the same time suggesting that its own
position on "peoples" exceeds that which is expressed in the 2002 "Explanatory Note."\(^{462}\)

There are some states that hold the view that the term and its application to
indigenous peoples may be presently accepted in international law. However, such
proponents still believe that it is synonymous with the "whole people," and therefore,
they favor a limitation to "internal self-determination." Further still, similar to the ILO
process, there have been a number of proposals by states to replace the term "indigenous
peoples," which remains bracketed in state proposals, or to include language to limit the
exercise of self-determination in the context of the term "peoples" because there is no
agreement amongst states.

Consistent with the international human rights Covenants, it is "peoples" that have
the right of self-determination. Also, under international law, the right to self-
determination is unequivocally a collective right. It is not a right of "minorities" or
"individuals" or any of the terms being proposed in the Explanatory Note by States.

\(^{462}\) 1996 Statement by the Government of Canada concerning Article 3 of the Declaration on the right to
self-determination and indigenous peoples. In particular, the Canadian government stated that all peoples,
including indigenous peoples have the right to self-determination. Wayne Lord, a member of the
Indigenous representatives asserted that many states in the Commission working group are now contradicting the rule of law and their own stated positions, when they seek to diminish the status of indigenous peoples as "peoples" in the Declaration. Such states are seeking to fabricate a diminished status and limited rights for Indigenous peoples in the Declaration despite the charge that these undemocratic and discriminatory actions are outside the mandate of the Working Group.

After years of examination and study, the Sub-Commission on Prevention of Discrimination and Protection of Minorities has also concluded that Indigenous peoples are "peoples" under international law and has approved the present Declaration in these terms.463

In Canada, the Royal Commission on Aboriginal Peoples (RCAP) has carefully researched the status and rights of Aboriginal peoples. After five years of examination, the RCAP concluded that indigenous peoples are "peoples" with the right of self-determination. Moreover, it has been concluded that it is the right of Aboriginal peoples to self-identify as they so choose in the context of exercising self-determination. As RCAP highlights:

"Aboriginal peoples are entitled to identify their own national units for purposes of exercising their right of self-determination. Given the variety of ways in which Aboriginal nations may be configured and the strong subjective element, any self-identification initiative must necessarily come from the people actually concerned."464

delegation of the Government of Canada, is largely responsible for the organizing, reporting and drafting of the ongoing work of the closed door government meetings concerning the Declaration.


The Report further states:

"At the heart of our recommendations is recognition that Aboriginal peoples are peoples, that they form collectivities of unique character ..."\(^{465}\)

The Royal Commission on Aboriginal Peoples concluded that:

"While it is possible that all Inuit, for example, constitute an Aboriginal people of Canada with a right of self-determination, we also consider that certain Inuit sub-groups clearly qualify for that status as well. The same observation holds true of certain sub-groups within First Nations and Metis peoples. In other words, the three Aboriginal peoples identified in section 35(2) encompass nations that also hold the right of self-determination."\(^{466}\) [Emphasis added.]

This conclusion has also been confirmed at the international level. For example, the 1991 Meeting of Experts in Nuuk, Greenland determined:

"... indigenous peoples constitute distinct peoples and societies, with the right to self-determination, including the right to autonomy, self-government, and self-identification."\(^{467}\)

In addition, Erica-Irene Daes addresses the matter in a discussion concerning the draft Declaration:

"[The draft Declaration on the Rights of Indigenous Peoples] reflects the essential concerns of indigenous peoples as a whole, in the understanding that indigenous peoples, in the manner of all nations and other peoples, vary greatly even among themselves. In this context, specific reference is made to the right of self-determination, not because it is a right of indigenousness, but as a right of peoples, a right of which indigenous peoples cannot be denied."\(^{468}\)


During every session of the Commission working group, indigenous representatives have laid out compelling arguments concerning the mandate of the Commission working group and the fact that states were engaging in a process that would undermine the status of Indigenous peoples as "peoples". Their arguments, in particular, affirmed their status as peoples and the fact that this pre-existing status cannot be diminished or denied by U.N. bodies or Member States -- such action would violate the principles of democracy, equality and non-discrimination. Unfortunately, neither the Chairperson nor a single state representative responded to this statement despite the specific request that states and the United Nations itself review and bar any discussion of positions that violate existing norms of international law. Indigenous peoples further cited Article 44 of the draft Declaration, which states, in part, that "nothing in this Declaration may be construed as diminishing or extinguishing existing ... rights."

Furthermore, recognizing the important linkage between "peoples" and the right to self-determination within international human rights law, increasingly scholars and state government representatives are moving away from a purely state-centered conception of the term peoples. For example, C. Tomuschat states:

used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state’s population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose." (para. 124).

Statement by D.S. Dorough, 1999 Session of the Commission Working Group, addressing peremptory norms of international law.

"It should be possible to call a people, in the ethnic sense, a peoples, in the legal sense, without having to fear that such recognition entails devastating consequences. International law cannot and should not promote secessionist moves, which, if successful, normally do not make the world any better."\(^{471}\)

Other international legal scholars have advanced the view that the term "peoples" does not only refer to the whole population of a state. In particular, I. Brownlie describes the right to self-determination as:

"the right of cohesive national groups ('peoples') to choose for themselves a form of political organization and their relation to other groups."\(^{472}\)

R. McCorquodale discusses the matter by describing the result of such restrictive understanding leading to legitimizing oppressive regimes and leading to conflict:

"[A] restriction on the definition of 'peoples' to include all the inhabitants in a State would tend to legitimate an oppressive government operating within unjust State boundaries and create disruption and conflict in the international community. This approach also upholds the perpetual power of a State at the expense of the rights of the inhabitants, which is contrary to the clear development of the right of self-determination and international law generally."\(^{473}\)

Consistent with the views of indigenous peoples, R. McCorquodale, later writes, in 1996, that self-determination applies to all peoples and not only those locked in colonial territories or conditions:

"[The right to self-determination] now applies to all peoples in all territories, not just colonial territories, and to all peoples within a state. Today the right to self-determination extends to all peoples suffering from oppression by subjugation, domination, and exploitation by others."\(^{474}\)


In this regard, indigenous peoples have affirmed and repeatedly asserted that they
are the "self" or the subjects, as peoples, who are free to determine their political status
and pursue their economic, social and cultural development. There should be no
argument over the fact that the text of the Covenants applies to all peoples, including
indigenous peoples. Scholar J. Crawford advances the argument that the term "peoples"
is not limited to colonial peoples:

"Just as a matter of ordinary treaty interpretation, one cannot interpret Article
1 as limited to the colonial case. Article 1, paragraph 1 does not say that some
peoples have the right of self-determination. Nor can the term ‘peoples’ be
limited to colonial peoples. Article 3 deals expressly, and non-exclusively,
with colonial territories. When a text says that ‘all peoples’ have a right – the
term ‘peoples’ having a general connotation – and then in another paragraph
of the same article, it says that the term ‘peoples’ includes the peoples of
colonial territories, it is perfectly clear that the term is being used in its
general sense. Any remaining doubt is removed by paragraph 2, which deals
with permanent sovereignty over natural resources. ... No one has ever
suggested that the principle of permanent sovereignty over natural resources is
limited to colonial territories. So far as the interpretation of Article 1 goes,
that surely settles the point."476

in all the relevant instruments, and in the state practice (by which I mean statements, declarations, positions
taken) on the importance of territorial integrity, means that "peoples" is to be understood in the sense of all
the peoples of a given territory. [emphasis in original]; P. Russell & B. Ryder, Ratifying a Postreferendum
Agreement on Québec Sovereignty (Toronto: C.D. Howe Institute, 1997), at 4: "...the inhabitants of the
province of Québec as a whole are not a single people, and therefore the province does not constitute a self-
determination unit for the purposes of international law."; P. Hogg, Principles Governing the Secession of
Québec, 8.1 N.J.C.L. 19 (1997) at 31: "If the definition of a people were to be given such a broad scope as
to extend to all Quebecers, then the wide definition would mean that other groups within Quebec,
especially the Aboriginal people, would also have to be acknowledged as a people, with a like right to
secede from Quebec."; and B. Schwartz, Last Best Hope: Québec Secession – Lincoln’s Lessons for
Canada (Calgary: Detselig Enterprises Ltd., 1998) at 25: "...the entire population of Québec is not a single
‘people’. [new para.] There are no objective ‘ethnic’ criteria that would make the Anglophones of Québec
or the Inuit [or] its various First Nations any less a ‘people’ than the Francophones of Québec...[new
para.]...It is an affront to individual freedom and dignity to deny a place for self-identification in the
determination of who is a ‘people’.

The debate surrounding the draft Declaration can be summarized to include a shrinking number of state delegates who hold an extreme positivistic view by clinging to the idea that the right to self-determination in international law attaches only to nation-state members of the U.N.

Some states, such as Canada, recognize that Article 1 applies to indigenous peoples, but they would either like to specify that this only means internal self-determination or that the right is subject in all situations to the territorial integrity of states. Others, like the United States, take the position that indigenous peoples have only the right to internal self-determination but that it is not the international right referred to in Article 1. Thereby attempting to single out indigenous peoples and re-define or distort their right to self-determination in international law.

Here again, in this context, it is clear that the world community is seeing an evolution of the right of self-determination. Political landscapes are changing. Recent discussions concerning self-determination advance the view that the right goes far beyond issues of state sovereignty and territorial integrity. The international community is slowly moving away from its previous state-centered understanding of the right and is beginning to embrace more of a human rights interpretation of self-determination. The latter is consistent with the approach that indigenous peoples have taken. Indigenous peoples have advanced a human rights argument but they have also underscored the distinct political status of their nations and communities, based upon a more accurate

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477 H. Hannum, supra note 452 "Rethinking Self-Determination," at 34: "Self-determination is also relevant to the matrix of human rights which has developed over the past four decades, including specific rights applicable to ... indigenous peoples."
understanding of pre-existing rights, historical contact and colonial thinking and forces. 

As stated previously, one critical element of this distinct political status is the fact that indigenous peoples are the original inhabitants of a territory or region, with "inherent" or pre-existing rights. These particular aspects of the indigenous argument for an explicit reference to the right to self-determination within draft Declaration, have been recognized by a number of governments, including the United States.

Furthermore, both the U.N. Human Rights Committee and the European Parliament have confirmed that Indigenous peoples are "peoples" with the right of self-determination, with the latter declaring that:

"... indigenous peoples have the right to determine their own destiny by choosing their institutions, their political status and that of their territory."

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478 See, for example, the Human Rights Committee, General Comment 12(21) on Article 1 of the ICCPR, UN Document A/39/40, pp. 142-143.

479 S.J. Anaya, Indigenous Peoples in International Law, supra note 46 at 3: "living descendants or preinvasion inhabitants of lands now dominated by others."

480 S.J. Anaya, "Superpower Attitudes Toward Indigenous Peoples and Group Rights," Lecture delivered at the 93rd Annual Meeting of the American Society of International Law March 24-27, 1999, Washington, D.C., stated: "One strain of argument is essentially within a state-centered frame. Indigenous groups, often referred to as "nations," are identified as having attributes of sovereignty that predate and, to at least some extent, should trump the sovereignty of the states that now assert power over them. The rhetoric of nationhood is used to posit indigenous peoples as states, or something like states, within the perceived post-Westphalian world of separate, mutually exclusive political communities. Within this frame of argument, indigenous advocates point to a history in which the "original" sovereignty of indigenous communities over defined territories has been illegitimately wrested from them or suppressed. The rules of international law relating to the acquisition and transfer of territory by and among states are invoked to demonstrate the illegitimacy of the assault on indigenous sovereignty. Claims to land, group equality, culture, and development assistance stem from the claim for reparations for the historical injustice against entities that, a priori, should be regarded as independent political communities with full status as such on the international plane."

481 Statement by the United States on Indigenous Self-determination, UN CHR Working Group, October 20, 1999: "I should emphasize that nothing in the U.S. international position on self-determination effects current U.S. domestic policy toward federally recognized tribes. From the first days of our republic, the United States has recognized Indian tribes as political entities with powers of self-government."

As mentioned in Chapter III, in 1999, the Human Rights Committee requested Canada, Norway and Mexico to indicate how the right of self-determination is being implemented in regard to Indigenous peoples in these countries in their periodic reports. Specifically, in regard to Canada:

"[The Human Rights Committee] urges [Canada] to report adequately on implementation of article 1 of the [International Covenant on Civil and Political Rights] in its next periodic report."\(^{484}\)

Here, it is important to note that substantial progress has been made in relation to state reporting requirements versus complaints brought under the Optional Protocol within the Committee,\(^{485}\) indicative of a gradual loosening of strict or positivist interpretations of the Covenant language on self-determination. Under the reporting requirements, a number of scholars have stated that the Committee is not confined to its previous interpretations concerning who has "standing" to bring forward a complaint. Furthermore, the Committee has the latitude and obligation to determine whether or not a state is upholding its human rights obligations under the Covenants. In particular, R. McCorquodale writes:

"... the Human Rights Committee has been limited in its ability to consider claims brought by peoples alleging violations of their right of self-determination because the Optional Protocol to the ICCPR allows only


\(^{484}\) United Nations Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, 7 April 1999, CCPR/C/79/Add. 105 (Concluding observations of the Human Rights Committee), para. 7. Similarly, in regard to Norway, see U.N. doc. CCPR/C/79/Add.112, para. 17; and in regard to Mexico, see U.N. doc. CCPR/C/79/Add.112, para. 19.

\(^{485}\) A. Cassese, International Law (Oxford/N.Y.: Oxford University Press, 2001) at 372: "The steady insistence on the need to respect human rights, by international law-making and monitoring bodies, and the impact these bodies have gradually had on States' behaviour, has produced a significant ripple effect. The whole international ethos has gradually, if almost imperceptibly, changed, so much so that some international supervisory bodies now consider warranted to depart from notions they themselves traditionally held. They currently consider it appropriate to place on those notions a much broader interpretation."
individuals' to bring claims. The Committee has interpreted this to mean that while all peoples have a right of self-determination ..., as stipulated in Article 1 of the [ICCPR], the question whether the Lubicon Lake Band constitutes a 'people' is not an issue for the Committee to address under the Optional Protocol to the [ICCPR].” However, the Committee can, and does, address the right under its reporting procedure as does the African Commission on Human and Peoples’ Rights.”

Scholar M. Scheinin states:

"The Human Rights Committee, acting under the CCPR and its Optional Protocol, has taken the position that as an individual cannot be a victim of a violation of a people’s (collective) right to self-determination and as collectives as such have no right to complain, complaints submitted under Article 1 of the CCPR are inadmissible. Reference can be made to the Committee’s views and decisions in the cases of Bernard Ominiak, Chief of the Lubicon Lake Band v. Canada, Kitok v. Sweden and A.D. v. Canada (Mikmaq No. 1).

The approach can be criticized as formalistic, and it might be that one day the Human Rights Committee will allow its position to develop in the procedural issue of whether the Optional Protocol can be used for submitting communications related to Article 1 of the CCPR. Be that as it may, one should, however, be careful not to take the Committee’s position in a procedural issue to mean that the right of all peoples to self-determination would not be a legal right under the CCPR. Even if the Committee’s position that ‘self-determination is not a right cognizable under the Optional Protocol’ were to be maintained, there are other procedures available under the CCPR for the purpose of pursuing claims related to the right of self-determination. Article 1 is subject to the scrutiny by the Human Rights Committee under the mandatory reporting procedure [Art. 40 of the CCPR] and the so far never initiated optional procedure for inter-state complaints [Art. 41 of the CCPR]. Furthermore, under the CESCR, which contains an identical Article 1, a reporting procedure is available.”


Furthermore, A. Cassese asserts:

"The contention is warranted that Articles 1 and 2 of the Optional Protocol do not rule out the right of legal representatives of a people to complain about breaches of Article 1 of the Covenant on Civil and Political Rights. It can be legitimately argued that an individual or group of individuals acting on behalf of a people could file a 'communication' complaining about a violation of some basic rights (e.g. ... the right to take part in public affairs, Article 25) and at the same time of Article 1. In other words the complainant could claim that the breach of some basic political rights amounts to a violation of the right of the whole people to 'freely determine' its internal 'political status. Similarly, possible infringements upon some basic provisions of the Covenant could be taken to amount to a breach of the right of the whole people 'freely to pursue' its "economic, social and cultural development". 488

Finally, the Committee itself notes:

"As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights [ICCPR, arts. 6 to 27 inclusive]. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27." 489

There is no doubt that the matter of the right to self-determination, in the context of the draft Declaration, will continue to be a matter of debate. However, the legal arguments being raised by states are highly questionable from an international law viewpoint and, in some cases, are not being raised in good faith. In regard to the right of self-determination, Indigenous peoples must have identical wording in the draft Declaration as in the human rights Covenants. To date, there have been no credible legal

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or moral arguments that demonstrate that the right of self-determination in the human
rights Covenants applies to "all peoples" but excludes indigenous peoples.

C) Indigenous perspectives on the right to self-determination

"Tribal government has existed since time immemorial. It was governing here
in 1492, at the time when Columbus supposedly discovered America. The
elders say, 'Reestablish your own governments, practice self-determination.'
We must understand the ways of the majority, but we must not forget who we
are."\(^{490}\)

Willie Kasayulie, Akiachak

To entrench explicit recognition of the right of indigenous peoples in the
operative paragraphs of the draft Declaration is at the heart of the present debate.
Indigenous peoples are far from getting out of the woods intact on the question of the
right to self-determination. In this regard, it is important to briefly discuss the
perspectives of contemporary indigenous peoples in terms of the meaning of self-
determination in international law and the content of the right within indigenous
communities. Therefore, it must be acknowledged that there are a wide range of
approaches and interpretation for the exercise of the right to self-determination in regard
to indigenous peoples – far too many to discuss in the present context. However, in
relation to indigenous peoples, it is important to note that self-determination, sovereignty
and self-government are inherent in the legal status of indigenous peoples as people. The
right is pre-existing and cannot be given or created by anyone or any government. It is
expressed, exercised and manifested in different ways by different peoples.

Scholars Vine Deloria and Clifford Lytle have identified some of the key
elements of Indian self-determination in their discussion of the future of Indian Nations:

\(^{490}\) Willie Kasayulie, Yupik, Akiachak, testimony to the Alaska Native Review Commission, August 1984.
survival of Indian people, the idea of governing themselves in communities of their own choosing or political independence or freedom from external control, continuity between the past and present, cultural renewal, economic stability, and stabilization of relationships with federal and state governments based upon mutual respect and parity in political rights. Without intentionally suggesting it, the elements of Tribal self-determination identified by Deloria and Lytle are consistent with Article 1(1) and (2) of the Covenants.

The authors, focusing upon Tribal self-determination in the United States, make a number of suggestions regarding tribal government reform, cultural renewal and economic stability. Needless to say, their discussion of all three is tied directly to the issue of Indian lands and resources, and the rights and ability of Indian people to access, own and control their natural wealth and subsistence. To a large extent these same elements have been elaborated upon throughout the course of the indigenous/state debate concerning self-determination.

Throughout their interventions, indigenous peoples have described their conception of the right and how it operates within their communities and societies. Some of them have described regional autonomy arrangements such as Nunavut or the

492 Downloaded from the Nunavut web site at http://www.tunngavik.com: "In 1993, the Inuit, the government of Canada and the government of the Northwest Territories signed the largest Aboriginal land claim agreement in Canadian history. At the same time, legislation was passed leading to the creation of a new territory of Nunavut on April 1, 1999. The new territory will have a public government serving both Inuit and non-Inuit. Nunavut Tunngavik Incorporated (NTI) was set up as a private corporation in 1993, to ensure that promises made in the Nunavut Land Claims Agreement are carried out. The negotiated land claims Agreement is based on and reflects objectives and clarifies the rights to ownership and use of land and resources, and of rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore. It also provides Inuit with wildlife harvesting rights and rights to participate in decision-making concerning wildlife harvesting. The Inuit are
Greenland Home Rule, others have addressed tribal sovereignty within the United States, like that of the Navajo Nation, others, like the Haudenousaunee have described their perspective of the right for their peoples, and others still address it in terms of a broad spectrum of political possibilities:

"ATSIC believes that unambiguous reference to self-determination is fundamental to the integrity of the Declaration. To remove this reference, would irreparably damage the declaration’s content, particularly the paragraphs in part VI relating to the relationship indigenous peoples to their land. ATSIC agrees with the views of indigenous organizations represented at this forum and supports the position which will be conveyed to you by Australia’s non-government representatives....It would be inappropriate to limit the application of the concept so as not to infer that it poses any challenge to the nation state. Indeed ATSIC would view further qualifications to the references to self-determination as an unnecessary weakening of the text....To Australia’s indigenous peoples self-determination is an aspirational concept – which embraces a widening spectrum of political possibilities, from self-management by indigenous peoples of their own affairs to self-government by indigenous peoples of their own communities or lands. Self-determination is a ‘dynamic right’ under the umbrella of which Aboriginal and Torres Strait Islander peoples will continue to seek increasing autonomy in decision making....The Declaration should state in simple unambiguous terms that all indigenous peoples have a right to self-determination."

also provided with financial compensation and means of participating in economic opportunities. One of the last main objectives of this Agreement is to encourage self-reliance and the cultural and social well-being of Inuit. The word "Nunavut" means our land, while "Tunngavik" refers to a multi-layered organism or foundation. NTI represents the interests of over 21,000 Inuit, for whom the land claim agreement was settled." See also, statement by Premier of Nunavut, Paul Okalik, Anchorage Daily News, June 24, 2002: "I cannot say we’re perfect....What we have attained is our own ability to determine our own future. The ability to make our own mistakes and correct those mistakes....But we have acknowledged them for two years and have fixed them on our own....That’s empowerment."

