Indigenous Peoples and the Law of Self-Determination: A Possible Consensus

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Introduction

Unprecedented attention has been given in recent years to the question of the application of the right of self-determination to indigenous peoples, especially in the context of the consideration of the draft UN Declaration on the Rights of Indigenous Peoples and the draft American Declaration on the Rights of Indigenous Peoples in the OAS. States, at first reluctant to concede any form of self-determination for indigenous peoples within states, have over the past seven years begun to express acceptance of self-determination for indigenous peoples within states, subject to certain limits and provided it does not include a right of secession, that is, the right to form an independent state.

This growing acceptance by states is the result of well-founded advocacy by indigenous leaders. Indigenous participants in the UN and OAS processes have argued correctly and convincingly that indigenous peoples have a right to self-determination under international law just as all other peoples. The right of self-determination is essential to the preservation and well-being of indigenous cultures and societies and is necessary for the enjoyment of all other human rights. Moreover, indigenous peoples within states have the right of self-determination as distinct peoples, supported by the principles of international law, supported by history, supported by the concepts of justice and political freedom, and supported by widespread and growing practice by states recognizing various forms of self-determination, self-government, and autonomy by indigenous peoples.1

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A number of indigenous leaders have argued that indigenous peoples are entitled to self-determination just as all other peoples under present international law, including, it is supposed, “external” self-determination or the right to secede.\(^2\) Progress on the UN Declaration has been slow, in large part because of the stalemate on the issues of self-determination and secession. While indigenous peoples are certainly entitled to self-determination, there may be some misunderstanding about secession in international law, and this has made the debate more difficult.

This article will briefly summarize the present state of international law on self-determination, particularly as it relates to the debates concerning self-determination for indigenous peoples. Then the UN and OAS draft declarations will be examined with regard to the language in each that pertains to self-determination. Next, the present positions of a number of states will also be examined. Finally, the prospect for reaching a consensus in the UN and the OAS on this issue will be discussed. The article concludes that there is an important opportunity now to achieve a consensus that would bring about an historic advance in the law of self-determination, recognizing the right of self-determination for indigenous peoples within states. If consensus is achieved and the Declarations are adopted, this would cement an advance in the law of self-determination brought about by indigenous peoples over the past several decades.

I. A Summary of International Law on the Right of Self-Determination

The subject of self-determination is comprised of three parts: a general political principle, a body of customary international law, and treaty law. (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 paper draws extensively.)

A. The Principle of Self-Determination. The general principle of self-determination is usually said to have originated in the period after World War I in the pronouncements of US President Woodrow Wilson. The principle of self-determination, that countries must respect the wishes and aspirations of peoples and nations, has often raised concerns for countries. Because of these concerns, the principle has been always shackled and hemmed in by states, which guard the domain of international law, and especially by those states whose prerogatives are threatened.

The principle, as a general political matter, means many things in many different settings. Among other things, it means the following:

- 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.
• 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 yet 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 principles are not fully reflected in present international law.

B. Customary Law. The present international law of self-determination includes components of both customary law and treaty law. 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. Customary international law is usually defined as the general practice of states which is regarded by states as obligatory or legally binding.\(^3\)

The customary law of self-determination is largely embodied in three UN General Assembly resolutions: (1) the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples,\(^4\) (2) the 1960 Resolution 1541 (XV),\(^5\) 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.\(^6\) These 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, rules were created, primarily in the United Nations, to take into account 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. A very helpful account of the development of these and other customary rules and principles of self-determination is contained in United Nations Centre for Human Rights, *United Nations Action in the Field of Human Rights* (1988) at pp. 54-74.

The customary international law of self-determination is comprised of relatively few basic rules:\(^7\)
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 does not include the right to alter the colonial boundaries. This rule follows the principle known as uti possidetis: 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 have 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 territories, the right of self-determination does not include a right to independence, that is, a right to separate statehood.

Sadly, these rules, with one exception, do not protect groups such as racial, ethnic, and national minorities within countries. State practice has consistently rejected any legal rule granting either internal or external self-determination to groups within existing states – ethnic and national minorities, religious, linguistic, and cultural minorities, with one exception: racial groups subjected to extreme oppression within a country are entitled to internal self-determination, that is the right to equal access to and participation in government. Of course, all groups and peoples, as part of the whole people of a country, have a right of self-determination established by treaty law. This is discussed in the next section of this paper.

The reason for the limit on self-determination for groups within countries is the principle of territorial integrity. Virtually every pronouncement of the right of self-determination in the United Nations has been expressly limited by the principle of territorial integrity. 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.

