

15 UCLA J. Int'l L. & Foreign Aff. 1

**UCLA Journal of International Law and Foreign Affairs**  
**Spring 2010**

Article

**THE LAW OF SELF-DETERMINATION AND THE UNITED NATIONS DECLARATION ON THE RIGHTS OF  
INDIGENOUS PEOPLES**

[Robert T. Coulter<sup>1</sup>](#)

Copyright (c) 2010 Regents of the University of California; Robert T. Coulter

**Abstract**

The recognition of the right of self-determination in the Declaration on the Rights of Indigenous Peoples, adopted by the UN in 2007, is probably the most important development in the law of self-determination since the era of decolonization. The right of self-determination in the Declaration is the crystallization of a new right for indigenous peoples as distinct peoples within states, not merely the right to participate in the political life of the country as part of the whole people of the state. The Declaration also reaffirms for indigenous peoples the right of self-determination contained in common Article 1 of the Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights. This article summarizes the international law concerning the right of self-determination at the time the Declaration was adopted and discusses the development and content of \*2 that right in the Declaration. This article is based on the author's personal observations and notes of the debates over the course of thirty years as well as the written records of the drafting and debate of the Declaration.

**Table of Contents**

<a href="#">Introduction</a>	<a href="#">2</a>
<a href="#">I. A Summary of International Law on the Right of Self-Determination Before Adoption of the Declaration</a>	<a href="#">4</a>
<a href="#">A. Customary International Law</a>	<a href="#">5</a>
<a href="#">B. Treaty Law</a>	<a href="#">11</a>
<a href="#">II. The Right of Self-Determination in the UN Declaration and the debates in the United Nations</a>	<a href="#">12</a>
<a href="#">III. What will be the effect of the Declaration in regard to self-determination?</a>	<a href="#">26</a>

**Introduction**

The right of self-determination for indigenous peoples within states is perhaps the most important right included in the Declaration on the Rights of Indigenous Peoples adopted by the United Nations in 2007. President Obama announced the support of the United States for the Declaration on December 16, 2010.<sup>2</sup> The recognition of the right of self-determination in the Declaration is a breakthrough of great importance in the law of self-determination, probably the most important development of the right since the era of decolonization. It does not, of course, include a right of secession. The Declaration not only reaffirms for indigenous peoples the right of self-determination contained in common Article 1 of the Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights, but it also for the first time recognizes a new and more extensive right of self-determination for indigenous peoples located within states. The Declaration also includes provisions on land rights, treaty rights, environmental rights, rights to be free from discrimination and genocide, and many other specific rights. The purpose of this article is to summarize the international law concerning the right of self-determination at the time the Declaration was adopted and to discuss the meaning and content of that right in the Declaration.

**\*3** The right of self-determination was and still is centrally important to indigenous peoples, because it is essential to the preservation and well-being of indigenous cultures and societies and is necessary for the enjoyment of all other human rights. When we first proposed to the United Nations in 1977 that indigenous peoples should have the right of self-determination and a host of other specific rights in international law, we were told in the strongest terms by the old hands in Geneva that we must not demand self-determination. As the Declaration was drafted and debated in the United Nations, the member states gradually began to recognize that the right of self-determination for indigenous peoples as distinct peoples within states is supported not only by principles of customary international law, but also the widespread and growing practice of states recognizing various forms of self-determination, self-government, and autonomy by indigenous peoples.<sup>3</sup>

The Declaration was created as an official document in the UN system by the Working Group on Indigenous Populations, under the purview of the Sub-Commission on the Protection and Promotion of Human Rights.<sup>4</sup> After years of drafting and discussion in the Working Group--with the participation of thousands of indigenous representatives from all over the world--the draft Declaration was adopted by the Sub-Commission in 1994 and referred to the UN Commission on Human Rights.<sup>5</sup> The Commission created a working group in 1995<sup>6</sup> and considered the Declaration until the Commission was terminated in 2006, when the Commission referred the draft to the new Human Rights Council. The Council adopted the Declaration by vote as one of its first actions in 2006.<sup>7</sup>

This article will identify, as far as possible, the content of the right of self-determination in the Declaration, based on the records of the drafting **\*4** and debate of the Declaration in the United Nations over the course of 30 years, as well as the author's personal observations and notes of the debates. The author had the privilege of participating in and observing the drafting and debates from 1977 until the Declaration's adoption in 2007.

### **I. A Summary of International Law on the Right of Self-Determination Before Adoption of the Declaration**

To better understand the meaning and content of the right of self-determination in the Declaration, it is helpful to review the law of self-determination prior to the adoption of the Declaration. What follows here is only the briefest summary of the law and is by no means a complete analysis of the subject.<sup>8</sup>

The general principle or concept of self-determination is usually said to have originated in the period after World War I in the pronouncements of, among others, US President Woodrow Wilson.<sup>9</sup> US President Franklin Roosevelt and Winston Churchill later adopted the idea in framing what would become the Charter of the United Nations.<sup>10</sup> The principle of self-determination-- that countries must respect the wishes and aspirations of peoples and nations-- has often raised concerns for countries, especially about secession and political instability. Because of these concerns, the principle of self-determination has always been sharply limited as a matter of law by states, which control the domain of international law.

The term "self-determination" is used, as a general political matter, to mean many different things in different settings. As a political term or concept, it means, among other things, the following:<sup>11</sup>

Where territorial changes are made among countries, it means that the population concerned should have a right to decide democratically which country to belong to.

