Developments in International Law: Indigenous Inherent Rights

Peter Grose*

Recent decades have witnessed at the international level an increasing articulation from indigenous peoples for recognition and accommodation from post-colonial governments of their inherent rights as indigenous peoples. Broad based international organisations such as the World Council of Indigenous Peoples (WCIP) and the Working Group on Indigenous Populations (WGIP) have raised international awareness of the fundamental issues of indigenous peoples' dispossession and subsequent marginalisation within their own lands. A comparison of the underlying premises of International Labor Organisation (ILO) Conventions 107 (1959) and 169 (1989) provides a view of international perceptions moving from those supportive of policies of assimilation to those supportive of indigenous self-determination. This article gives insights into international developments of the past few decades which both advance and retard indigenous aspirations for the recognition of inherent indigenous rights.

Introduction

During the last two decades, dating from the mid 1970's, there have been widening and strengthening international movements pressing for recognition and protection of indigenous rights. In international law the ambit of such rights is in the crystallising stage, embracing overlap with and distinction from human rights law. In common with human rights law, indigenous rights include the pursuit of land, resources, services and the like, but in addition, the pursuit of attainment of formal equality which demands the recognition of distinct status above and beyond that which is recognised in human rights law for minorities and other special interest groups. The single most articulated universal indigenous aspiration is self-determination. At this point in history the United Nations represents the most important international organisation but it needs to

* BA (UQ), LLB (QUT), MLS (British Columbia); Lecturer, Faculty of Commerce and Administration, Griffith University.

be clearly recognised that the ground rules for its creation fell to States. In like manner the approval by the General Assembly of international developments falls to States, not subordinated indigenous nations. To date UN declarations and covenants have been brought into existence without "the consent of the natives".

A development of major significance has been the role played by indigenous peoples in their pursuit of having their voices heard at this international level. If that articulation can be summarised into an encapsulated phrase it is for the recognition and accommodation of their inherent indigenous rights as *peoples*. This article will identify both major international developments and progress in this movement and international impediments.

World Council of Indigenous Peoples (WCIP)

WCIP arose from the First International Conference on Indigenous Peoples, held at Port Alberni, British Columbia in October 1975.[1] Nineteen countries were represented including Australia, New Zealand, Canada and the United States, with a total of 260 participants. The objectives of WCIP have been summarised as follows:

> "To promote unity among indigenous peoples; to facilitate the exchange of information among the indigenous peoples of the world; to strengthen their organisations and to encourage the abolition of any possibility of genocide or ethnocide; as well as to combat racism, to ensure the political, economic, social and cultural justice of the indigenous peoples, based on the principles of equality among the indigenous peoples and the people of the countries that surround them." [2]

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1 Sanders, D, "Background Information on the World Council of Indigenous Peoples: April 1980: The Formation of the World Council of Indigenous Peoples" <ftp://ftp.halcyon.com/pu.international/wcipinfo.txt>, pp 1-14.

2 Directory, Indigenous Peoples Organisations 1995, *Youth Sourcebook on Sustainable Development* Winnipeg: IISD, <http://iisd1.iisd.ca/youth/ysbk146.html> (5 Feb 1996).

At the conclusion of the October 1975 international conference, a Solemn Declaration was adopted which concluded with this avowal:

> "We vow to control again our own destiny and recover our complete humanity and pride in being Indigenous People."[3]

University of British Columbia law professor, Douglas Sanders presents evidence that both the leadership and the organisations that were instrumental in the formation of the WCIP could not be classed as radical. Financial government support had been provided by among others, Canada, and the Scandinavian countries. The Canadian Catholic Organisation for Development and Peace, the Anglican Church of Canada and the World Council of Churches also provided funding. Sanders presents argument which justifies such support in terms of gaining national stability. Speaking of western industrialised countries such as Australia, New Zealand, Canada and the United States he states that:

> "[they] have come to the conclusion that stable patterns of political accommodation cannot be achieved without the existence of indigenous political leaders able and willing to participate in the political life of the nation. The funding programs are designed to make that leadership possible. They represent a recognition that indigenous populations have survived as distinct political communities within the nation state and a discarding of the view that integration and assimilation are the only possible 'solutions' to the 'problem'." [4]

Such views may be contrasted with those of the earlier "Law of Nations", the previous term for international law founded upon European legal principles and with membership initially so restricted.[5] The nineteenth century Berlin Conference confirmed the non-worth and

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3 Sanders, already cited n 1, p 8.

4 Id, p 11.

5 Preiser, W, "History of the Law of Nations" in Bernhardt, R (ed), *Encyclopedia of Public International Law* (v 2), Elsevier, Amsterdam, 1995, p 716.

non-recognition of "uncivilised" peoples.[6] Consultation and consent were not requirements for the imposition of European style government and law.[7] This view simply continued the line of thinking advanced by publicists such as Vitoria in the sixteenth century that the "Law of Nations" being natural law was universal law and that with or without consent, Indian people were bound.[8] Hence the rules were designed by Europeans for European views of reality. For the USA, Allott summarises it thus: "The voice of invincible Anglo-American common sense became the representative voice of self-misconceiving international society and its law."[9]

Sanders' identification of more recent national government support for the recognition of indigenous rights suggests the combination of political stability and retreat from injustice may yet crystallise into both international and national law protecting and fostering indigenous rights.