The 1970 General Assembly resolution noted above also contains powerful limiting provisions in its final two paragraphs reaffirming the rule of territorial integrity:

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 Declaration is a forceful statement of the right of self-determination, but it is followed by an equally forceful statement of the rule of territorial integrity.\textsuperscript{12}

It is important to keep in mind the dynamic nature of customary international law. New rules are certainly evolving, and they may gradually in time crystalize into new customary norms as states throughout the world in practice give recognition to self-determination claims.

C. Treaty Law. Surprisingly, even the right of the whole people of a state to freely chose its form of government and its rulers is not clearly established as a norm of customary international law. That rule however is established by common Article 1 of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, though as a matter of treaty law it is binding only on the ratifying states. Common Article 1 of both 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 cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

It is crucial to be clear about the meaning and intention of this common Article 1. The entire history of the negotiation of the Articles and the text of the Articles themselves make it undeniably clear that the phrase “All peoples” does not mean that indigenous peoples, racial and ethnic minorities, and nationalities within existing states are accorded a right of external self-determination – the right to secede, or indeed any distinct right of self-determination.\textsuperscript{13} The principle of territorial integrity has always had the paramount place, and it still does today.

II. The Right of Self-Determination in the UN Draft Declaration on the Rights of Indigenous Peoples and the OAS draft American Declaration on the Rights of Indigenous Peoples.

In the UN Draft Declaration on the Rights of Indigenous Peoples,\textsuperscript{14} the right of self-determination is proclaimed for indigenous peoples in Article 3 in the same language
as that used in common Article 1 of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights:

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.

Three other articles must be read together with Article 3 in order to understand the scope of the right of self-determination in the UN draft Declaration. The other articles are:

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.

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.

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.

Almost all indigenous participants in the UN standard-setting process have consistently demanded, in principle, the fullest measure of self-determination, without limitations that would mean indigenous peoples have only some second-class form of the right. To deny indigenous peoples the right of self-determination on the basis of equality with all other peoples would violate the principles of equality and non-discrimination declared in Articles 1 and 2 of the draft Declaration -- principles that are already a part of international law.

Practically no indigenous representatives have spoken explicitly of a right to secede from an existing country. In general, from their countless statements in the Working Group and elsewhere, it appears that indigenous leaders mean self-determination to include freedom from political and economic domination by others; self-government and the management of all their affairs; the right to have their own governments and laws free from external control; free and agreed-upon political and legal relationships with the government of the country and other governments; the right to participate in the international community as governments; and the right to control their own economic development.
Whether all these aspirations are included in the language of the draft Declaration is open to considerable doubt. There is no comprehensive definition of "self-determination" in the draft.

The intended meaning of the self-determination provisions of the Declaration has been explained in an article by Dr. Erica-Irene A. Daes, the Working Group's then Chairperson-Rapporteur. Her writing is probably the best guide to the meaning of the Declaration at this time. Ultimately the Declaration will mean primarily what the countries that adopt it say it means, and these member countries of the UN are creating an extensive record of their positions, views, and concerns in the debates in the UN Human Rights Commission’s Working Group on the Draft Declaration.

Professor Daes' views on the meaning of the right of self-determination in the draft Declaration can be summarized as follows:

1. Self-determination and the right of independence or secession cannot be denied any people that meets the legally established criteria for the right:
   a. It applies to a territory that is geographically separate and ethnically or culturally distinct.
   b. It may be exercised by a distinct people.

2. "Indigenous peoples are unquestionably 'peoples' in every social, cultural, and ethnological meaning of this term."  

3. But there is a limit. 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.

4. She sums up as follows:

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. However, a state may sometimes abuse this right of its citizens so grievously and irreparably that the situation is tantamount to classic colonialism, and may have the same legal consequences. 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.
5. 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.

With regard to indigenous peoples, then, I believe that the right of self-determination would ordinarily be interpreted as the right of these peoples to negotiate freely their political status and representation in the States in which they live.

Some elements of self-determination are made relatively clear in the draft Declaration. The right of indigenous peoples to create and to maintain their own governments or "institutions" and their own laws and legal systems (this would include courts) is plainly set out in Articles 4, 21, 31, 32, 33 and in other articles as well. Many of these provisions, particularly Article 33, are aimed at stopping the unwanted interference and control over indigenous governments that are often exercised by countries.