**\*5** It is also a general political principle that the people of every country should have the right to freely choose their rulers and their form of government.

It is a principle calling for the independence of peoples and territories that were subject to colonial rule.

It is also a principle forbidding the military invasion and occupation of foreign territories.

Finally, it is a political principle, but not a rule of international law, calling for the right of ethnic minorities, linguistic and national minorities, and other groups and peoples within countries to be permitted to freely choose their political status both internally and externally, that is, internationally, including the right to secede.

Much confusion has resulted from the fact that these meanings or concepts are not all reflected in present international law. International law is much more limited, as is the right of self-determination, as set out in the Declaration on the Rights of Indigenous Peoples.

### **A. Customary International Law**

The present international law of self-determination includes components of both customary law and treaty law. Customary international law is usually defined as the general practice of states which is regarded by states as obligatory or legally binding.<sup>12</sup> The customary law of self-determination arose mainly after the close of World War II when certain countries called for the dismantling of colonial empires and for the independence of colonies and other non-self-governing territories.

The customary law of self-determination is set forth primarily in three UN General Assembly resolutions: (1) the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>13</sup> (2) the 1960 \*7 Resolution 1541 (XV),<sup>14</sup> and (3) the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations.<sup>15</sup> These \*8 resolutions spell out in some detail the rules regarding self-determination for colonial peoples and peoples of non-self-governing territories, not for peoples within existing countries. In addition, the United Nations later created rules to account for the extraordinary situations that existed in Rhodesia and southern Africa, and in the occupied territories of the West Bank and Gaza Strip following the Six-Day War.<sup>16</sup> The customary international law of self-determination is comprised of relatively few basic rules:<sup>17</sup>

\*9 1. Peoples in colonial territories are entitled to freely determine their political status, including complete independence, and to control their own lands and natural resources.

2. This right is held by the whole people of the territory and does not include the right to alter the colonial boundaries. This rule follows the principle known as *uti possidetis*:<sup>18</sup> boundaries are to remain as they are at present, not altered or returned to some prior condition, this latter being referred to somewhat inaccurately as *status quo ante bellum*.

3. The whole people of a state or territory has the right to be free from alien or foreign military occupation.

4. A distinct people or racial group subjected to extreme forms of oppression or denial of effective political participation or access to government may be entitled to internal self-determination, that is, access to and participation in government.

5. Except for peoples of colonial and non-self-governing territories, the right of self-determination does not include a right to independence, that is, a right to separate statehood.

Virtually every pronouncement of the right of self-determination in United Nations resolutions and declarations has been expressly limited by the principle of territorial integrity.<sup>19</sup> The 1960 Declaration on the Granting of Independence to Colonial Peoples contains the following language in paragraph 6:

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.<sup>20</sup> The 1970 General Assembly resolution noted above also contains powerful limiting provisions in its final two paragraphs reaffirming the rule of territorial integrity:<sup>21</sup>

\*10 Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour.

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

One of the more recent expressions of the right to self-determination in a major declaration was in the Vienna Declaration and Program of Action adopted at the World Conference on Human Rights in 1993. Article 2 of the Vienna Declaration is a forceful statement of the right of self-determination that is followed by an equally forceful statement of the rule of territorial integrity.<sup>22</sup>

\*11 It is important to keep in mind the dynamic nature of customary international law. New rules are evolving and crystallizing into new customary norms as states recognize self-determination claims. This is taking place in regard to indigenous peoples, as many countries in all parts of the world accord various forms of self-government or autonomy to indigenous peoples.<sup>23</sup> The debates on the draft Declaration on the Rights of Indigenous Peoples in the working group of the Human Rights Commission demonstrated that almost no countries opposed the right of self-determination for indigenous peoples, but debate focused instead on the precise content and limits of that right.<sup>24</sup>

## B. Treaty Law

Treaty law concerning the right of self-determination is embodied in Article 1 of the Covenant on Civil and Political Rights and the identical Article 1 of the Covenant on Economic, Social, and Cultural Rights.<sup>25</sup> These two covenants have been almost universally ratified. Surprisingly, the right of the whole people of a state to freely choose its form of government and rulers is not clearly established as a norm of customary international law, but established by common Article 1 of the Covenants. Common Article 1 of the Covenants states:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self- \*12 determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Common Article 1 established for the first time the right of the whole people of each ratifying state to freely choose their rulers and form of government, as well as the right to be free from interference or occupation by other states.<sup>26</sup> The second paragraph of the Article establishes the right to control and benefit from natural resources, extending the right of self-determination to the economic realm.

The history of the negotiation of the articles and the text of the articles themselves make it clear that the phrase “All peoples” in Article 1 does not mean that the right of self-determination is accorded to indigenous peoples, racial and ethnic minorities, or nationalities within existing states.<sup>27</sup> The right as agreed upon in the Covenants applies only to the whole people of a state, former colony, or non-self-governing territory. The principle of territorial integrity has continued to be observed.

## II. The Right of Self-Determination in the UN Declaration and the Debates in the United Nations

In the UN Declaration on the Rights of Indigenous Peoples as adopted by the General Assembly in 2007,<sup>28</sup> the right of self-determination is proclaimed for indigenous peoples in Article 3 in virtually the same language<sup>29</sup> as that used in common Article 1 of the Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights:

- \*13 3. Indigenous 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.<sup>30</sup>

There is no formal or comprehensive definition of “self-determination” in the Declaration. In terms of what was not understood to be included, it is significant, however, that practically no indigenous representatives in the negotiations on the Declaration have spoken explicitly of a right to secede from an existing country.<sup>31</sup> The content of the right can to some extent be inferred from many other articles in the Declaration that provide for decision-making by indigenous peoples and control over their own property and affairs.

