Barriers to the Recognition of Indigenous Peoples' Human Rights at the United Nations*

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Within the United Nations system, work to secure the recognition and effective protection and promotion of the human rights of indigenous peoples continues. This article assesses the progress of the United Nations Draft declaration on the rights of indigenous peoples, and explores the initial stages of the negotiation of a permanent forum for indigenous peoples within the United Nations framework. If the human rights of indigenous peoples are to improve, a comprehensive legal framework for indigenous peoples' rights should be adopted and a permanent forum, dedicated to indigenous issues, established. Neither outcome has occurred because States cannot reach agreement on certain fundamental principles: the right of all peoples to self-determination, the validity of collective rights and the scope and definition of 'indigenous peoples'. States must be more courageous and forward-looking when recognising for indigenous peoples what all non-indigenous peoples take for granted.

INTRODUCTION

> Indigenous peoples have been deprived of vast landholdings, and access to life sustaining resources, and they have suffered ... activ[e] suppress[ion of] their political and cultural institutions. As a result indigenous people have been crippled economically and socially, their cohesiveness as communities has been damaged or threatened, and the integrity of their cultures has been undermined.[1]

It is in this context that I wish to discuss indigenous rights in international law. Many initiatives have attempted to redress the poor status of indigenous peoples which has been caused by colonialism, some more successfully than others. Success has depended upon attitudes of empowerment rather than assimilation and the participation of indigenous peoples in decision making

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1 J Anaya, *Indigenous Peoples in International Law* (1996) 4.

processes rather than the paternalistic imposition of outcomes 'for their own good'. Initiatives are being generated through the work of the United Nations. These include the drafting of a declaration addressing the rights of indigenous peoples and the prospect of the establishment of a permanent forum for indigenous peoples within the United Nations framework.

The existing protection under international law for indigenous peoples will be briefly outlined. The article will then focus on the work occurring within the United Nations. Initially, the range of activities of the United Nations Working Group on Indigenous Populations will be outlined, then focus will turn to the progress of the Draft United Nations declaration on the rights of indigenous peoples and the proposal for a permanent forum.

CURRENT PROTECTION IN INTERNATIONAL LAW

The International Labor Organisation (the 'ILO') was the first international organ to consider formal protection of indigenous rights. In 1957 the ILO adopted the *Indigenous and Tribal Populations Convention*.[2] This Convention was highly discredited because of its assimilationist and integrationist thrust and paternalistic attitudes.

This was superseded by the ILO *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*.[3] This Convention recognises the 'aspirations of [indigenous] people to exercise control over their own institutions, ways of life and economic development and to maintain and develop their own identities, languages and religions, within the framework of the states in which they live'. This Convention is not highly regarded by many indigenous people.[4] There was no consultation with indigenous peoples in drafting the Convention, despite the Convention itself providing for consultation processes in the future.[5] It also fails to clearly comprehend that indigenous peoples live in communities and that their rights should be of a collective character. Many of the provisions are substantively weak.[6] Relatively few states have ratified this Convention.[7]

2 *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, opened for signature 26 June 1957, ILO Convention No 107 (entered into force 2 June 1959) *('Indigenous and Tribal Populations Convention')*.

3 *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, ILO Convention No 169, 1989 (entered into force 5 September 1991). See 72 *International Labour Organisation Official Bulletin* 59.

4 L Strelein 'The Price of Compromise: Should Australia Ratify ILO Convention 169?' in G Bird, G Martin and J Nielsen (eds), *Majah Indigenous People and the Law* (1996) especially 79 and 85. Eg 'The failure of the ILO to recognise the inherent right of indigenous peoples to determine their political, cultural, and social structures meant that the instrument has lost credibility with those it was intended to benefit': at 75. See also R Barsh, 'An Advocates Guide to the Convention on Indigenous and Tribal People' (1990) 15 *Oklahoma City Law Review* 209.

5 Article 6.

6 See Part 2, which deals with land and natural resources. Also refer to Articles 8 and 9 which attempt to recognise indigenous customs and customary laws, but which nonetheless give a wide scope for the states to override customary law.

7 Ratification has mainly come from the South American states.

Two articles of the *International Convention on Civil and Political Rights* 1966 ('ICCPR') are of particular relevance to indigenous peoples. Article 1 guarantees the right to self-determination to all peoples. By virtue of that right, all peoples may freely pursue their economic, social and cultural development and may freely dispose of their natural wealth and resources. Article 27 states that persons belonging to ethnic, religious or linguistic minorities 'shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'. The Human Rights Committee (the 'Committee')[8] has recognised that indigenous peoples constitute a minority for the purposes of Article 27.[9] In 1994 the Committee reaffirmed the relevance of Article 27 for indigenous peoples:

> [T]he Committee observes that culture manifests itself in many forms, including a way of life associated with the use of land resources, specially in the case of indigenous peoples. That right may include such traditional activities as hunting or fishing, and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[10]

The final international instrument I wish to draw your attention to is the *International Convention on the Elimination of All Forms of Racial Discrimination* 1966 ('ICERD'). Under this Convention, state signatories assume obligations to pursue the elimination of racial discrimination, and to promote understanding among all races.[11] The substantive provisions of ICERD seek to confront racial discrimination, while the procedural provisions establish procedures for the supervision of states parties, as well as settlement provisions. I will discuss the effectiveness of the supervisory provisions when considering the permanent forum.

8 The Human Rights Committee is the body established to determine complaints made pursuant to the ICCPR. See *First Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966 (entered into force 23 March 1976).

9 *Chief Ominayak and the Lubicon Lake Cree Band* v *Canada*, Comm No 167/1984, UN Doc CCPR/C/41/D/167/1984 (1990) ('*Lubicon Lake Band* v *Canada*'); D McGoldrick, 'Canadian Indians, Cultural Rights and the Human Rights Committee' (1991) 40 *International and Comparative Law Quarterly* 658, 667; S Marquardt, '*International Law and Indigenous Peoples' (1995) 3 International Journal of Group Rights* 47.

10 HRC General Comment No 23, UN Doc CCPR/C/21/Rev.1/Add.5 (1994)

11 In particular, Article 5 protects equality before the law and identifies human rights obligations that must be enjoyed in a non-discriminatory manner. This Article has formed the basis for indigenous claims in domestic state law for equality of recognition and enjoyment of property rights. The High Court of Australia found that Australia's *Racial Discrimination Act* 1975 (Cth), enacted to implement its obligations under CERD, restrained the legislative power of Queensland to extinguish or even diminish indigenous title as recognised by the common law in *Mabo* v *Queensland (No 1)* (1988) 166 CLR 186.

THE UNITED NATIONS PROGRAMME[12]

Before 1970 indigenous issues formed part of the overall human rights work of the United Nations, rather than being a particular focus. In 1970, the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (the 'Sub-Commission')[13] recommended that a comprehensive study be made of the problem of discrimination against indigenous populations. The report, by Special Rapporteur Jose R Martinez Cobo,[14] led to the creation by the Economic and Social Council ('ECOSOC') of the Working Group on Indigenous Populations (the 'Working Group') in 1982. The Working Group is a subsidiary arm of the Sub-Commission and is composed of independent human rights experts.

The Working Group has undertaken many initiatives that have focussed international attention on the concerns and aspirations of indigenous peoples.[15] The Working Group meets annually for one week in Geneva, Switzerland. This is the world's largest gathering of indigenous peoples, with approximately 700 people regularly attending the meeting including governments, indigenous peoples, non-governmental organisations and scholars. The formal mandate of the Working Group is, first, to review national developments regarding the human rights and fundamental freedoms of indigenous peoples and, secondly, to develop international standards concerning indigenous rights.

Many studies have been instituted under the auspices of the United Nations. A 'Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations' was undertaken by Special Rapporteur Miguel Alfonso Martinez.[16] He considered the ongoing development of universally relevant human rights standards and the need to develop innovative approaches to the relationships between indigenous populations and states, taking into account the socio-economic realities of states and the inviolability of their sovereignty and territorial integrity. The final report was

[12] For a good overview of the indigenous focus within the United Nations, refer to United Nations Office of the High Commissioner for Human Rights, *Fact Sheet No 9: The Rights of Indigenous Peoples* (1997).

[13] The Sub-Commission has recently had its name changed to the 'Sub-Commission on the Promotion and Protection of Human Rights'.

[14] J R Martinez Cobo, 'Study of the Problem of Discrimination Against Indigenous Populations', issued in consolidated form as UN Doc E/CN.4/Sub.2/1986/7 (1987). The report was extensive and covered issues including the definition of indigenous peoples, the role of intergovernmental and non-governmental organisations in indigenous affairs and special areas of action, such as culture, social and legal institutions and religious rights.

[15] See Sanders, 'The UN Working Group on Indigenous Populations' (1989) 11 *Human Rights Quarterly* 406; L Stomski, 'The Development of Minimum Standards for the Protection and Promotion of Rights for Indigenous Peoples' (1991) 16 *American Indigenous Law Review* 575.

[16] See ESC Dec 1988/34 (1988) and CHR Res 1988/56, 'Study on the Significance of Treaties, Agreements and Other Constructive Arrangements for the Promotion and Protection of the Human Rights and Fundamental Freedoms of Indigenous Populations' (1988).

submitted in 1999.[17] The Commission appointed Special Rapporteur Erica-Irene A Daes to prepare a working paper on 'Human Rights of Indigenous Peoples: Indigenous Peoples and Their Relationship to Land'.[18] It is hoped that the working paper will suggest practical measures to address problems relating to indigenous peoples and land.[19]

In response to the growing concern about the widespread and increasing threats to the integrity of the cultural, spiritual, artistic, religious and scientific traditions of indigenous peoples, the Sub-Commission commissioned a study into the 'Protection of the Heritage of Indigenous People'.[20] The Sub-Commission endorsed the report of Special Rapporteur Erica-Irene A Daes,[21] and requested that she elaborate draft guidelines for the protection of indigenous peoples' heritage.[22] The draft principles and guidelines[23] were completed in consultation with the United Nations, the United Nations Educational, Scientific and Cultural Organisation, the World Intellectual Property Organisation and other financial, scientific and professional organisations. The Sub-Commission requested that a seminar on the draft principles and guidelines be held.[24] This was scheduled for early March 1999, but did not place.[25] In light of the broad-based threats to indigenous heritage such broad consultation must be commended.

At the close of the International Year of the World's Indigenous People in 1993, the General Assembly proclaimed 1995 to 2004 to be the International Decade of the World's Indigenous People (the 'International Decade').[26] The principle goal of the International Decade is to increase international co-operation to improve the lives of indigenous peoples in areas such as health,

17 The final report: UN Doc E/CN.4/Sub.2/1999/20 of 22 June 1999; the preliminary: UN Doc E/CN.4/Sub.2/1991/33, 31 July 1991; the first progress report: UN Doc E/CN.4/Sub.2/1992/32, 25 August 1992; the second progress report: UN Doc E/CN.4/Sub.2/1995/27 of 31 July 1995; and the third progress report: UN Doc E/CN.4/Sub.2/1996/23, 15 August 1996.

18 See CHR Dec 1997/114 (1997) which took note of SC Res 1996/38, UN Doc E/CN.4/Sub.2/RES/1996/38 (1996).

19 A preliminary working paper and progress report have been completed to date. The preliminary working paper on indigenous people and their relationship to land prepared: E/CN.4/Sub.2/1997/17 (1997); and progress report on the working paper on indigenous people and their relationship to land prepared: E/CN.4/Sub.2/1998/15 (1998).

20 Special Rapporteur, Erica-Irene A Daes, was mandated to consider what should be done to strengthen respect for the cultural and intellectual property of indigenous peoples.