494 Statement by the Navajo Nation, Fifth Session of the CHR Working Group, 1999.
495 Numerous statements have been made by Haudenousaunee representatives to the WGIP and the CHRWG concerning their perspective on the right to self-determination and in particular, the Great Law of Peace, which involves the basic rights of people within a distinctive and representative governmental framework, where all had equal hearing, with built in checks and balances, and where Iroquois power "rested upon the consent of the governed, and was not coercive in areas of military service, taxation, and police powers." For more detailed discussion of the Great Law of Peace and the Iroquois Confederacy, see chapters by O. Lyons, J. Mohawk and D. Grinde, Jr. in Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution (Santa Fe: Clear Light Publishers, 1992).
496 Statement by Chairperson of the Aboriginal and Torres Strait Islander Commission, WGIP Eleventh session, July, 1993.
In 1997, again ATSIC and seven other Aboriginal organizations addressed the right of self-determination and stated that:

"international practice has increasingly shown that self-determination can be realized in many different forms. In the case of indigenous peoples, these forms will vary in accordance with particular customs, needs and aspirations....Central to the right of self-determination are notions of control and consent: control over decision-making processes affecting our affairs and consent to the terms of our relationships with States. Increasingly, these have been recognized as central to any catalogue of the rights of indigenous peoples and implicitly in the principle of racial non-discrimination as applied to indigenous peoples."\(^{497}\)

Though there was early concern that the language of Article 31 of the draft Declaration would somehow limit the exercise of Article 3 to "internal" self-determination, there has been far too much focus, as well as international legal evolution on the right to self-determination that these concerns will likely not resurface. In sum, no indigenous peoples' representative has spoken of secession or dismemberment of states and most, if not all, have addressed the recognition of the right of indigenous peoples to self-determination as a means of transforming and improving political and legal relationships with state governments and others as discussed previously. As Geoff Clark stated to the ILO Committee during the revision of Convention 107:

"We define our rights in terms of self-determination. We are not looking to dismember your States and you know it. But we do insist on the right to control our territory, our resources, the organization of our societies, our own decision-making institutions, and the maintenance of our own cultures and ways of life."\(^{498}\)

\(^{497}\) Statement by ATSIC, Aboriginal and Torres Strait Islander Social Justice Commissioner, Foundation for Aboriginal and Islander Research Action, Indigenous Woman Aboriginal Corporation, National Aboriginal and Islander Legal Services Secretariat, New South Wales Aboriginal Land Council, Tasmanian Aboriginal Centre, CHR Working Group, Third Session, October 1997.

\(^{498}\) Statement by Geoff Clark, National Coalition of Aboriginal Organizations of Australia, ILO Committee, 1988.
Throughout the course of the WGIP and the present CHRWG, indigenous peoples have articulated an approach that is in fact consistent with international law. The 1992 statement of the Four Directions Council generally expresses the view of most indigenous peoples and organizations:

"[W]hen speaking of the right to self-determination of indigenous peoples, we are not creating new law, but merely clarifying the application of principles which are as old as the United Nations itself. Our purpose...is not simply to ensure that indigenous peoples are not deprived of a fundamental right which is secured to all other peoples."\(^{499}\)

In 1993, a unanimous statement by the indigenous participants present also outlines the consensus position of indigenous peoples:

"It is the position of the indigenous delegates...that self-determination is the critical and essential element of the Draft Universal Declaration on the Rights of Indigenous Peoples. Discussion on the right of self-determination has been and still is the sine qua non of our participation in the drafting process. The right of self-determination must therefore be explicitly stated in the declaration....We believe that the working group should demonstrate consistency and objectivity on this issue because the right of self-determination is the heart and soul of the declaration. We will not consent to any language which limits or curtails the right of self-determination...."\(^{500}\)

While the reality of the exercise of the right to self-determination for indigenous peoples is quite clear: few, if any, seek full independence or full autonomy as nation-states, every indigenous person who has intervened at the United Nations has unequivocally stated that the right to self-determination must be recognized for indigenous peoples, as "peoples" without qualification, limitation or any other discriminatory double standard. The right to self-determination must be applied universally, to all peoples, including indigenous peoples.

\(^{499}\) WGIP, Tenth Session, 1992.
\(^{500}\) WGIP, Eleventh Session, 1993.
D) State positions

"Just as the original legal rhetoric of colonialism was based upon assumptions that the lands and lives of indigenous peoples could be taken over because such peoples were primitive, heathen inferiors, so many of the present concerns of States about self-determination reflect the still clear but now unspoken assumption that we remain somehow less human. For if the right to self determination is a human right that is applicable to peoples, then to attempt to deny or limit its application to us is to continue to affirm our lack of human worth, which was the justification claimed by Europeans for our original dispossession."\(^{501}\)

Moana Jackson, Aotearoa

Throughout the debates at the CHRWG, some States have claimed that Article 3 of the draft Declaration must be altered in a manner that permanently entrenches the notion of territorial integrity of States. Indigenous peoples vehemently oppose such proposals since they are unnecessary, as well as having the potential of stifling the natural evolution of the right to self-determination under international law. Furthermore, the notion of territorial integrity is already incorporated as an integral part of international law. In particular, the 1970 Declaration Concerning Friendly Relations, as an interpretive document of the U.N. Charter, emphasizes this point. States are well aware that other existing principles and rules in international law will still be applied in any given circumstance, in determining the meaning and scope of the right of peoples to self-determination.

Like other aspects of self-determination, this concept of territorial integrity is also evolving and is no longer one that is tied solely to States. Rather the integrity of Indigenous peoples' territories and their other basic interests are intimately linked to this principle. In this regard, U. Umozurike emphasizes:

"... the ultimate purpose of territorial integrity is to safeguard the interests of the peoples of a territory. The concept of territorial integrity is therefore meaningful so long as it continues to fulfill that purpose to all the sections of the people."  

It is also important to note that the right of peoples to self-determination is a relative right. Contrary to the implications by some States, self-determination is not an absolute right without limitations. It does not confer on any one people the right to deny other peoples the same right on an equal footing. It does not include any right to oppress other peoples. As Professor R. McCorquodale makes clear:

"The right of self-determination is not ... an absolute right without any limitations."  

It is almost laughable that certain States, such as the United States and Canada, suggest or imply that the explicit recognition of indigenous peoples’ right to self-determination is a threat to the territorial integrity of existing States. Current developments in Canada, for example, demonstrate the reverse. In fact, over the past two decades, the self-determination actions of Indigenous peoples in Canada have effectively contributed to safeguarding the territorial integrity of Canada. For example, the democratic actions of James Bay Cree people have far exceeded what the government of Canada itself has done to secure its borders as an existing state.  

As already stated, there are few indigenous peoples, nations or communities seeking to disrupt or

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dismember existing nation states. On the contrary, more and more indigenous peoples and nations are seeking to create relationships that allow for the natural tension of shared sovereignty and cross cultural regimes and arrangements to protect and promote their interests.

It appears that State governments have become far too focused upon drafting of a text, which will ensure that an isolated, "worst-case scenario" will never be realized. They have conjured up "scenarios" where the right to self-determination is absolute and if upon, inclusion of the unqualified right of indigenous peoples to self-determination in the draft Declaration, the sky will fall and the world as we know it will collapse into chaos and strife.

States have used such an approach, as well as other erroneous assumptions, to support their views. They are now trying to build consensus around language to protect themselves from their "scenarios" and to preserve the status quo – the status quo being a

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505 See M.C. Lâm, *At the Edge of the State: Indigenous Peoples and Self-Determination*, supra note 12 at 135: "... indigenous peoples represent – repeatedly, seriously, and plausibly – that the overwhelming majority of them seek, not independent statehood, but appropriate forms of association with surrounding states that would safeguard their distinctive identities and special relationships to their territories." And, at 150: "The animating impulse behind the principle of self-determination is the free realization by a people of its sense of self. While the principle sometimes provokes the disruption of peace, it more often than not also constitutes its pre-condition."

506 M. Ignatieff, *The Rights Revolution* (Toronto: Anansi, 2000), at 80: "Aboriginal groups have consistently argued that their treaty claims to land and resources are based on an ideal of sharing use rights with others, rather than a European model of exclusive ownership. When sharing is the intention, resolution is possible. The problem is how to create the good faith to share between peoples who have had such a long history hurt and injury between them, and in particular, how adjudicate disputes when sharing fails. As aboriginal leaders have been saying, and as a recent Canadian Royal Commission on Aboriginal Peoples has argued, the best way to address both issues is through a treaty-making process. This process recognizes the existing treaty obligations of both parties, and it acknowledges that both parties come to the table as equal nations. The purpose of negotiations is not just to define title to land and resources, and not just to turn over powers of local administration to legitimate aboriginal authorities, but also to find a way to share the sovereignty of the national territory." See also P. Russell, *Aboriginal Nationalism and Québec Nationalism: Reconciliation Through Fourth World Decolonization*, (1997) 8:4 Constitutional Forum 110, at 116: What is required - on both sides - is a willingness to share sovereignty. It is only by sharing
narrowly defined notion of self-determination as only a right of states and not peoples. Furthermore, state government representatives have failed to be intellectually honest about the dialogue and debate concerning the right to self-determination. To date, few states have even engaged in a substantive and intellectually honest discussion, at the international level, about this fundamental human right. Indigenous peoples have encouraged states to consider the content of the right, from a range of perspectives, including articulation of how the right operates in domestic contexts. Furthermore, the political, demographic, and economic realities don’t point to indigenous peoples as the major threat to state dismemberment, impairment or disruption. The matter of the right of self-determination of indigenous peoples will have to be addressed on a case by case basis and will require the full, direct and meaningful participation of the indigenous peoples concerned.

Certain States, such as Canada, have stated that the right of self-determination is not clearly defined in international law and that limitations should be added to existing Article 3 of the draft Declaration. This position contradicts Canada’s own actions before its own courts. In 1998, in the Québec Secession Reference, despite Cree efforts to have the Court clarify Cree status and rights under Canadian and international law, the Attorney General of Canada urged the Court not to consider the status and rights of Aboriginal peoples in a self-determination context. In this way, the government of Canada did everything in its power to persuade the Court that no certainty in this regard would be necessary or helpful.

sovereignty that the relationship of Aboriginal peoples to the nation-states in which they live can move to one that is fundamentally federal rather than imperial.
The right to self-determination is directly tied to the continuing survival and development of Indigenous communities. Given the rapid social change that is taking place, globalization as well as greater pressure for renewable and non-renewable resources, self-determination will be critical for the safeguarding of indigenous communities, lands, territories and resources. In addition, greater respect for and recognition of indigenous peoples’ right to self-determination will allow for the much needed re-defining and re-constructing of political and legal relationships domestically and reconciling differences.

If Article 3 of the Declaration were to be altered - even to include the same or similar notions as might currently exist under international law - it would invite interpretations to be applied to Indigenous peoples’ right to self-determination that are different from those of other peoples. It might also have the effect of wrongfully "freezing" the interpretation of this Indigenous human right, in such a manner as to prevent or otherwise stifle its natural evolution under international law. The significance of such principles as self-determination and territorial integrity must be able to evolve under international law in the same manner for Indigenous and non-Indigenous peoples. This would be consistent with the prevailing view of the need for constant evolution and

507 M. Lâm, *At the Edge of the State: Indigenous Peoples and Self-Determination*, supra note 12 at xxiii-xxiv: "... given the accelerated threat to culture and physical survival that global interconnectedness now poses to indigenous peoples, the latter must be given the most effective international legal mechanism available for assuring the protection and reproduction of their societies. That mechanism is the right of self-determination."

508 R. Falk, "Forward" in M.C. Lâm, *At the Edge of the State: Indigenous Peoples and Self-Determination*, supra note 12 at xvi: "Of course, there are diversities among indigenous peoples with respect to their circumstances, priorities and demands, but there is a surprising degree of convergence around the idea that their various experiences and destinies are joined by a common insistence that their future depends upon the enjoyment of a right of self-determination. There will be no reconciliation without such a right being acknowledged, and the practical application of such a right being negotiated on a case by case basis in a manner that takes account of the opposed existential circumstances of indigenous peoples and states."
accommodation of different circumstances, as the Supreme Court of Canada has recommended:

"... concepts of equality and liberty which appear in human rights documents are not bounded by the precise understanding of those who drafted them. Human rights codes are documents that embody fundamental principles, but which permit the understanding and application of these principles to change over time."\(^{509}\)

E) **Present state government positions**

To date, the indigenous position has remained consistent. Recently, however, state positions began to shift and change in the Commission level dialogues. For example, the Nordic states of Denmark, Norway and Finland and the Government of Switzerland have all supported the language of Article 3 on the right to self-determination, without reservation or qualification. In addition, quite a number of Latin American states feel that they can accept self-determination in the Declaration, as it is consistent with domestic usage.\(^{510}\) Yet, they have expressed concern over the potential threat to territorial integrity and would like to see a reference to internal autonomy or internal self-determination. A number of other states have concerns because they have no domestic experience with the concept. For example, France has raised questions about Article 3 and whether or not the wording means exercise within nation-states or secession.

The most dramatic departure from all other previous state interventions concerning Article 3 of the draft Declaration came in 1996 under the general debate on

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\(^{509}\) *A.-G. Canada v. Mossop*, [1993] 1 S.C.R. 554 (Supreme Court of Canada), at p. 621, per L’Heureux-Dubé J. Though this is from a dissenting opinion in *Mossop*, the view represents majority approaches in other Supreme Court of Canada cases.

\(^{510}\) In particular, Latin American states such as Brazil, Argentina, Venezuela, Chile, Columbia, Mexico and Ecuador.
self-determination when the Government of Canada referenced the various international instruments that uphold the right of self-determination and further recognized "that this right applies equally to all collectivities, indigenous and non-indigenous, which qualify as peoples under international law." Essentially, the Canadian government affirmed the right of self-determination and its application to indigenous peoples. This was a major step forward in this standard-setting process, and it came in the face of sustained opposition by most countries to the explicit reference to self-determination in the Declaration.

However, the Canadian government also recognized that "the issue is complex." They further stated that:

"our goal at this Working Group will be to develop a common understanding, consistent with evolving international law, of how this right is to apply to indigenous collectivities, and what the content of this right includes. Once achieved, this common understanding will have to be reflected in the wording of Article 3....

[T]he Government of Canada accepts a right of self-determination for indigenous peoples which respects the political, constitutional and territorial integrity of democratic states. In that context, exercise of the right involves negotiations between states and the various indigenous peoples within these states to determine the political status of the indigenous peoples involved, and the means of pursuing their economic, social and cultural development."

Although there are a number of serious problems with this 1996 Canadian statement, which will be addressed below, it marks a substantial turning point in the international dialogue and it made an important contribution to greater understanding of the rights and status of the indigenous peoples and their fundamental right to self-determination. For example, the following year, 1997, the Government of New Zealand

acknowledged the centrality of the right to self-determination and went a step further by reciting the text of the 1970 Declaration Concerning Friendly Relations:

"[s]ubject to any draft Declaration being consistent with domestic understanding of the relationship between Maori and the Crown (representing all New Zealanders), and respecting the territorial integrity of democratic States and their constitutional frameworks where these meet current international human rights standards, New Zealand could accept the inclusion in the draft Declaration of a right of self-determination for Indigenous peoples....

New Zealand considers that consistent with an emerging usage at international law, any right to self-determination included in the Declaration 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 or independent states, possessed of a government representative of the whole of the people belonging to the territory, without distinction as to race, creed or colour. The Declaration should clearly reflect these principles."

By 1999, it was clear that "no state rejected the inclusion of the right to self-determination in the Declaration," to borrow the words of the Guatemalan government representative, and many of the statements were repeated by both indigenous peoples and state government representatives in 2000 and 2001 during the informal discussions on self-determination. Yet, the difficult question of reconciling the views of indigenous peoples and state governments is far from being answered. The most recent proposal made by Canada, at the OAS, but applicable to the U.N. as well, reads:

"The following is a Canadian attempt, for the purpose of both the UN and the OAS Working Groups, to outline how the right of self-determination could be implemented by indigenous collectivities living within states having a government representative of the whole people belonging to the territory without distinction as to race, creed or colour:

- This right of self-determination respects the political, constitutional, and territorial integrity of democratic states;
- Exercise of the right involves negotiations between states and the various indigenous peoples within those states on the means of pursuing the political, economic, social and cultural development of the indigenous peoples involved;"
• These negotiations must reflect the jurisdictions and competence of existing governments and must take account of different needs, circumstances and aspirations of the indigenous peoples involved;
• This right of self-determination is intended to promote harmonious arrangements for indigenous self-government within sovereign and independent states; and;
• Consistent with international law, the right 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 representative of the whole people belonging to the territory, without distinction as to race, creed or colour."

This position is alarming for several reasons. First of all, this position was articulated at an OAS session (but expressed as the position of Canada for both the OAS and UN Declarations), where very few indigenous participants are present to counter the rationale and provide arguments against such a narrow interpretation of the right of indigenous peoples to self-determination. Secondly, the Government of Canada is at the center of the debate, actively facilitating the closed door meetings of governments and other inter-sessional government only consultations.

In addition, as discussed above in relation to territorial integrity, indigenous peoples have already advanced grounded, intellectually honest legal arguments in response to the "unfounded" fears of government to dismemberment. However, Canada continues to claim that Article 3 must be altered in a manner that permanently entrenches the notion of territorial integrity of States. The notion of territorial integrity is already an integral part of international law. In particular, the 1970 Declaration Concerning Friendly Relations, as an interpretive document for the U.N. Charter, emphasizes this

512 Comments by the Delegation of Canada on Articles VII through XVIII and on the issue of self-determination in the Proposed American Declaration on the Rights of Indigenous Peoples, Special Meeting
States are well aware that other existing principles and rules in international law will still be applied in any given circumstance, in determining the meaning and scope of the right of peoples to self-determination yet they persist.

To compound the Canadian governments' position on territorial integrity is their introduction of the concept of "constitutional integrity" and "political integrity." What do these terms mean? In February 2002, despite early international usage of the terms, the Canadian government expressed opposition to the wording of Article 7 concerning "cultural genocide" and "ethnocide" by stating that they "are not terms that are generally accepted in international law." Yet, in the context of the indigenous right to self-determination the Canadian government has introduced "constitutional integrity" and "political integrity," in an attempt to confine and limit the right to "internal" self-determination, and based on negotiation to further prescribe the right, in order to bring about "harmonious relations." Such language (which introduce terms not generally accepted in international law) is obviously self-serving and attempts to preserve the status quo with regard to subjecting the right of indigenous peoples to self-determination as prescribed by existing state controlled institutions and it would not allow for any further international debate on the content of the right of self-determination for indigenous peoples. In addition, as has been recently stated by Professor Erica-Irene A. Daes, Professor Maivan Lam, and Australian Social Justice Commissioner, Bill Jonas, there is no security in legislation or negotiation with political leaders or political institutions.
which are highly volatile arenas and subject to frequent change. Furthermore, though the government of Canada has used language from the 1970 Declaration Concerning Friendly Relations, they neglect to note that the same Declaration already provides for alternatives to independence, namely to negotiate other arrangements for the exercise of the right to self-determination of peoples within existing states.