Many other provisions in the Declaration refer to aspects of the right of self-determination or recognize particular rights that are a part of the right of self-determination. For example: preambular paragraphs 16 and 17 acknowledge that the right of self-determination is affirmed in other international instruments, including the UN Charter, the Covenants, and the Vienna Declaration, and that nothing in the Declaration may be used to deny that right, exercised in conformity with international law;<sup>32</sup> Article 14: the right of indigenous peoples to establish and control their own educational \*14 systems;<sup>33</sup> Article 16: the right to establish their own media; Article 18: the right to participate in decision-making affecting them and to develop and maintain their own decision-making institutions;<sup>34</sup> Article 19: the right of consultation and consent through their own representative institutions;<sup>35</sup> Article 23: the right to determine and develop priorities and strategies for exercising their right to development;<sup>36</sup> Article 26: the right to own, use, develop and control the land, territories, and resources they possess;<sup>37</sup> Article \*15 27: the obligation of states to recognize indigenous laws, traditions, customs, and land tenure systems in adjudicating and recognizing indigenous lands and resources;<sup>38</sup> Article 32: the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources;<sup>39</sup> Article 33: the right to determine their own identity or membership and to determine the structures and to select the membership of their institutions;<sup>40</sup> Article 37: the right to recognition and enforcement of \*16 treaties made with indigenous peoples;<sup>41</sup> Article 40: the obligation of states to give due consideration to the customs, traditions, rules, and legal systems of the indigenous peoples concerned.<sup>42</sup>

Taking account of all these specific provisions in the Declaration, all relating to aspects of the right of self-determination, let us summarize the content of the right of self-determination. The right includes: the right of an indigenous people to form and change a government for itself; the right to determine the relationship of that government to the state (within certain limits); the right to make and enforce laws to govern their own affairs; the right to exist and act as a collective body politic within the state and to participate in the international community; the right to engage in political and economic relations with others; the right to control, use and benefit from its lands and resources; and many other specific rights as well. This summary is by no means a comprehensive enumeration of what is included in the right of self-determination. No such definition is possible either for indigenous peoples or for other peoples of the world. The acceptance by most states of all these specific provisions shows that there was broad understanding that the right of self-determination was an extensive right to be exercised by indigenous peoples on their own behalf and not merely as part of the whole people of the state. These provisions describe a wide range of possible choices or options for indigenous peoples that they may exercise depending on their desires and circumstances.

**\*17** Some states in the negotiations on the Declaration expressed the desire that the right of self-determination should be limited principally to the right of autonomy stated in Article 4, but no such limitation was ever agreed upon or included in the text of the Declaration. As a result, the general right of self-determination declared in Article 3 is considerably more extensive than the autonomy provided for in Article 4, and the express provisions of the articles discussed above confirm this understanding of the scope of the right in Article 3. Indeed, the general right of self-determination creates a limit on states' authority to restrict by legislation the right of autonomy or any other of the elements of the right of self-determination, especially those stated in other articles.

The rule of territorial integrity is explicitly stated in the Declaration in Article 46. The reference to territorial integrity was added in the General Assembly to reassure some states that the right of self-determination does not include a right to secede. It does not change international law on this point,<sup>43</sup> as we have discussed above, but is simply intended to clarify the right of self-determination.

Article 46. 1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or 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.

All of these provisions in the text of the Declaration compel the inference that the right of self-determination in the Declaration is the crystallization or emergence of a new right for indigenous peoples as distinct peoples within states, not merely the right to participate in the political life of the country as part of the whole people of the state. Not surprisingly, the deliberations of states in the Working Group of the UN Human Rights Commission reflect the same understanding--namely that the right of self-determination for indigenous peoples within states is a distinct new right that is far more extensive than the right contained in common Article 1 of the Covenants.

**\*18** The right of self-determination was discussed and debated by states and by indigenous participants from the time that the declaration was proposed in 1977,<sup>44</sup> but the crucial and definitive discussions took place in the Working Group of the Human Rights Commission in 2004, 2005, and 2006.<sup>45</sup> It was in these meetings during the final three years of discussions that states gave the most thorough consideration to the issues and reached a broad understanding about the right of self-determination in the Declaration and the right of self-determination expressed in the Covenants. Over the 30 years during which the Declaration was under consideration, the views of states on self-determination for indigenous peoples evolved enormously from rejection and disbelief to widely shared understanding, acceptance, and affirmative support.

In the 1982 Working Group on Indigenous Populations, created by the Sub-Commission on the Elimination of Discrimination and Protection of Minorities,<sup>46</sup> as it was then named, states for the most part expressed their opposition to the idea of self-determination for indigenous peoples located within states, but this working group of human rights experts nevertheless drafted the declaration with the right of self-determination expressed just as it would remain in the final text.<sup>47</sup> After the draft declaration was approved by the Sub-Commission in 1994 and after years of consideration in the Human Rights Commission's Working Group on the Draft Declaration, states' views evolved enormously. By 2002 and even earlier, a substantial **\*19** number of countries from many parts of the world stated a willingness to recognize the right of self-determination for indigenous peoples within countries, provided that the right did not impair the territorial integrity of these countries. This growing group of countries said, in many different and sometimes vague terms, that they could accept



the language of self-determination in the draft, but not the right of indigenous peoples or other peoples within states to secede or create an independent state. This was perhaps the first time that a substantial number of states had expressed a willingness to recognize a right of self-determination for any distinct peoples or groups within states.