21 Preliminary report on the Protection of the Heritage of Indigenous Peoples: UN Doc E/CN.4/Sub.2/1993/28 (1993).

22 SC Res 1993/44 (1993).

23 Preliminary report on the Protection of the Heritage of Indigenous Peoples: UN Doc E/CN.4/Sub.2/1994/31 (1994); Final report on the Protection of the Heritage of Indigenous Peoples, prepared by Special Rapporteur, Erica-Irene A Daes: UN Doc E/CN.4/Sub.2/1995/26 (1995); and Supplementary report on the Protection of the Heritage of Indigenous Peoples: UN Doc E/CN.4/Sub.2/1996/22 (1996).

24 SC Res 1997/13, UN Doc E/CN.4/Sub.2/RES/1997/13 (1997).

25 This meeting has been tentatively rescheduled for the end of February 2000.

26 GA Res 163, UN Doc A/48/163 (1993) on 'The International Decade of the World's Indigenous People'.

development, employment, education, environment and human rights.[27] In its Resolution, the General Assembly recognised, inter alia, 'the importance of consulting with indigenous people' and 'the importance of the establishment of a permanent forum for indigenous people'.[28]

The remainder of this article will consider whether the International Decade's aim of improving the human rights of indigenous peoples is likely to be achieved, through examining two United Nations initiatives: international standard setting and the proposal for a permanent forum.

STANDARD SETTING — THE DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The Working Group has placed special emphasis on the second arm of its mandate — international standard setting. In 1985, the Working Group began preparing the text of a United Nations Draft declaration on the rights of indigenous people (the 'Draft Declaration'). The drafting process involved States, indigenous groups and non-governmental organisations. This is the first time that indigenous peoples have been involved in drafting an instrument concerning their rights. At the eleventh session of the Working Group in 1993 the text was agreed upon. The Sub-Commission adopted the Draft Declaration and then submitted it to the Commission for consideration. The Commission is currently considering the Draft Declaration[29] in a series of open-ended, intersessional working groups, the sole purpose of which is to elaborate on the Draft Declaration pursuant to Resolution 1995/32.[30] ECOSOC and the General Assembly must then adopt the Draft Declaration.

Participation of indigenous peoples

Many interested parties were invited to participate in the Working Group on the Draft Declaration ('WGDD'): States, relevant United Nations organisations and specialised programmes, those non-governmental organisations in consultative status with the ECOSOC, as well as those indigenous groups authorised to participate in accordance with special accreditation procedures set out in an annex to the Commission's Resolution 1995/32.

Indigenous groups seeking accreditation under the Resolution must submit various materials to the Commission.[31] The Commission then consults the

[27] 'While the ideals of cooperation and improved awareness are commendable goals, they will remain unattainable whilst states continue to condone colonial practices and participate in activities that continue to deny indigenous peoples human rights': I Watson, 'International Year for Indigenous Peoples' (1992) 2(59) *Aboriginal Law Bulletin* 11, 11–12.

[28] GA Res, above n 26. Note also that the General Assembly approved a programme of activities for the International Decade of the World's Indigenous People in 1995: GA Res A/50/157 (1995) annex.

[29] SC Res 1994/45, UN Doc E/CN.4/Sub.2/RES/1994/45 (1994).

[30] CHR Res 1995/32, UN Doc E/CN.4/RES/1995/32 (1995).

[31] Including a statement of the aims and purposes of their organisation, information on their activities and programs, and the countries in which the activities are carried out.

relevant State and, finally, the ECOSOC Committee on Non-Government Organisations decides whether to grant accreditation. Pritchard is critical of this process because of the obvious 'subtext'.[32] She argues that the procedure gives governments the power of veto over the participation of particular indigenous groups. She also notes that the ECOSOC Committee consists of UN member states, whose decisions are of a political (not impartial) nature. Further, the ECOSOC Committee ordinarily meets once every two years, although irregular meetings may be convened to process applications for accreditation to the WGDD. Such sporadic meetings will unduly delay participation by some indigenous groups.

Although Pritchard's concerns are valid, the accreditation procedure seems worthwhile in that many more indigenous groups are able to attend the WGDD than if participation were limited to only ECOSOC approved non-governmental organisations. States and the ECOSOC are more willing to approve of indigenous groups under this procedure as recognition is for the limited purpose of participating in the WGDD, as opposed to granting general consultative status with ECOSOC. To highlight the impact of this procedure, in 1998 the WGDD was attended by 17 non-governmental organisations in consultative status with ECOSOC, 11 indigenous organisations in consultative status with ECOSOC and 37 indigenous organisations accredited under the resolution procedure.[33] In an international setting, indigenous peoples have never participated so fully in the processes that are aimed at promoting and protecting their rights. This is a move away from the paternalistic and assimilationist attitudes that have pervaded in the past.

Overview of the Draft Declaration

The Draft Declaration is very broad, covering a range of individual and collective rights. It recognises the right of indigenous peoples to express their distinct identity whilst retaining all the rights of nationality (Articles 5 and 32). It contains non-discrimination clauses (Articles 2 and 43) and the right to self-determination (Articles 3 and 31). It includes articles relating to physical and cultural genocide (Articles 6 and 7) and to land, resources and intellectual property (Article 10 and Pt VI). There are also provisions relating to the practice, manifestation, development, teaching and revitalisation of indigenous peoples' cultural traditions and customs (Part III), media and education issues (Part IV) and issues relating to the public life of indigenous peoples and to its development (Part V). The rights contained in the Draft Declaration constitute the minimum standards necessary for the survival and well being of the indigenous peoples' of the world.[34]

[32] S Pritchard, 'The United Nations and the Making of a Declaration on Indigenous Rights' (1997) 3(89) *Aboriginal Law Bulletin* 4, 6.

[33] In 1999, the WGDD was attended by 11 non-governmental organisations in consultative status with ECOSOC, 15 indigenous organisations in consultative status with ECOSOC and 26 indigenous organisations approved under the Resolution procedure: CHR Report on the fifth open-ended inter-sessional WGDD, UN Doc E/CN.4/2000/84 (1999); and UN Doc E/CN.4/WG.15/1998/INF.1 (1998).

[34] Article 42.

The progress of this Draft Declaration has been relatively slow for many reasons, ranging from the lack of political will to the complexity of the issues. To date, the Working Group has adopted only Articles 5 and 43.[35] For some perspective, the United Nations Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities was drafted and accepted within approximately four years.[36] The Commission, some 18 years later, is still considering the Draft Declaration. Once consensus can be reached on the fundamental principles underlying the Draft Declaration, the wording of the articles will fall into place with relative ease and speed. Although most participants recognise this, some are determined to delay the process by shutting their ears to alternative, legitimate viewpoints on international legal issues and by insisting on semantic changes to the text.[37] I propose to discuss the tensions that exist in relation to the fundamental principles.[38]

Individual rights versus collective rights

Historically, human rights have been conceived of as individual rights; that is, rights belonging to individuals. This conception of human interactions is not complete, as individuals live in communities and such collectives are viewed as being more than merely a sum of the individuals. This has led to calls for the recognition of collective or group rights, which are to be held collectively by in-digenous peoples. There is much disagreement about group rights amongst commentators.[39]

The Draft Declaration recognises various group rights.[40] At the fourth session of the WGDD,[41] debate on Articles 1 and 2 raised the issue of collective

35 These articles are recognised as being of minimal controversy. Article 5: Every indigenous individual has the right to a nationality; Article 43: All the rights and freedoms recognised herein are equally guaranteed to male and female indigenous individuals.

36 GA Res 135, UN Doc A/RES/47/135 (1992).

37 The issue of states amending the text of the Draft Declaration arose throughout the fourth and fifth sessions of the WGDD. Indigenous representatives emphasised that experts had formulated and reviewed the text, and that any proposed amendments had to be essential and substantiated by coherent reasoning. To stall the adoption of Articles over semantics would not be considered by the indigenous representatives to be negotiations in good faith.

38 For a more complete discussion of the different views expressed during the fourth open-ended inter-sessional working group in December 1998 (Articles 1, 2, 12, 13, 14, 15, 16, 17, 18, 44 and 45) see: CHR Report on the fourth open-ended inter-sessional WGDD (UN Doc E/CN.4/1998/WG.15 (1998)) and J Debeljak, 'Formality Against Informality: The Fourth Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples' (1999) 40 *International Law News* 76.

39 See W Kymlinka, *Liberalism, Community and Culture* (1989); J Waldron, 'Minority Cultures and the Cosmopolitan Alternative' reprinted in Kymlinka (ed), *The Rights of Minority Cultures* (1995) 93; I Young, *Justice and the Politics of Difference* (1990); Appardurai, 'Disjuncture and Difference in the Global Cultural Economy' in Featherstone (ed), *Global Culture* (1990) 295.

40 Articles 6, 7 and 8 specifically refer to collective rights, and all references to 'indigenous peoples' can be read as recognising group rights.

41 This issue was not a direct topic of debate at the fifth session of the WGDD.

rights.[42] Most governments were able to adopt the text of Article 1 as drafted.[43] However, France, Japan, the Netherlands, the United Kingdom and the United States had difficulty with the term 'indigenous peoples'. They could only accept the text if the rights in the Draft Declaration were to vest in individuals only. France explained this was necessary to avoid clashes between individual and collective rights. Most governments were also able to adopt Article 2.[44] Again, the main dissent came from France, Japan, the Netherlands, the United Kingdom and the United States, all of whom would not accept the collective rights embodied in the Article.

The United States understood human rights and fundamental freedoms to vest only in individuals.[45] The United States argued that collective rights were problematic because they could be exercised in a manner detrimental to individual rights.[46] To be acceptable, the Draft Declaration had to clearly state that the rights guaranteed are those of individuals, so as to prevent governments or groups violating individual rights under the guise of the 'greater good' of the state or group. The United States preferred the language of the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities,[47] which refers to 'persons belonging to minorities' rather than 'minorities', and allows these persons to exercise their rights 'individually as well as in community with other members of their group'. This language recognises that individuals may choose to act in collectivities, but that rights do not vest in the collective as such. Japan restated its position that collective rights are not normally established in international law.

Collective rights *have* been recognised in international human rights law in international conventions, regional treaties and by international decision making bodies. The ILO Convention 169 arguably contains collective rights. Throughout the Convention, the term 'peoples' is used. This term signifies collective rights. However, in Article 1, it is stated that the 'use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law'. This Article attempts to limit the definition of 'peoples' to distinguish the rights of 'peoples' under the Convention and the rights of 'peoples' under general international law; that is, the Convention purports to limit the use of the term 'peoples' so that it does not automatically equate to collective rights or a right to self-determination. Barsh highlights the associated difficulty:

[42] Article 1: 'Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law'. Article 2: 'Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity'.

[43] Bolivia, Brazil, Colombia, Denmark, Ecuador, Finland, Guatemala, Mexico, Norway, Peru and Switzerland. Canada wanted the primary importance of *individual* rights to be recognised in this Article.

[44] Australia, Bolivia, Brazil, Canada, Denmark, Ecuador, Finland, Guatemala, New Zealand, Norway, Peru, Russian Federation, Switzerland and Venezuela.

[45] As did the Netherlands.

[46] Argentina and France have similar concerns.

[47] GA Res, above n 36.

> [T]he recommendation of the ILO's governing body to treat any rejection of implied rights in the context of the instrument is not to be construed as a rejection of the rights of indigenous and tribal peoples to self-determination, as defined in any other forum. ... [S]uch an implication was outside the competence of the ILO and should be dealt with more appropriately in the United Nations.[48]

This indicates that the ILO did not have the competence to unilaterally limit the international law implications of the term 'peoples'. Thus, 'peoples' in the Convention should be given the ordinary meaning it has in international law. International law does not preclude the recognition of collective rights.[49]

Article 5 recognises and protects the social, cultural, religious and spiritual values and practices of indigenous and tribal peoples and stipulates that due account be taken of the nature of the problems which face them both as *groups* and as individuals. It further states that the integrity of the values, practices and institutions of these peoples shall be respected. Both of these provisions support collective rights. The fact that *peoples* can take legal proceedings for the effective protection of the rights outlined in the Convention, either individually or through *their representative bodies*, is also consistent with group rights.