Throughout the 1997, CHR working group session, a troubling discussion was prompted by states concerning the notion of "internal" and "external" self-determination. This dichotomy was introduced in the CHRWG by states in order to confine indigenous peoples right to self-determination to one of domestic or state prescription. Some indigenous peoples fell into the trap and began discussing their perspectives of exercising "internal" self-determination as embraced by national constitutions and so forth. However, others immediately noted that the right to self-determination cannot be separated; it is a whole right. They argued further that governments cannot affirm that indigenous peoples, like all peoples, have the right to self-determination and in the same breath state that they have only the right to internal autonomy or self-government consistent with state prescribed methods for defining the content of the right. As previously noted, the expressions of indigenous peoples at the CHRWG of the United Nations, the Arctic Council and other international fora are examples of the external exercise of the right to self-determination. Indigenous peoples have been expressing


514 Martinez Cobo Study, supra note 36, at paragraphs 579 and 580: "Self-determination, in its many forms, must be recognized as the basic pre-condition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future. It must also be recognized that the right to
their worldviews and perspectives on the international plane, and making their voices heard outside of or external to their own communities as one aspect of the external right to self-determination. Scholar J. Crawford points out this linkage by stating:

"The state's acknowledged interest in territorial integrity does not require the subjection of distinct groups within the state to a unitary government dominated by an ethnically defined majority. On the contrary, 'arithmetical' equality in such cases may involve a denial to a minority group of an adequate way of life other than that of assimilation into the majority group – in effect, a denial of their right to respect. In these ways, external and internal self-determination are linked, and the connection made by the Canadian Supreme Court between Question 1 (on constitutional law) and Question 2 (on international law) has a broader significance."\(^{515}\)

There is no question that the Canadian government position quoted above will be met with strong opposition by indigenous representatives to the CHRWG. And, rightly so as it is inconsistent with international legal interpretations and furthermore, such a proposal violates existing peremptory norms of international law and the purposes of the U.N. Charter.

**F) The legal imperatives should follow the moral imperatives**

1) Denial of status in order to create a double standard for the right to self-determination

As discussed earlier, there exists no internationally agreed definition of "peoples". Therefore, the United Nations is not free to determine that Indigenous peoples are not "peoples" with the right to self-determination, based on indigenous identity or origin - or

any other discriminatory ground.\textsuperscript{516} Rather, the United Nations should follow the practice of the Human Rights treaty bodies, in particular the CERD Committee and the Human Rights Committee, which have consistently affirmed the concept of \textit{Indigenous peoples} when considering violations of the fundamental human rights of indigenous peoples. As noted above, the relationship between the term peoples and the right to self-determination has moved beyond the formalistic, narrowly defined views of the old world and is now embodied in assertions such as that of J. Crawford, who writes:

"... this does not mean that the only ‘peoples’ relevant for international purposes are the whole people of each state. International lawyers should resist the conclusion that a widely-used term is to be stipulatively and narrowly defined, in such a way that it reflects neither normal usage nor the self-perception and identity of diverse and long-established human groups. That would make the principle of self-determination into a cruel deception: it may be so, but the presumption is to the contrary, and our function should be to make sense of existing normative language, corresponding to widely-regarded claims of right, and not to retreat into a self-denying legalism."\textsuperscript{517}

It is essential to note in conformance with the right to equality and non-discrimination, the U.N., its organs and Member states are prohibited from denying indigenous status as "peoples" in order to deny them their right to self-determination. To deny such status would wrongfully deny Indigenous peoples their right to self-identification and status as distinct peoples. This view is not in accordance with

\textsuperscript{516} Chief Ted Moses, Ambassador of the Grand Council of the Crees (on behalf of the North American Region), at the Vienna World Conference on Human Rights, June 14-25, 1993: "All peoples have the right of self-determination. The States that object to the recognition of this right seek to circumvent the application of international law to indigenous peoples in order to avoid the obvious and undeniable conclusions that flow from international standards. In order to avoid the implications of existing international law, they have hit upon a simple strategy: They have decided that our rights as peoples will not exist if they simply avoid referring to us as ‘peoples’....They have called us ‘populations’, ‘communities’, ‘groups’, ‘societies’, ‘persons’, ‘ethnic minorities’; now they have decided to call us ‘people’, in the singular. In short, they will use any name they can think of, as long as it is not ‘peoples’ with an ‘s’. They are willing to turn universality on its head to avoid recognizing our right of self-determination. They will call us anything but what we are: PEOPLES."

international law nor domestic interpretations. For example, Canada’s highest court in the 1998 Québec Secession Reference expressly stated that:

"It is clear that ‘a people’ may include only a portion of the population of an existing state."\textsuperscript{518}

More importantly, the term "racial discrimination" as used in the International Convention on the Elimination of All Forms of Racial Discrimination confirms that no one can deny Indigenous Peoples their status as "peoples" in order to deny them the human right of self-determination:

"In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."\textsuperscript{519}

According to the Human Rights Committee, such actions would also constitute racial discrimination under the ICCPR. In this regard, the Committee stated that:

"... the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."\textsuperscript{520}

Moreover, there is an affirmative obligation on the part of all States to promote and respect the right to self-determination of Indigenous peoples. As stated in both human rights Covenants:

"The States Parties to the present Covenant ... 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." (Art. 1, para. 3)


\textsuperscript{519}International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, para. 1.

\textsuperscript{520}U.N. Human Rights Committee, General Comment No. 18, Non-discrimination, 37\textsuperscript{th} sess., (1989), at para. 7.
The human right to self-determination, like all human rights, is inalienable. As the Human Rights Committee highlights:

"Article 1 [of the International Covenant on Civil and Political Rights] enshrines an inalienable right of all peoples ..."521

In terms of applying international criteria in the human rights context, all peoples - whether Indigenous or non-Indigenous - must be treated on an equal footing. This also means that the international community cannot determine that Indigenous peoples will have only a portion of "indivisible" human rights recognized regardless of future circumstances. The universal, indivisible, inter-related nature of human rights was addressed earlier and is relevant to the question of indigenous peoples and the right to self-determination as well. In this way, states have a duty to promote and protect all human rights for all peoples, including indigenous peoples, regardless of their political, economic and cultural systems.522

There is no question concerning the factual basis of the pre-existing status of indigenous peoples. For example, in Canada, the Royal Commission on Aboriginal Peoples has confirmed that the right of Aboriginal peoples to self-determination is not dependent on recognition by federal and provincial governments:

"... Aboriginal peoples are entitled to identify their own national units for purposes of exercising the right to self-determination. For an Aboriginal nation to hold the right of self-determination, it does not have to be recognized as such by the federal government or by provincial governments."523

In regard to Indigenous Peoples it is clear that any other approach, strategy or interpretation would create double standards and would adversely discriminate against indigenous peoples. Thus far, state government representatives have not been able to respond to the arguments that have been advanced by indigenous peoples nor have they been able to provide any compelling rationale for their hypocritical positions and double standards.

As Moana Jackson states:

"[t]he colonial culture which has been inventing legal and ideological justifications for the dispossession of indigenous peoples for over five hundred years, is the same culture which is now attempting to find a new rationale to deny our equality and even our humanity."\textsuperscript{524}

However, the position articulated by ATSIC and the possibility for multiple outcomes and multiple futures should not be denied by states. Though indigenous peoples and states are far from reconciling their differences on the language of Article 3 of the draft Declaration, it is clear that some minimal progress has been made. For indigenous peoples, there is no question that they will persist in their efforts and arguments. Though it may appear that indigenous peoples are rigid or unwilling to engage in debate and negotiation to reconcile differences, they will only do so once states are prepared to affirm their obligations and recognize the potential of multiple realities.

"Thus, despite the difficulties and uncertainties ..., the continuing vitality and potential for expansion of the principle of self-determination, at least as a directive principle, should not be underestimated. ... [T]he principle of self-determination shows no sign of disappearing from the language of international relations .... The principle is entrenched in general terms in the United Nations Charter and in the two Human Rights Covenants, and it has been repeated in other significant international instruments .... It was reasonable to concentrate initially on the elimination of more obvious forms

\textsuperscript{524} M. Jackson, "Self-Determination," supra note 501.
of colonial rule, but unreasonable (then and now) to treat international law as static and incapable of further development. ... Outside the colonial context, the legitimacy of maintaining national unity and territorial integrity must be accepted. But national unity and territorial integrity are consistent with a variety of outcomes.”

G) Position of the United States – An Increasing Anachronism

Due to the influential position of the United States, as the world’s remaining superpower, and its aggressive, proactive role in the draft Declaration discussions, it is important to focus some attention on the impact that they are having in the process. Here it is important to emphasize that the point is not about who is most active but rather the effect that the content of their arguments are having on the current debate, especially in light of the record of the United States in the area of human rights. It may come as no surprise that rather than playing a constructive and positive role within the United Nations in relation to the international indigenous human rights standard setting work, the United States has actively obstructed efforts to affirm and uphold the distinct status, rights and aspirations of Native Americans. The United States is the only state that has publicly and consistently resisted the growing international trend to establish strong and uplifting indigenous human rights standards. Rather than recognize the contribution that indigenous peoples can make in regard to human rights norms, the U.S. government has busied itself with various arguments to stifle the progressive development of such norms.


526 There may be a larger number of states who oppose indigenous peoples’ status and rights. However, many of them remain silent at the CHRWG and it is therefore, difficult to assess or comment upon their positions.
The present and consistent positions of the United States government have been framed in terms of Cold War politics and outdated thinking and values. Thus far, U.S. positions run counter to the progressive positions of other states and indigenous advocates. A specific example is the refusal of the United States government representatives to affirm the collective or group rights of Native Americans – they have repeatedly called for reference to "persons belonging to minorities" and the exercise of rights "in community with other members of their group."\textsuperscript{527}

Furthermore, the United States has addressed the right to self-determination solely within the context of "management and control over internal affairs." At the 1998 session of the CHRWG, the United States rejected the recognition of indigenous peoples' right to self-determination by stating that they "do not believe that international law accords indigenous groups everywhere the right to self-determination....It also would be unacceptable from a policy perspective and impossible as a practical matter."\textsuperscript{528} Because of their opposition to both collective rights and the equal application of the right of self-determination to indigenous peoples, the U.S. has expressed opposition to the use of the term "peoples" in the emerging standards contained in the U.N. Declaration. A year later, their 1999 statement declared that:

"The United States has consistently stated its understanding that the "peoples" entitled to self-determination under international law are the entire peoples of a state or those that could constitute themselves as a sovereign independent state, and not particular groups within an existing state."\textsuperscript{529}

\textsuperscript{527} Statement of the United States government at the fourth session of the Commission working group on the draft Declaration, November, 1998.
\textsuperscript{528} Statement of the United States government at the fourth session of the Commission working group on the draft Declaration, November, 1998.
The U.S. has suggested the consideration of a form of "autonomy" which would allow "indigenous groups to manage their local and internal affairs."\textsuperscript{530} Similarly, the government of Australia, in one breath, stated that they were willing to "work constructively with colleagues" on an understanding of self-determination and rejected the inclusion of the term "self-determination." Such state government positions were strongly opposed by indigenous representatives who countered with arguments addressing the racially discriminatory nature of such statements, as well as the fact that exercising the right of self-determination and secession are not synonymous.\textsuperscript{531}

Furthermore, such positions are contrary to the purpose of the standard setting process, as well as the underlying principles supporting the right to self-determination of all peoples.

Rather than support the evolution or progression of international human rights standards, the U.S. government has insisted that international human rights law fit into existing domestic law and policy. The legal advice presently being relied upon is actually impeding the establishment of human rights standards that could possibly create genuine partnerships between indigenous peoples and nation-states. Unfortunately, such international matters have been primarily determined by individuals with little or no experience with and sensitivity to human rights and international affairs from an indigenous perspective. The U.S. government representatives are strictly State Department employees who have no background in the work of the Department of Interior, which is the agency primarily responsible for government-to-government

\textsuperscript{530} Opening Statement delivered by Leslie Gerson of the U.S. Department of State, under the Agenda Item "General Debate," fourth session of the Commission working group on the draft Declaration, November, 1998.
dialogue with American Indian and Alaska Native Tribal governments. Even the head of the U.S. delegation has confessed that he is not very familiar with political and legal relationships and dynamics with tribes such as the Navajo Nation. Furthermore, many are Geneva-based diplomats who are generalists when it comes to issues addressed at the Palais des Nations in Geneva.

Such policies and positions are even inconsistent with existing domestic law and policy. For example, all three branches of government have recognized that American Indian and Alaska Native tribes have the right to self-determination, and that it is inherent and pre-existing. In addition to the various doctrines concerning Indian tribes in the United States, policies such as the Statement and Executive Directives of President Clinton, which were signed on April 29, 1994, at the Tribal Leaders Event at the White House, and affirmed by the various federal departments, should be echoed at the international level.\textsuperscript{532} Furthermore, the U.S. government position is inconsistent with the growing international momentum toward inclusion of the distinct status and rights of indigenous peoples in the body of international human rights law.\textsuperscript{533}

\textsuperscript{531} Statement of D.S. Dorough, on behalf of Indian Law Resource Center, Fourth session of the Commission working group on the draft Declaration, November, 1998.

\textsuperscript{532} All three branches of government have recognized that American Indian and Alaska Native tribes have the right to self-determination, and that it is inherent and pre-existing. In addition to the various doctrines concerning Indian tribes in the United States, policies such as the Statement and Executive Directives of President Clinton, which were signed on April 29, 1994, at the Tribal Leaders Event at the White House, and affirmed by the various federal departments, should be echoed at the international level. The statement and directives specifically address: the re-affirmation of the government-to-government relationship between federal and tribal governments; the principle and requirement of consultation with tribes by every department of the U.S. and not only the Department of Interior (Executive Order No. 12875-"Enhancing the Intergovernmental Partnership"); impact assessments to assure that tribal government rights and concerns are considered during the development of plans, projects, programs and activities (Executive Order No. 12866-"Regulatory Planning and Review"); removal of impediments to working directly with tribes; and respect for Native American religious practices.

\textsuperscript{533} It should be noted that despite the fact that the United States has ratified the International Covenant on Civil and Political Rights, which includes recognition of collective rights in Article 1, and the specific reference to American Indian Tribes (and implicitly their distinct political status) in the United States
The current approach by the U.S. is affecting indigenous peoples worldwide, not only those in the U.S. Such positions do not contribute to peace, security and stability. Indeed, the outdated policies of the U.S. government are likely to have adverse impacts upon states already feeling the effects of political and economic instability, not to mention the impacts on vulnerable indigenous communities within such states.

While other states are introducing a vision of the future, which includes indigenous peoples and increasing respect for and recognition of their distinct rights, status and aspirations, the United States has introduced "yesterday." For example, the November 1996 statement by the Canadian Government on indigenous peoples’ right to self-determination at the UN Commission working group reflected an important departure from their previous statements. There, the government of Canada recognized that "all peoples, including indigenous peoples" have the right to self-determination. For example, they stated: "We recognize that this right applies equally to all collectivities, indigenous and non-indigenous, which qualify as peoples under international law....International law does not clearly define the terms 'self-determination' or 'peoples'....Our goal in this Working Group will be to develop a common understanding, consistent with evolving international law, of how this right is to apply to indigenous collectivities, and what the content of this right includes." The statement acknowledges the important legal foundations of the right to self-determination and the need for equality but they have left themselves room for prescription and their own interpretation of the term peoples and the content of the right to self-determination.

Such a position is in clear conflict with President Clinton's commitment to government-to-government relations with Indian tribes, as collectivities. Group rights of peoples have already been recognized by the United States in the Covenant on Civil and Political Rights (Article 1, Self-determination). The ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (International Labor Organization Convention No. 169), now ratified by 13 countries, recognizes the collective rights of
In regard to the draft declaration being formulated within the United Nations, indigenous peoples have addressed their main objections to the U.S. government positions, which have all gone unheeded despite so-called "consultations" between indigenous peoples and the U.S.\textsuperscript{536} government representatives. For example, the United States government has proposed that the Declaration be crafted in the framework of "goals" and not recognition of "rights." The U.S. has also consistently expressed opposition to the recognition of both the collective and individual rights of indigenous peoples. As noted above, the U.S. has also proposed to limit the right of indigenous peoples to self-determination to only "management and control of internal affairs."

Furthermore, the U.S. has proposed qualifications or modifiers in relation to indigenous peoples’ rights and state obligations. Such qualifications and modifiers are dangerously subjective and ambiguous. Specific examples include introduction of language such as "states, where appropriate," "as far as possible and appropriate," and "States should take reasonable measures."

The essential message of the United States appears to be that international standards are unnecessary because U.S. domestic law already provides sufficient guarantees through its embrace of individual rights and respect for equality, civil rights and non-discrimination. It is especially disturbing that the U.S. government

\textsuperscript{536} The U.S. Department of State, Interior and Justice, have had random and very brief "consultations" with leaders and representatives of Indian tribes in Washington, D.C. However, little dialogue has taken place and the sessions are often so scripted that tribal leaders spend most of their time listening to "talking heads." It is the position of indigenous peoples in the United States that the "consultations" that have taken place are inadequate, insufficient, and do not include representation from the diverse indigenous peoples, nations and communities, in the U.S.
representatives are resorting to such low standards, since the draft Declaration is aspirational in nature and intended to be non-binding.

It is quite ironic that the most powerful and affluent nation in the world, the United States, in advancing positions as though indigenous peoples are a genuine threat to their territorial integrity, has started from a false premise and attempted to build upon this "unfounded fear." The only way that the principle of territorial integrity can be invoked is if they themselves act in a manner that would lead to the consequence of impairing their territorial integrity. In large part, they control whether the principle of territorial integrity applies or not. The positions that they advance appear to have the objective of ensuring an absolute principle of territorial integrity, which doesn’t exist in international law. They do so in order to be immune from the consequences.

The United States and others seem to miss the point of the principle: if you respect the principles of equal rights and self-determination of all peoples and the conditions to refrain from forcible actions which deprive peoples of the right to self-determination and are possessed of a democratic government that is representative of the whole people belonging to a territory without distinction as to race, creed or color, you can thereby uphold the territorial integrity of a state. If such principles and conditions are upheld, states can invoke territorial integrity. Those who challenge territorial integrity and threaten a state with dismemberment must do so as a last resort – there are conditions to the principle of territorial integrity; it is not an absolute principle that can be invoked by states.

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In this regard, indigenous peoples have expressed a willingness to accept the principles of international law and the conditions of the principle of territorial integrity in a manner that puts indigenous peoples on an equal footing with all other peoples, and ensures that international law is applied equally. The efforts of the United States and others has been to create a different principle or a different standard for indigenous peoples and to continue to treat indigenous peoples as "subjects" of international law rather than objects. On the contrary, no such limitation or distinction concerning the right of indigenous peoples to self-determination should be made.

The United States in advancing their position are in effect fabricating principles and arguments to maintain the status quo of their control and domination. It is the same colonial attitudes of superiority and racism and racial discrimination, which seem to guide the development of state policies and positions. The United States, in the context of their positions regarding indigenous human rights, has been promoting the notion of homogeneity rather than embracing diversity and recognizing the distinct status and collective rights of indigenous peoples in America. They do so with no regard for the clear and explicit language of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination:

"In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." 538

Their strategy is simply to deny or restrict the status of indigenous peoples in order to deny them their human rights. And, it is done on the basis of race. This is the type of systemic racism and racial discrimination that indigenous peoples have faced throughout the debate on the draft Declaration at the United Nations and elsewhere. Throughout the dialogue concerning the draft Declaration, both at home and abroad, indigenous peoples have been stifled by the lack of U.S. ratification of human rights instruments, as well as their misinterpretation of the few they have ratified. The essential obligations of the U.S. are shared by all members of the U.N., and they too must take proactive steps to respond to such obligations.

**H) Essential International Obligations of States and Peremptory Norms of International Law**

Nation-state members of the United Nations have largely defined and refined various legal rules and obligations by which human beings (or peoples) will act and interact. International law and corresponding international legal obligations, as well as the attendant solemnity of such international legal obligations, have been the focus of legal advisors within offices of foreign and external affairs, diplomats, academics and students of international law. The various and specific international legal obligations of states are not taken lightly – they are the stuff of parliamentary ratification hearings and executive branch briefings and decision-making. In regard to binding international obligations of states, the Vienna Convention on the Law of Treaties is perhaps one of the most important international instruments that define the nature of state obligations in the context of treaties and treaty making. Article 53 of the Vienna Convention states:

"A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm
accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.\textsuperscript{539}

There is general acceptance of a reference of \textit{jus cogens} to the area of fundamental human rights.\textsuperscript{540} In this regard, let us again review the specific developments concerning human rights bodies and Member States and the obligations of such States to promote and protect fundamental human rights.