The position stated by the government of Guatemala in the UN Human Rights Commission Working Group on the Draft Declaration in 2000<sup>48</sup> was one example of the general position of this growing group of states. The statement read, in part, as follows:

In respect to self-determination, we do not believe it is necessary to redefine it, to limit its meaning, or to restrict its internal and external dimensions. The right of self-determination is an individual and collective human right. By virtue of its exercise, states are born and disappear, and within states it is made up of various forms of autonomy. . . . Likewise, within states, the exercise of self-determination permits peoples and national groups to determine, within these states, their condition and political status through a process of decentralization and autonomy and permits them to participate effectively in decision-making about their economic, social, and cultural development. (Unofficial translation.)

Other countries that took more or less similar positions favoring a right of self-determination, but without a right of secession for indigenous peoples within countries included Mexico, Brazil, Peru, Ecuador, Cuba, Colombia, Chile, Bolivia, Argentina, Venezuela, Canada, United States, Denmark, Norway, France, Spain, Russian Federation, Finland, Pakistan, Philippines, New Zealand, and Switzerland.<sup>49</sup>

**\*20** Of this group, Canada stated its position in greater detail than most. At the Commission on Human Rights Working Group on the Draft Declaration in 1996, Canada made the following statement:<sup>50</sup>

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.

Canada reiterated its position at the Commission Working Group in 2000 and in the Organization of American States in 2002.<sup>51</sup> As discussed below, Canada would later try to limit the right of self-determination by tying it to the right of self-determination as recognized in common Article 1 of the Covenants.

**\*21** The United States was the other country in the group that took a detailed position on this issue, and again, issues were raised about the exact scope of the right. The United States' detailed position regarding indigenous people's right to self-determination, within the context of the UN and OAS draft declarations, was stated with some precision in January 2001.<sup>52</sup> This position remained the policy of the United States. Key excerpts follow:

3. The US delegation should support use of the term "internal self-determination" in both the UN and OAS declarations on Indigenous Rights, defined as follows:

"Indigenous Peoples have the right to internal self-determination. By virtue of that right, they may negotiate their political status within the framework of the existing nation-state and are free to pursue their economic, social, and cultural development. Indigenous Peoples, in exercising their right of internal self-determination, have the internal right to autonomy or self-government in matters relating to their local affairs, including determination of membership, culture, language, religion, education, information, media, health, housing, employment, social welfare, maintenance of community safety, family relations, economic activities, lands and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous activities."

. . .

In an effort to harmonize U.S. domestic and foreign policy on the right of self-determination for indigenous groups, we have

considered the views of our indigenous representatives, other governments, and scholars, including the views that 1) Self-determination is an evolving concept, 2) Self-determination includes both external and internal aspects and the latter would apply to groups within existing States, 3) Self-determination is limited by the principle of territorial integrity and, therefore, must be exercised within the existing States, 4) Self-determination as articulated in the Draft Declaration is specifically limited by Article 48 (Article 26) protecting the territorial integrity of existing nation states.

Although self-determination may be an evolving concept under international law and although the Draft Declaration may contain limitations on the exercise of self-determination, to protect the territorial integrity of the existing State [s], it is the position of the \*22 United States that the Draft Declaration should be more explicit with regard to the civil and political rights enjoyed by indigenous peoples. Thus, the United States would be able to endorse the concept of self-determination in the Declaration if the Declaration itself specifically characterized the right as one of “internal self-determination.”

The United States’ position on self-determination was also laid out in a statement to the OAS working group on the draft American Declaration on March 14, 2002.<sup>53</sup> The US proposal found little support from other states and was not included in the text of the declaration.

Thus, it was clear by 2002 that despite the obvious differences in details and wording, the states, such as the United States, Guatemala, and Canada, were supporting for the first time in an international declaration a distinct right of self-determination for indigenous peoples within existing states. Not only was there growing acceptance of this position by states in the UN and OAS,<sup>54</sup> but also state practice around the world had in these years \*24 increasingly included creating or recognizing various regimes of autonomy or self-government for indigenous peoples.<sup>55</sup>

The content or meaning of the right of self-determination became an issue in the UN Working Group when Canada began to state that the right of self-determination, in its view, was to be understood as it is in common Article 1 of the Covenants, that is, a right to participate in the governance of the state as a part of the whole people of the state. Canada stated this view repeatedly, and even opined that at least some First Nations in Canada might not, in fact, constitute peoples within the meaning of international law. Canada sought to limit the meaning of self-determination for indigenous peoples to the right as it existed in common Article 1 of the Covenants and thus avoid any extension of the right for distinct peoples within countries. This sentiment resulted in the addition of a provision in preambular paragraph 16 that the “right of self-determination” would be exercised within the limits of international law. Canada’s view was not, however, embraced by a substantial number of other states, at least not in statements in the Working Group.