The African Charter on Human and Peoples' Rights[50] also recognises collective rights. Article 19 guarantees equality to '[a]ll peoples' and states that '[n]othing shall justify the domination of a people by another'. The right to existence of '[a]ll peoples' and the 'unquestionable and inalienable right to self-determination' is guaranteed under Article 20. 'All peoples' have the right to freely dispose of their wealth and natural resources under Article 21, with the right to be exercised for the exclusive interest of the people. Article 22 guarantees '[a]ll peoples' the right to economic, social and cultural development with due regards to their freedom and identity and in the equal enjoyment of the common heritage of mankind. Article 23 guarantees the right to national and international peace and security to '[a]ll peoples'.

Under the Charter, the African Commission on Human and Peoples' Rights can also accept communications from individuals asserting an alleged violation of the Charter. Under the Charter 'peoples' have the capacity to complain about the infringement of their guaranteed collective rights. The only admissibility criteria regarding communications made by 'other than states parties', is that the 'author' be 'indicate[d]'. There is no stipulation that the 'author' be an individual, arguably leaving it open for a representative group or a 'people' to lodge a complaint.[51]

The Committee has also indicated its acceptance of group rights. In the case of *Kitok* v *Sweden*,[52] the Committee had to consider whether Kitok was denied his right to membership of the Sami community in contravention of Article 27

[48] Strelein, above n 4, 78.
[49] J Anaya, of the Indian Law Resource Centre, 'Collective Rights' (Statement made at the fourth open-ended inter-sessional WGDD, Geneva, 2 December 1998); J Anaya, above n 1.
[50] African Charter on Human and Peoples' Rights (1981).
[51] Ibid Chapter III, especially Article 56.
[52] HRC Dec, UN Doc CCPR/43/40 (1988) 221.

of the ICCPR. In order to reduce the number of reindeer breeders, the Swedish Government and the Lap bailiff legislated that if a Sami engages in any profession other than reindeer breeding for a period of three years, they would lose Sami status and their name would be removed from membership of the Sami community. Such an individual could not re-enter the area without special permission. This happened to Kitok.

The case is significant as an example of an individual member of a minority community bringing a case against the minority community; that is, it is an illustration of the fear held by France and the United States that individual and collective rights may clash. The Committee not only upheld the community rights of the Sami, but also adequately dealt with the 'clash' of rights. The Committee decided that the exclusion from membership of the community as of right was justified on the basis that Kitok was not totally excluded from the community. Kitok could still be permitted, albeit not *as of right*, to graze and farm his reindeer, to hunt and to fish. This decision can be criticised on a number of levels; however, it is a clear indication that the Committee views itself as being capable of settling conflicts between individual members of the community and the community itself.

In the context of Article 1 of the ICCPR, the Committee has also recognised collective rights. Article 1 guarantees the right to self-determination. In a number of decisions, the Committee has found that the collective right to self-determination does apply to indigenous peoples.[53] However, the Committee's mandate is limited, in that it can only consider communications made by individuals.[54] The Committee held that it could not enforce the right to self-determination because individuals cannot enforce collective rights.[55]

The response by indigenous groups at the WGDD was that human rights can be collective in character and that the Draft Declaration sufficiently recognises and protects the rights of individuals elsewhere.[56] Gatjil Djerrkura concisely addressed the perceived difficulty related to the conflict between individual and collective rights.[57] He acknowledged that a conflict of this nature may arise from time to time, as do conflicts between competing individual rights, such as a conflict between one individual's freedom of expression clashing with another's right to privacy. He argued that courts and tribunals are equipped in terms of procedure and theory to resolve these conflicts. Further,

[53] *Marshall (Mikmaq Tribal Society)* v *Canada*, Comm No 205/1986, UN Doc CCPR/C/43/D/205/1986 (1991); *Lubicon Lake Band* v *Canada*, Comm No 167/1984, UN Doc CCPR/C/41/D/167/1984 (1990).

[54] First Optional Protocol to the ICCPR, above n 8.

[55] *Lubicon Lake Band* v *Canada*, Comm No 167/1984, UN Doc CCPR/C/41/D/167/1984 (1990); 'Self-Determination is not a Right Cognizable Under the Optional Protocol', HRC General Comment No 23, above n 10, para 7.

[56] See Articles 1, 2, 5 (right to nationality), Article 6 (right to life, physical and mental integrity, liberty and security of person), Article 7 (protection against ethnocide and genocide), Article 8 (preserving the option not to identify as indigenous), Article 15 (right to education) and Article 43 (gender equality rights).

[57] G Djerrkura, Chairperson of the Aboriginal and Torres Strait Islander Commission ('ATSIC'), 'Collective Rights' (Statement made at the fourth open-ended inter-sessional WGDD, Geneva, 7 December 1998 (his speech was delivered by M Dodson, former Social Justice Commissioner of ATSIC)).

he was confident that conflict would only occasionally arise as 'individual and collective rights address conceptually distinct concerns and will simply coexist'.[58] Djerrkura, an elder of the Wangurri clan, described his perspective as follows:

> Wangurri law ... imposes upon us obligations to perform ceremonies, to care for the land, the trees, the hills, and the rivers, and to ensure the survival of our culture, traditions and law. Obligations of sharing and respect for each other are central to our law and world-view. In hunting and fishing we have obligations to ensure that hunting and fishing become feasts not only for the nuclear family but for the entire community. It is from these obligations to one another that we derive our identity as individuals. And it is collective rights which give expression and substance to this sense of our obligations and identity.[59]

Dennis Eggington[60] illustrated his desire for collective rights by explaining that the Noongah people consider themselves to have come from one person, the mother, and that the concept of collective rights is an ancient one among indigenous peoples. Mamani[61] argued that since indigenous peoples were colonised as groups not individuals, it is correct to recognise their collective rights. Finally, Peter Yu[62] argued that to the extent that existing human rights jurisprudence denies collective rights, it should be abandoned because such views are now outdated.

Self-determination

The right to self-determination of peoples has been expressly recognised by the United Nations General Assembly and by states in a number of international conventions.[63] Article 3 of the Draft Declaration guarantees indigenous peoples the right to self-determination, by virtue of which indigenous peoples may freely determine their political status and freely pursue their economic, social and cultural development. Article 31 states that, as a specific form of exercising self-determination, indigenous peoples have the right to autonomy or self-government in matters relating to internal and local affairs, including culture, religion, education, information, media, health, housing, employment,

58 Ibid.

59 Ibid.

60 D Eggington, of the Aboriginal Legal Service of Western Australia, Australia, 'Collective Rights' (Statement made at the fourth open-ended inter-sessional WGDD, Geneva, 2 December 1998).

61 Mamani, of the Consejo Indio de Sudamerica, 'Collective Rights' (Statement made at the fourth open-ended inter-sessional WGDD, Geneva, 2 December 1998).

62 P Yu, of the Kimberley Land Council, 'Collective Rights' (Statement made at the fourth open-ended inter-sessional WGDD, Geneva, 1 December 1998).

63 GA Res, 'Self-Determination' (1958); GA Res 1514 (XV), 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (1960). The principle has been defined extensively in GA Res 2625 (XXV), 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations' (1970). The ICCPR and the International Convention on Economic, Social and Cultural Rights ('ICESCR') share a common Article 1 guaranteeing self-determination.

social welfare, economic activities, land and resources management, environment and entry by non-members. It also guarantees the ways and means for financing these autonomous functions.

At the fourth session of the WGDD, state representatives did not question the principle that all *peoples* have the right to self-determination. However, there was disagreement in relation to the scope of self-determination and whether self-determination applied to indigenous peoples. Argentina rejected the notion outright.[64] Few governments were prepared to accept Article 3 as drafted.[65]

Some governments accepted self-determination in accordance with international law, but sought textual clarification of the scope of the concept in the present context.[66] For example, Norway argued that the content of the right at international law was unclear. Reference was made to the two aspects of self-determination. First, the internal aspect guarantees the right of all peoples to pursue freely their economic, social and cultural development without outside interference. The external aspect implies all peoples have the right to freely determine their political status and their place in the international community. The external aspect is associated with secession from the existing nation-state. Norway sought clarification as to which aspects of self-determination the Draft Declaration contemplated. Other governments were willing to support self-determination of indigenous peoples, provided it was expressed to be without prejudice to the sovereignty, territorial integrity, political unity and the existing constitutional arrangements of the state.[67]

To expressly limit the concept to internal self-determination as such is unnecessary in international law and should be resisted. There is a strong presumption against secession or independence flowing from the right of self-determination in the colonial setting. The United Nations is strenuously opposed to any attempt to disrupt territorial integrity. The principle of *uti possedetis* (the respect for colonial boundaries) is stated in the General Assembly Resolution on the Granting of Independence to Colonial Countries and Peoples.[68] The General Assembly Declaration on Principles of International Law clearly states that the principle of self-determination should not:

[64] Argentina argued that the term 'indigenous peoples' did not impliedly recognise the right to self-determination and argued that the Argentinian Government already represented all the people of Argentina, including the indigenous. In the fifth session of the WGDD, Argentina appeared to have softened their stance. Argentina is now prepared to accept Article 3 if it is expressly stated to be subject to the territorial integrity and political unity of a state.

[65] Cuba and Pakistan. At the fifth session of the WGDD, Switzerland extended greater support for Article 3 than at the fourth session (below, n 67). Switzerland supported the inclusion of Article 3, stating that self-determination is an essential right of indigenous peoples and is analogous with the principle of subsidiarity that is implemented in Switzerland, where local autonomy co-existed with a federal system.

[66] Chile, China, France (who sought clarification that the right would not be exercised to the detriment of other inhabitants of the state. This represents a change in view since the second meeting, where France was staunchly opposed to 'self-determination'), Norway, Sweden and the United Kingdom.

[67] The following governments required at least one of the listed qualifications: Bolivia, Brazil, Colombia, Denmark, Finland, Guatemala, Mexico, New Zealand, the Russian Federation, Switzerland and Venezuela.

[68] GA Res 1514 (XV), above n 63, para 6.

> be construed as authorising 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 as to race, creed or colour.[69]

The principles set down by the General Assembly in its Declaration on Principles of International Law have been reaffirmed in a non-colonial context in a General Recommendation of the Committee on the Elimination of All Forms of Racial Discrimination ('CERD').[70] CERD also acknowledged that international law has not recognised a general right of peoples to unilaterally secede from a state without the free agreement of all parties concerned.[71] According to CERD, the internal aspect of self-determination meant that every citizen has the right to take part in the conduct of public affairs at any level, and consequently that governments are to represent the whole population without distinction as to race, colour, descent, or national or ethnic origin. CERD emphasised that the external aspect of self-determination, which implies that all peoples have the right to determine freely their political status and their place in the international community, was based upon the principle of equal rights and was exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation.[72] As discussed later, it is the continued exposure to colonialism,[73] sub-jugation, domination and exploitation which many indigenous peoples argue justifies secession from nation states.

In the context of the dissolution of the former Socialist Federal Republic of Yugoslavia, the Badinter Arbitration Committee denied the Serbian populations in Bosnia-Herzegovina and Croatia the right to self-determination on the ground that self-determination cannot involve the change of existing frontiers, unless the state involved agrees.[74]

The Charter of the United Nations confirms respect for the principles of territorial and political integrity. Article 1 of the Charter outlines the purposes of the United Nations, which includes the development of friendly relations among member states on the basis of respect for self-determination of peoples. Article 2 states the principles to be maintained whilst pursuing the purposes. One such principle is that member states refrain from the threat or use of force against the territorial integrity or political independence of any state. This suggests that self-determination should only occur within existing territorial boundaries.