It is well recognized that the Charter of the United Nations is the constitution of the international community. As such, it sets out common values, goals and principles that must be respected by all organs of the U.N. and its Member states. In particular, Article 1(3) of the Charter states that one of the key purposes of the United Nations is to:

"achieve international cooperation in solving problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

This central purpose has recently been highlighted in a General Assembly Resolution entitled "Strengthening United Nations action in the field of human rights through the promotion of international cooperation and the importance of non-selectivity, impartiality and objectivity," U.N. General Assembly Res. 54/174, adopted on 15 February 2000:

"In promoting and protecting all human rights, including the human right of self-determination, General Assembly Resolution 54/174 underlines the importance of "impartiality and objectivity".


In addition, the Resolution makes clear that this important purpose should "not be used for political ends" by stating that the UN General Assembly:

"Reaffirms that the promotion, protection and full realization of all human rights and fundamental freedoms, as a legitimate concern of the world community, should be guided by the principles of non-selectivity, impartiality and objectivity and should not be used for political ends" (para. 5)

The General Assembly makes clear that the contents of this Resolution should be taken into account by "all human rights bodies", including this Working Group of the U.N. Commission on Human Rights by specifically stating that the General Assembly:

"Requests all human rights bodies within the United Nations system, as well as the special rapporteurs and representatives, independent experts and working groups, to take duly into account the contents of the present resolution in carrying out their mandates" (para. 6).

Therefore, it is clearly not within the mandate or competence of the CHRWG or the Commission itself, to engage, for example, in a process that would undermine the status of Indigenous peoples as "peoples" or their human right to self-determination.

As the 1993 Vienna Declaration and Programme makes clear (para. 20), positive steps must be taken to ensure respect for "all" of our human rights without discrimination:

"States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization."

As discussed in Chapter III, the right to self-determination is described as "the oldest aspect of the democratic entitlement." Professor Rodolfo Stavenhagen similarly concludes:
"... the denial of self-determination is essentially incompatible with true democracy. Only if the peoples’ right to self-determination is respected can a democratic society flourish ..."\textsuperscript{541}

In Resolution 2000/62, the U.N. Commission on Human Rights also emphasizes that:

"... a democratic and equitable international order requires, inter alia, the realization of the following rights: (a) The right of all peoples to self-determination, by virtue of which they can freely determine their political status and freely pursue their economic, social and cultural development ..."\textsuperscript{542}

In addition, the Commission on Human Rights highlights in Resolution 2000/40 that:

"... political platforms based on racism ... or doctrines of racial superiority and related discrimination must be condemned as incompatible with democracy ..., and that racial discrimination condoned by governmental policies violates human rights ..."

Consistent with previous statements by indigenous peoples to the CHRWG, additional peremptory norms of international law include the matters of the principles of equality, non-discrimination and the prohibition of racial discrimination.

The right of peoples to self-determination is considered by numerous international authorities to be \emph{jus cogens} or a peremptory norm. Similarly, the prohibition of racial discrimination is considered by numerous authorities to be a peremptory norm. Other examples of peremptory norms include prohibitions against genocide, torture, slavery, and trading in human beings.

As noted above, \emph{jus cogens} is defined as a body of norms or standards "accepted and recognized by the international community of States as a whole ... from which no

derogation is permitted and which can be modified only by subsequent norm[s] of
general international law having the same character."

As Professor I. Brownlie indicates in his book on Public International Law, these
are "rules of customary law which cannot be set aside by treaty or acquiescence but only
by the formation of a subsequent customary rule of contrary effect." This means that even
if States were to sign a treaty or other agreement that goes against an existing peremptory
norm, the new norm would not have any validity.

Therefore, in the context of the CHRWG, States who offer any proposals or
substantive changes to the text of the Declaration, which are discriminatory should be barred from making such proposals if nation state members and the United Nations itself are to respect the basic precepts of international law. If, in fact, discriminatory proposals are made by a particular state, this would mean that participating States would have an obligation to reject such proposals and not accord them any further consideration.

Indigenous representatives have raised the matter of peremptory norms in the past. 543 However, these important statements have gone unheeded. 544 This is evidenced by the fact that various drafts of "alternate language," which would violate existing peremptory

542 Promotion of the right to a democratic and equitable international order, E/CN.4/RES/2000/62, 27 April 2000, para. 3.
543 Statement of Indian Law Resource Center (which was represented by the author), October 31, 1997, to the Commission working group, where the representative stated "equality and non-discrimination are peremptory norms which cannot be circumvented."
544 Despite these demands and the very words of the Chairperson of the working group in 1999, no government nor the United Nations Secretariat nor the Chairperson responded. The working group Chairperson stated: "committed to continuing the work in the same spirit of dialogue and transparency and with full participation,... pleased to note that indigenous representatives and Governments were fully committed to the process of elaborating a substantive, effective and universal declaration. That the declaration should be ... a document founded on the principles of equality and non-discrimination."
norms, continue to be circulated for consideration by State members and State observers to the Commission working group.

Indigenous peoples have demanded that the United Nations and its Member States uphold their own norms and principles of equality, non-discrimination and the prohibition of racial discrimination with respect to Indigenous peoples. It is critical for the CHRWG to appreciate that the full and equal participation of indigenous peoples is unquestionably linked to upholding these universal and fundamental principles. Beyond the positive law aspects of peremptory norms and other principles of international law, states appear to have forgotten the purpose of the human rights standard setting, which is the progressive (not regressive) evolution of human rights.\textsuperscript{545}

1) Where do we go from here?

In charting a course for the future, it may be helpful to briefly survey the various scholarly proposals that have emerged to date and follow with the preference of this author. In this regard, the ongoing debate at the United Nations concerning the term "peoples" and the right to self-determination within the indigenous world has spawned a

\textsuperscript{545} M.C. Lâm, \textit{At the Edge of the State: Indigenous Peoples and Self-Determination}, supra note 12 at 176: In addition to granting legal personality, access, and voice to indigenous peoples, the interstate system needs to de-positivize in another respect. It needs to let go of its infatuation with the finality that codification supposedly confers but that, on reflection, looks more like rigidity. Judge R.Y. Jennings made a similar point not long ago when he decried a "pathological disorder" among international lawyers of trying to run international society by a "plethora of legal rules." Instead of codification, Jennings suggests, a world order might do better to rely more on principles of administrative law which permit a greater flexibility in decision-making. And flexibility is exactly what an increasingly complex and fast-changing world needs. ... States have been compulsive codifiers around the Draft Declaration at the United Nations. ... [M]any have insisted on definitions of the terms "self-determination" and "indigenous peoples." As such they have approached the document as if it were a statute that prescribes rights and duties for all parties concerned. Indigenous peoples, on the other hand, point out that the document, if adopted, would be an international declaration of constitutive principles ... [Lâm is referring to J.Y. Jennings "Closing Address" in C. Bröllmann, R. Lefeber, M. Zieck, (eds.), Peoples and Minorities in International Law (Boston: Kluwer Academic Publishers, 1993) at 343].
number of different proposals by scholars who have expended quite a lot of time examining the issue in order to reconcile the differences between indigenous and state representatives at the United Nations. There are many divergent approaches. Due to the long-standing debate concerning the paramount right to self-determination for indigenous peoples and others, certainly, there must be other approaches that have not yet surfaced in the literature not to mention the corridors of the U.N. This is most probably true for the Asian, Pacific Basin and African regions. However, for the present discussion, let us address the following four concepts or proposals concerning the right of indigenous peoples to self-determination: 1) state exercise only; 2) indigenous peoples entitled to "internal" self-determination or autonomy; 3) the substantive/remedial model proposed by Professor S. James Anaya; and 4) self-determination applies without limitation and complimented by U.N. approval and oversight, which are the proposals advanced by Professor Mai van Clech Lam and to a lesser extent by Professor Benedict Kingsbury.

The latter two proposals have been advanced by extremely knowledgeable and informed scholars, who have all made substantial contributions to this debate and many other matters fundamental to indigenous peoples worldwide. They have offered such proposals with a genuine interest in finding ways in which to propel the discussion on the right of indigenous peoples to self-determination and to further reconcile the vast differences between indigenous peoples and states over this highly contentious issue. Furthermore, the right to self-determination is so subjective that it is risky to advance any proposal at all. Therefore, they should be applauded for taking the time to carefully analyze the contours of international law and developments concerning indigenous peoples and for taking the risk of making such proposals.
The first two proposals have been articulated by the government positions of the United States and Canada respectively and discussed above. The approach by the United States and Canada (and a few others who have not been as direct) serve to prop up a false dichotomy between external self-determination and internal self-determination, leading to misuse and abuse of the concepts in international law.

In the case of Canada, which has stated that they can, first, accept that "all peoples, including indigenous peoples" have the right to self-determination but they then continue by stating that they can only accept "a right of self-determination for indigenous peoples which respects the political, constitutional and territorial integrity of democratic states." What exactly is meant by political integrity or constitutional integrity? This appears to be a distortion of international law and the present understanding of the right to self-determination and the related aspect of territorial integrity outlined in the 1970 Declaration Concerning Friendly Relations. One cannot state that the full right applies and alternatively state that you have an absolute right to "political, constitutional and territorial integrity." The position also equates the right of self-determination, in the indigenous context, with the right to secede. The latter of which only exists in international law under extreme instances of abusive conditions or "oppressed or colonial people."546

Indigenous peoples would be willing to take up discussions on the formalistic understanding of the terms "external" and "internal" self-determination in international law if states were in fact dealing in good faith in the debates of the CHRGW. However, they would do so only when it is understood that the right to self-determination applies to
all peoples, including indigenous peoples, without qualification or limitation. It is only on this basis that a principled, intellectually honest debate concerning the concepts of formal internal/external self-determination can be had.

Another dimension outside of the internal/external dichotomy is the fact that indigenous peoples are expressing external self-determination by engaging in the debates of the United Nations and other international fora. Numerous indigenous peoples’ organizations and indigenous governments participate in the U.N. human rights work, as well as those concerning human rights, peace and security and environment and development. Other examples include, the Inuit Circumpolar Conference, as a Permanent Participant in the Arctic Council regime, where representatives are direct and active participants in an international, organic regime, focused on a region that they have direct rights and interests in.

The model elaborated by S. James Anaya is that of recognition of the "substantive" right to self-determination as universal in character and as such attaching to indigenous peoples. However, the "remedial" aspect of his proposal posits that if the exercise of self-determination of peoples is violated, then a remedy consistent with the extent of violation can be prompted. Such an approach has far too many subjective possibilities and further, provides state actors with far too much control over determining the exercise of self-determination, which may ultimately confine indigenous peoples to an "internal" state prescribed exercise of the right. This dissection of the right to self-determination, unfortunately, focuses upon the extent of suffering, rather than upon the

546 Quebec Secession Reference, supra note 405 at para. 112.
547 S. James Anaya, Indigenous Peoples in International Law, supra note 46 at 80-88.
affirmative demand for exercise of the fundamental right to self-determination by indigenous peoples endeavoring to genuinely redefine and improve relations with state actors.

Setting aside the internal/external dimension of the right to self-determination and the positions of states such as the U.S. and Canada (who emphasize internal self-determination), the Declaration Concerning Friendly Relations references various options under the principle of equal rights and self-determination of all peoples by providing, if the peoples so choose, "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." This, to some degree, responds to the "remedial" aspect of Anaya's proposal, especially the latter, where indigenous peoples have negotiated different models for self-determination and self-government to satisfy the exercise of their political rights.

The fourth category is that expressed by a number of scholars, including M. Lam, who proposes explicit recognition of the right to self-determination within the draft Declaration. Professor Lam emphasizes the distinct political right of indigenous peoples to self-determination, which is critical. However, she appears to suggest that the right is entirely political and independent of or autonomous from an overall human rights framework. Therefore, she suggests that realization of the right or conflicts arising out of

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the exercise be complimented by the work of the Permanent Forum or an oversight mechanism within the United Nations, which would potentially operate under specific criteria concerning the mediation of self-determination if and when conflicts arise. The potential separation of the political right to self-determination from all other human rights, which have been regarded by indigenous peoples as inter-related, indivisible and interdependent, could be highly problematic for a number of reasons. Another adverse element of the proposal is that the mediation mechanism is conceived of as an entity specifically for "indigenous peoples," which suggests a different class of peoples and would therefore, segregate indigenous peoples from the universal nature and understanding of the right to self-determination in international law. Even if the mechanism were to operate on the basis of explicit recognition of the right to self-determination of indigenous peoples, it would be giving affect to a double standard within the U.N. system.

Furthermore, the proposal calls for establishment of an entity within the United Nations as the overseer without giving full consideration to the fact that it is states that presently control the U.N. as they are the constituency or members. Though she suggests, by citing other commentators such as R. Stavenhagen and C. Tomuschat, that such an entity would have to be comprised of individuals with integrity, guided by "selective criteria," the fact remains that the United Nations is a political organization heavily influenced, if not controlled, by the same states that currently desire a narrowly state-prescribed right to self-determination for indigenous peoples. The element of state

549 M. Lam, At the Edge of the State: Indigenous Peoples and Self-Determination, supra note 12 at 184-191 and 196-7.
control would be inconsistent with the very basis of the right to self-determination. Furthermore, her proposal makes no specific mention of the principle of the free and informed consent or agreement by indigenous peoples to such a regime. For these reasons, the proposal is problematic.

Scholar Benedict Kingsbury, which Lam cites, offers what he refers to as "essential requirements" and "relevant indicia" as a method for reconciling differing viewpoints concerning self-determination.\textsuperscript{550} Though Kingsbury attempts to be comprehensive to ensure an inclusive approach, it too, may be highly problematic due to its over-specificity in regard to determining the threshold question of who is "indigenous" thereby making even more perplexing the question of scope and exercise of the right to self-determination of the "peoples" concerned. This problem is similar to the debate over a definition of indigenous peoples, which has been rejected by indigenous peoples as unnecessary.

It is safe to say, that the proposals outlined are a part of the existing international instruments, the United Nations itself, and domestic policies within existing states. For example, in regard to the positions of the United States and Canada (and elsewhere), internal autonomy of indigenous peoples operates through the various political mechanisms and institutions of Tribal Governments, First Nations, Treaty peoples and

\textsuperscript{550} B. Kingsbury, in P. Alston, \textit{Peoples' Rights}, supra note 32 at 455. Kingsbury lists the following: Essential Requirements: self-identification as a distinct ethnic group; historical experience of, or contingent vulnerability to, severe disruption, dislocation or exploitation; long connection with the region; the wish to retain a distinct identity. Relevant indicia - 1. Strong indicia: nondominance in the national (or regional) society (ordinarily required); close cultural affinity with a particular area of land or territories (ordinarily required); historical continuity (especially by descent) with prior occupants of land in the region; 2. Other relevant indicia: socioeconomic and sociocultural differences from the ambient population; distinct objective characteristics such as language, race, and material or spiritual culture; and
Aboriginal peoples. Obviously, not all of these mechanisms and institutions are perfect. In fact, there are some areas where real and urgent problems have persisted or are now emerging. However, the means exist and do function to varying degrees of success. The substantive/remedial model proposed by Anaya exists as well: indigenous peoples do have the right to self-determination and governments must respect this fundamental collective right. When and where they don’t and dependent upon the seriousness of the violation of the right, the international community may be alerted and if the conditions are so dire they may be engaged to remedy the situation. The same is true for the proposal by Lam. The right to self-determination is understood in international law, it applies to indigenous peoples as a universal right, and the working definition of the U.N. accompanied by the right to self-identification are all generally accepted. Furthermore, the Permanent Forum has been established though it presently doesn’t envisage itself as the mechanism to resolve indigenous/state conflicts over the right to self-determination. And, like the Anaya model, if the right is so severely violated then the international community could or should be engaged.

Setting aside abstract or theoretical approaches, in the end of the day, all must recognize that it is the state governments who control the results of this debate. Not only at the United Nations but also domestically. At the United Nations, state governments speak as though they are the victims, that they are the actors under serious threat of being dismembered by indigenous insurgents. Their persistent and present positions are absent the fact that it is they who must uphold particular obligations with regard to behaving in a regarded as indigenous by the ambient population or treated as such in legal and administrative arrangements."
manner that protects their territorial integrity. It is not indigenous peoples who must do so. It is state governments who must uphold the right of all peoples to self-determination and who must represent the whole of the people in order to maintain their territorial integrity.\textsuperscript{551} They control the result. The right is not absolute for either states or indigenous peoples. Most, if not all, indigenous peoples do not desire separation, secession or total independence nor are they in an economic position to undertake such a significant political enterprise. In fact, if states do not accept the right to self-determination as a right that applies to all peoples universally, including indigenous peoples, the world community will then have real cause for alarm. However, under the present text of the draft Declaration, no real threat exists.

The view and preference of this author is the universal application of the right to self-determination, as understood in international law and consistent with all relevant peremptory norms and principles of international law, as a right of all peoples, including indigenous peoples, without limitation, qualification or any other discriminatory double standard. What this thesis has attempted to argue is that the right to self-determination must be applied on the basis of equality, non-discrimination and consistent with the

\textsuperscript{551} \textit{Reference re Secession of Québec}, [1998] 2 S.C.R. 217, (1998) 161 D.L.R. (4\textsuperscript{th}) 385, 228 N.R. 203, (1998) 37 I.L.M 1342: "While the International Covenant on Economic, Social and Cultural Rights, supra, and the International Covenant on Civil and Political Rights, supra, do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a "people" to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity." (para. 130), and "... A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. ..." (para. 154)
absolute prohibition of racial discrimination. It would be highly damaging to accept compromise language that upholds outdated notions of territorial integrity or some form of internal autonomy prescribed solely by states and frozen in international law. Even if reference to the 1970 Declaration Concerning Friendly Relations were made in the draft Declaration, it may have the effect of freezing the interpretation of the right to self-determination for indigenous peoples. There is always the potential for further evolution and development of international law and in particular, the right to self-determination, beyond the present understanding, principles and conditions. If such evolution or development takes place, any new interpretation, understanding or principle would have to apply equally to all peoples, including indigenous peoples. Therefore, Indigenous peoples rightfully object to the racially discriminatory double standards being applied by states, in a self-serving fashion and inconsistent with the peremptory norms of international law.

According to the purposes and principles of the United Nations Charter, states do not have the authority to even make such proposals. Prohibition of racial discrimination is a peremptory norm of international law, which cannot be circumvented. For these reasons, state government representatives, decision-makers, scholars, and the United Nations itself must take the demands of indigenous peoples seriously. How is it that indigenous peoples are to take state governments seriously when the principles upon which they have composed by and for themselves are easily and conveniently avoided in the context of indigenous peoples? Indigenous peoples must maintain, consistent with internationally recognized peremptory norms, that states abide by their obligations under
the Charter of the United Nations and under international law and affirm the right to self-determination explicitly within the Declaration text, without qualification, limitation or discrimination.

If there is no equality of application of the rule of law in the context of international law and states succeed in introducing discriminatory double standards in connection to indigenous peoples and their fundamental right to self-determination, then the failure of the human rights framework, the United Nations system and nation-states themselves will seriously erode the very concepts of democracy, human rights and the rule of law.
CHAPTER VI

THE CONTINUING EXERCISE OF THE RIGHT TO SELF-DETERMINATION

"I think that Native people are capable of governing themselves. They always have been and they always will be."

Margie Johnson, Eyak

"[The Indians] were told that Columbus discovered America and here is how you are going to live. If a single Native can speak English at that time, he would reply, 'No, no, no? We are the first Americans. ...Our people have one perpetual goal – self-determination, freedom, and peace."

Roger Silook, Gambell

"Sovereignty derives from the people....Well, we, the people, are still here, and we still have our sovereignty."

Lonnie Strong Hotch, Klukwan

This dissertation has sought to illustrate the transformation of international human rights law through the infusion of indigenous worldviews and perspectives. The international processes that have emerged in my lifetime represent a tidal change in the ability of indigenous peoples to engage in international legal diplomacy to advance their perspectives. It is clear that the human rights discourse and framework have the capacity to include indigenous peoples and their perspectives. However, it is also clear that there are a number of rights that are considered non-negotiable and that without these very rights, indigenous peoples, nations and communities will remain vulnerable to the potential of becoming "less human" on the international plane.