Eventually, in 2005, the issue was resolved by acknowledging in preambular paragraphs 16 and 17 that indigenous peoples, like all peoples, are entitled to self-determination as provided in the Covenants, and that right (as provided in the Covenants) is to be exercised in conformity with international law as it was understood at that time. In addition, indigenous peoples have a new and more extensive right of self-determination as declared in Article 3 and other articles of the Declaration. After lengthy debate, the Chair of the Working Group, Luis Enrique Chavez of Peru, summarized this understanding of the right of self-determination, and his statement was never challenged nor publically contradicted by states in the Working Group. Some states repeatedly expressed their understanding that the Declaration, particularly Article 3, would recognize a new right of self-determination for indigenous peoples, not merely the right provided by the Covenants. Most states participating in the Working Group did not clearly state their understanding of the right, but they did not object to the understanding as expressed by the Chair of the Working Group.

The recognition of a distinct new right of self-determination for indigenous peoples going beyond the right in the Covenants was the most important achievement of the Declaration, but the right of self-determination \*25 for peoples located within states is a complex matter involving not only rights of self-governance but also rights to participate in the governance of the state. One of the most important architects of the Declaration discussed this complex group of rights in an article written in 1994, long before the Declaration was adopted.

Professor Erica-Irene A. Daes, the Chairperson-Rapporteur of the Working Group on Indigenous Populations throughout the drafting of the Declaration, explained in detail the intended meaning of the self-determination provisions of the Declaration.<sup>56</sup> Though she wrote about the Declaration in the version adopted by the Sub-Commission in 1994,<sup>57</sup> her writing is nevertheless applicable to the present Declaration and is still a very useful guide to its meaning.

According to Professor Daes, self-determination and the right of independence or secession cannot be denied to any people meeting certain legal requirements for the right:

1. The right applies to a territory that is geographically separate and ethnically or culturally distinct.

2. The right may be exercised by a distinct people.

She concludes: "Indigenous peoples are unquestionably 'peoples' in every social, cultural, and ethnological meaning of this term."<sup>58</sup> But where a people is within an existing state, the people or constituent peoples must act through that state's political system and government, unless the system is "so exclusive and non-democratic that it no longer can be said to represent the whole of the population." There is a continuing right to secession, she says, under these extreme circumstances.<sup>59</sup>

Professor Daes envisioned a new right that embodies options for indigenous peoples to share power and enjoy autonomy within the states where they are located:

\*<sup>26</sup> Self-determination has consequently taken on a new meaning in the post-colonial era. Ordinarily it is the right of the citizens of an existing, independent state to share power democratically. . . . The international community discourages secession as a remedy for the abuse of fundamental rights, but as recent events around the world demonstrate, does not rule out this remedy completely in all cases. The preferred course of action, in every case but the most extreme, is to encourage the state in question to share power democratically with all groups, under a constitutional formula that guarantees that it is effectively representative.

She observed that indigenous peoples have, in most cases, not been a part of state-building in the countries where they live; that is, they have not participated in constituting the state or in national decision-making. Daes writes:

[T]he existing State has a duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to share power democratically. This approach also would mean that indigenous peoples have the duty to try to reach an agreement, in good faith, on sharing power within the existing State, and, to the extent possible, to exercise their right to self-determination by this means.

Professor Daes did not give explicit treatment in her article to indigenous peoples' governments, but it is nevertheless clear from the Sub-Commission's draft of the Declaration that indigenous peoples have the right to create their own governments, make their own laws and be governed by them. The Sub-Commission draft included Article 3 just as in the final text, as well as an Article equivalent to Article 4 providing for autonomy.<sup>60</sup>

### III. What will be the effect of the Declaration in regard to self-determination?

The real world effect of the right of self-determination recognized in the Declaration may not be dramatic, because it represents the articulation of a right that has developed in state practice over a period of many decades, and because the Declaration per se has no binding force. But in our work at the Indian Law Resource Center, we have observed that the formal declaration of the right has led countless indigenous peoples, at least in the Americas, to <sup>\*27</sup> record their laws and to create or reconstitute their governing institutions that have been suppressed, in many situations, for generations.

States all over the world have already instituted various autonomy regimes, as we have noted, and this practice will contribute to the further crystallization of the international law rule. The right of self-determination in the Declaration is or will become customary international law, even though a few states may continue to oppose it. This will be enormously important, especially in countries of Central and South America. I believe this will be the eventual outcome, because there is growing awareness among states and others that self-determination for indigenous peoples is a good and pragmatic idea that will contribute to peaceful development and good government.

In the United States, the right of self-determination in the Declaration would extend and strengthen self-determination, but it will not create any great change. The principal effect is likely to be to discourage the restriction or denial of the right by the federal government. In *Santa Clara Pueblo v. Martinez*,<sup>61</sup> Justice Marshall asserted that Congress could alter or eliminate Indian nations' powers of self-government. The UN Declaration has created or will create a rule of customary international law that the United States cannot exercise such a power to deprive Indian nations of their right of self-determination or self-government.