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6 Munch, F, "Berlin West Africa Conference (1884/1885)" in Bernhardt, R (ed), *Encyclopedia of Public International Law* (v 7), Elsevier, Amsterdam, 1984, pp 21-22.

7 Bennett, G, *Aboriginal Rights in International Law* Occasional Paper (Royal Anthropological Institute of Great Britain and Ireland) No 37. Royal Anthropological Institute (for) Survival International, London, 1978.

8 Vitoria, F, *De Indis et de Jure Belli Relectiones* (1st ed np 1557, 1696), reprinted in Scott, J. B, (ed), *Classics of International Law* (1964), p 151, cited by Marks, GC, 1992 "Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas" in Greig, D. W, and Alston, P, (eds) *The Australian Yearbook of International Law* (v 13), National Capital Printing, Canberra, p 46. Williams, R, "The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought" (1983) 57 *Southern California Law Review* 1, p 84, recognises with distain the same point: cited in Marks, Ibid. But compare and contrast antipodean requirements of consent in the secret instructions to Cook, *Additional Instructions for Lieutenant James Cook* [Executed by the Admiralty Commissioners, 30 July 1768]. British Admiralty, Secret Instruction Book, Public Record Office, London, Admn2/1332, cited in Bennett, J. M, and Castles, A. C, *A Source Book of Australian Legal History*, The Law Book Company Limited, Sydney, 1979, pp 253-254; and also "Instructions from the Secretary of State for War and Colonies, Lord Normanby, to Captain Hobson, recently appointed HM Consul at New Zealand, concerning his duty as Lieutenant Governor of New Zealand, as a part of the Colony of New South Wales, dated 14 August 1839" in McIntyre, W and Gardner, W, (eds) *Speeches and Documents on New Zealand History*, Oxford, Clarendon Press, 1971, pp 11-12.

9 Allott, P, *International Law & International Revolution: Reconceiving the World*, Josephine Onoh Memorial Lecture, 1989, p 15.

Indigenous and Tribal Populations Convention 1957 (No 107) and Indigenous and Tribal Peoples Convention 1989 (No 169)

The first international instruments dealing specifically with indigenous peoples were the *Indigenous and Tribal Populations Convention 1957 (No 107)*[10] and the accompanying *Recommendation No 104*. The tenor of *No 107* may be gleaned from the preamble which in part read:

> "Considering that there exists in various independent countries indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community and whose social, economic or cultural situation hinders them from benefiting fully from the rights and advantages enjoyed by other elements of the population..."

For the next thirty years the official view thus encapsulated, supported an assimilative approach by national governments in dealing with indigenous issues. By the 1970's however through the international articulation by indigenous organisations, pressure began to mount for a reformulated convention denying the legitimacy of assimilation and proclaiming the continuance of and respect for indigenous cultures. These aspirations are now reflected in the *Indigenous and Tribal Peoples Convention 1989 (No 169)*.[11] The preambular paragraphs read in part:

> "Considering that the developments which have taken place in international law since 1975, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and,

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10 *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, International Labour Organisation, United Nations Document E/CN.4/Sub.2/1988/24, Annexure II; 40th Session No 107, 328 *UNTS* 247 (1959).

11 72 *ILO Official Bulletin* 59, entered into force 5 September 1991; 28 *ILM* 1382 (1989).

> Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and...adopts this twenty-seventh day of June of the year one thousand nine hundred and eighty-nine the following Convention, which may be cited as the Indigenous and Tribal Peoples Convention, 1989."

It will be noted that the terminology in International Labor Organisation (ILO) *Convention No 107* uses "populations" while ILO *Convention No 169* uses "peoples." It was only on the insistence of indigenous peoples that the term was retained but to appease the trepidation of certain governments the following qualification was inserted: "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."[12]

In similar fashion, the 1993 International Year for the World's Indigenous People[13] deliberately bore not the plural form "peoples" but rather the singular form "people" so that there might be no hint of suggestion of reference to rights that accrue to "peoples" under international law, especially self-determination. In the same year Chairperson-Rapporteur, Ms Erica-Irene Daes of the Working Group on Indigenous Populations stated:

> "Certain governments have sought to narrow the definition of 'peoples' in order to limit the number of groups entitled to exercise a claim to self-determination... Indigenous groups are unquestionably 'peoples' in every political, social, cultural and ethnological meaning of this term... It is neither logical nor scientific to treat them as the same 'peoples' as their neighbours, who obviously have different languages, histories and cultures."[14]

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12 Article 1 (3).