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There is no question that indigenous peoples have been and continue to be victims of subjugation, domination and exploitation. Unfortunately, there are numerous examples of the denial of the right to self-determination of indigenous peoples, in addition to a wide range of other human rights abuses and violations throughout the indigenous world. My own people in the north are not exempt from such acts of oppression. The introduction to this thesis mentioned my individual family members. It seems logical to conclude with a discussion of my people, collectively.

In my short lifetime, they have suffered from the imposition of Eurocentric values and worldviews in the form of a unilateral act of the United States Congress that attempted to wholly transform them from indigenous peoples to corporate shareholders in the course of one generation. The experiment of the Alaska Native Claims Settlement Act (ANCSA) of 1971 is a concrete example of the devastating impacts from the denial of the right to self-determination. The provisions of ANCSA are a continuing attempt to cleanse, stretch, and make Native societies more pliable. The underlying intent of the Act was to not only make us more useful in their society by re-creating us in the image of corporate shareholders but more importantly (to them) was to ensure that our resources would be accessible and useful in their society. Every person impacted by the ANCSA is a scraped skin, at different stages of readiness. This brief section will

556 See, for example, the four-part Anchorage Daily News series entitled "People in Peril," 1984, which documented the wide range of social ills facing Alaska Native communities, from substance and alcohol abuse to family violence, youth suicide and overall community dysfunction.
address the recent history and experience of Alaska Native peoples and the omission of the right to self-determination in the ANCSA.

The indigenous peoples of Alaska, including the Inupiat of Norton Sound, lived in relative security, where the natural order guided their cycles and rhythms. The Inuit are hunters and gatherers, relying primarily upon the ocean and rivers for sustenance and organized communally. In all matters, the collectivity was more important than the individual. Leaders were chosen based upon their ability to hunt and provide for the community as a whole. A balance existed between women and men because the combined skills of both were needed for survival.

There was no real contact with the aboriginal peoples of Alaska until the early 1800’s when Russian fur traders arrived and even then contact was limited primarily to coastal areas. In 1867, the Russian government "fabricated"\textsuperscript{557} title to Alaska and "sold" the territory for 7.2 million dollars to the United States. The rights of the Alaska Native peoples were never substantively addressed in the 1867 Treaty of Cession\textsuperscript{558} nor were they addressed years later in the Statehood Act of 1958.\textsuperscript{559}

Though our communities remain culturally intact, from the point of first contact with outsiders to the present time, Inuit communities have suffered immensely. The introduction of diseases for which they had no natural immunity, maltreatment and enslavement, encroachment and exploitation of natural resources by outsiders, and

\textsuperscript{557} Many indigenous peoples have asserted that Russia never acquired "title" to Alaska and merely fabricated title due to their need for finances to support their depressed domestic economy as the result of war.

\textsuperscript{558} Treaty of March 30, 1867, 15 Stat. 539.

\textsuperscript{559} Proclamation of Statehood, Agreed upon by the Delegates of the People of Alaska, University of Alaska, February 5, 1956, effective upon Statehood, January 3, 1959.
punishment for resistance have all taken their toll on the indigenous peoples of the north. The rapid and radical change that occurred has left a deep, dark mark on our communities.

It was not until oil was discovered on Alaska's north slope that the federal and state governments were prompted to discuss and address the aboriginal right and title of the Alaska Native people to the whole of the territory of Alaska. The state and federal governments and private industry felt that congressional legislation would better address and fulfill their interests rather than legal action taken on the part of the Alaska Natives, who would have had very strong and compelling legal arguments to support their assertion of ownership, rights and title. The massive lobbying effort of the various stakeholders culminated in the adoption of the ANCSA. Throughout the process, indigenous peoples had very little direct involvement and the final outcome was not a matter of referendum. Hence, the basic principle of consent was not applied.

The provisions of the Act transferred to the Alaska Native peoples 44 million acres of land and 962.5 million dollars in compensation for all lands lost. These so-called "entitlements" were channeled through twelve regional and two hundred village corporations created by the Act. These are for-profit corporation established under U.S. legislation and chartered by state statutes. To access these "entitlements," individuals of one-quarter Native blood or more, born on or before December 1971, were eligible to enroll as shareholders of a corporation. The shareholder rolls were then closed. The shares held by Native people are inalienable and these profit making corporations hold the land in fee simple, enjoying a tax-exempt status for a twenty-year period (from 1971
to 1991). Even with a minimal understanding of corporate America, one can imagine the overnight vulnerability of Native ancestral lands under this regime.

A significant omission in the act was the fact that there was no single provision addressing the right of Alaska Native peoples to self-determination. In fact, many Alaska Natives contend that it was intentionally omitted in order to assimilate Alaska Natives into mainstream society and terminate their distinct relationship with the federal government. Equally damaging are the ANCSA provisions purportedly "extinguished" aboriginal title to all other lands and aboriginal hunting and fishing rights of the Alaska Native people despite our dependence upon a subsistence based economy.\textsuperscript{560} Furthermore, many of the village corporations are without resources to generate profits. And, even if they do have such resources, to exploit them for profit is inconsistent with their values, customs, practices, and land and resource use.

In a short period of time, it was clear that ANCSA did not reflect and has never reflected the true aspirations of the Alaska Native peoples nor was the corporate structure an institutional structure freely chosen by them.\textsuperscript{561} The vulnerability of the corporations and the exposure of Native ancestral lands through taxation, alienation of shares and take-

\textsuperscript{560} Alaska Native Claims Settlement Act, supra note 555, Sections 4(a), (b) and (c). For a commentary on the Act, see T.R. Berger, \textit{A Long and Terrible Shadow[:] White Values, Native Rights in the Americas 1492 – 1992,} supra note 37 at 133: "In the Alaska Native Claims Settlement Act of 1971 Congress abolished the aboriginal rights of Alaska Natives, including their aboriginal rights of hunting, fishing and trapping. Congress had spoken. Yet twenty years later Alaska Natives refuse to acknowledge the loss of their tribal right, their right as collectivities, to take fish and wildlife and to regulate their own subsistence activities."

\textsuperscript{561} Though Alaska Native people were minimally involved in lobbying Congress, through the Alaska Federation of Natives, over the provisions of the Alaska Native Claims Settlement Act, the corporate structure was not an institution that they formulated nor did they have any measure of real control over the final outcome of the Act. Furthermore, no referendum allowing Native people at large to approve or disapprove of the terms was held.
over by more powerful forces all continue to be very real.\textsuperscript{562} However, the real problems of ANCSA lie in the fact that land, self-government and subsistence were not initially made secure by the Act. The very instrument that was to secure the land and a future for Alaska Native peoples may be the one by which we lose the distinct characteristics of our status as indigenous peoples.

In response to this reality and the threats facing Alaska Native communities, the Inuit Circumpolar Conference established the Alaska Native Review Commission\textsuperscript{563} to gain an understanding of the impact of the Act on the lives of Alaska Native peoples. We felt that it was important to provide a forum that would allow Alaska's indigenous peoples to speak in their own languages and in their own communities. To conduct the review of the Act, the ICC appointed former British Columbia Supreme Court Justice Thomas R. Berger of Canada as the sole Commissioner. A well-known advocate of Native rights, Berger’s mandate was to conduct a comprehensive review of the social, economic, political and environmental impact of the ANCSA, independent of the ICC or any other organization in Alaska or elsewhere.

The backbone of the Commission’s work was a village hearing process. The sixty-two village hearings were complimented by eight formal roundtable discussions, where both indigenous and non-indigenous representatives from throughout the world


\textsuperscript{563} The Alaska Native Review Commission (ANRC) was established by the Inuit Circumpolar Conference and endorsed by the World Council of Indigenous Peoples. I was the Director of the Alaska Office of the ICC, working as the ICC’s liaison to the ANRC, and responsible for raising the funds necessary to
participated. There are over 98 volumes of transcripts from over 800 hours of tapes. The findings of Commissioner Berger affirmed and re-affirmed what Native people had been saying since the enactment of ANCSA. His report, *Village Journey: The Report of the Alaska Native Review Commission* amplified the desires of Alaska Natives for continued ownership of their ancestral lands, self-government, and recognition of hunting and fishing rights. Alaska Natives want to retain their lands through governing institutions of their choice. They continue to feel that land and all of the renewable and non-renewable resources are key to survival as distinct communities. The recommendations made by Commissioner Berger reflected these desires and were quite specific as to how to accomplish such objectives.

From 1985 to 1988, village and tribal leaders from across the state lobbied Congress to amend ANCSA in a fashion consistent with Berger’s recommendation and the views of the tribal leadership: to ensure that village lands (held by corporations) could be transferred to traditional governments; to ensure that nothing in the legislation would undermine the inherent rights of self-government and self-determination; and to entrench traditional hunting and fishing rights in both state and federal law. The tribal campaign to amend ANCSA was spearheaded by the Alaska Native Coalition (ANC), a statewide organization representing traditional indigenous governments and village corporations. The corporate led effort to amend ANCSA solely within the framework successfully complete its work. The ANRC initiated their work in September 1983 and concluded in September 1985.


565 The Alaska Native Coalition (ANC) succeeded United Tribes of Alaska (UTA), statewide organization of tribal governments that subsequently folded due to financial difficulties. The ANC was distinct from UTA in that it included village corporation and tribal government representatives, both equally concerned.
of the corporate structure was spearheaded by the Alaska Federation of Natives (AFN). The AFN, considered the Native "Chamber of Commerce," has been the most visible and powerful Native institution in Alaska. This "corporate cartel," similar to other major corporations, enjoys a comfortable relationship with major industry in Alaska (including the oil industry) and the Republican Congressional Delegation of Alaska. In addition, they have a great amount of influence over the State and Federal political agenda.

Hence, the lobbying effort was a fierce battle between the ANC and AFN, which divided the Alaska Native community along tribal/corporate lines. Unfortunately, due to many factors, the ANC was not successful in gaining the amendments desired. The resulting law does not curb the major threats of ANCSA. The land can still be lost or sold and there are no provisions to ensure continued Native ownership and control of the corporations. The amendments actually allow corporations to sell new stock to non-Natives. More importantly, however, is the fact that the amendments did not provide for returning land to the traditional and tribal governments.

From 1971 until 1993, Alaska Native traditional and tribal governments were in a vague political and legal status due to the fact that neither the United States’ Congress nor the State of Alaska were willing to acknowledge the existence of tribal governments in Alaska and their inherent powers. In 1993, Ada Deer, a Menominee Indian woman

about the impact of ANCSA. I was the spokesperson for the ANC throughout the legislative lobbying effort and headed up much of their fund raising, lobbying, and public relations work.

566 The Alaska Federation of Natives is a statewide organization controlled by the Native regional corporation executives, most of whom feel personally charged to make the ANCSA a success and who have personally and individually profited from the institutions. For example, the Native and non-Native management of Cook Inlet Region, Inc., a southcentral Alaska Native corporation, recently divided $17 million as the result of a windfall sale of telecom stock, while a majority of the shareholders live at or below poverty level.
and former Assistant Secretary for Indian Affairs, published the list of federally-recognized tribes, including 226 Alaska Native tribes\textsuperscript{568} and further drafted preambular language clarifying the powers, status, authority and the sovereign immunity of Alaska Native governments. This action caused a flurry of political activity prompted by the undercurrents in the stream of non-Native opponents to tribal sovereignty.

For example, in the \textit{Alaska v. Native Village of Venetie}\textsuperscript{569} case, the tribe was sued by the State of Alaska for imposing a tax on a contractor intending to build a structure within the tribal community. The State asserted that the Alaska Native Claims Settlement Act purportedly "extinguished" any status of Alaska Native lands as "Indian Country."\textsuperscript{570}

The United States 9\textsuperscript{th} Circuit Court of Appeals affirmed the right of the tribal government of Venetie, as a legitimate third order of government in the United States, to impose such a tax, stating that ANCSA did not alter the status of Venetie tribal lands as Indian Country. The reaction of political leaders and the general public was swift and definite: appeal the decision to the Supreme Court in order to reverse the appellate court decision, on the basis that it was paramount to ensure that the government is the only plenary power that can prescribe rights and powers of Indians, whenever and wherever they feel it necessary. And, more importantly the State wanted a decision to confirm that Indian Country did not exist in Alaska. It is no surprise that the conservative U.S. Supreme Court accepted the case and determined that the vague wording of the 1971

\textsuperscript{567} Public Law 100-241 of February 3, 1988, and commonly referred to as the "1991 amendments" and signed into law by President Reagan.

\textsuperscript{568} Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, Federal Register, Volume 58, No. 202, October 21, 1993.


\textsuperscript{570} Ibid.
ANCSA supposedly did "extinguish" the status of Alaska Native tribal lands as Indian Country and therefore, the tribe had no authority to impose such a tax. The politicians and general public achieved their objective with this sweeping decision and were only then prepared to engage in government-to-government dialogue in an effort to further prescribe the rights, powers and authority of Alaska Native tribal governments.

Despite such legal and political action, tribal governments have persisted and taken on some of the outstanding issues of ANCSA. In 1993, the Alaska Inter-Tribal Council (AITC) was organized and modeled after the Arizona Inter-Tribal Council. This statewide organization has been engaged in a number of initiatives to resolve any gray area in terms of the State of Alaska’s recognition of tribes.

For example, in the area of policy development, tribal leaders infused a government-to-government dialogue, which followed the Venetie decision, with the language of the draft United Nations Declaration, which resulted in the adoption of Administrative Order No. 186\textsuperscript{571} acknowledging the existence of Tribes in Alaska and their distinct legal and political authority, and also adoption of the \textit{Millenium Agreement} in April 2001 by both Tribal governments and the State Executive branch.\textsuperscript{572}

Before the yearlong dialogue with the State of Alaska, tribal governments discussed their strategy and approach for gaining an agreement that would have genuine meaning within their communities and for their relations with the State of Alaska. One of the first actions was the adoption of a Declaration of Fundamental Principles to guide the work and also to put the State on notice as to the principles that the indigenous peoples of

\textsuperscript{571} Administrative Order No. 186, September 29, 2000, Office of the Governor, State of Alaska.
Alaska felt were fundamental to their continued existence as distinct collectivities. This Declaration of Fundamental Principles provided essential procedural, as well as substantive, guidelines for the dialogue with the State. As a result of the tribal leaders actions, the final *Millenium Agreement* echoes some of the language of the draft Declaration, albeit adapted for this specific context. Specifically Part III entitled "Guiding Principles" states:

"The following guiding principles shall facilitate the development of government-to-government relationships between the Tribes and the State of Alaska:

(a) The Tribes have the right to self-governance and self-determination. The Tribes have the right to determine their own political structures and to select their Tribal representatives in accordance with their respective Tribal constitutions, customs, traditions, and laws.

(b) The government-to-government relationships between the State of Alaska and the Tribes shall be predicated on equal dignity, mutual respect, and free and informed consent.

(c) As a matter of courtesy between governments, the State of Alaska and the Tribes agree to inform one another, at the earliest opportunity, of matters or proposed actions that may significantly affect the other.

(d) The parties have the right to determine their own relationships in a spirit of peaceful co-existence, mutual respect, and understanding.

(e) In the exercise of their respective political authority, the parties will respect fundamental human rights and freedoms."

In addition, tribal government councils have voted to abolish the state chartered city governments. They have also transferred assets from the village corporations created by ANCSA to the tribal governments. Furthermore, they have found creative ways to pool resources without triggering "dissenters' rights."

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The ANCSA represents only one of many examples of the need to address the rights of indigenous peoples in comprehensive terms and in a manner consistent with international human rights law. In this regard, a careful analysis of ANCSA in the context of international human rights standards would immediately bring out the inconsistencies between domestic United States' policy and international norms. A primary example is the purported "extinguishment" of the hunting and fishing rights of Alaska Native peoples. Here, even though Article 1(2) of the International Covenants, drafted in 1966, state that "In no case may a people be deprived of its own means of subsistence," the United States Congress, in 1971, "extinguished" these specific rights. The fundamental rights of participation in decision-making, consent, inter-generational rights, development, and a wide range of other rights have been violated by the terms of ANCSA. However, the denial of the paramount right to self-determination and self-government has been the most destructive to the indigenous communities of Alaska. Therefore, the draft Declaration stands as an important document to Alaska Native peoples, including my people. Through the Declaration, we can begin to right the wrongs of ANCSA and other destructive and unhelpful laws, regulations and policies.

But rather than characterize indigenous peoples solely as victims of oppression, it is important to underscore the positive reality of indigenous peoples (and their rights) and recent developments that have emerged by virtue of the initiatives of the United Nations and other international and regional organizations. This conclusion intends to highlight a number of significant positive developments and also to demonstrate the importance of the international indigenous human rights standards to indigenous peoples in their efforts
to combat racism, racial discrimination and the denial of rights within their own communities.

Too often, indigenous leaders are consumed with the day-to-day and more urgent issues facing their communities and have little time to consider the activities taking place far away in Geneva. Some, too, ask, quite legitimately, what is the point of this work, especially in light of the fact that it has been 20 years of annual meetings focused upon a text that still remains "indigestible" to state government representatives. The same question has also been asked by those indigenous peoples who have been and continue to exercise the right to self-determination, and who view themselves as independent despite the states that have grown up around them and attempted to assimilate and subsume them. These are important questions for those that have been intimately involved in the process. In some instances, indigenous representatives have been able to respond in a direct, proactive and concrete fashion by utilizing and giving greater meaning to the existing and emerging instruments to safeguard and advance the political right to self-determination, as well as other economic, social, cultural and spiritual rights.

In regard to policy development, the above example of use of the draft Declaration provisions by Alaska Native tribal governments in their government to government negotiation with the state is one good model as to how the document has been used to re-define political and legal relationships between local governments and indigenous governments. Certainly, other policy development examples abound in other regions of the world.
B) Political organizing and use of international human rights mechanisms

In the case of the *Mabo v. Queensland*,\(^5\) five Torres Strait Islander individuals brought the case arguing that their land rights had not been extinguished and were not subject to the emerging land rights initiatives or Queensland Parliament decisions. In June, 1992, the High Court in Australia, determined that the plaintiffs rights to land had not been "extinguished" and affirmed the rights of Aboriginal peoples based upon Native title, and went further by denouncing "terra nullius" as an invalid doctrine to assume full and total control over Aboriginal peoples and their lands and resources. This case was followed by that of *Wik Peoples v. The State of Queensland* case,\(^6\) where the High Court affirmed that pastoral leases did not "extinguish" the rights of the Aboriginal peoples but rather such rights and interests co-existed. Like the general public and political leaders in Alaska, the government and landowners moved swiftly and decisively to, in this case, legislatively unravel the Court's decision through the weakening of the Native Title Act. Both of these politically charged developments were further exacerbated by the role of the media fanning the flames on all sides.

In response, Australian Aboriginal peoples used the human rights treaty body to draw attention to the discriminatory actions of the government and relied upon not only the Australian Racial Discrimination Act of 1975 but also the human rights standards of


\(^{575}\) *The Wik Peoples v. The State of Queensland & Ors*, No B8 of 1996; *Thayorre People v. The State of Queensland & Ors*, No B9 of 1996 (1996) 141 A;R 120 [Wik]. The Wik Peoples and the Thayorre People argued that their native title was not extinguished by the grant of the leases, but rather coexisted with the interests of the lessees. The High Court held that the grant of the relevant leases did not confer on the lessees exclusive possession of the land under lease. The relevant intention to extinguish all native title rights, which subsisted when the grants were made was not present. The grant of the leases did not,
the ILO, draft Declaration, International Convention on the Elimination of All Forms of Racial Discrimination and others, to advance their arguments.\textsuperscript{576}

C) \textbf{Litigation and human rights complaints}

Further, in the area of international human complaints and litigation, a number of recent developments are also indicative of the reach of the international indigenous human rights standards beyond the scope of the United Nations. As noted in Chapter II, the recent decision of the Inter-American Court of Human Rights in the \textit{Case of the Mayagna (Sumo) Awas Tingni Community vs. Nicaragua}\textsuperscript{577} affirming the rights of the indigenous peoples in Nicaragua is quite significant. The Court’s attention was drawn not only to the relevant provisions of the American Convention of Human Rights and the American Declaration on the Rights and Duties of Man but also by the provisions of the ILO Convention No. 169, the OAS Proposed American Declaration on the Rights of Indigenous Peoples, as well as the draft Declaration. This case represents a major precedent for many reasons. However, most significant for the present context is the fact that both the OAS Proposed American Declaration on the Rights of Indigenous Peoples and draft Declaration, as only draft and emerging declarations, were utilized to inform the Court about the distinct relationship and rights that indigenous peoples have with regard to their lands, territories and resources. This case was originally initiated as a human rights complaint to the Inter-American Commission on Human Rights wherein the


\textsuperscript{577} \textit{Case of the Mayagna (Sumo) Awas Tingni Community vs. Nicaragua}, Judgement of August 31, 2001.
Government of Nicaragua failed to heed the findings and recommendation of the Commission, which then requested that the Court hear the case.