Footnotes



- 1 The author is an attorney admitted to the bar of the states of Montana and New York and of the District of Columbia. He is a graduate of Columbia University School of Law (1969) and is President and Executive Director of the Indian Law Resource Center. He is a member of the Citizen Potawatomi Nation (an Indian nation in the United States), and he participated in the development of the draft UN Declaration on the Rights of Indigenous Peoples from 1976 to 2007. He is the author of numerous articles in the fields of international law and the rights of indigenous peoples, including The Draft UN Declaration on the Rights of Indigenous Peoples: What is it? What Does it Mean?, 13 *Netherlands Q. of Hum. Rts.* 123 (1995) and The [U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law](#), 45 *Idaho L. Rev.* 539 (2009).
- 2 See Remarks by the President at the White House Tribal Nations Conference, December 16, 2010, available at <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>.
- 3 A number of case studies of such instances of autonomy or other forms of self-determination on the part of states and indigenous peoples are included in John B. Henriksen, Implementation of the Right of Self-Determination of Indigenous Peoples, *Indigenous Affairs*, Mar. 2001, at 18-21.
- 4 U.N. Econ. & Soc. Council [ECOSOC], Study of the Problem of Discrimination Against Indigenous Populations, Res. 1982/34, 26-27, 1st Sess., Supp. No. 1 (May 7, 1982).
- 5 U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, Draft U.N. Declaration on the Rights of Indigenous Peoples, 103, Res. 1994/45, U.N. Doc. E/CN.4/Sub.2/1994/56 (Aug. 26, 1994).
- 6 U.N. Econ. & Soc. Council [ECOSOC], Establishment of a Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of General Assembly Resolution 49/214, Res. 1995/32, U.N. Doc. E/CN.4/1995/L.62, (July 25, 1995) (as revised, adopted without a vote on Mar. 3, 1995).
- 7 Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/RES/1/2 (June 29, 2006).
- 8 Many works discuss the history and the law concerning self-determination. An excellent and comprehensive study is Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995), from which this summary draws extensively. See also Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (1990); *Modern Law of Self-Determination* (Christian Tomuschat ed., 1993).
- 9 See, e.g., President Woodrow Wilson, Speech at Billings, Montana (Sept. 11, 1919), reprinted in *Wilson's Ideals* 109 (S.K. Padover ed., 1942), cited in Cassese, *supra* note 8, at 20, n. 26.
- 10 See Cassese, *supra* note 8, at 37-43.
- 11 Cassese, *supra* note 8, at 11-33.
- 12 See Statute of the International Court of Justice art. 38; 1 *Oppenheim's International Law*, Peace 25-31 (Robert Jennings & Arthur Watts eds., 1992); J. L. Brierly, *The Law of Nations: An Introduction to International Law of Peace* 60-65 (5th ed. 1955).
- 13 G.A. Res. 1514 (XV), at 66-67, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/RES/1514(XV) (Dec. 14, 1960). The text of the Declaration follows:  
The General Assembly,  
Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations 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 and to promote social progress and better standards of life in larger freedom,  
Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect

for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,  
 Recognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence,  
 Aware of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace,  
 Considering the important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories,  
 Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations,  
 Convinced that the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace,  
 Affirming that peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law,  
 Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,  
 Welcoming the emergence in recent years of a large number of dependent territories into freedom and independence, and recognizing the increasingly powerful trends towards freedom in such territories which have not yet attained independence,  
 Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,  
 Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations;  
 And to this end  
 Declares that:

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

14 G.A. Res. 1541 (XV), at 29, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4651 (Dec. 15, 1960). The resolution, among other things, provides that a country's obligation to transmit information on non-self-governing territories under Article 73(e) of the UN Charter continues until "a territory and its peoples attain a full measure of self-government." A territory is considered to be non-self-governing if it is geographically separate and ethnically or culturally distinct. The Resolution also describes "self-government" as including independence, "free association" with an existing state, or integration on the basis of equality with an existing state. See, Hurst Hannum, *Rethinking Self-Determination*, 34 Va. J. Int'l L. 1 (1993).

15 G.A. Res. 2625 (XXV), at 123-24, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Oct. 24, 1970). The pertinent text follows:  
 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.  
 Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:  
 (a) To promote friendly relations and co-operation among States; and  
 (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;  
 and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the

principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

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.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

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

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

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

- 16 A very helpful account of the development of these and other customary rules and principles of self-determination is contained in U.N. Ctr. for Human Rights, U.N. Action in the Field of Human Rights 54-74 (1988).
- 17 See Cassese, *supra* note 8, at 67-140.
- 18 Cassese, *supra* note 8, at 72-73; Rosalyn Higgins, Problems and Process: International Law and How We Use It 122 (1995); Rosalyn Higgins, Minority Rights: Discrepancies and Divergences Between the International Covenant and the Council of Europe System, in 3 *The Dynamics of the Protection of Human Rights in Europe: Essays in Honor of H. G. Schermers* 195, 197 (Rick Lawson & Matthijs de Blois eds., 1994).
- 19 See Higgins, *supra* note 18, at 121; Henriksen, *supra* note 3, at 7, 10.
- 20 G.A. Res. 1514 (XV), *supra* note 13, at P 6.
- 21 G.A. Res. 2625 (XXV), *supra* note 13, at 121.
- 22 World Conference on Human Rights, June 14-25, 1993, Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (July 12, 1993), stating in pertinent part:  
2. All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social, and cultural development.  
Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right. In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.  
The UN General Assembly adopted a resolution in 1995 incorporating substantially the same terms. U.N. Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, G.A. Res. 50/6, at 13, U.N. GAOR, 50th Sess., Supp. No. 49, U.N. Doc. A/RES/50/49 (Oct. 24, 1995).