69 GA Res 2625 (XXV), above n 63.

70 CERD Gen Rec, 'Right to Self-Determination', UN Doc CERD Gen Rec 21 (General Comments) (1996).

71 Ibid para 11.

72 Ibid para 9.

73 In the sense that settler colonies have been freed from colonial domination, but indigenous peoples have not been freed from the domination of the settlers.

74 Badinter Arbitration Committee, Opinion 2 (1992); see A Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples' (1992) 86 *European Journal of International Law* 178, Appendix.

Chapter XI of the Charter contains the 'Declaration Regarding Non-Self-Governing Territories'. This is aimed at member states that have assumed responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government. This obliges such member states to promote the well being of the inhabitants of such territories in the context of international peace and security. In no way does it confer a right on the inhabitants to impair the territorial or political integrity of the territory. The Charter does not specifically consider indigenous peoples or colonisation, but does illustrate the commitment of the United Nations to territorial sovereignty and political integrity. Article 45 of the Draft Declaration states that actions contrary to the Charter are not permitted.

The Committee indicated that Article 27 of the ICCPR does not prejudice the territorial integrity or sovereignty of states, confirming that indigenous peoples have no right to secede.[75] Article 1 of the ICCPR is not cognisable under the First Optional Protocol to the ICCPR, such that the Committee is unable to authoritatively rule on whether self-determination would endorse secession by indigenous peoples.

Thus, the demands by governments for qualification and clarification of the term 'self-determination' are unnecessary as the term is inherently so qualified. Such demands will hamper the reconciliation process, as witnessed by the response of the indigenous participants at the WGDD. Indigenous representatives argued that to qualify their right to self-determination would be a discriminatory exercise, given that other United Nations documents do not expressly qualify the concept in relation to other groups. They called for the right to self-determination to be applied equally and universally. Many commentators agree.[76] For example, Watson argues that '[t]he denial of the right of self-determination to indigenous peoples is racist; it is a right that should apply equally to all peoples regardless of culture and regardless of race'.[77]

Indigenous representatives referred to Article 1 of the Charter of United Nations which states that the purpose of the United Nations is to develop friendly relations based on the principles of self-determination of peoples and common Article 1 of the ICCPR and ICESCR, which confers an unqualified right to self-determination. Neither Article attempts to define or delimit the term self-determination. Moreover, Article 20 of the African Charter on Human and Peoples' Rights gives all peoples the unquestionable and inalienable right to self-determination. It provides that all colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community. The African Charter also refrains from expressly qualifying the right to self-

[75] HRC General Comment No 23, above n 10, esp para 3.

[76] 'It is clear that most states are resisting the inclusion of the right to self-determination to indigenous peoples. To deny Nunga peoples the right to self-determination is an act of discrimination. This discrimination will ensure the continued subordination of indigenous peoples to the dominant state': I Watson, 'Nungas in the Nineties' in G Bird, G Martin and J Nielsen (eds), above n 4,7. See also C Cunneen, 'Judicial Racism' (1992) 2(58) *Aboriginal Law Bulletin* 9.

[77] Watson, above n 76, 9.

determination in relation to indigenous peoples. Further, it recognises that the international community condones valid methods of emancipation from domination, which currently do not involve territorial and political disintegration of states.

Some indigenous representatives agreed that autonomy and self-government were *likely* to be the principal means of exercising their right to self-determination, but were *not* willing to limit self-determination to these means.[78] Samson Ole Mootian[79] questioned the inviolability of state boundaries with respect to indigenous peoples as, in his view, the marginalisation of indigenous peoples began with the imposition of arbitrary territorial boundaries during the period of colonisation, Yazzie[80] insisted that self-determination in the decolonisation process and under the Draft Declaration is indistinguishable. He insisted that the continuing exploitation and domination of indigenous peoples is colonialism, a view shared by some human rights commentators.[81] Naomi Kipuri[82] stated that the continuous denial of self-determination will further embitter indigenous peoples of Africa and may lead to the dismemberment of more states.

Milton Bluehouse[83] noted that the territorial integrity of states is threatened only where States deny fundamental human rights. The implication from this statement is that states that resist claims to self-determination because of unfounded fears of secession are not possessed of a government representing all people belonging to the territory without distinction as to race, creed or colour. Accordingly, the case for secession of indigenous peoples may be enhanced according to the General Assembly Declaration on the Principles of International Law. It states that territorial integrity and political unity of a nation-state need only be respected where peoples have self-determination and the nation-state is 'thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.[84] Bluehouse further argued that indigenous self-determination could produce, rather than obstruct, peace and territorial integrity of the state.

[78] Mansell clearly believes that any compromise from Aboriginal people asserting full-blown sovereignty, would be to sell ourselves short and would be conceding legitimacy to the colonial invasion that has left indigenous people dispossessed, destitute and pariahs in their own country' in N Pearson, 'Reconciliation: To be or not to be' (1993) 3(61) *Aboriginal Law Bulletin* 14.

[79] Samson Ole Mootian, of the MAA Development Association, 'Self-Determination' (Statement made at the fourth open-ended inter-sessional WGDD, Geneva, 7 December 1998).

[80] R Yazzie, of the Navajo Nation, 'Self-Determination' (Statement made at the fourth open-ended inter-sessional WGDD, Geneva, 8 December 1998).

[81] J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995) 13–17; J Corntassel and T H Primeau, 'Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing "Self-Determination"' (1995) 17 *Human Rights Quarterly* 343, 352–3.

[82] Naomi Kipuri, of the International Work Group for Indigenous Affairs, 'Self-Determination' (Statement made at the fourth open-ended inter-sessional WGDD, Geneva, 8 December 1998).

[83] Milton Bluehouse, of the Navajo Nation, 'Self-Determination' (Statement made at the fourth open-ended inter-sessional WGDD, Geneva, 7 December 1998).

[84] GA Res 2625 (XXV), above n 63.

The position adopted by Canada represents the middle ground. They accepted a concept of self-determination that respects territorial and constitutional integrity of states and is implemented via negotiation.[85] It is a position that goes some way to addressing the concern of Rod Towney:

> One of the most common and fundamental misnomers in relation to self-determination lies in failure to identify its nature as a process and to confuse a whole myriad of possible outcomes with its application.[86]

Australia has, contentiously, changed its stance with respect to self-determination; a concept that had been the indigenous affairs policy in Australia since 1972.[87] At the first inter-sessional WGDD, the Australian Government's position was:

> In Australia's view self-determination is not a static concept, but rather an evolving right which includes equal rights, the continuing right of peoples to decide how they should be governed, the right of people as individuals to participate fully in the political process (particularly by way of periodic elections) and the right of distinct people within a state to make decisions and administer their own affairs.[88]

According to Djerrkura, this statement, coupled with the General Assembly Declaration on Principles of International Law,[89] demonstrates that 'Australia's view was that self-determination must be exercised in ways which are consistent with the territorial integrity of the state, "so long as the government of that state is representative"'.[90] Djerrkura recognised the broad range of outcomes from the exercise of self-determination, which include guarantees of cultural security, self-governance and autonomy, effective participation at international fora and land rights. The Kimberley Land Council expressed its vision of self-determination. It envisaged an agreement with the Federal and Western Australian Governments within which 'the agreed rights of settlers would be confirmed, the rights of resource developers would be administered, and our own rights would be acknowledged and guaranteed'.[91] Considerable autonomy was another ingredient. Autonomy meant empowerment, with decisions affecting indigenous peoples being made by indigenous peoples, and matters affecting regions in general being addressed by a regional governmental structure in which indigenous peoples cooperate with non-indigenous interests, but retain substantial control.

[85] Similar comments were made by the representative of Peru.

[86] Rod Towney, of the New South Wales Aboriginal Land Council, 'Self-Determination' (Statement made at the fourth open-ended inter-sessional WGDD, Geneva, 7 December 1998).

[87] M Dodson and S Pritchard, 'Recent Development in Indigenous Policy: The Abandonment of Self-Determination?' (1998) 4(15) *Indigenous Law Bulletin* 4.

[88] Djerrkura, above n 57.

[89] GA Res 2625 (XXV), above n 63.

[90] Djerrkura, above n 57. The implications from this statement may be similar to that of Milton Bluehouse: Bluehouse, above n 83.

[91] Kimberley Land Council, 'Self-Determination' (Statement made at the Fourth open-ended inter-sessional WGDD, Geneva, 7 December 1998).

Despite such constructive and open statements clarifying what self-determination meant to indigenous representatives in the Australian context, the Australian Government sought to abandon the concept on the basis that, to many, 'self-determination' implies a right to establish separate nations or separate laws. The Government sought to adopt alternative language, such as 'self-empowerment' or 'self-management', in preference to a qualified version of self-determination. The United States considered the Australian proposal merited further consideration.[92]

Concepts of self-management are familiar in the Australian political setting. For example, Australia granted Norfolk Islanders self-governing status in 1978.[93] This self-governing community has limited powers in law and order, taxation, education, immigration, health and social welfare matters. Self-government was granted because of 'the special relationship of the [Pitcairn] descendents of Norfolk Island and their desire to preserve their traditions and culture'.[94] This reasoning led Reynolds to state that the test for self-government was:

> A sense of belonging, some unique traditions, a history, going back to the beginning of white man's interest in the South Pacific. On none of these accounts ... could the Norfolk Islanders be shown to have anywhere near as powerful a case for autonomy as Aboriginal and Islander communities.[95]

Dissatisfaction with self-management as a substitute for self-determination was voiced at the fourth session of the WGDD and extends beyond those participants. As Watson argues, 'the example of ATSIC as a model initiative in indigenous self-determination is, in reality, a process of self-management of federal and state government policies'.[96] She argues that the decolonisation of indigenous peoples is 'yet to commence [and that d]ecolonisation will occur when the inherent right to self-determination of indigenous peoples is recognised'.[97]

The Aboriginal Provisional Government ('APG') also rejects notions of self-management. The APG was formed in 1990 with the aim 'to change the situation in Australia so that instead of white people determining the rights of Aboriginal people, it will be the Aboriginal people who do it'.[98] The APG seeks to establish an Aboriginal state within the existing territorial boundaries of Australia, with control over this state being vested in Aboriginal communities.[99] It is expected that enough land will be returned to the Aboriginal people

92 The United States were only willing to cede autonomy over the management of local and internal affairs, such as economic, cultural and social matters.

93 *Norfolk Island Act 1979* (Cth). See Dodson and Pritchard, above n 87, 5.

94 *Norfolk Island Act 1979* (Cth) preamble.

95 H Reynolds in M Mansell, 'Australians and Aborigines and the Decision in Mabo: Just Who Needs Whom the Most?' [1993] 15 *Sydney Law Review* 168, 175.

96 Watson, above n 76, 8.

97 Ibid 4.

98 M Mansell, 'Towards Aboriginal Sovereignty: Aboriginal Provisional Government' (1994) 13(1) *Social Alternatives* 16.

99 The APG have been active in many areas for years, particularly in gaining and retaining control over indigenous cultural heritage. Inter alia, it has been very successful in its efforts to secure the return to Australia of Aboriginal bodily remains from museum collections in Australia and overseas. See G Bird, 'Koori Cultural Heritage: Reclaiming the Past?' in G Bird, G Martin and J Nielsen (eds), above n 4, 102.

to enable them to survive as a nation of people, with the residual land remaining with non-indigenous Australia, enabling them to continue as a nation. The pockets of Aboriginal territory would be scattered throughout Australia. Each Aboriginal community would determine its own legal and political system so that it is appropriate to its community's situation; thus, some communities would follow 'traditional' concepts, whilst communities having more contact with non-indigenous communities may have a mixture of indigenous and non-indigenous practices. The APG would not be subordinate to the Australian Government, operating alongside it in the international community.[100] Aboriginal people will have the choice whether to join the Aboriginal nation or to continue to live under the non-indigenous jurisdiction.[101]

There are many motivators behind this vision of self-determination. Mansell expressed that 'the APG saw nothing to indicate that there was ever going to be change from the continual reliance upon the white welfare system and being forced to participate in the Australian political system'.[102] Past government policies, whether or not they were supportive of Aboriginals, continually reinforced white domination. Aboriginal organisations are viewed as service providers, dealing with the daily crises facing their poorly treated people, with no emphasis on giving effective control of Aboriginal communities back to the communities themselves. The APG, with participation from the Aboriginal people, want 'to fully accept responsibility for determining [their] long term future'.[103] This considered plan for external self-determination for indigenous Australians would not lead to the territorial disintegration of Australia.