The minimum extent of the governing powers of indigenous governments is set out in Article 31 quoted above. This provision would recognize for indigenous peoples the right to govern for themselves essentially all internal and local affairs. When read, as it must be, in conjunction with the articles concerning control over lands and resources, control over matters affecting indigenous interests, control over cultural matters and intellectual property, control over education and other such provisions, it is evident that this article contemplates a very full measure of self-government, with practically no exclusions.

There is no explicit statement of the principle of territorial integrity in the UN draft Declaration, and this may account for the uneasiness of many states. There is however a general article, Article 45, which states:

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.

It is arguable that the principle of territorial integrity is embodied in the UN Charter at least so far as prohibiting the threat or use of force against the territorial integrity of states. The Charter doesn’t give much comfort to states concerned about territorial integrity, but it doesn’t rule out internal self-determination either.

Since 1988, the Organization of American States has had its own process to produce a new juridical instrument on the rights of indigenous peoples, the proposed American Declaration on the Rights of Indigenous Peoples. The draft American
Declaration does not include the term “self-determination,” but in most other respects it includes the same substantive elements as the UN draft Declaration. Article XV reads:

**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.

Most of this language of Article XV (1) is practically identical to that in the UN draft Declaration Articles 3 and 31 quoted above.

Two other articles in the draft American Declaration are also relevant to self-determination. Article XVI provides among other things, that indigenous law is to be recognized and made a part of domestic legal systems and that indigenous peoples have the right to maintain and apply their own legal systems. Article XVII provides that states shall “facilitate the inclusion in their organizational structures, [of] the institutions and traditional practices of indigenous peoples, ...”

The fact that the word “self-determination” does not appear may lessen state fears of secession, but the right of indigenous peoples, expressed in the draft, to “freely determine their political status” keeps the issue alive nevertheless. Whether the totality of rights that would be recognized by the American Declaration would be different from those recognized in the UN draft Declaration is an interesting question. In any event, indigenous leaders are certain to continue calling for the addition of the term in the American Declaration.

The principle of territorial integrity is spelled out in the draft American Declaration in the following terms:

**Article XXVI.**

Nothing in this Declaration may be construed as permitting any activity contrary to the purposes and principles of the OAS, including sovereign equality, territorial integrity and political independence of states.
III. The Positions of States in the UN and OAS

In the UN debate on the draft Declaration, statements by a substantial number of countries from many parts of the world demonstrate a willingness to recognize the right of self-determination for indigenous peoples within countries, provided that the right does not impair the territorial integrity of these countries. This growing group of countries is saying, in many different and sometimes vague terms, that they will accept the language of self-determination in the draft, but the not the right of indigenous peoples or other peoples within states to secede or create an independent state. This may be the first time that a substantial number of countries has 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 is one example of the general position of this group of states. The statement reads, 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 have taken more or less similar positions favoring the right of self-determination but without a right of secession for indigenous peoples within countries include the following: 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. The list includes 21 countries. This is not an organized group, nor are there any countries that have assumed leadership on this issue. This is simply a list of the countries that have, in many different ways, stated positions that share a common willingness to recognize a right of self-determination (not a right of secession) for indigenous peoples within countries.

Of this group, Canada has stated its position in greater detail than most. It is useful to examine Canada’s statement, because it illustrates the position with more clarity, and it reveals some significant issues that will need resolution. At the Commission on Human Rights Working Group on the Draft Declaration in 1996 Canada made the following statement:
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.

[The 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.

This position was reiterated by Canada at the Commission working group in 2000, and it remains Canada’s position today. In the Organization of American States, Canada in March 2002 stated a similar position in respect to the draft American Declaration.]

The United States is the other country in the group that has taken a detailed position on this issue, and again issues are raised about the exact scope of the right. The United States’ position regarding indigenous peoples’ right to self-determination, within the context of the UN and OAS draft declarations, was stated with some precision in January 2001. This position remains the policy of the United States today. 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 a right of 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 functions.”

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In an effort to harmonize US 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 an external and internal aspect 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 state, 4) self-determination as articulated in the draft declaration is specifically limited by Article 43 (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, it is the position of
the 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.\(^{33}\)

In the positions of all these states, the basic elements of a possible consensus appear to be present, despite many obvious differences in details and wording. This emerging coherence of state positions, if it becomes a consensus, would recognize and clarify for the first time in an international declaration a distinct right of self-determination for indigenous peoples within existing states.