- 23 See Henriksen, *supra* note 3.
- 24 See *infra* note 38 et seq.
- 25 International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), art. 1, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), entered into force Jan. 3, 1976; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 1, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), entered into force Mar. 23, 1976.
- 26 Cassese, *supra* note 8, at 65-67.
- 27 See Cassese, *supra* note 8, at 61-62; Hannum, *supra* note 14 at 23-24; Higgins, *supra* note 18, at 124; Higgins, *supra* note 18, at 195-97; Catherine J. Iorns, [Indigenous Peoples and Self-Determination: Challenging State Sovereignty](#), 24 Case W. Res. J. Int'l L. 199 (1993).
- 28 Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GAOR, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (Sept. 13, 2007).
- 29 In the text of Article 3 as adopted by the Sub-Commission in 1994 and by the Human Rights Council in 2006, the term used was "right of self-determination." The Sub-Commission text is contained in U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities, Working Group on Indigenous Populations, Report of the Working Group on Indigenous Populations on its Eleventh Session, U.N. Doc. E/CN.4/Sub.2/1993/29/Annex I (Aug. 23, 1993). The term "right to self-determination" first appeared in the General Assembly text without any discussion or explanation. It appears to have been a typographical error. No state has commented on the change of the words so far as records show. The two formulations, "right of" and "right to" should be regarded as equivalent, there being no difference in meaning.
- 30 Three other articles, when read together with Article 3, help to describe the scope of the right of self-determination in the Declaration. The other articles are:
  4. Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
  5. Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social, and cultural life of the State.21. (1) Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, 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.  
(2) Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair compensation.  
Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 26, at arts. 4, 5, 21.
- 31 Henriksen, *supra* note 3, at 14.
- 32 See *infra* p. 11. These preambular paragraphs refer to the right of self-determination as it existed prior to the adoption of the Declaration and not to the right stated in Article 3 of the Declaration.
- 33 Article 14.
  1. Indigenous peoples have 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.
  2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
  3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 26, at art. 14.

- 34 Article 18.  
Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.  
Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 26, at art. 18.
- 35 Article 19.  
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.  
Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 26, at art. 19.
- 36 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 be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.  
Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 26, at art. 23.
- 37 Article 26.  
1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.  
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.  
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.  
Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 26, at art. 26.  
Note that this article protects the right to own and enjoy the benefits of land and natural resources, and this, in effect, takes the place of the second paragraph of common Article 1 of the Covenants. See *supra* note 16.
- 38 Article 27.  
States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.  
Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 26, at art. 27.
- 39 Article 32.  
1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.  
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of their mineral, water or other resources.  
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.  
Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 26, at art. 32.
- 40 Article 33.  
1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.  
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance



with their own procedures.

Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 26, at art. 33.

41 Article 37.

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as to diminish or eliminate the rights of indigenous peoples contained in treaties, agreements and constructive arrangements.

Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 26, at art. 37.

42 Article 40.

Indigenous peoples have the right to have access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 26, at art. 40.

43 Present law concerning the rule of territorial integrity is contained in the Vienna Declaration. See Vienna Declaration and Programme of Action, *supra* note 20. States in the General Assembly expressed no intention to depart from the formulation of the rule on territorial integrity as stated in the Vienna Declaration, and this suggests that Article 46 of the Declaration on the Rights of Indigenous Peoples should be interpreted as consistent with the rule stated in the Vienna Declaration.

44 Report of the International NGO Conference on Discrimination Against Indigenous Populations in the Americas (1977). The declaration proposed by the indigenous participants and adopted by the Conference was printed in the final report of the U.N. Commission on Human Rights, U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, Study of the Problem of Discrimination Against Indigenous Populations, PP 81-113, U.N. Doc. E/CN.4Sub.2/476/Add. 5/Annex IV (June 17, 1981).

45 The author participated in all of the Working Group meetings during these years and kept detailed notes of the discussions and statements, as well as copies of many of the statements and positions of states. The discussions are also reflected to some extent in the reports of the Working Group. See U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Tenth Session, U.N. Doc. E/CN.4/2005/89 (Feb. 28, 2005) (concerning meetings in 2004); U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session, U.N. Doc. E/CN.4/2006/79 (Mar. 22, 2006) (concerning meetings in 2005 and 2006).

46 U.N. ECOSOC, Res. 1982/34, *supra* note 2.

47 See *supra* notes 3, 25.

48 Embajador Antonio Arenales, Representante Permanente de Guatemala, Intervención en el Grupo de Trabajo sobre la Declaración de los Derechos de los Pueblos Indígenas (Nov. 22, 2000) (on file with author).

49 U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, PP 62-109, U.N. Doc. E/CN.4/2001/85 (Feb. 6, 2001); U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, P 20, U.N. Doc. E/CN.4/2002/98 (Mar. 6, 2002); Sarah Pritchard, *Setting International Standards: An Analysis of the United Nations Declaration on the Rights of Indigenous Peoples and the First Six Sessions of the Commission on Human Rights Working Group* ch. IV (3d ed. 2001).