Another example of the use of international mechanisms which employ the international human rights standards, with similar origins to that of the Awas Tingni case is that of the Western Shoshone, who presently have a complaint before the Inter-American Human Rights Commission. Thus far, the United States has not responded to the Commission's various requests. The case involves the ancestral land rights of the Western Shoshone, which the U.S. asserts were purportedly "extinguished," allowing the Department of Interior's Bureau of Land Management to make repeated attempts to remove the Danns and other Western Shoshone peoples from their homelands. This complaint asserts that the United States government has failed to meet its obligations with respect to the land rights of Mary and Carrie Dann. The Danns and other allies have also requested consideration of the matter by the CERD. This case has been accompanied by domestic litigation, which similarly incorporates the international indigenous human rights standards.

Each of these cases illustrates the important linkage between domestic conditions and violations and the importance of the international human rights framework. The international work has resulted in the creation of important tools and mechanisms by which indigenous peoples can advance their rights and more importantly advance their worldviews and perspectives. The possibilities for use of the standards in judicial institutions, legislation, negotiation, public policy and law reform cannot be underestimated.
However, possibly more important than these formalistic developments, is the work that indigenous peoples are doing within their own communities, amongst their own peoples. This grassroots indigenous work is a reflection of the synergy needed to breathe life into the documents that are emerging internationally.

Other examples of domestic litigation, where legal counsel has invoked the international indigenous human rights standards, have emerged in Canada. The first use made in an indigenous rights case involved the Gitksan-Wet'suwet'en case in northwest British Columbia, where the indigenous parties invoked international law and referred to the ILO Convention 169 and the draft Declaration as supporting their claims to ownership and jurisdiction of their traditional territories.\(^{578}\) Also, the *Mitchell v. M.N.R.* case,\(^{579}\) focused upon whether Akwesasne Mohawks had the right to bring goods into Canada from the U.S. without being subject to customs duties, wherein they relied upon the cross- or trans-boundary language of the international instruments. Another recent example is the *R. v. Powley* case,\(^{580}\) which involved the hunting and fishing rights of two Metis individuals in Ontario. Here again, the indigenous peoples concerned invoked the relevant text of the draft Declaration concerning Metis as a distinct people. In addition, the Grand Council of the Cree, in both their submission to the Court on the Quebec


Secession Reference, invoked the international indigenous human rights standards extensively.

**D) Negotiation**

There is a growing practice of usage in negotiation of bilateral and multi-lateral agreements or regimes, such as the inclusion of numerous principles from the draft Declaration and the ILO Convention 169 in the Charlottetown Accord, which emerged from the national constitutional debates of Canada in 1992.

**E) Indigenous community-based work**

Certainly, it is probable that there are numerous examples of indigenous community based work being done worldwide. However, the specific examples to be highlighted here include a number of important, "from the ground up" initiatives in Alaska.

The first example is that of the Yukon River Inter-Tribal Watershed Council (YRITWC). The YRITWC is an initiative that emerged in 1996 involving over 42 Athabascan, Yupik and Tlingit indigenous communities from the headwaters of the Yukon River (in Yukon Territory, Canada) to the mouth of the river in southwest Alaska, a 2,300 mile watershed. An important distinction about this indigenous led initiative is that it was conceived of by and for indigenous peoples themselves and was not in response to a real or perceived threat. The Tribes and First Nations of the watershed began with a conference that brought all the indigenous peoples and leaders from the

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581 Draft Legal Text (October 9, 1992) based upon the Charlottetown Accord of August 28, 1992, which includes amendments to the Constitution Act of 1867, the Constitution Act of 1871, the Alberta Act, and
river together to meet one another and discuss their visions for watershed protection. It was determined that an international treaty would be the first step to take in order to define the objectives of the Council and goals of the Tribes and First Nations. Presently, the YRITWC is focused upon water pollution and toxics and they initiated a water sampling and analysis program this past year. However, they intend to consider long-term management and assertion of control and ownership issues in the future. The Inter-Tribal Treaty was adopted in 2001, and both the treaty and the work of the Council incorporate many of the important principles that have emerged in the draft Declaration.

The YRITWC has also been involved in the International Joint Commission (on waterways) due to the threat of mining on the Canadian side of the border and its impact on the U.S. side.

Similar to the YRITWC, a number of Tribes (in Alaska) and First Nations (in Canada) have signed an agreement to establish an Inter-Tribal Pipeline Commission. This initiative stems from unsuccessful efforts of the traditional government of Stevens Village in the Yukon River Flats to gain the ear of the oil industry over their concerns about the Trans-Alaska Pipeline encroachment in their ancestral territory. The Athabaskan peoples are not only concerned about the potential for oil pollution but also the fact that they receive no compensation for the intrusion that the pipeline represents. The new Commission intends to monitor developments related to the existing pipeline and those of the proposed gas pipeline, which may also cut across their territories. Here again, the Agreement draws upon the international standards concerning land rights, environmental

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protection, right to determine priorities for development and just compensation in the event of environmental degradation.

In regard to indigenous justice systems, a number of promising and unprecedented initiatives have been led by three distinct Tribal Courts in the southwest, southeastern and Arctic slope regions of Alaska. The first is that of the Orutsararmiut Native Council (ONC), which is the traditional indigenous government in the village of Bethel, Alaska. The ONC has developed the Mikilgnurnun Alirkutait or Tribal Children’s Code. This Yupik community felt that it was critical to safeguard the most vulnerable sector of their society: the children. The ONC took on the task of developing the code by first establishing their long-standing Yupik values, customs, and practices or Yupik custom law as the foundation for the Code. They followed by reviewing domestic laws and regulations, including the Indian Child Welfare Act, and borrowed what they deemed useful from this text. They also informed themselves about the international indigenous human rights movement and chose to incorporate not only provisions from the draft Declaration but also from the United Nations Convention on the Rights of the Child (CROC). The final code was adopted by the Council and completely translated into the Yupik dialect and is used on a daily basis by the ONC Tribal Court.

The project in southeast Alaska involves the Sitka Tribe of Alaska (STA) and their Tribal Court, which initiated a series of interviews with tribal elders about child

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582 *Yukon River Watershed Inter-Tribal Accord*, adopted on August 9, 2001 by 35 Tribes and First Nations. On file with author.


584 Orutsararmiut Nakmitlait Tsiulekagitluk Mikilgnurnun Alirkutit, [Title 1, Orutsararmiut Native Council Children’s Code], 1999.
custody practices and traditions, with the aim of producing a code that would assist children at high risk for drug and alcohol abuse. Like ONC, the Tribal Court coordinator used the values, practices, customs and traditions of the Tlingit peoples to establish the foundation for the remaining work, which incorporated the international standards contained in both the draft Declaration and the CROC. The project in Barrow, on Alaska’s Arctic slope, is similar to the above two initiatives. However, the Barrow Tribal Court is developing an appellate court based upon the traditions of this whaling culture. Other tribes have considered the development of tribal codes that deal with intellectual property in an effort to safeguard themselves from exploitation by outside developers and pharmaceuticals.

Each of these projects reflect the development of new regimes based upon age old values or more accurately indigenous values and adaptation of the human rights framework and standards of the United Nations for their particular cultural context. Another approach is that of First Nations and Tribal Governments, as legitimate political institutions, adopting the draft Declaration and various other international human rights instruments within their own communities, making them applicable to their own members. So, not only are indigenous peoples incorporating such standards, they are moving to ratify them in the way that nation-states ratify various conventions that emerge from the human rights framework.

Yet, another example of the international standards making their way into indigenous communities is through the work of individuals like scholar R. A. Williams, who leads a clinic at the University of Arizona law school that ensures that his students
are exposed to and employ the developments at the United Nations, OAS, ILO, and other international fora.\footnote{R.A. Williams, "Vampires Anonymous, supra note 9 at 761-763.}

More often than not, indigenous peoples have had to make adjustments to the standards in order for them to adequately respond to their particular cultural context. For example, within indigenous justice systems there is more of an emphasis upon the duties, obligations and responsibilities within these collectivities rather than rights enjoyed. The kinship, moiety and relationships are emphasized rather than a model where strangers are dealing with strangers. Another distinct dimension is the direct and intimate linkage between the natural world, spirituality and collective relations in contrast to the separation of religion and governance. Other inconsistencies can arise in the area of equal protection or equal application of the rule of law, such as duties and responsibilities of women and men within indigenous that don’t neatly translate for indigenous communities.

Finally, it important to mention the impact that indigenous peoples have had on the international processes themselves. As noted previously, indigenous peoples’ methods for dialogue and decision-making have had a direct influence on the procedures of the WGIP and now the CHR Working Group. In particular, the fact that in the early days indigenous peoples were gavelled for speaking in their own languages, singing, making prayers to the Creator, or any other demonstration of their cultural heritage. It is now much more common for such events and ceremony to make up the agenda of a United Nations gathering involving indigenous peoples. Even the most recent session of
the CHR Working Group was closed by a Navajo elder who spoke a prayer in Navajo at the request of the Chairperson of the session.

As stated in the introduction, indigenous legal perspectives have always existed. In the past, indigenous peoples' thoughts focused more on relationships, their relationships with each other and to all other beings and things. However, since the time of contact, indigenous peoples have attempted to articulate their worldviews, perceptions, and values, or their legal theory, to ensure their survival. Yet, indigenous peoples' views and demands have gone largely unheeded. Professor R. A. Williams points out that "indigenous peoples have begun to redefine the terms of their survival in international law." And, to a minor extent, there has been an adaptation of non-indigenous language and legalese. Yet, much of this has been done only in response to repression and state arguments. There have been few opportunities to actually be listened to, let alone heard by others. The exceptions are the internal dialogue of indigenous communities and their sharing with allies of indigenous peoples.

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586 H. Napoleon, *Yuuyaraq: the Way of the Human Being*, (Fairbanks: University of Alaska Fairbanks Press, 1991) at 4: Prior to the arrival of Western people, the Yup’ik were alone in their riverine and Bering Sea homeland—they and the spirit beings that made things the way there were. Within this homeland they were free and secure. They were ruled by the customs, traditions, and spiritual beliefs of their people, and shaped by these and their environment: the tundra, the river and the Bering Sea. Their world was complete; it was a very old world. They called it Yuuyaraq, "the way of the being a human being." Although unwritten, this way can be compared to Mosaic law because it governed all aspects of a human being’s life. It defined the correct behavior between parents and children, grandparents and grandchildren, mothers-in-law and daughters and sons-in-law. It defined the correct behavior between cousins (there were many cousins living together in a village). It determined which members of the community could talk with each other and which members could tease each other. It defined acceptable behavior for all members of the community. It outlined the protocol for every and any situation that human beings might find themselves in."

587 Ibid, at 5: "Yuuyaraq defined the correct way of thinking and speaking about all living things, especially the great sea and land mammals on which the Yup’ik relied for food, clothing, shelter, tools, kayaks, and other essentials. These great creatures were sensitive; they were able to understand human conversations, and they demanded and received respect."

588 R.A. Williams, "Encounters on the Frontier," supra note 64.
Internationally, indigenous peoples have attempted to elaborate upon and provide a cultural context in order to gain respect for and recognition of their indigenous legal perspectives. Scholar R. A. Williams cites Vitoria's notion of the "universal character" of the Law of Nations, who believed that it is "clearly capable of conferring rights and creating obligations" through the "consensus of the greater part of the whole world, especially in behalf of the common good of all." Again, if international law is to be universal, it must include indigenous legal perspectives and indigenous cultures. Again, the universality of international law does not mean homogeneity but rather it is about the development of unified views of international law, which embrace cultural diversity and allow for a multiplicity of cultural contexts.

R. A. Williams further states that "through the power of their stories, indigenous peoples have begun to transform legal thought and doctrine about the rights that matter to them under international law." However, as has been stated above, the international community not only has the capacity to accommodate an indigenous legal theory, they have an urgent duty and obligation to respond to the demands of indigenous peoples.

We have seen a growing recognition of indigenous worldviews and perspectives through the human rights standard setting work, embodied by the draft Declaration on the Rights of Indigenous Peoples, as well as in the more recent comments and opinions of the human rights treaty bodies. These developments are contributing to the crystallization of indigenous legal perspectives in terms of customary international law and the continued use and growth of custom law or the common law of the indigenous peoples concerned.

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Finally, it should be recognized that indigenous peoples can make an important contribution to legal theory, which could prove beneficial to all of humankind. The recognition of indigenous legal perspectives should become the foundation upon which all relations between states and indigenous peoples are established. As distinct peoples, with extraordinarily rich cultural diversity and values, we may be able to arrive at a post-colonial state that allows us to live in a world that truly believes in "the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." In this way, we will continue to enrich the human rights framework and international law, as well as contribute to the continuation of our distinct societies, thereby protecting our right to the future.
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ANNEX "A"

Draft United Nations Declaration On The Rights
Of Indigenous Peoples

Affirming that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, inter alia, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,
Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children,

Recognizing also that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect,

Considering that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination,

Encouraging States to comply with and effectively implement all international instruments, in particular those related to human rights, as they apply to indigenous peoples, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples:

PART I

Article 1

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

Article 2

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.
Article 3
Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4
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.

Article 5
Every indigenous individual has the right to a nationality.

PART II
Article 6
Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.

Article 7
Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;

(e) Any form of propaganda directed against them.

Article 8
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 be recognized as such.
Article 9
Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

Article 10
Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11
Indigenous peoples have the right to special protection and security in periods of armed conflict.

States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

(a) Recruit indigenous individuals against their will into the armed forces and, in particular, for use against other indigenous peoples;

(b) Recruit indigenous children into the armed forces under any circumstances;

(c) Force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes;

(d) Force indigenous individuals to work for military purposes under any discriminatory conditions.

PART III

Article 12
Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13
Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.
States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

**Article 14**

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

**PART IV**

**Article 15**

Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes.

**Article 16**

Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.

States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

**Article 17**

Indigenous peoples have the right to establish their own media in their own languages. They also have the right to equal access to all forms of non-indigenous media.

States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.

**Article 18**

Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation.
Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, employment or salary.

PART V

Article 19
Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 20
Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.
States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

Article 21
Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

Article 22
Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.
Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.

Article 23
Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24
Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.
They also have the right to access, without any discrimination, to all medical institutions, health services and medical care.

PART VI

Article 25
Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26
Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27
Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28
Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 29
Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.
They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 30
Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

PART VII
Article 31
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.

Article 32
Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 33
Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

Article 34
Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities.

Article 35
Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for
spiritual, cultural, political, economic and social purposes, with other peoples across borders.

States shall take effective measures to ensure the exercise and implementation of this right.

Article 36
Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

PART VIII

Article 37
States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

Article 38
Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration.

Article 39
Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

Article 40
The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 41
The United Nations shall take the necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence
in this field and with the direct participation of indigenous peoples. All United Nations bodies shall promote respect for and full application of the provisions of this Declaration.

PART IX

Article 42
The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 43
All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 44
Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire.

Article 45
Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.
ANNEX "B" The Revision of International Labor Organization Convention No. 107: A Subjective Assessment

Note: This annex and the perspectives contained herein stem from my direct participation in the revision process as a representative of the Inuit Circumpolar Conference. I was one of two lead spokespersons on behalf of the "Indigenous Rights Group." This descriptive, personal account is included to provide some insights and alert others to the serious shortcomings in the ILO standard-setting process as it relates to Indigenous peoples. It is not intended to be a comprehensive analysis of the ILO procedures or the text of the Convention.

Introduction

This section will examine the 1988 and 1989 process of the International Labor Organization (ILO) in its "partial" revision of Convention 107 -- Indigenous and Tribal Populations (1957). The purpose of this discussion is to illustrate how the contentious issues related to the term "peoples" and the articles addressing lands, territories and resources were dealt with in this highly politicized forum, in the hope that it will be insightful to those involved in the ongoing draft United Nations Declaration and the Organization of American States Proposed American Declaration processes. There are a number of points about the substance and procedures of the ILO revision process that may be instructive to the current debates, including the time frame, state government positions and procedures, selection of chairperson, closed door meetings, procedures employed to arrive at "consensus" and so forth.

International Labor Organization revision of Convention No. 107

The process involved many diverse aspirations and political interests. Because of the task of revising an "outdated" convention, within this tripartite organization, and the attempt to accommodate these diverse interests, the result of the process was both too
much and too little, depending upon whom one was representing. Unfortunately, the final product did not reflect a consensus on any one issue, and there were many issues.

Setting the stage

The process began with the September 1986 Meeting of Experts, convened by the Governing Body of the ILO, to discuss the possible revision of Convention 107. The participants in the Meeting of Experts were employers’ and workers’ organizations and governments. However, the ILO Governing Body, in a break from the norm, also chose to invite two NGO representatives to join the meeting. The result of this decision was the direct participation of representatives from Survival International and the World Council of Indigenous Peoples (WCIP).

This step was seen as an important development. However, it later became clear, throughout the negotiation, that it was more of a political move than it was a genuine desire to gain direct indigenous participation in the process. The WCIP was unfortunately, at the time, a fractionalized and relatively non-representative organization, with many internal political problems. The WCIP leaders were criticized for accepting funds from oppressive governments and being detached from real indigenous communities. Throughout the revision process it was asserted by some that the role of the WCIP was to keep the indigenous peoples divided and thereby, much easier to defeat.

Survival International is a worldwide support organization, which has helped to bring attention to the many critical issues facing indigenous peoples. Ironically, Survival International, as a non-indigenous support group, played a more useful role than the WCIP. They did not yield to the government, employer and Secretariat pressure and maintained their integrity and independence throughout. These "political" dynamics
contributed greatly to the process of negotiation, with both good and bad results. In addition, a number of other indigenous and support organization representatives attended the Meeting of Experts as observers.

The result of the September 1986 Meeting of Experts was a series of recommendations to the Governing Body, including the decision to revise Convention 107. The matter was then placed on the June 1988 (75th session) agenda of the International Labor Conference. According to ILO procedures, the Conference discusses an issue for a two-year period, thereby, creating the two-year revision process, providing the scheduled adoption of the revised Convention in June 1989 (76th session). The report of the Meeting of Experts stated that "Convention 107 was in urgent need of revision to remove its integrationist approach and to reinforce its provisions on land rights." This report established the objectives of the revision process.

The Office (or Secretariat) then prepared a draft text of the Convention based on the discussions of the Meeting of Experts, the report was labeled Report IV(1). The report was then distributed, as a questionnaire, to governments. The Office sent along copies to some of the established indigenous organizations and support groups upon request. The Office requested that governments consult "the most representative organizations" (worker and employer organizations and not specifically indigenous peoples organizations) about whether they had any amendments, suggestions or comments to make to Report IV(1). From the outset, the process was facilitated by the Secretariat of the ILO. The report contained a draft text, which was the starting point for discussion. Many indigenous peoples who reviewed the proposed language felt that the
Secretariat had favored governments in the drafting stage. This suspicion was later confirmed in the actual revision process.

Little or no consultation with indigenous peoples took place. For example, in the United States, the Department of Labor, the Department of Interior (responsible for Indian affairs), the employer organizations, and unions, were all involved in the process. However, none of them instituted any formal consultation process with indigenous peoples or their governments in the U.S. despite the fact that it is Indian people who are the "subjects" and supposed "beneficiaries" of the instrument.

This "consultation" process shaped the proposed text to be tabled at the first session. In ILO practice and negotiation, it is customary, because of only a two-year revision process, to have a starting point: a draft text to focus upon and respond to. However, a draft text developed without broad consultation and without a comprehensive review by all concerned, provided a poor starting point for the ultimate objective of "reinforcing" and strengthening an admittedly "outdated" document.