### IV. The Prospect of Consensus and Concluding Remarks

The significance of the emerging state position on self-determination described above and the possibility of a consensus around this position have been largely overlooked in the vehemence of the debate in the UN. Indigenous participants have almost all denied any desire to secede but have nevertheless argued strongly for “external” self-determination (understood to include a right to independence) on the ground that denial of this right is discriminatory.\(^{34}\) In view of the consistent refusal of states to recognize a right of secession on the part of any peoples or groups within states, as discussed above, there is no prospect whatever that states would include such a right in the UN or OAS draft Declarations on the Rights of Indigenous Peoples.

However, there appears to be a basis for a possible consensus around the position taken by the group of countries favoring self-determination without secession for indigenous peoples within states. Not only is there growing acceptance of this position by states in the UN and OAS, but also state practice around the world has increasingly included creating or recognizing various regimes of autonomy or self-government for indigenous peoples.\(^{35}\) To build an actual consensus and ultimately adopt a strong declaration, states must do more to build understanding among states about this right and to find acceptable language that will secure the undiluted right of self-determination for indigenous peoples without raising excessive concerns about territorial integrity.

Although the possibility of achieving consensus around the idea of self-determination for indigenous peoples within states is very encouraging, there are many difficulties and obstacles to overcome and many issues to resolve before consensus can be expected. It will be a tremendous challenge for indigenous peoples to win from states in the UN a meaningful recognition of the right of self-determination for indigenous peoples within states. First of all, a majority of states in the UN have not yet stated their recognition of any right of self-determination for indigenous peoples within states. In this
regard, it is encouraging that in the OAS practically all countries of the Americas have expressed their willingness to accept the right of self-determination in the American Declaration, subject, of course, to maintaining the principle of territorial integrity.36

Many states in the UN that do not yet support the right of self-determination for indigenous peoples within states no doubt fear that recognizing self-determination for indigenous peoples will mean that all groups within states must be accorded such rights. This raises real fears of instability, unrest and political violence. However, there are a number of reasons, unique to indigenous peoples, for recognizing their right to self-determination without necessarily extending such rights to other groups. These reasons are tied to the unique history and distinct character of indigenous peoples:

1. Indigenous peoples typically exist as functioning societies or political entities, not just as populations of individuals. Indigenous peoples in many countries are legally recognized as distinct political or social entities. Typically, indigenous peoples function as organic social entities with on-going social interactions, active cultures, social and political institutions, and a variety of other ties and relationships.

2. Most indigenous peoples had or still have a definite or distinct territory and a legally defined membership.

3. Indigenous peoples, nations or tribes, pre-date the states where they are located, and they do not derive their existence from the state.

4. Indigenous peoples for the most part have their own laws and governments or other institutions of social control. In most cases they have a long history of independent self-government. Thus, they are already in a position to exercise autonomy.

5. Indigenous peoples are characterized by many shared ties, including culture, religion, language, kinship, political history, and their unique cultural and spiritual relationship to their lands. Many other groups are linked by just one or only a few shared characteristics such as race or national origin.

6. The cultures, languages, social institutions, spiritual traditions, and ways of life of indigenous peoples are, in most situations, gravely threatened by the dominant societies, and as a result indigenous peoples have a particularly great need to protect their societies, cultures, religions, languages, institutions, and ways of life.

7. Most indigenous peoples (with a few modern exceptions) were excluded from participating in the constitutional creation of the state and for a long time were excluded from all political participation. Many indigenous peoples are still not able to participate fully as part of the whole people of the existing state, and their existence as a distinct people or nation is not taken into account or protected by the state constitution.

8. Most indigenous peoples, as peoples, nations or tribes, were forcibly or wrongfully deprived of their lands and resources by the state, suffered unjust warfare, discrimination, and the suppression of their political, social and cultural rights.

9. Many indigenous peoples were formally recognized as nations and entered into legally binding treaties with states. These indigenous peoples have long-established legal relationships as peoples with the state concerned.
10. Many indigenous peoples continue to be in a political and economic situation resembling colonialism:
   a. They were involuntarily subjugated and brought under the jurisdiction of the state;
   b. They have been largely deprived of their lands and resources;
   c. They have little or no political power within the state;
   d. They are the frequent victims of discrimination and of economic and social injustice.

There are also significant issues that must be resolved concerning the positions taken by some countries, notably Canada and the United States. For example, does Canada mean by the term “constitutional integrity” that indigenous peoples’ freedom of choice must be limited by the country’s constitution of 1982? Would there not be an obligation to bring a country’s constitution into compliance with international norms regarding indigenous self-determination? Would there be rules and standards guaranteeing that the negotiations envisioned by Canada with indigenous peoples would be free and fair?