Non-indigenous Australians must realise that what they may consider 'separatist', others consider to be their human right to self-determination. Watering down the concept will not placate indigenous peoples and the issue is bound to cause future conflict. 'There is no necessity for continual conflict provided that the imposition of the white man's will on Aborigines is removed once and for all.'[104]

Self-determination was again debated at the fifth session of the WGDD.[105] Most States' views had not changed from the fourth session. However, there were some significant statements made. The United States maintained their view that the international law concept of self-determination required clarification. It was argued 'that "peoples" entitled to self-determination under international law were the entire peoples of a state or peoples that could constitute themselves as a sovereign independent state, and not particular groups within an existing state'.[106]

[100] M Mansell, 'The Bicentenary and Aboriginal Sovereignty' (1988) 62 *Law Institute Journal* 1206, 1207

[101] For critical analysis of the proposals of the APG see Pearson, above n 78, 14–15. Pearson (at 16) states that the APG 'agenda is often interpreted as a deliberate strategy to set the extreme position, with a view to settling for the best compromise at some stage when the adoption of this strategy has extracted maximum concessions from the state'.

[102] Mansell, above n 98.

[103] Ibid.

[104] Ibid 17.

[105] CHR Report, above n 33.

[106] Ibid para 49.

This view must be based on a very conservative reading of Principle VI of the General Declaration on the Granting of Independence to Colonial Countries and Peoples.[107] Principle VI outlines the ways colonised countries and peoples may exercise self-determination. First, a colonised country may declare independence from the colonial power; secondly, a colonised country can merge with other state(s), whether the other state(s) were the colonial power or not; and thirdly, the colonised country may establish a free association with an independent state.[108] Whether you consider indigenous peoples to be in a pre- or post-decolonised state, these principles are relevant to the validity of methods of self-determination.[109]

Principle VI encompasses outcomes that are broader than those outlined by the United States. Firstly, the second suggestion of the United States is not technically correct. 'Peoples' need not be able to constitute themselves as a sovereign independent state, as Principle VI expressly contemplates a free association of states, under which one state is not necessarily independent of the other.[110] Secondly, the concepts of merger and free association seem particularly suited to address the difficulties facing indigenous self-determination. As Samson Ole Mootian stated,[111] the colonial powers did not respect the territorial boundaries of indigenous peoples when colonising them. Upon decolonisation, it is natural that various peoples will want to group together regardless of the arbitrary boundaries that were forced upon them. The ability to merge or form free associations facilitates this. It is true that such mergers or associations will not constitute 'the entire peoples of [an existing] state' and may be 'a particular group within an existing state', and thus be unacceptable to the United States, but why should the boundaries be measured in post-colonial terms? Decolonisation is about freeing peoples from dominion. To refuse to recognise no 'state' territorial boundary other than that claimed by the dominators seems unreasonable. Finally, in the words of the United States, such mergers or associations may be formed by 'peoples that could constitute themselves as a sovereign independent state'. In the indigenous context, this would involve the merging or association of groups within an existing state, and the merging or association of groups that span the territorial boundaries of more than one existing state. The only 'peoples' that could constitute themselves as a sovereign independent state must consist of either: (a) the entire peoples of that state (which the United States lists as a separate category) or (b) groups within an existing state or groups that span more than one existing state (which the United States disallows). So there is an internal inconsistency in the United States argument: in one breath the United States allows peoples

[107] GA Res 1514 (XV), above n 63.

[108] In the third scenario, the right of the colony to self-determine continues, subject to the written constitutional arrangement between the two independent states. Thus, the colony can change its mind about the association and later become an independent state or merge with other states.

[109] Luis-Enrique Chavez comments, below n 112.

[110] The United States has entered into one very such arrangement with Micronesia, under which Micronesia operates as a state with the United States retaining certain powers over Micronesia.

[111] Samson Ole Mootian, above n 79.

to constitute themselves as a sovereign independent state, but in the next the United States makes it practically impossible for this to occur.

The United States' reluctance to adopt a forward looking, dynamic approach to self-determination undermines the diplomatic approach to the issue of the Chairperson-Rapporteur, Luis-Enrique Chavez. He stated that '[a]lthough many governments had linked the right [to self-determination] to the colonial context, ... it could and should be adapted to current circumstances'.[112] Such sentiment supports the interpretation of Principle VI in a manner appropriate to the current circumstances of the indigenous peoples.

During the debate, indigenous representatives reinforced the need for unqualified self-determination by referring to actions of the Committee. The Committee made observations when assessing both the Norwegian and Canadian periodic reports that international practice or international instruments accorded indigenous peoples the right to self-determination.[113]

There is a very broad debate about whether the language of self-determination aids the position of indigenous peoples.[114] It is clear that states equate self-determination with potential secession from existing territories and independence. Equally clear is that most indigenous peoples equate it with some form of greater control over matters, such as, natural resources, environmental preservation of homelands, education, use of language and autonomous decision making. Because parties are often at cross-purposes when using the term self-determination, and because states are loath to dilute the meaning of self-determination under international law,[115] changes in terminology have been called for.

In relation to internal, as opposed to external self-determination, the jurisprudence of the Committee is revealing. In *Lubicon Lake Band* v *Canada*,[116] the Canadian Government expropriated lands of the Lubicon Lake Band to private corporate interests for the purpose of oil and gas exploration. Negotiations between the Government and the Band were underway, but the Band withdrew from negotiations. At the time of withdrawal, the formal offer of the Government sought 95 square miles in exchange for $C45 million in benefits and programs. The Committee decided that such development did threaten the way of life and culture of the Band in violation of Article 27, but

[112] Luis-Enrique Chavez, Chairperson-Rapporteur, CHR Report, above n 33, para 82.

[113] Regarding Canada, see UN Doc CCPR/C/79/Add.105 (1999). The Committee asked Norway to report on its position in respect of the Sami peoples' right to self-determination.

[114] See generally: Pearson, above n 78; Corntassel and Primeau, above n 81; M C Lam, 'Mailing Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination' (1992) 25 *Cornell International Law Journal* 603; M Trask, 'Indigenous Self-Determination and Reconciliation: The Case of Hawaii and the United States' (paper presented at the Australian Reconciliation Convention, Melbourne, Australia, May 1997); Anaya, above n 1; J Anaya, 'The Principles of Self-Determination and Indigenous Peoples Under International Law' (paper presented at the Australian Reconciliation Convention, Melbourne, Australia, 23 May 1997).

[115] That is, dilute 'self-determination' to the extent that as it relates to indigenous peoples, the term should only be read as referring to internal self-determination, not external self-determination. They fear that such dilution of the term may become the norm rather than the exception.

[116] Comm No 167/1984, UN Doc CCPR/C/41/D/167/1984 (1990) 1.

that the violation had been rectified with an effective remedy consistent with Article 2 of the ICCPR.[117] The formal offer was viewed as sufficiently enabling the Band to maintain its culture, maintain control over its way of life and to achieve economic self-sufficiency.

In *Lansman* v *Finland*,[118] the Finnish Government allowed quarrying in Sami areas. The Sami complained that the quarrying disturbed reindeer and that the environmental impact harmed the Sami culture and their sacred sights. The Committee decided that the quarrying of 30 cubic miles was not so substantial that it effectively denied the Sami the right to enjoy their culture under Article 27. This decision was based on the fact that the Sami had been considered and consulted during the decision making process and that the quarrying did not appear to have any adverse impact on reindeer herding.

These decisions highlight the advantages of external self-determination. Currently, the Committee must balance the conflicting minority and majority interests. In the *Lubicon Lake Band* case, the minority interest was threatened but the majority provided adequate compensation. In the *Lansman* case, the impact on minority interests had been taken into account and the damage minimised. In both cases, the balance fell in favour of the majority interest. If external self-determination were granted, there would be no such conflict of interest, and thus no balancing of conflicting interests, and the minority interest would not be constantly subjugated. Also, the system of purely indigenous institutions and laws arising from external self-determination would be free of all systemic biases that exist within colonial or settler forms of government.[119] Further, if the political climate of a country changes, laws and constitutional protections may change, such that any rights secured by indigenous peoples may be lost. This is avoided by external self-determination. Finally, external self-determination may pave the way for economic self-sufficiency. In Australia, crown lands generate approximately six billion dollars, of which only two billion is spent on Aborigines. To gain complete control over these resources via self-determination will 'enable Aborigines to gain greater financial benefits than they do at present. ... To say that Aborigines having control over crown land would still result in financial dependence on Australia is a dubious comment'.[120] External self-determination has much to offer indigenous peoples and their struggle for it will continue.

[117] Article 2(3)(a) of the ICCPR states that 'any person whose rights of freedoms as herein recognised are violated shall have an effective remedy'.

[118] Comm No 511/1992, UN Doc CCPR/C/52/D/511/1992 (1994).

[119] 'To my research in [indigenous rights], I have brought a sympathy for Koori communities' desire for sovereignty and custodianship (that is, physical control and control at a policy level) of their heritage. This sympathy arises from a theoretical position which acknowledges the connection between the legal system and the dominant white culture. The legal system is dressed up in the language of objectivity and neutrality, but its "skeletal framework" privileges white versions of history and legality. ... The dominant white culture has created the legal system which, in turn, supports a hegemony of white cultural values' in Bird, above n 99, 103–4. See C Golvin, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (1992) 7 *European Intellectual Property Review* (UK) 227, for concrete examples of how recognition of Aboriginal customary law will enhance indigenous self-determination.

[120] Mansell, above n 95, 176.

Les Malezer[121] summed up the injustice of the continuing denial of self-determination for indigenous peoples when he found no satisfactory answer to his question: How did the British and Australian Governments acquire our right to self-determination 210 years ago, a right which we have possessed and exercised for 60,000 years? Erica-Irena A Daes, Special Rapporteur to the Working Group, believes there 'can be no reconciliation without self-determination'.[122]

The scope of the Draft Declaration: the need for a definition of 'Indigenous Peoples'

The final fundamental principle underlying the Draft Declaration for discussion is the scope of the Draft Declaration. Precisely who will be regarded as 'indigenous peoples'? The debate centres on the desirability of allowing people to self-identify as indigenous, as opposed to having an objective definition of who is indigenous, and whether an objective definition should be inclusive or exclusive. [123]

The Committee has battled with the issue of cultural identity. In the case of *Lovelace* v *Canada*,[124] Lovelace married a non-Indian and lost her status as a 'Maliseet Indian' under Canadian legislation. The legislation was designed to preserve the identity of the Maliseet. Her marriage dissolved and she sought to return to her community. The Committee held that a 'person belonging to such minorities' under Article 27 included those born on an Indian reserve, who have kept ties with the community and who wish to maintain ties with the community. The Committee stated that access to native culture and language 'in community with others' under Article 27 can be restricted in order to preserve the identity of the community. However, it did not have to consider the validity of the restriction under the Canadian legislation because it decided this case involved special circumstances, such that to deny Lovelace residency was not necessary to preserve the identity of the Maliseet. The special circumstances consisted of the fact that Lovelace's marriage had broken up, that under this circumstance it was natural for her to wish to return to the environment in which she was born, and that after the dissolution of her marriage it was clear that her main cultural attachment would be with the Maliseet.