Therefore, the initial draft text, as presented to the 75th session of the International Labor Conference Committee on Convention 107 (1988), was far from satisfactory. This view was shared by many, including government representatives. The draft Convention contained nine parts and a total of thirty-five articles. Briefly, some of the issues present for negotiation included the replacement of term "populations" with the term "peoples" (Article 1); customs and traditions of indigenous and tribal peoples (Articles 8-9); environmental protection of indigenous territories; indigenous rights to lands and resources (Articles 13-19); control of indigenous peoples over their economic, social and cultural affairs (Articles 22, 25 and 27); implementation of the
Critical issues to be negotiated

It is important to illustrate two of the most critical issues present in the text which in turn influenced the behavior of all negotiating parties and produced entrenched positions, lead players, coalitions, good guys, bad guys, working groups, private negotiations, "pressure drops", threats, etc. This description, because of space and the focus of this section, will tend to be somewhat superficial, however, the reader will be able to grasp the relative importance of the issues to all stakeholders present.

As discussed in the main body of this thesis, the first and most contentious was the use of the term "peoples" versus the term "populations." Furthermore, the entire Part dealing with lands, territories and resources was equally contentious. The provisions include ownership and possession, protection of ownership rights, control over natural resources, consent of indigenous peoples before undertaking any exploitation or exploration of mineral and other subsurface resources, prohibition of removal from lands, unauthorized intrusion or use of lands, alienation of lands, respect for traditional customs for transferring lands, and the provision for a land claims settlement mechanism.

Given the diverse political situations and stages of development in the countries involved, especially in Latin America, it was clear that many of these articles posed major difficulties for many States. In particular, the provisions requiring the "consent of the peoples concerned" for resource exploitation and alienation of lands, caused great dissension.
Indigenous peoples felt that if Convention 107 was to be transformed into a useful instrument, indigenous peoples' land and resource rights must be fully respected by the Convention's terms. Indigenous peoples asserted that effective recognition and protection of these basic rights are viewed as fundamental to any serious recognition of indigenous economic, social, or cultural rights. In the context of the ILO Convention, Part II on Lands was considered the "soul" of the Convention.

**The actors**

With the draft text in place, and replies received and commentaries submitted, the actual revision process began and the actors quickly emerged and became a part of the landscape over the two-year period. First of all, there was the Secretariat or, as mentioned above, often referred to "the Office." The Secretariat consisted of the Liaison for NGO's, Lee Swepston; an ILO Assistant Director in Latin America; the Legal Advisor; and several interns from various law schools and numerous staff persons. The key person at the Secretariat dealing with indigenous issues was Mr. Lee Swepston, who has experience with and knowledge about indigenous affairs. He was viewed by many indigenous representatives as the person directly responsible for the many "closed door" decisions made with regard to indigenous representation at the sessions and political "deal-making" that took place in the closed working group meetings.

**The Governments**

The Committee itself was made up of 41 government members, 10 employers' members and 23 workers' members, for a total of 74. The governments involved were varied and from all parts of the globe. In particular, North, Central and South America were heavily represented -- having two or more delegates in place at a time. For instance, Canada had five delegates seated in the room at all times. Most of the representatives
came from their respective Departments of Labor or the equivalent. Unfortunately, very few delegations included individuals who had any background in indigenous affairs, rights or issues domestically. There were a couple of exceptions to this, however. Portugal, Colombia and Ecuador sent individuals with particular expertise in the area of indigenous human rights and who were very knowledgeable and supportive of indigenous concerns. Norway and Sweden actually had Sami individuals serving in the capacity of official delegates or advisors to the delegation. And, the United States’ delegation included an American Indian.

The selection of representation was critical to this process. It was clear which governments were prepared to participate in the forum in order to diminish indigenous rights and those who were there to defend indigenous rights. Many delegates were simply sent from the local Mission or the Embassy offices with "instructions" and "orders" on key issues. Others were sent with few, if any, instructions and were eager to learn about the process, indigenous human rights and the conditions facing indigenous communities in order to do what they felt was right and within the limits of their own domestic laws, political conditions and climates.

There were many times in which delegates demonstrated inadequate knowledge of the issues and lack of preparation for the negotiation and Committee meetings. As a general rule, government delegates were insufficiently informed on indigenous issues, both prior to and during the negotiation process. In relation to the time frame, it would have been useful to hold an appropriate "education" or information process, with effective indigenous input, in order to generate understanding between the parties and more importantly, the significance of the Convention to indigenous peoples. This is one
area of contrast between the ILO, the UN and the OAS. The latter two forums have been in the works for some time allowing for more cross cultural education, one on one lobbying and sharing of information, which has propelled the issues forward. Within the ILO there was never this opportunity. Ignorance of indigenous peoples and their distinct interests and rights also applied to the worker and employer delegates as well (to be addressed below).

The Employers

The employers' delegations consisted of organizations like the Employers' Confederation of Gabon and the Confederation of Industrial Chambers (Mexico), the Japan Federation of Employers' Associations, and the National Confederation of Industry in (Brazil). These organizations are primarily concerned with private industry in their respective countries. The majority of employer delegates had no knowledge of indigenous rights, interests or conditions. Their view was that indigenous peoples should be dealt with as any other kind of "employee" or "worker." For example, Article 4, paragraph 1 of the Convention states:

"Special measures shall be adopted as appropriate for safeguarding the institutions, persons, property, labor and environment of the peoples concerned."

The response of the National Confederation of Industry to this article, as recorded in Report IV(2A), stated:

"This Article should be drafted to avoid the possibility of more favorable treatment being given to these communities than to other workers."

The following example will further help to illustrate the views of the employers, which relates to the objective agreed upon by the Governing Body when deciding to undertake the revision process. Article 5 states that:
"due account shall be taken of the cultural and religious values and practices of these peoples..." and "the integrity of the values, practices and institutions of these peoples shall be respected."

The Japan Federation of Employers' Associations (NIKKEIREN) responded to this language by stating:

"(g)iving too much priority to the protection of peoples and to the enhancement of their social status may discriminate against other citizens. The instrument should provide for equal rights."

This Japanese government expressed the same view. Similar arguments concerning equality without a cultural context have emerged in the UN process as well.

Again, one of the main objectives of the process was to remove the integrationist approach of the Convention, and thereby remove such government policies, which would ultimately effect the internal decisions and policies of employers. In sum, the employers were not responsive, in any way, to the objective of the negotiation process from start to finish. There were two exceptions in the Employer delegation: 1) the First Nations Financial Project, a U.S. Indian employer organization that works with Indian tribes and Nations throughout the United States, whose delegate to the ILO session was an American Indian; and 2) an Australian Aborigine working with a major company in Australia.

The Workers
The workers' delegation was a diverse array of individuals and they emerged, quite naturally, as the strongest allies of indigenous peoples. The workers' delegation included unions like the Australian Council of Trade Unions (ACTU), National Confederation of Agricultural Workers (Brazil), Danish Federation of Trade Unions (LO), Swiss Workers' Union (SGB), American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), General Confederation of Workers (CGTP, Peru),
and the General Council of Trade Unions of Japan (SOHYO). There existed such diversity but also a real measure of solidarity and sensitivity to indigenous peoples and in particular, "group" or "collective" rights issues. Some of the worker delegates were indigenous peoples, including Maori (New Zealand), Sami, Australian Aborigines, and Canadian Indian -- all serving as official delegates.

Yet the worker delegation sympathy was not enough. Here again, even the head of the workers delegation was unable to properly convey indigenous positions on specific amendments in an effective manner. This was due to ignorance as well as a lack of negotiating skill, with emphasis on the former. The indigenous peoples' representatives had originally hoped for an advance session with the workers to conduct an effective information and education process. However, there was never sufficient time nor funds available. Such preparation would have gone a long ways in helping to conduct "meaningful negotiation." The indigenous/worker coalition was the strongest coalition and it weathered many battles until the final hours of the 76th session.

**The Indigenous Peoples and "representation"**

The indigenous delegation, referred to as the "Indigenous Rights Group" was comprised of several indigenous NGO's and indigenous leaders and peoples from around the globe. The NGO's involved were the National Indian Youth Council, Nordic Sami Council, Inuit Circumpolar Conference (ICC), World Council of Indigenous Peoples (WCIP) and Four Directions Council. Regional organizations included representatives from the Metis, the Prairie Indian Alliance, Assembly of First Nations (Canada), the Ainu Association of Hokkaido (Japan), and the National Coalition of Aboriginal Organizations
As noted earlier, the WCIP and the role they played in the Meeting of Experts caused many indigenous organizations to question their legitimacy as a representative international indigenous peoples organization. This matter came up again in the Indigenous Rights Group sessions and it created disunity in the indigenous coalition, which was very detrimental in the 1988 session.

The issue of participation in the process was always a heated discussion within various fora, both indigenous and international, beginning in 1986. During the 1987 Indigenous Peoples' Preparatory meeting at the U.N. in Geneva, indigenous organizations discussed the ILO revision process and agreed unanimously to express to the U.N. its opposition to the way in which the revision was taking place and further recommended that the ILO delay work on the Convention until the issue of greater indigenous peoples participation was properly dealt with.\textsuperscript{591}

At the 1988 ILO session, indigenous participation was minimal. Under ILO rules only NGO's affiliated with the ILO or accredited as "observers" may make oral or written submissions. However, permission to do so has been granted only in rare circumstances. Furthermore, only international NGO's were eligible for ILO accreditation. As a result, indigenous organizations that function at the community or national level and consequently most directly representative of and knowledgeable about the actual conditions and aspirations of indigenous peoples were excluded from direct participation in the 1988 session. The few indigenous organizations sufficiently international in character to gain ILO accreditation were able to negotiate for each a ten-minute

presentation at the close of business on the second day of deliberations of the Committee on Convention 107. In addition, the organizations collectively were granted one ten-minute presentation for each category of articles placed before the Committee.

The lack of direct participation is extremely unfortunate, especially in light of the fact that the Convention Preamble itself urges recognition of the aspirations of indigenous "peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions...."

Overall, indigenous input was woefully inadequate and this contributed to the lack of quality in the final product. Here again, the contrast with that of the UN process is significant. Lack of more open and direct participation in the ILO generated an insufficient document. The OAS is presently struggling with improving upon this point of procedure, which will be critical to the final text of the Proposed American Declaration. Whereas, the UN has allowed for open, inclusive participation, even at the Commission level and the draft Declaration reflects such participation through its more comprehensive text.

Despite the lack of broader and more direct indigenous participation in the ILO process, the natural "coalition" of workers and indigenous peoples minimally increased indigenous involvement in the process. However, this created another level of negotiations. The workers agreed to allow a limited number of indigenous representatives to attend their private delegate meetings. The result of these negotiations was the submission of amendments for consideration by the Committee that embraced
indigenous positions, views and aspirations. Sometimes indigenous peoples were successful in convincing the workers to submit amendments and other times they were not.

Very informal coalitions also developed between the employers and some governments, in these cases, the indigenous rights group attempted to break these coalitions, without success.

By the end of the 1988 process, the matter of indigenous representation was still not satisfactorily dealt with and was re-visited in the fall of 1988 and early 1989. Despite the inadequacy of the procedural measures to ensure direct indigenous peoples participation, it is important to underscore the impact of the presence of indigenous peoples in the room when the Committee proceedings took place. Governments, employers and workers were all very aware of the presence of indigenous peoples and the fact that they were listening, thinking, lobbying, formulating positions and most importantly watching. Without the simple presence of indigenous peoples, surely more violence to the document would have been done.

Non-Indigenous Support Groups
In addition to the governments, employers, workers and indigenous organizations, non-indigenous support groups were present and played a useful role in aiding the Indigenous Rights Group in their lobbying efforts to gain votes and more direct participation in the process. The two groups present were Survival International and the International Work Group on Indigenous Affairs (IWGIA). Both of these organizations

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592 Two indigenous spokespersons were allowed to participate in the private Worker Delegation meetings. The two spokespersons were S. James Anava, Anaya of the National Indian Youth Council and myself, on behalf of the Inuit Circumpolar Conference.
also assisted by documenting the proceedings and generating awareness about the process and issues during the period between the 1988 and 1989 sessions.

**Selection of the Committee Chairperson**

This matter was a major factor in the proceedings and it directly shaped the final outcome of the Convention. The workers and employers, respectively, select a Vice Chair to be their spokesperson during Committee sessions, and the full Committee (governments, workers and employers) selects the Chairperson from the government delegates present, for the entire discussion. Throughout the proceedings each government has a voice. The workers and employers may speak only through their Vice Chairperson. Hence, the selection of the Chairperson is an important decision in the process because it sets the overall tone of the proceedings. The same is true for the UN and OAS processes, however, to date, little attention has been paid to this crucial matter.

Much to the disgust and opposition of the indigenous peoples, the Committee selected the government delegate of Bolivia as Chairperson. This was a deliberate move on the part of several governments to ensure greater control over the direction of the entire revision process. In particular, the government of Canada set up a group of supporters who seconded the nomination and spoke in support. The government of Bolivia ratified Convention 107 in 1962 and has since then repeatedly violated many of its provisions. From the view of indigenous peoples, it was unconscionable that, simultaneously with the Committee on Convention 107, the government of Bolivia was under review by the Committee of Experts on the Application of Conventions and Recommendations for not supplying information about their treatment of indigenous peoples in Bolivia, as well as direct violation of Articles 7, 11, 12, 13 and 14 of Convention 107. The specific violations included incursion into indigenous lands for
purposes of development and settlement by non-indigenous peoples. In short, colonization of indigenous homelands and territories. Again, in 1989, Bolivia was under review for Convention 107 violations but the Committee again seated the government representative of Bolivia as the Chair.

The intention behind the selection of an offending government representative for the position of Chairperson should be clear to any independent observer. Indigenous peoples looked on with incredulity as the Committee confirmed this nomination. There was no way of affecting a change. Because of this decision a great amount of suspicion, lack of confidence and mistrust was generated, which lasted throughout the entire process. The workers, as allies with only one-third of the votes, were not able to affect a change either.

The Negotiating Process

This section will briefly describe the negotiations that took place between the workers and indigenous peoples, and those within the Committee.

The method of work between the coalition of workers and indigenous peoples can be described as follows: 1) the indigenous rights group would meet, with draft Convention in hand, and discuss each point, improve the wording, discuss the strategy and arguments to give to the workers; 2) a representative of this group would then meet privately with the workers, present their positions and arguments and hope that the workers would approve the amendments for introduction on the floor; 3) a discussion and negotiation with the workers would take place and they would then approve the amendments, occasionally with alterations and sometimes with indigenous positions completely lost; 4) these indigenous/workers amendments were then submitted to the
Secretariat for inclusion in the entire packet of amendments for discussion by the Committee.

Amendments to the draft were transmitted to the Secretariat by governments and employers separately. The work was broken down into manageable sections of three to four articles at a time. In some cases amendments were discussed internally by the Secretariat and combined if there were duplications. These amendments were then submitted to the full Committee. In 1988 alone there were 284 amendments proposed to the thirty-five provisions of the draft Convention.

The time frame was much too short for real "negotiation." An Indigenous Rights Group meeting would last up to two hours and the session with the workers would be over within an hour (and oftentimes less). Simultaneously, the governments and employers were conducting their private meetings, with no indigenous participation with the exception of the few indigenous employer and government delegates. Everything moved very rapidly, providing little or no time to effectively deal with the issues in a comprehensive fashion.

Following this, amendment packages would be prepared by the Secretariat and were made available at a central desk. Delegates would pick up the packages, review them and hold a second round of private meetings to discuss how to vote on the amendments. The indigenous representatives would also re-join the workers and provide them with "fall-back" positions if the workers' amendments failed on the floor. These were to be strictly confidential positions and would not be proposed unless it became clear that a worker amendment was going to fail. Sometimes these "fall-back" positions would be variations of the worker amendments or some form of improvement on the
government or employer amendments. At times it was clear that an avalanche of amendments on a particular issue would be coming up and a series of descending strategies were developed.

Following the private caucuses, the Committee would be seated and the discussion would open. Before a new Part of the Convention would be discussed, governments, workers, employers and the indigenous rights group would make short statements concerning the upcoming articles. This was kept to a minimum. The amendments were numbered and dealt with in order of extreme: if they were major amendments they appeared first, lesser amendments were dealt with later. Again, the amendments would come up quickly in Committee and positions would be lost almost immediately, with no recourse whatsoever. The workers Vice Chair was the spokesperson for the indigenous cause and had to debate the amendments with the employer Vice Chair and governments. Decisions were made by so-called "consensus" or majority vote.

Regarding dialogue within the Committee, it was kept to a minimum and very well "dictated" by the Chair. Often he re-directed the discussion or simply chose to "not notice" someone who might speak in favor of an amendment. This made dialogue nearly impossible. At times, the Colombian or the Portuguese delegate would speak up and demand that more dialogue take place in order to draw out the real positions of other governments or to draw attention to extremely detrimental language. In part, this was done to ensure inclusion of the extremely oppressive views of some governments in the session record and also to show how governments were not being responsive to the objective of the revision process. The only way in which opposing governments had to
cease discussion was to deflect discussion. If matters were going from bad to worse (for indigenous peoples), the workers would call a recess to allow for time to lobby and re-formulate strategy. This approach was useful to a certain degree. However, it was rarely done.

Voting and how it can hurt or help

The ILO voting procedure is extremely complicated and can be used very effectively if, and once, thoroughly understood. Each tripartite delegate has one vote. The votes are weighted to ensure that the aggregate total number of votes available to each group is equal. Thus the worker and employer delegates of a state voting together on an issue may outvote their own government. In practice, the worker and employer representatives separately form highly disciplined caucuses that vote as a block. When the workers and employers agree on a point, it will automatically carry, even in the face of large-scale government objection. It can also be disastrous. If the workers and employers block each other out, the governments can decide the issue on their own.593

Here is where a new coalition that was not readily apparent in the beginning began to emerge. The employers and certain governments were collaborating on positions. It was only after a series of votes that indigenous peoples could see a pattern developing and eventually determined which governments were working with the employers. As stated earlier, it was nearly impossible to break this coalition. However, one attempt was made.

593 The votes are re-calculated each time a vote is taken because of the possible change in government participation. The composition of the Committee, in 1989, was modified five times during the session and the number of votes attributed to each member was adjusted accordingly. For example, on June 10, 1989 there were 70 members of the Committee present: 39 government members with 66 votes each; 9 employers' members with 286 votes each; and 22 workers' members with 117 votes each, see Draft Report of the Committee on Convention No. 107, June 1989.
The spokesperson for the indigenous rights group requested a meeting with the employers and was subsequently invited to one of their private caucuses. This was a major break from tradition. They had a brief opportunity to explain the positions of the indigenous peoples with respect to the lands and resources provisions, and further explained that in many cases in North America and elsewhere one could find indigenous employers, like that of the First Nations Financial Project, and certainly in Alaska there are many indigenous employers (Native regional corporations). Furthermore, it was pointed out that there are many indigenous governments recognized by States, which function like any other municipal or county government. This was followed by a question and answer period and then a general discussion about the role of the employers and their objectives in the process. Nearly everyone was convinced that the aspirations of the "subjects" of the Convention should be yielded to. The exceptions were the Vice Chair and his legal assistant. The employers applauded the effort and stated that they would be flexible and would like to hear future positions.

However, because of the entrenched position of the Vice Chair and the already developed coalition, the effort was really futile, and indigenous peoples were never invited back to brief them on other positions. Too often the employers assumed a "government role," and were not influenced in any way by the indigenous employer delegates. The indigenous employer delegates were forced to vote with the block, against the positions of indigenous peoples. Their only alternative was to simply be "absent" when a critical vote came up. In extreme cases, the indigenous employer delegates could cast a no vote or they abstained from voting. This was rarely done, however. Though it appeared useful to have indigenous peoples represented in the employer delegation, it had
little effect. In this regard, it was clear that it was highly discriminatory and unfair to stereotype indigenous peoples only as "workers," and deny the indigenous rights group representation and/or participation in the employer and government delegation meetings.

When indigenous peoples saw the possibility to win a vote on a critical issue, for example the matter of "consent," indigenous peoples requested that the workers call for a roll-call vote. This is an extremely tedious task but it can work in your favor, especially if there are some employer and government delegates out having coffee in the lounge or "absent" for one reason or another. Fortunately, the workers always made sure that they had more delegates in the room than needed, even if they had to borrow them from another Committee. This also reflected the fact that no real and meaningful negotiation took place. However, indigenous peoples were in such a weak position that anything that could be done to improve the situation was taken advantage of.