- 50 Canada, Statement at the Commission on Human Rights Working Group on the Draft Declaration (1996).
- 51 Organization of American States [OAS], 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, OAS Doc. OEA/Ser.K/XVI, GT/DADIN/doc.69/02 (Mar. 14, 2002). The General Assembly of the OAS requested the Inter-American Commission on Human Rights to prepare a draft declaration on the rights of indigenous peoples in 1989. Inter-Am. C.H.R., Reports of the Inter-American Commission on Human Rights, AG/Res. 1022 (XIX-O/89), 9th plen. sess. (Nov. 18, 1989). The Commission submitted its draft in 1997, and the draft is now under review by the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples. See Organization of American States [OAS], Committee on Juridical and Political Affairs, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, Twelfth Meeting of Negotiations in the Quest for Points of Consensus: Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples, OAS Doc. OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 5 (Dec. 3, 2009). The most recent meeting of the OAS working group took place November 30 to December 2, 2009. Documents relating to the draft American Declaration can be found on the web at [www.oas.org](http://www.oas.org).
- 52 Letter and cable from Robert A. Bradtke, Executive Secretary, U.S. Nat'l Sec. Council, to Kristie A. Kinney, Executive Secretary, U.S. Dep't of State (Jan. 18, 2001) (on file with author).
- 53 U.S. Intervention, Organization of American States [OAS], Special Session on the 'Proposed American Declaration on the Rights of Indigenous Peoples,' Section 4, at 3-5 (Mar. 14, 2002). In the intervention, the United States delegation offered the following language for inclusion in the draft Declaration:  
Indigenous peoples have the right to internal self-determination. By virtue of that right, they may negotiate their political status within the framework of the existing nation-state and are free to pursue their economic, social, and cultural development. Indigenous peoples in exercising their right of internal self-determination, have the internal right to autonomy or self-government in matters relating to their local affairs, including determination of membership, culture, language, religion, education, information, media, health, housing, employment, social welfare, maintenance of community safety, family relations, economic activities, lands and resources management, environment and entry by non-members, as well as ways and means of financing these autonomous functions.  
The statement includes other language proposed by the United States, including the following:  
Where a national policy, regulation, decision, legislative comments or legislation will have a substantial or direct effects for indigenous peoples, States should consult with indigenous peoples prior to the taking of such actions, where practicable and permitted by law.  
Consistent with international human rights standards, indigenous peoples may develop, maintain and reinforce their legal systems, to apply indigenous law to the internal and local affairs of their communities, including systems pertaining to ownership, management and development of land and natural resources, resolution of conflict with and between indigenous communities, prevention of crime, law enforcement and maintenance of peace and harmony.
- 54 Practically all states in the Americas had expressed support for this position. The text of the draft American Declaration showed that it, too, would declare a distinct new right, not one limited to participation as part of the whole people of the state. Organizacion de los Estados Americanos, Comision de Asuntos Juridicos y Politicos, Informe del Presidente: Grupo de Trabajo Encargado de la Elaboración del Proyecto de Declaración Americana Sobre los Derechos de los Pueblos Indígenas, OAS Doc. OEA/Ser.K/XVI, GT/DADIN/doc.82/02 (May 2, 2002).  
The draft text contained most of the elements relating to self-determination that were included in the UN draft, though the term "self-determination" was not used.  
Article XV. Right to Self-Government  
1. Indigenous peoples have the right to freely determine their political status and freely pursue their economic, social, spiritual and cultural development, and accordingly, they have the right to autonomy or self-government with regard to inter alia culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, the environment and entry by nonmembers; and to determine ways and means for financing these autonomous functions.  
2. Indigenous peoples have the right to participate without discrimination, if they so decide, in all decision-making, at all levels, with regard to matters that might affect their rights, lives and destiny. They may do so directly or through representatives chosen by them in accordance with their own procedures. They shall also have the right to maintain and develop their own indigenous decision-making institutions, as well as equal opportunities to access and participate in all state institutions and fora.  
Two other articles in the OAS draft at that time showed that the rights of indigenous peoples were not understood to be limited to participation along with the whole people of the state.

Article XVI. Indigenous Law

1. Indigenous law shall be recognized as a part of the states' legal system and of the framework in which the social and economic development of the states takes place.
2. Indigenous peoples have the right to maintain and reinforce their indigenous legal systems and also to apply them to matters within their communities, including systems related to such matters as conflict resolution, crime prevention and maintenance of peace and harmony.
3. In the jurisdiction of any state, procedures concerning indigenous peoples or their interests shall be conducted in such a way as to ensure the right of indigenous peoples to full representation with dignity and equality before the law. This shall include observance of indigenous law and custom and, where necessary, use of their language.

Article XVII. National incorporation of indigenous legal and organizational systems

1. The states shall facilitate the inclusion in their organizational structures, [of] the institutions and traditional practices of indigenous peoples, and in consultation and with consent of the peoples concerned.
2. State institutions relevant to and serving indigenous peoples shall be designed in consultation and with the participation of the peoples concerned so as to reinforce and promote the identity, cultures, traditions, organization and values of those peoples.

- 55 A number of case studies of such instances of autonomy or other forms of self-determination on the part of states and indigenous peoples are included in Henriksen, *supra* note 3, at 18-21.
- 56 Erica-Irene A. Daes, Some Considerations on the Right of Indigenous Peoples to Self-Determination, 3 *Transnat'l L. & Contemp. Probs.* 1, 4-6 (1993).
- 57 The text of the draft Declaration as adopted by the Sub-Commission is contained in Report of the Working Group on Indigenous Populations on its Eleventh Session, *supra* note 27.
- 58 Daes, *supra* note 54, at 6.
- 59 Scholars and advocates carry on a lively debate about whether there is a legal right to secede under these exceptional circumstances. Professor Cassese, Cassese, *supra* note 8, at 120-21, concludes that no such right exists as a matter of customary or treaty-based international law. A discussion of this interesting issue, along with references to other works, is in Cassese, *supra* note 8, at 118-24.
- 60 The right of autonomy was included as Article 31 of the Sub-Commission draft. See Report of the Working Group on Indigenous Populations on its Eleventh Session, *supra* note 27.
- 61 *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).