The Committee's decision that Lovelace 'belonged' to the community can be commended in that it was based on her own belief, her own self-identification of belonging, not just the view of the state. However, the

[121] Les Malezer, Foundation for Aboriginal and Islander Research Action, 'Self-Determination' (Statement made at the fourth open-ended inter-sessional WGDD, Geneva, 8 December 1998).

[122] Erica-Irena Daes, as quoted by Djerrkura, above n 57.

[123] See generally: J Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature and Art* (1988) ch 12; Tully, above n 81; Williams, 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World' [1990] *Duke Law Journal* 660.

[124] HRC Comm No 24/1977, UN Doc CCPR/C/OP/1 (1981). Reprinted in Selected Decisions under Optional Protocol, vol 1, 83.

[125] *Kitok* v *Sweden*, HRC Comm 197/1985, UN Doc CCPR/C/33/D/197/1985 (1988).

Committee's view that it was clear that Lovelace would want to return to her Indian culture suggests that the Committee has a fixed view of identity; people are either wholly Indian and submerged in their Indian community or not. The decision also indicates that the Committee has a fixed view of culture; culture was viewed as static and unaffected by external factors, such as, superimposed political structures and broader environmental influences.

In the *Kitok* decision discussed earlier,[125] the Committee expressed its concern that membership of the Sami community was determined by designated rules, not objective criteria. It was concerned that membership on this basis could be disproportionate to the legitimate ends to be achieved under the legislation,[126] and that the designated rules failed to account for the fact that Kitok had always retained some link to the Sami community.[127] However, the Committee went on to decide that the exclusion from membership of the community *as of right* was justified, given that Kitok was not totally excluded from the community. The Committee did not place enough emphasis on Kitok's self-identification as Sami, nor on any objective criteria that may have indicated membership of the community. As a result, Kitok was denied the very protection that the national legislation sought to provide, namely to secure the preservation and wellbeing of the Sami community.

The Working Group defined 'indigenous peoples' as 'the descendents of the original inhabitants of conquered territories possessing a minority culture and recognising themselves as such'.[128] A leading commentator in the area defines 'indigenous peoples', in the international context, to be 'those living descendents of pre-invasion inhabitants of lands now dominated by others'.[129]

The Draft Declaration is silent on the issue. At the fourth session of the WGDD,[130] all governments agreed that the Draft Declaration must apply universally. However, this sentiment was undermined by various calls to delimit the term 'indigenous peoples'. Some governments called for an exclusive definition,[131] others for an inclusive definition consisting of the identification of broad criteria.[132] The United States suggested the criteria extend beyond 'being first in time' and include identification as a distinct ethnic group

[126] The legitimate ends being to: restrict the number of breeders for environmental reasons; ensure the future of reindeer breeding; address economic problems, such as, protecting the livelihood for those whom reindeer hunting is a primary source of income; and to secure the preservation and well being of the Sami community.

[127] This point should be contrasted with the HRC decision in *Lovelace* v *Canada*. In *Lovelace*, the phrase 'persons belonging' under Article 27 was held to include those that were born and brought up on reserves, who had kept ties with the community and who wish to maintain ties with the community. Although note, the Committee did consider the situation of Lovelace to be exceptional.

[128] See also the Working Paper by the Chairperson-Rapporteur, Erica-Irene Daes, 'Standard Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People: The Concept of "Indigenous Peoples"', UN Doc E/CN.4/Sub.2/AC.4/1996/2 (1996).

[129] Anaya, above n 1, 3.

[130] The issue was not a direct topic of debate at the fifth session of the WGDD.

[131] Bangladesh, China, Malaysia (stating that any definition of 'indigenous peoples' that conflicted with its constitutional definition would not be acceptable) and the United States.

[132] Australia (stating that in Australia it was not difficult to identify who was indigenous, but was happy to have an inclusive definition to aid other countries), Bangladesh and Norway.

through objective standards such as language, culture, race or religion. The most common justification for supporting a definition was to ensure that the rights and freedoms guaranteed were not diluted or rendered worthless by unwarranted claims of indigenity.[133] Many governments could accept the Draft Declaration without a definition, thus accepting self-identification.[134]

Mick Dodson[135] spoke the minds of most indigenous representatives in his address to the meeting. He suggested that to define 'indigenous peoples' would violate their right to self-determination; that is, the right of indigenous peoples to identify themselves.[136] He recalled the view of CERD that self-identification was the key to recognising an individual as a member of a particular ethnic or racial group.[137] Dodson and various governments noted that Article 8 of the Draft Declaration, which guarantees the 'right to identify themselves as indigenous and to be recognised as such', is sufficient to protect the autonomy of individuals.[138]

There are problems associated with identification via an objective test. An exclusive objective test could exclude some groups, both in definition and in application. In terms of definition, the imprecise nature of history means that it can be difficult for groups to meet the stated criteria. In terms of application, there is a tendency, especially amongst the Asian countries,[139] to act disingenu-ously when analysing the origins of groups, resulting in blanket claims that no 'indigenous peoples' exist within their territory. The Committee acknowledged such blanket denials in a General Comment,[140] noting that many States incorrectly claim that because they do not discriminate under Articles 2(1) or 27 of the ICCPR they have no 'minority'. The Committee has made it clear that the existence of a 'minority' does not depend on a state's decision, but must be established by objective criteria.

It is imperative that the changing nature of culture and identity is understood. In a world subjected to colonisation and globalisation, cultural groups cannot (and should not) be expected to remain pure. In identifying 'indigenous peoples', the compromise of strict traditional cultures to accommodate colonial powers or the forces of globalisation cannot be deemed to be fatal. To conclude discussion on the scope of the Draft Declaration, the words of Yeo are instructive:

[133] Bangladesh and China.
[134] Canada, Chile, Cuba, Denmark, Ecuador, Finland, New Zealand and Norway.
[135] M Dodson, representing ATSIC, 'Defining Indigenous Peoples' (Statement made at the fourth open-ended inter-sessional WGDD, Geneva, 8 December 1998).
[136] 'Recognition of self-determination in international law depends on the definition of a group as a "people". This in turn depends on the definition of the group as a distinct entity based on the linguistic, religious, ethnic and cultural practices of the members. Self-determination cannot be separated from the capacity of indigenous peoples to define and control their own cultural identities' in S Wright, 'Intellectual Property and the "Imaginary Aboriginal"' in G Bird, G Martin and J Nielsen (eds), above n 4,148.
[137] CERD Gen Rec, 'Identification With a Particular Racial or Ethnic Group (Art 1, Paras 1 and 4)', UN Doc CERD Gen Rec 8 (General Comments) (1990).
[138] Malaysia and Switzerland.
[139] Pritchard, above n 32, 5.
[140] HRC General Comment, above n 75.

> The 'ordinary' Aborigine is ... not restricted to some narrow static definition. There are recognisable forms of Aboriginality ranging from the so-called tribal Aborigine living in isolated regions to the urban Aborigine residing in a predominantly white community. While adherence to culture and traditions are significant in the determination of Aboriginality, it is important to realise that the Aboriginal psyche has also been affected by cultural denigration and deprivation. This has in turn placed immense social, economic and psychological pressures on the Aboriginal personality.[141]

Outcomes of the fourth and fifth sessions of the Working Group on the Draft Declaration

Overall, governments that had difficulty with either the scope of the Draft Declaration, self-determination or guaranteeing collective rights stalled the adoption of the Draft Declaration. These fundamentals are interdependent and permeate the entire document. Without consensus on these issues, efforts of reconciliation made by indigenous peoples and many governments will be rendered futile and the adoption of the Draft Declaration unlikely.

No articles were adopted at the fourth or fifth sessions of the WGDD. However, to measure the success of these meetings in this way would fail to recognise the significant progress made regarding consensus on the fundamental principles underlying the Draft Declaration and relationship building.[142]

The Working Group on the Draft Declaration as a forum

Finally, let us consider the WGDD as a forum. Most of the meetings consisted of informal discussions between States and indigenous representatives. The Indigenous Caucus and the States also held separate informal meetings to consider the progress of the WGDD. At the fourth session of the WGDD, informal consultations between the government delegations produced an informal paper that reflected the different textual concerns that some governments had with the articles under consideration, including suggested textual amendments. Reasons in support of the changes were not included, nor were the suggested amendments attributed to particular governments. As such, indigenous representatives could not establish the merit of the suggested changes; they could not establish which governments they needed to consult about the changes; and most importantly, they could not identify which other sections of the Draft Declaration were acceptable to the recalcitrant governments, which may have quelled their concerns over the disputed articles.

The Indigenous Caucus was outraged that a non-consensual, unofficial document was being considered by the WGDD rather than the official Draft Declaration as agreed upon by the Sub-Commission and referred specifically

[141] S Yeo, 'The Recognition of Aboriginality by Australian Criminal Law' in G Bird, G Martin and J Nielsen (eds), above n 4, 236.

[142] The High Commissioner for Human Rights, M Robinson, and Denmark agreed that the building of confidence and mutual understanding between indigenous peoples and the states were important criteria for success in the long run.

by the Commission to the WGDD. Concern was expressed that some governments believed they were involved in negotiating a text with other governments in the presence of indigenous peoples but without their participation. The informal paper was annexed to the report of the WGDD, as was the indigenous representatives' response, which in essence supported the Draft Declaration as adopted by the Sub-Commission.[143]

This issue resurfaced at the fifth session of the WGDD. Government delegations introduced the informal papers to the meeting. After some debate between government delegations, the emerging view 'was that the alternative texts [in the informal papers] could be considered as an acceptable basis for further work and could be presented to the working group in order to advance the discussion in the plenary'.[144] In an apparent attempt to quell indigenous objection to the alternative texts becoming the basis for discussion, governmental representatives stated they 'would be pleased to consider including indigenous observers in informal meetings among governments when discussions focused on specific articles of the declaration, if those meetings could be part of the work schedule of the next session'.[145]

The indigenous representatives were not quelled. They insisted that nothing other than the original text as approved by the Sub-Commission should form the basis of discussions. They emphasised that the accepted procedure for the WGDD[146] was to 'consider the original text as a basis for all work and discussions addressing the declaration's underlying principles, as well as the specific contents of the articles'.[147] With the agreement of many indigenous representatives, Tracey Whare[148] confirmed that any proposals for change to the text had to be reasonable, necessary and improve or strengthen the text, and that they should be consistent with the fundamental principles of equality, non-discrimination and the prohibition of racial discrimination.[149] Other representatives emphasised that the WGDD was a process of discussing the existing text, not negotiating a new one.[150]

This is precisely the type of behaviour that has led indigenous peoples to push for a permanent forum for indigenous peoples. How can claims regarding the principle of self-determination be taken seriously when indigenous peoples perceive their exclusion from the negotiation of the instrument that is supposed to recognise their rights and finally empower them? It must be recalled that the Committee has stressed the importance of 'effective

[143] CHR Report, above n 38.
[144] CHR Report, above n 33, para 114.
[145] Ibid para 117.
[146] CHR Res, above n 30.
[147] CHR Report, above n 144, para 120.
[148] Tracey Whare, of the Maori Legal Service, 'Changes to the Draft Declaration' (Statement made at the fifth open-ended inter-sessional WGDD, Geneva, 20 October 1999).
[149] CHR Report, above n 144, para 124.
[150] Kenneth Deer, co-chair of the Indigenous Caucus and representative of the Kahnawake Mohawk people, 'Changes to the Draft Declaration' (Statement made at the fifth open-ended inter-sessional WGDD, Geneva, 20 October 1999), as well as Andrea Carmen, of the International Indian Treaty Council, 'Changes to the Draft Declaration' (Statement made at the fifth open-ended inter-sessional WGDD, Geneva, 20 October 1999).

participation of members of minority communities in decisions which affect them',[151] as has the General Assembly when emphasising 'the importance of consulting with indigenous people'[152] in its Resolution pertaining to the International Decade. Tinkering with the Draft Declaration is a double edged sword: surely it may improve the rights of indigenous peoples, but the cost will be the many years of semantic debate before governments can agree on the wording. When evidence exists that the situation of some indigenous peoples is so serious as to threaten the very existence of the people, surely the cost is too high.