Numerous decisions were made by "consensus." People would tire or it was clear that the workers did not have the votes to carry an amendment and would yield to the majority. On some occasions, deals and/or compromises would be struck between the employers and workers during the Committee meeting. This was done over the objection of indigenous peoples -- the employers would never live up to their end of the deal. Once agreed and the issue was resolved, the Committee swiftly moved onto the next item. On two occasions the employers reneged on the agreement struck with the workers. This bred mistrust, suspicion and lack confidence.

The short time frame for revision did debilitate the negotiation process and the positions of the workers/indigenous peoples. People were tiring and frustration, impatience and anger mounted. There was never an opportunity for "cooling off."
indigenous peoples, in particular, were working around the clock even though they were not direct parties to the negotiation. They had to be a step ahead of the entire process, in addition to our work with the media. The other factor was the lack of human resources and basic necessities such as phones, typewriters, paper, copy machines, and so forth.

The workers, employers and governments had computers, phones, secretarial pools, legal advisors, and supplies made available to them within the ILO complex. The indigenous rights group was provided one office and a room to meet as a group and this had to be scheduled in advance before each proposed meeting.

In summary, the public negotiation process included the draft text, amendment process, private caucus meetings, time pressure, governments, workers, employers, indigenous rights group, non-indigenous support groups, Chairperson, consensus decision-making, voting, worker/indigenous coalition, coalition of employers and some governments, and the Secretariat.

Closed meetings: Lands and "Peoples"

There were also parallel "closed" Working Group negotiations taking place. This was the result of two dynamics. First, the governments had submitted so many amendments to the lands and resources sections that it was impossible for the Committee to review all of them in a comprehensive fashion. Therefore, the Committee decided to establish the "lands and resources" Working Group. In addition, the issue of "peoples" versus "populations" generated so many proposals that the Committee agreed to establish a smaller "peoples" Working Group. Secondly, the entire Committee had to complete its work within a 21-day period and this created a hard and fast deadline.

Indigenous peoples were not allowed in the closed working group sessions, unless you were a delegate selected by your group to participate in the closed meetings. There
were a total of fifteen working group members, five from each tripartite member. From the workers group three indigenous delegates were selected for participation in the lands and resources Working Group. The government members of the Working Group included Canada, Australia, Argentina, India and Norway. The governments and employers group provided for no indigenous delegate participation. Again, the lands and resources section was considered the "soul" of the Convention by indigenous peoples and a major objective of the revision process was to strengthen the land rights provisions.

The closed Working Group meetings also contributed to the fact that little meaningful negotiation took place. More distressing was the fact that indigenous peoples were not even observers to these meetings. This is another example of gross inadequacy of indigenous participation in a process that will directly affect indigenous lives and homelands. For indigenous peoples to have little or no access to these critical negotiations resulted in provisions that are more favorable to governments than to the "beneficiaries" of the Convention.

Because of the actors involved, the Working Group negotiations skewed the outcome of the text. The governments involved in the lands and resources working group were clearly those who took a leadership role in diminishing indigenous rights, in particular, India and Canada.


595 The Government of Canada played a lead role throughout the entire two-year revision process. They worked in the interim period, between the 75th session and the 76th session, lining up governments to support their positions on lands and resources and the issue of "peoples." They also actively spoke out against the "collective rights" aspects of Convention 107 at the U.N. Working Group on Indigenous Peoples 1987 and 1988 sessions. They made numerous interventions during the Committee meetings that targeted key provisions of the text and more specifically, they led the fight on the issue of "peoples" in the 1989 Committee meetings.
As already discussed, the working group on "peoples/populations" was comprised of even fewer delegates and there is no record of the formal creation of this working group because of its eventual demise due to the flurry of "corridor" negotiations and the vast numbers of proposals to limit the term "peoples" in the Convention. The closed working group negotiations differed greatly from the public negotiation process within the Committee: limited number of key delegates involved (five each on lands and resources, 2 each on peoples), no independent indigenous involvement, and reliance upon and influenced exerted by the Secretariat and Legal Advisor, little communication with the rest of the Committee until the final draft was completed, and finally, only specific articles were being re-drafted and this led to taking some of the provisions out of context.

Back to center stage

The Working Group on lands and resources reported to the full Committee and discussion ensued. It was clear that the Working Group itself could not accommodate the diverse views of the governments and the result was no consensus on the entire chapter dealing with lands and resources. In addition, the issue of "peoples" and "populations" achieved no consensus and left the Secretariat in a peculiar state of indecision. The final decision, as suggested by the Secretariat, was to draft text of the Convention with the terms "peoples/populations" in parenthesis and italicized throughout. It is ironic that these two decisions about lack of consensus were made by consensus.

Throughout both of these discussions, governments and employers wanted the indigenous peoples present to compromise, similar to the arguments by states in the CHRGW, states attempted to portray indigenous peoples as intransigent and unwilling to
compromise. Yet, never once did they compromise, give in or put themselves in the
shoes of indigenous peoples. Governments would change the wording on a particular
article, come back and say to indigenous peoples "look we've budged and you haven’t."
Indigenous peoples would read their changes and the language would have the same
intent or sometimes would be worse than the original language. Regarding
communication, governments always spoke in terms of fear and they focused on
indigenous positions. They never spoke about their own interests, motives or positions --
they always elaborated upon the interests and positions of indigenous peoples and how
such wording would create problems for them.

The final report of the Committee (1988), prepared by the Rapporteur, did not
include the entire lands and resources (Articles 13-19) section and contained the
ambiguous use of the terms "peoples/populations." As soon as the draft was issued,
government representatives proceeded to amend it extensively. This was an exercise in
the re-writing of government statements regarding their national policies in order to
ensure that the formal record would not characterize them as being negative or
oppressive. The governments of India and Japan submitted the most extensive re-writes
of their interventions.

The role of the media

The indigenous rights group, though few in numbers, was always active with the
media in order to apply pressure on the governments. They intended to show the "people
at home" what was really happening and what their governments really represented. This
was very effective, and especially in the case of Canada, who was took a hard-line
approach to the lands and resources provisions and the "peoples" issue. Nearly every day
indigenous peoples would issue a press release about the positions taken by governments,
with quotes from indigenous peoples from all regions of the world to illustrate the impact that Canada was having on indigenous peoples everywhere (and not simply in Canada). The releases were faxed out to press worldwide and others at home would fax the printed stories back for distribution at the Conference. After several press releases, journalist became curious about what was happening at the ILO and started coming over from the U.N. Press Agency in Geneva and the local papers. Also, indigenous peoples held a couple of successful "meetings with the press" at the U.N. Press Agency. The government of Canada would see the articles and immediately go into private caucus on how to proceed. It created the illusion that the whole world was watching and therefore, governments had better be careful about their votes, decisions and positions. Even more dramatic was the response of indigenous peoples who could not attend the session but commented for the press at home about how such positions could harm them and their way of life. This provided for immediate application of government positions to real life situations that no one could ignore.

Unfortunately, it worked in the reverse on the Japanese government delegates. They had resisted open confrontation with the Ainu Association of Hokkaido, however, once they saw the press clippings that were being printed in Japanese newspapers they became more entrenched in their positions and would proceed to confront the Ainu openly in their remarks to the Committee. This was then met with aggressive attacks by the Ainu observers and it went back and forth for some time. However, overall the media and the pressure generated by the series of articles greatly assisted indigenous peoples in the already asymmetrical conditions.

The plenary stage
The indigenous rights group was also able to make a presentation to the full plenary of the International Labor Conference. This was another opportunity to apply political pressure and call upon delegates present to discuss these issues. Some of the more sensitive delegates were able to persuade their colleagues to scale back their attack on indigenous rights. This did not happen often but when it did, it was useful. It also caught the attention of those who knew about indigenous human rights issues and they would subsequently appear at the Committee meetings to observe or to directly participate. Thus, the plenary presentations created their own political pressure.

Following the close of the 75th Session, the Secretariat started the process all over again for the second and final discussion. The first task was the re-draft of the text based upon the 1988 report. Here liberties were taken by the Secretariat in the interpretation of the report, which tended to lean towards the views of governments. Governments were again invited to provide the Secretariat with any amendments or comments after consultation. In addition, they were encouraged to consult with indigenous peoples. Though this was not a formal request on the part of the Secretariat, it did help in the consultation process and to some extent this changed the role of indigenous peoples and indigenous NGO's in the revision process. Following the receipt of comments from governments, the Secretariat published Report IV (2A) and Report IV (2B). Report IV

\[596\] In addition to the work of indigenous NGO's to raise awareness of the revision process, indigenous peoples in Canada organized the "Indigenous Peoples' Working Group" (IPWG), specifically to deal with the ILO Convention revision process. Throughout the course of 1988 and 1989, the IPWG actively met and discussed the provisions of Convention 107, all the draft texts put out by the ILO, and they also held meetings directly with government representatives in Canada. This was an intensive effort involving the Assembly of First Nations, Assembly of Manitoba Chiefs, Federation of Saskatchewan Indian Nations, Four Nations of Hobbema, Grand Council of the Crees (Quebec), Indian Association of Alberta, Inuit Circumpolar Conference, Indigenous Bar Association, Inuit Tapirisat of Canada, Metis National Council, Native Council of Canada, Native Women's Association of Canada, and Prairie Treaty Nations Alliance.
(2A) was the proposed new text and (2B) included the comments of governments, workers, employers and indigenous peoples. Again, this is a significant development -- the Secretariat included indigenous comments and amendments in the official report of the Office. These developments were not done out of kindness. They were the result of persistent efforts, on the part of indigenous NGO's to state their grave concern about lack of indigenous participation in the process. These statements were made in the Committee, in the Plenary session, in the press, at the U.N. Working Group on Indigenous peoples, and at home. With this small but important change, the 1989 Revision Process began.

**The second and final act**

As stated above, the Committee selected the government delegate of Bolivia as Chair (and once again, the government of Bolivia was up for violations of Convention 107). The government of Canada made a statement about their faith and full confidence in the Bolivian delegate and the importance of continuity and consistency. This comment was echoed by a number of other Latin American governments as well. Most indigenous peoples in the room knew that the governments were preparing to play hardball.

Because of organizing efforts on the part of indigenous NGO's there were several more indigenous participants in 1989 than appeared in 1988. There was also a greater number of direct participants in the process. Because of the lack of direct participation in the process, several international indigenous NGO’s organized the "Coordinator for Indigenous Peoples’ Rights,” which included the National Indian Youth Council, Indian Law Resource Center, Inuit Circumpolar Conference, National Aboriginal Islanders and Legal Services, Cordillera Peoples’ Alliance, and the Grupo Coordinadora de la Cuenca Amazonica. The Coordinator conducted fundraising activities, a comprehensive legal review of the Convention, and was admitted to the ILO Special List of NGO’s, allowing any indigenous person attending the sessions to be given credentials to participate. The Coordinator continued its work with indigenous peoples in the area of communications and coordination. They also completed a review of Convention 169 and addressed it at the Indigenous Peoples’ Preparatory Meeting in July 1990, and the U.N. Working Group on Indigenous Peoples.
sense of unity throughout the session. The majority of indigenous representatives there
realized that if we don't act in unison, substantial losses would occur. The WCIP
representatives (who were not cooperating) were neutralized by the fact that there were
more grassroots leaders present. Indigenous peoples also felt that they had partially
achieved the goal of being more directly involved in the process and furthermore,
because of the 1988 proceedings they would be taken seriously by governments and
employers.

The same amendment process was put in place and the "coalition" meetings of the
workers and indigenous peoples began almost immediately. Most of the delegates were
the same participants as the previous year, with a few minor changes. Everyone knew
that cooperation and time were critical and pledged to work as efficiently as possible.
The worker/indigenous coalition developed in the 1988 session made the 1989 session
run much more smoothly. Where trust and confidence was built, it remained.

The lead role: The Lands and Resources Working Group
From the outset, the Committee realized that the lands and resources section
would be attacked from all sides and they immediately set up a working group to once
again deal with the many amendments. However, because of the time limit and the fact
this was the final discussion on the matter, the Working Group was instructed by the
Chair to negotiate a "package deal" that would be responsive to all the amendments
tabled by governments, workers and employers. This tended to "lock in" all parties. All
were determined to see that their positions went into the package deal. The same issues
emerged: ownership of lands and resources, surface and sub-surface resources, consent, and so forth.

The "peoples/populations" issue had to be resolved this time around also. The result of this debate was covered in the main body of this thesis. Regarding the all-important lands and resources section, it was likely the most painful part of the process. The workers would come to the indigenous rights group with draft texts of the package deal. They would counsel them on what was non-negotiable. They would meet again, and the text would be even worse. The worker delegates involved were not quick on their feet and did not have any legal experience whatsoever. This also reflected their poor bargaining position in the process. Indigenous peoples had no access to the private working group and were only seeing the results of the so-called "bargaining." Not knowing exactly what was happening behind closed doors and only hearing second-hand from worker delegates who were present in the negotiation, was nearly an impossible position for indigenous peoples to be in. In this step-by-step process, tempers began to get out of hand and the workers realized their weak position and began to turn on the other half of the coalition: the indigenous rights group. The workers did not want to take responsibility for the low standards being established by the "package deal" process and they were looking for scapegoats. When the ultimate worst text surfaced, the workers held a caucus and invited two indigenous representatives in to hear the opinion of the Secretariat on the lands issue. This was their way of legitimizing their position on the "package deal." This is also another example of how the Secretariat was used in a situation where they were not impartial nor objective.

Possible walk-out
Simultaneously, indigenous peoples were working the press and doing all that they could to effect changes on the "package deal" negotiations. They were temporarily able to convince the workers that they didn't have to go along with the package deal and requested that they discuss the possibility of a "walk-out." The indigenous rights group had already agreed to walk-out after making a statement on lands and resources. They did so and it had a dramatic effect on the governments and employers who suddenly became silent and started to re-group. The workers explained that a walk-out at an ILO Conference is a major decision, unlike walking out of labor negotiations but they were willing to discuss the matter. They then held a private "workers only" caucus. Somehow word got out that the workers may walk-out or threaten a walk-out from the Committee, and if so, no revised Convention would be adopted and a third year would have to be scheduled. Here again, this is highly unusual within the ILO system. Other worker delegates attending other Committees heard the rumor and came over to the worker caucus to express their solidarity. The governments and employers got even more nervous and they began to re-consider their positions and wonder if they ought to be a little more reasonable.

The workers decided that they could not walk out and the Workers' Vice Chair requested a private meeting with an Indigenous Rights Group representative. He proceeded to berate the Indigenous Rights Group and those legal advisors working with them, and blamed the indigenous peoples for the condition of the lands and resources section. He further stated that the workers have unanimously decided against a walk out and did not want to discuss the matter any further. This was unexpected. It was then clear that the Vice Chair could not handle the pressure of being the sole spokesperson for
the workers and could not handle being saddled with the responsibility of negotiating on behalf of the workers. Later, it was learned that the no walk-out decision was not unanimous and in fact, there was quite a bit of support for the idea. Just the discussion of a walk-out had quite an effect on the governments and employers but it was much too late for the working group to re-open the package deal text. The walk-out by indigenous peoples had minimal effect.

Closing act

The Chair then decided that the Committee had better vote on the package deal before anything else happened. Over the objection of the Indigenous Rights Group it was adopted, but not by a large majority. The Committee then also adopted the language on the term "peoples." This was immediately followed by government statements and reservations about Article 1(3). These closing moments of the Committee were the most telling about the interests and motives of governments. For example, the government of Brazil stated that they went along with the package deal because of the "consensus" and pressure to complete the revision process, however, they don't believe that indigenous peoples should ever own land, and certainly not subsurface resources.

So little time was left for the remainder of the Convention articles. Therefore, no negotiation whatsoever took place after the adoption of the so-called "package deal" (Articles 13-19). This left no real discussion on the merits of Articles 20-35, some of which were important to the interpretation of the overall Convention as they are the General Provisions contained in Articles 33 and 34.

The game was not completely over though. The International Labor Conference as a whole then had to adopt the revised Convention. Though it would be difficult to
persuade such a large and varied audience, the indigenous peoples speech to the plenary had to be carefully crafted to be useful. The indigenous rights group also lined up other worker delegates to make presentations at the plenary, and the effect was positive but again not quite enough. The Plenary narrowly adopted the Convention.

**Revision procedures and their relevance to the OAS and UN drafting processes**

Regarding representation, governments, employers and workers should have done more to ensure the participation of delegates who are knowledgeable about the issues and are prepared to take on the task of high-pressure, fast-moving negotiations. The delegates should not simply come from the local Foreign Office or Embassy -- more thought must be given to selection. The issue of indigenous participation is critical in any forum wherein the rights of indigenous peoples are being addressed. There is obviously room for direct, full and meaningful participation by indigenous peoples in these important forums. However, the lesson of all three processes of the ILO, OAS and the UN is that the matter should be formalized and unequivocal. It is clear that indigenous peoples have made some headway. However, more can be done to further genuine participation.

Within the ILO, the matter of selecting the Chairperson for the proceedings, as stated earlier, was a critical factor in how the Committee proceeded. In other settings, there should be greater care taken with regard to this issue. Governments who violate the rights of indigenous peoples should not be able to serve as Chairpersons. Governments may be hard pressed to find such representatives. However, what took place within the Committee on Convention 107 is unethical and should be disallowed. At the ILO, the Chairperson openly favored governments and employers. There was little objectivity
shown. The workers, on a number of occasions, called attention to this fact only to be met with a dismissal of their concern.

Formal closed working groups should be also be disallowed. This had a significant impact on the process and caused pressure where it could have been avoided. Unfortunately, the same practice is being utilized at the UN, with states holding closed meetings to discuss and agree upon amendments to furnish to the CHR working group. At the UN, indigenous peoples strongly criticized this new development, with little response or affect.

Consensus negotiation, in the case of the ILO, had its pros and cons. The parties never had to state their positions, therefore, it was hard to know why positions were being taken because there was never any full discussion of the issues. It also resulted in a lack of accommodation of the views present. Because decisions were being taken by consensus all appeared to be well-rounded, however, in reality they were not well-rounded and only reflective of one political extreme or another. Employer and government self-interests prevailed over urgent and critical indigenous rights and concerns. The same is becoming the case in the UN process. The notion of consensus is being built around the worst or most extreme position, causing even governments who support indigenous peoples, and who have already agreed to the draft Declaration as worded, to entertain alternative proposals.

Clearly, package deal negotiations are extremely dangerous and do not allow for comprehensive discussion on all the dimensions of a particular article or right.

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Hopefully, such an approach is never used in the OAS or UN context. This approach is also indicative of the dangers of placing time constraints on the drafting of important standards. Within the UN, the government of Mexico and few others have made an issue of the slow moving standard setting and remarked that the close of the International Decade is fast approaching. However, most indigenous peoples or states feel the need to move with any haste. In fact, the more time in dialogue and debate has furthered understanding rather than stifled it. If all the stakeholders do not have the luxury of time, everyone can plan on losing something, unless you know that you have the upper hand. And, in the case of both OAS and the UN, the governments may have the upper hand. The issues and articles should be dealt with one by one, giving them the attention they deserve.

Also, the Secretariat or in the case of the ILO, the Legal Advisor should be completely impartial in the proceedings. Though this has never been raised formally in the UN or the OAS, such a matter must be discussed and agreed upon as a basic principle before any dialogue or negotiations begin. At the ILO, everyone assumed that this would be the case and did not explicitly state the need for objectivity on the part of the Secretariat. The discussion of fair and equitable standards and procedures, at the international level or anywhere else, should not be taken for granted.

**Conclusion**

As stated above, for those States who have ratified the 1957 Convention (No. 107), it remains in force until they ratify Convention 169. They could chose not to and allow the "old" Convention 107, to remain in force. Ratifications for Convention 169 now stands at 14. As mentioned in the thesis, the Committee and the Plenary Conference also adopted a resolution aimed at assisting adequate input of indigenous peoples in
supervising, monitoring and implementing the new Convention. Additionally, the facilitation of access of indigenous peoples to supervisory and complaint mechanisms could be a useful future measure. The latter two initiatives have not been discussed to date within either the UN or the OAS but are equally relevant in both contexts. It may be that the exercise of revising Convention 107 will be a useful guide for the remaining work of uplifting indigenous human rights standards at both the UN and the OAS in a fashion that is fair, equitable and objective.

599 Resolution on ILO Action Concerning Indigenous and Tribal Peoples", Provisional Record No. 25 (June 1989), 32-33, para. 3, 4[b] and [c], 5, 6[b] and [e], and also Convention 169, (1989), Article 33[2]).