The United States’ statement that the expression “internal self-determination” must be used in the Declarations raises questions about what exactly is meant by these words. It would seem that concerns about territorial integrity could be better addressed directly with a plain statement of that principle as set down in other international legal instruments such as the 1970 Declaration on Friendly Relations and the Vienna Declaration of 1993.

Secondly, the United States’ position that “internal self-determination” does not include a right to permanent sovereignty over natural resources, will certainly be a matter of serious concern for indigenous peoples. The relationship between self-determination and ownership and control over natural resources is enormously important. For this reason, at its 2001 session, the UN Sub-Commission on the Promotion and Protection of Human Rights decided to request Professor Erica-Irene Daes to prepare a working paper on the subject of indigenous peoples’ permanent sovereignty over natural resources. From the indigenous point of view, the importance of the working paper is to examine the crucial relationship between the right of self-determination and indigenous peoples’ land rights and control over natural resources. As the world recognized in the process of decolonization, formal political independence alone can be inadequate, and meaningful economic development can be frustrated unless formerly colonized peoples have ownership of and a meaningful degree of control over their natural resources. This same calculus applies to indigenous peoples. These and many other issues lie ahead to be debated and resolved.

In conclusion, if a consensus emerges in the UN and OAS, and it appears possible, that indigenous peoples are to be recognized as having a distinct right of self-
determination, lacking a right to independence except within present rules, that would be an historic and very salutary improvement in the law. It would be a formal acknowledgment that indigenous peoples are entitled to self-determination within existing states. A consensus about the concept of self-determination for indigenous peoples within states appears to be within reach, difficult as that reach may be. It appears to be an achievable objective. Coming to agreement on the language to express the concept will be another difficult matter, but less so. It is to be hoped that states, in consultation with indigenous leaders, will find sufficient political will as well as appropriate language for this purpose. However, gaining state acceptance of a right to independence or secession for peoples within existing states is, as ever, not within reach.

ENDNOTES

1. See below at endnote 35.


   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.


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.


10. See endnote 5 above.

11. See endnote 7 above.


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.


19. Scholars and advocates carry on a lively debate about whether there is a legal right to secede under these exceptional circumstances. Professor Cassese, *op. cit.* at 120-121, 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 at A. Cassese, *op. cit.*, at 118-124.

20. Articles 32 and 33 are as follows:

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.

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.

Other relevant articles include:

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.

34. Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities.

21. The Declaration on the Granting of Independence to Colonial Peoples, paragraph 6, states that any attempt to disrupt the territorial integrity of a state is “incompatible with the purposes and principles of the Charter.” See, endnote 5 above.


4. 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.


24. 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.

25. 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.

26. The right of an indigenous people to “freely determine [its] political status” appears, based upon customary international law and the Covenants (see Section I. A and B of the text above), to have the following possible content:
1. The right to participate, as part of the whole people of a state in determining the political status of the whole people;
2. Where an indigenous people is part of or entirely constitutes the people of a separate colonial territory, the right to independence, free association, or integration with an existing state;
3. Where an indigenous people is within an existing state, the right to a freely chosen degree of autonomy.

This meaning would not appear to embrace the full meaning of the term self-determination even in its most conservative sense. Self-determination as a right also includes the right of a people to form its own government and to participate freely in that government, either as the whole people or as part of the whole people of the state. It also includes the right to be free from foreign occupation or domination. (See text above following endnote 8.) It might also include the right of an indigenous people, within its own society, to freely choose its form of government and to participate in that government.

27. See endnote 36 below.


30. Copy on file with author.


32. National Security Council, Memorandum of Robert A. Bradtke, Executive Secretary, Subject: Indigenous Peoples, with attached draft cable (January 18, 2001).

33. U.S. Intervention, Organization of American States, Special Session on the “Proposed American Declaration on the Rights of Indigenous Peoples,” Section Four (March 14, 2002), copy on file with author. 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.

34. See text above at endnotes 16 and 17.

35. 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 J. Henrikson, *op. cit.* at 18-21.


37. See endnote 7 above.

38. See endnote 13 above.

39. The position cable (see endnote 30 above) states:

   Instead, the U.S. delegation to both the UN and OAS working groups on the indigenous declarations will read a prepared statement that expresses the U.S. understanding of the term “internal self-determination” and indicates that it does not include a right of independence or permanent sovereignty over natural resources.