This is not the first time debate on procedure has surfaced in relation to the Draft Declaration.[153] The process by which the Draft Declaration is agreed upon is equally important as the substance of the Draft Declaration. Process is synonymous with self-determination, voice and empowerment. If non-participation of indigenous representatives creates even a *perception* of a flawed process, the Draft Declaration may lack legitimacy for indigenous peoples.

THE PERMANENT FORUM[154]

The Secretary-General's review of existing mechanisms within the United Nations for indigenous peoples

The World Conference on Human Rights in Vienna recommended that consideration be given to establishing a permanent forum for indigenous peoples within the United Nations system.[155] In its Declaration on the International Decade, the General Assembly recommended that the Commission give priority consideration to establishing a permanent forum for indigenous peoples.[156] The establishment of a permanent forum within the United Nations is identified as one of the important objectives of the International Decade.[157] Accordingly, the General Assembly recommended that the Secretary-General undertake a review, in close consultation with governments and taking account

[151] HRC General Comment, above n 10.
[152] GA Res, above n 26.
[153] Pritchard, above n 32, 6–8.
[154] There are many references to the establishment of a permanent forum within the United Systems from the existing bodies of the United Nations. See GA Res 49/214, UN Doc A/RES/49/214 (1994); GA Res 50/157, UN Doc A/RES/50/157 (1995); GA Res 51/78, UN Doc A/RES/51/78 (1996); GA Res 52/108, UN Doc A/RES/52/108 (1997); GA Res 53/130, UN Doc A/RES/53/130 (1998); CHR Res 1994/28, UN Doc E/CN.4/RES/1994/28 (1994); CHR Res 1995/30, UN Doc E/CN.4/RES/1995/30 (1995); CHR Res 1996/41, UN Doc E/CN.4/RES/1996/41 (1996); CHR Res 1997/30, UN Doc E/CN.4/RES/1997/30 (1997); CHR Res 1998/20, UN Doc E/CN.4/RES/1998/20 (1998); CHR Res 1999/52, UN Doc E/CN.4/RES/1999/52 (1999); SC Res 1994/28, UN Doc E/CN.4/SUB.2/RES/1994/28 (1994); SC Res 1994/50, UN Doc E/CN.4/SUB.2/RES/1994/50 (1994); SC Res 1995/39, UN Doc E/CN.4/SUB.2/RES/1995/39 (1995); SC Res 1997/10, UN Doc E/CN.4/SUB.2/RES/1997/10 (1997).
[155] Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights, UN Doc A/CONF.157/24 (1993) pt I, ch III.
[156] GA Res, above n 26.
[157] GA Res 50/157, above n 154, annex.

of the views of indigenous peoples, of the existing mechanisms, procedures and programmes within the United Nations concerning indigenous peoples.[158]

The report of the Secretary-General considered, inter alia, participation of indigenous peoples in the legislative bodies of the United Nations; policy guidelines and research activities related to indigenous peoples within the United Nations; funds available for indigenous peoples; and planned future activities in connection with indigenous peoples.[159] The report highlighted the noticeable difference in the level of activity among United Nations bodies whose mandates concern indigenous peoples. This development was coupled with a growing interest in indigenous issues among the United Nations bodies, as well as the planning and undertaking by United Nations agencies of a number of indigenous related programmes and projects. However, the report found that there was no mechanism to ensure the regular exchange of information between the United Nations, governments and indigenous people on an ongoing basis. The report concluded that adequate procedures were *not* in place to accommodate the effective involvement of indigenous peoples in the work of the United Nations.[160]

Workshops on a permanent forum

In accordance with Resolutions of the Commission, two workshops on a permanent forum for indigenous people within the United Nations system have been held.[161] Participation in these workshops have included States, United Nations bodies, specialised agencies, indigenous organisations and non-governmental organisations with consultative status with ECOSOC. The workshops considered the mandate, terms of reference and activities that might be undertaken by the forum. Some participants highlighted the necessity of establishing a legal framework to provide a context within which the permanent forum could operate. The Draft Declaration would provide this framework once (and if) it is adopted. At the second workshop, outlines of model permanent forums for indigenous peoples were submitted by Denmark, the Grand Council of the Crees, and the Sami Council.[162]

[158] Ibid.

[159] The review was submitted at the 51st session of the General Assembly, UN Doc A/51/493 (1996).

[160] CHR Report, 'Indigenous Issues: Activities Undertaken and Information Received in Pursuance of Commission Resolution 1996/41 on a Permanent Forum for Indigenous People in the United Nations System: Report of the Secretary-General', UN Doc E/CN.4/1997/100 (1997). The Secretary-General also commented on the need to avoid duplication within the United Nations and to strengthen cooperation and consistency of approach within the system to ensure cost-effectiveness in indigenous programmes.

[161] CHR Res 1995/30, UN Doc E/CN.4/RES/1995/30 (1995) called for the first workshop to be held in Copenhagen, which produced 'Consideration of a Permanent Forum for Indigenous People: Report of the Workshop Held in Accordance With Commission Resolution 1995/30', Copenhagen, 26–28 June 1995 (UN Doc E/CN.4/Sub.2/AC.4/1995/7 (1995)); CHR Res 1997/30, UN Doc E/CN.4/RES/1997/30 (1997) called for the second workshop to be held in Santiago, which produced 'Report of the Second Workshop on a Permanent Forum for Indigenous People Within the United Nations System Held in Accordance With Commission on Human Rights Resolution 1997/30', Santiago, 30 June–2 July 1997 (UN Doc E/CN.4/1998/11 (1998)).

[162] Santiago workshop, above n 161, Annex I, II and III of the Report.

The issues of membership and participation of indigenous people within the forum were also addressed. However, there was disagreement as to the appropriate proportion of indigenous to state to independent expert members. One State delegation could not support a forum within the United Nations where indigenous peoples were granted the same legal status as member states and another noted that there was no precedent for membership in a United Nations body beyond governments and independent experts. The basis for determining membership was also contested. Some participants wanted indigenous peoples themselves to determine their membership within the forum, whilst others sought the additional step of confirmation by all state members of the forum.[163] Finally, there was discussion on the body to which the permanent forum would report and financial implications were considered.

The first Ad Hoc Working Group on the Permanent Forum

Following these workshops, the Commission decided to establish an open ended inter-sessional Ad Hoc Working Group ('WGPF') to elaborate and further consider the proposals for the possible establishment of a permanent forum for indigenous people in the United Nations system.[164] The WGPF is to base its work on the reports of the two workshops, the comments of governments, United Nations bodies and organs, specialised agencies, indigenous organisations, the Working Group and ideas of the High Commissioner for Human Rights. Participation in the WGPF is in accordance with the special accreditation procedure established for the WGDD.[165] Non-governmental organisations with consultative status with ECOSOC and indigenous organisations accredited in accordance with Commission Resolution 1995/32 were automatically granted the right to participate in the WGPF.

The first WGPF met in Geneva, Switzerland from 15–19 February 1999.[166] A significant proportion of the 211 people at the meeting were able to attend because of the special accreditation procedure under Commission Resolution 1995/32. There were 44 government representatives, five specialised agencies, one regional body, 13 indigenous organisations with consultative status with ECOSOC, 13 non-governmental organisations with consultative status with ECOSOC and 28 indigenous organisations accredited under the Resolution.

Before substantive issues could be debated, there was a dispute over process. Indigenous representatives proposed that an indigenous person be elected as Co-Chairperson-Rapporteur of the WGPF. Several governments insisted that the rules of procedure of the functional commissions of ECOSOC would not allow the election of any person who was not a representative of a

[163] These participants referred to the arrangements for participation and membership in the Development Fund for the Indigenous Peoples of Latin America and the Caribbean.

[164] CHR Res 1998/20, UN Doc E/CN.4/RES/1998/20 (1998). ECOSOC endorsed the decision of the Commission in ESC Dec 1998/247 (1998).

[165] That is, under the special procedure set out in the annex of CHR Res 1995/32, above n 30.

[166] 'Report of the Open-Ended Inter-Sessional Ad Hoc Working Group on a Permanent Forum for Indigenous People in the United Nations System', Chairman Rapporteur Richard van Rijssen, UN Doc E/CN.4/1999/83 (1999).

member state as one of its officers. An indigenous representative requested a legal opinion from the Office of Legal Affairs of the United Nations on this matter.

The legal opinion found that the rules of procedure of the Commission applied to the proceedings of subsidiary organs. The relevant rule provided that the 'Commission shall elect, from among the representatives of its members, a Chair[person], one or more Vice-Chair[persons] and such other officers as may be required'. The advice concluded that this rule firstly precluded the possibility of nominating an indigenous representative as chairperson, Vice-Chairperson or any other officer, and, secondly, the rule provided for only one Chair.[167] As a compromise, 'co-facilitators' (one governmental representative and one indigenous representative) were appointed to facilitate discussion on the substantive agenda items.

The need for a permanent forum was highlighted by this debate. Indigenous peoples do not believe that they have the carriage of the issues that are determining their future and thus there has been a very real need to discuss the establishment of a permanent forum. However, even within these discussions, indigenous peoples are being excluded from having a formal directive role. It is ironic that during the process that will lead to indigenous leadership and voice within the United Nations system, indigenous peoples are not given a formal leadership role. Further, the commitment to forward looking approaches to the issue of a permanent forum appears questionable.

During the WGPF, the mandate and terms of reference were initially discussed. Indigenous groups and many governments envisaged a broad mandate for the permanent forum, including political, civil, economic, social and human rights, the environment, development, education and health.[168] Many governments also accepted that the permanent forum would have a role in coordinating United Nations activities relating to indigenous peoples, disseminating information on the conditions and needs of indigenous peoples, and promoting greater understanding among nations and peoples of the world. There was disagreement amongst governments as to whether the permanent forum should be mandated to make recommendations and give advice to governments and United Nations agencies. Some governments did not want standards development and policy-making elements within the mandate. However, the exclusion of these functions was not acceptable to some indigenous representatives.[169] Of interest, the Asian Group of member states feared that the more ambitious the mandate, the more difficult it would be to achieve consensus on the permanent forum.

[167] See Rule 24 and 15 of the rules of procedure of the functional commissions of the Economic and Social Council.

[168] New Zealand and Paraguay. Indigenous representatives included: the Aboriginal Legal Service of Western Australia, Comite Intertribal, Consejo Indio de Sud America, Coordinadora de las Organizaciones Indigenas de la Cuenca Amazonica and the New South Wales Aboriginal Land Council.

[169] Eg, the National Aboriginal and Torres Strait Islander Legal Services Secretariat.

Indigenous representatives sought the inclusion of the above-mentioned functions in the mandate, as well as seeking the mandate to implement the existing international standards pertaining to the rights of indigenous peoples, including the capacity to hear individual complaints of human rights violations. Certain indigenous organisations considered the inclusion of conflict prevention and resolution in the mandate as being of vital importance.[170] Many governments rejected this on the basis that maintenance of international peace and security was the prerogative of the United Nations Security Council. Arguably, given the inadequacy of the existing enforcement mechanisms for indigenous rights, the demand for conflict prevention and resolution to be included in the mandate was reasonable. The inadequacies are illustrated by recent action of the Australian Government. When the Australian Government refused to accept CERD's evaluation of the Australian Government's human rights record, the legitimacy and effectiveness of CERD was undermined.

In August 1998, CERD issued a 'please explain' request to Australia in relation to its amendments to the *Native Title Act 1993* (Cth), the consultation process preceding the legislative amendments, and the changes in the function of the Aboriginal and Torres Strait Islander Social Justice Commissioner.[171] Australia submitted an extensive report.[172] After considering Australia's report, CERD expressed concern over the compatibility of the amended *Native Title Act* 1993 (Cth) with Australia's obligations under the ICERD.[173] It also expressed concern over the lack of effective participation by indigenous communities in the formulation of the amendments, which had potentially violated Australia's obligations under Article 5(c) of ICERD.[174] CERD called on Australia to address these concerns as a matter of utmost urgency. CERD also sought the suspension of the amendments and requested that discussions with Aboriginal and Torres Strait Islander peoples be re-opened.[175]

The Australian Government rejected the view of CERD in the most emphatic terms. It stated that the comments were 'an insult' and were 'unbalanced'.[176] It alleged that a critical assessment by CERD was expected because some committee members had pre-judged the issue. The Australian Government refused to issue an invitation to CERD to visit Australia in order to further analyse the issue, despite CERD's request. The most striking part of this whole exchange was the esteem in which the Australian government held CERD:

> [CERD] is not a court, and does not give binding decisions or judgements. It provides views and opinions, and it is up to countries to decide whether they agree with those views and how they will respond to them.

[170] The Aboriginal Legal Service of Western Australia, Consejo Indio de Sud America, Innu Council of Nitassinan and the New South Wales Aboriginal Land Council.
[171] CERD Decision 1(53) on Australia, UN Doc A/53/18 (1998) para 22.
[172] Commonwealth of Australia's response, UN Doc CERD/C/347 (1999).
[173] CERD Decision in its 54th session, 1–19 March 1999, UN Doc CERD/C/54/Misc.40/Rev.2 (1999) unedited version, para 6–8.
[174] Ibid para 9.
[175] Ibid para 11.
[176] D Williams, Attorney-General News Release, 'United Nations Committee Misunderstands and Misrepresents Australia', No 541 (19 March 1999).

The Australian Government, when faced with criticism, chose to discount the opinions of CERD as being partial and thus irrelevant. This attitude reinforces the call by indigenous peoples for the permanent forum to have some sort of reporting and complaint mechanism.

In relation to membership and participation in the permanent forum, all participants considered that full, free and active participation of indigenous peoples was fundamental. A range of options were discussed. Some governments sought a body modelled on the Working Group, being particularly attracted to the body operating as an expert body with both governmental and indigenous representation.[177] Some governments called simply for the expansion of the mandate of the Working Group, along with enhanced participation of indigenous peoples within other United Nations agencies.[178] These models were the weakest proposed.

Many governments and indigenous organisations recommended an assembly with a large and open composition, coupled with a 'core group' or 'executive committee' that would have the right to make decisions on the basis of consensus.[179] Some governments supported indigenous claims that election to the 'core group' should occur in accordance with the respective practices of the governments and indigenous peoples. Indigenous representatives argued that the 'core group' should consist of an equal number of governmental and indigenous representatives participating on an equal footing.[180] In apparent support, New Zealand reiterated the importance that the permanent forum be of a type and status that would allow indigenous representatives to participate alongside states as fully as possible. In contrast, the Asian Group insisted that forum membership must be established with the principles of representativeness and legitimacy in mind. They insisted that it might not be legally possible to have equality between the indigenous and governmental representatives. According to the Asian Group, 'creative' solutions were needed to take account of this. The optimum size of the 'core group' was mooted at between five and 30 members, with the point being made that the smaller the group, the easier consensus could be reached and the more efficient and cost-effective the forum would be.

In terms of who should be able to participate, many governments and indigenous organisations argued that the forum should be open to observers, including non-governmental organisations (whether or not they were in consultative status with ECOSOC),[181] governments and United Nations agencies. Some took issue with independent experts having a right to participate, preferring that such participation should be by invitation only.[182] This was based on

[177] Brazil and the United States.
[178] Brazil and India.
[179] Indigenous representatives from Bolivia, Ecuador, Guatemala and Mexico.
[180] The Aboriginal Legal Service of Western Australia, Comite Intertribal, Coordinadora de las Organizaciones Indigenas de la Cuenca Amazonica, Grand Council of Crees, Inuit Circumpolar Conference, New South Wales Aboriginal Land Council and the Sami Council.
[181] Coordinadora de las Organizaciones Indigenas de la Cuenca Amazonica, Inuit Circumpolar Conference and the Sami Council.
[182] Inuit Circumpolar Conference and the Sami Council.

opposition to the notion of 'independent experts' in indigenous affairs. Indigenous representatives argued that indigenous peoples were capable of representing themselves as experts on their own status, conditions and affairs. Moreover, it was felt that the geographical balance of indigenous representation needed serious consideration, given that the actual distribution of indigenous peoples throughout the world does not mirror the five existing regions recognised within the United Nations.

There was disagreement as to which body the permanent forum should be responsible to. Some governments envisaged the permanent forum being linked to ECOSOC, given its commitment to conferring the broadest possible mandate on the permanent forum.[183] The forum could be either a functional commission or a standing committee of ECOSOC. Some governments argued that the forum should report to ECOSOC through the Commission. This was rejected by indigenous peoples because the mandate of the forum could not extend beyond human rights if it had to report via the Commission. In addition, this status was not acceptable considering that all subsidiary organs of the Commission are only temporary organs.[184] Many indigenous representatives declared that ECOSOC was the lowest acceptable level for the establishment of the permanent forum.[185] Some indigenous groups stated that they would not be satisfied unless the forum was answerable to the General Assembly or to the Secretary-General.[186]

Resourcing the permanent forum was also discussed. The United States called for a realistic forum in terms of resources. The United States called for the following factors to be accounted for: the constrained United Nations budget which cannot accommodate net growth in the system, the imperative to avoid duplication and to direct resources to areas having the greatest impact and benefit, and the availability of voluntary funding.[187] For reasons of function, efficiency, focus and effective utilisation of resources, the Australian Government thought that the permanent forum would have to replace the Working Group, subject to the need for a period of transition.[188] The New Zealand Government agreed that funding for the permanent forum should come from the regular budget of the United Nations on the basis that savings would be generated from the amalgamation with, or disestablishment of, the Working Group. Some indigenous groups agreed that the permanent forum should be funded from the existing United Nations budget, whilst also

[183] New Zealand.
[184] With the exception of the Sub-Commission.
[185] The Aboriginal Legal Service of Western Australia, Comite Intertribal, Consejo Indio de Sud America, Coordinadora de las Organizaciones Indigenas de la Cuenca Amazonica, Inuit Circumpolar Conference, New South Wales Aboriginal Land Council and the Sami Council.
[186] The Aboriginal Legal Service of Western Australia, Grand Council of Crees and the New South Wales Aboriginal Land Council.
[187] Australia agreed.
[188] If a permanent forum were established, Australia's demand was supported by the Asian Group.

allowing for voluntary contributions.[189] However, some indigenous groups disagreed about the discontinuance of the Working Group. These groups argued that the Working Group should continue to play a separate role in the field of indigenous rights because it is an expert body nominated by governments with a human rights mandate, whereas the permanent forum would have a much greater scope and would consist of states and indigenous representatives.[190]

The Danish Government sought the inclusion of a review clause. They argued that the permanent forum would gain strength if its establishment were viewed as an evolutionary process. For a comprehensive overview of the views of indigenous peoples in relation to the permanent forum, reference should be had to the Declarations of the First and Second International Indigenous Conferences on a Permanent Forum in the United Nations System, the latter actually setting out a text in relation to the establishment of a permanent forum.[191]

The Commission welcomed the report of the first WGPF, requesting it to meet again and to submit one or more concrete proposals on the establishment of a permanent forum, with a view to completing its task.[192]

The second Ad Hoc Working Group on the Permanent Forum

The second WGPF met in Geneva from 14–23 February 2000.[193] At the time of submitting this article the formal report of the WGPF was not available.[194] According to a media release issued by the Indigenous Project Team of the United Nations Office of the High Commissioner for Human Rights, the report will appear as document E/CN.4/2000/86.[195]

Julian Burger confirmed in the media release that broad consensus had been reached on three key issues:

a) that there should be a forum established;
b) that it should be a subsidiary body under ECOSOC; and
c) that the membership should be equally divided between governments and indigenous representatives serving in their individual capacities.[196]

[189] ATSIC, Aboriginal Legal Service of Western Australia, Comite Intertribal, Consejo Indio de Sud America, Coordinadora de las Organizaciones Indigenas de la Cuenca Amazonica, National Aboriginal and Torres Strait Islander Legal Services Secretariat and the New South Wales Aboriginal Land Council.

[190] Grand Council of Crees and the New South Wales Aboriginal Land Council.

[191] Declaration of the First International Conference on a Permanent Forum in the United Nations System, Temuco, Chile 6–9 May 1997, UN Doc E/CN.4/1998/11/Add.1 (1997) annex IV; and Declaration of the Second International Conference on a Permanent Forum in the United Nations System, Ukupseni, Kuna Yala, Panama, 4–6 March 1998, UN Doc E/CN.4/1998/11/Add.3 (1998).

[192] CHR Res 1999/52, UN Doc E/CN.4/RES/1999/25 (1999).

[193] Provisional Agenda of the second WGPF, UN Doc E/CN.4/AC.47/2000/1 (1999).

[194] An *informal* 'Summary of Debate' for each day of the WGPF has been compiled by ACUNS/Native Americas Magazine for Netwarriors. See <http://mypage.bluewin.ch/tokala/wgpf2000>.

[195] J Burger, Indigenous Team Leader, 'Working Group on Permanent Forum' (25 February 2000). See <http://www.unhchr.ch>. The final report can be found at: <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/712bf2a875b64e69802568c0005661e9/$FILE/G0011423.pdf>.

[196] Ibid.

Points of disagreement include the name of the forum and the way in which indigenous peoples elect their forum members.[197] It appears likely that the Commission will recommend that the forum be established within the United Nations Office of the High Commissioner for Human Rights, at least temporarily, for financial reasons.

CONCLUSION

A comprehensive legal framework for indigenous peoples' rights should be adopted and a permanent forum dedicated to indigenous issues established. If the aim to improve the human rights of indigenous peoples during the International Decade is to be achieved, States must be forward-looking and courageous in their approach to indigenous peoples.

A legal framework, such as the Draft Declaration, addressing the specific needs and concerns of indigenous peoples is imperative. However, the integrity of indigenous peoples and the integrity of international human rights law should not be compromised in the process. Indigenous peoples should be given the unqualified right to self-determination if human rights are to apply universally — and this extends to their right to self-identify as indigenous. Further, their collective life must be recognised by the international community and reflected in any legal framework.

The voice of indigenous peoples must be heard, and this must occur in a culturally appropriate setting. Indigenous peoples have had to utilise non-indigenous institutions for too long. The impact of the subjugation to non-indigenous ways is illustrated by the failure of the indigenous peoples to ensure informal documents were not presented to the WGDD and appended to the formal report of the WGDD, as well as by their failure to have a Co-Chairperson-Rapporteur appointed to the WGPF. During the processes that are designed to promote indigenous leadership and voice within the United Nations system, why are indigenous peoples' views discounted and why are indigenous peoples not given formal leadership roles?

The appalling bureaucracy and 'diplomacy' at the United Nations results in indigenous peoples expending precious energy on brokering deals to alter a word in a document or the membership of a committee. This process must also have a detrimental impact on the will and motivation of the States. It would be a tragedy if the process of reconciliation between indigenous and non-indigenous peoples were to fail because the insincere motives of a few governments consumed the good will that exists between most indigenous and non-indigenous peoples in the world. 'There is not a single future to which [indigenous peoples] must conform, there are multiple futures. And multiple futures within the same environment'[198] as non-indigenous peoples.

[197] Ibid. Indigenous peoples, supported by some governments, called for the name 'Permanent Forum for indigenous peoples', whilst other governments would only accept the name 'Forum on indigenous issues'.

[198] L O'Donoghue, ATSIC Chairperson (Statement made at the 11th session of the Working Group on Indigenous Populations, 21 July 1993).