13 Proclaimed by the General Assembly in Resolution 45/164 of 18 December 1990.

14 Explanatory note concerning the *Draft Declaration*, E/CN.4/Sub.2/1993/26/Add.1.

If the word "peoples" is not associated with indigenous nations, then international laws have limited importance in enforcing the rights of "indigenous peoples."

Not surprisingly there has been from indigenous peoples themselves varying views on the advisability of supporting ILO *Convention No 169*. In part this relates to the "peoples" proviso of Article 1 (3), but also because ILO *Convention No 169* makes no express mention of the right to indigenous self-determination.[15] On the other hand Lee Swepston, Chief of the Equality of Rights Branch of the International Labor Office, Geneva writes:

> "the argument that the Convention limits the right to self-determination of these groups can be rejected without detailed consideration. This right, if it exists for them, remains to be defined in international law... It is more likely that the effect will be a positive one for increasing the recognition in international law of the right of these people to a continued existence."[16]

Support for ratification by Australia has been expressed by ATSIC in its response to "the formal views" sought

> "of the Commission on further measures that the Government should consider to address the dispossession of Aboriginal and Torres Strait Islander people as part of its response to the 1992 High Court decision on native title."[17]

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15 See Strelein, L, "The Price of Compromise: Should Australia Ratify ILO Convention 169?" in Bird, G, et al (eds), *Majah: Indigenous Peoples and the Law*, Federation Press, Sydney, 1996, pp 63-86.

16 Swepston, L, "A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention 169 of 1989" (1990) 15 *Oklahoma City University Law Review* 677, p 694.

17 ATSIC, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures*, Australian Government Publishing Service, Canberra, 1995, p (iii); see also criticism levelled at the then Labor Government for failure to ratify ILO *No 16*, and recommendation of ratification: Recommendation 4, Chapter 3, and paragraphs 5.3 and 5.10, by the Joint Committee on Foreign Affairs, Defence and Trade, in the first Parliamentary Report for the promotion and protection of human rights: *A Review of Australia's Efforts to Promote And Protect Human Rights*, Australian Government Publishing Service, Canberra, 1992.

Recommendation 15 reads:

> "The Commonwealth Government should make a commitment, following upon consultation and negotiation with Indigenous peoples:
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> (a) ensuring that the endorsement of the *Draft Declaration* of the Rights of Indigenous People is achieved without undue delay; and
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> (b) the ratification of ILO Convention 169."

ATSIC, as the principal Australian Commonwealth agency for Aboriginal and Torres Strait Islander affairs, represents a recent innovation in an attempt, domestically, to provide government with one peak body through which the heterogeneous voices of indigenous peoples might be articulated.[18] The objects of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) include the ensurance of "maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them." ATSIC's role includes the allocation and administration of indigenous funding and this has run to support for indigenous organisations' attendance and participation[19] at the UN Working Group on Indigenous Populations (WGIP) sessions.[20] With an estimated 2000 incorporated indigenous organisations and the undisputed heterogeneity of indigenous societies thus served in Australia,[21] ATSIC occupies a position from which it is

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18 For an overview of the history, structure and functions see *Aboriginal and Torres Strait Islander Commission Annual Report 1995-96*, pp 1-20.

19 Eg Secretariat of National Aboriginal & Islander Child Care; Central Land Council; National Federation of Aboriginal Education Consultative Groups; IINA Torres Strait Islander Corporation; Indigenous Women's Aboriginal Corporation; Foundation for Aboriginal & Islander Research Action; National Committee to Defend Black Rights; Northern Land Council; NSW Aboriginal Land Councils; National Coalition of Aboriginal Organisations and Islander Legal Services Secretariat. For other indigenous representation from Australia at WGIP Sessions see the Annual Reports of the Working Group on Indigenous Populations; United Nations Economic and Social Council; Commission on Human Rights; Sub-Commission on Prevention of Discrimination and Protection of Minorities.

20 See below, Working Group on Indigenous Populations.

impossible to escape criticism for the views which it pronounces and the policies it pursues both domestically[22] and internationally.[23]

As to Australia's progress in consideration of ratifying ILO *Convention No 169*, Senator Herron's office of Aboriginal Affairs advised that (as with the previous Labor Government), there is no indication of ratification taking place in the near future.[24]

Self-Determination

Australia as a signatory to the United Nations Charter has recognised the principle of self-determination.[25] Australia is also signatory to the Human Rights Covenants.[26] The central issue of indigenous self-determination[27] which is at the slow crystallising stage in international law may eventually formalise protection against cultural genocide from moral to legal status.

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21 *Aboriginal and Torres Strait Islander Commission Annual Report 1995-96*, p 8.

22 See Coe, P, "ATSIC: Self-Determination or Otherwise" (1994) 35 (4) *Race & Class*, pp 35-39.

23 See eg "Statement by Mr Jeremy Clark on behalf of the Aboriginal Provisional Government", UN Working Group on Indigenous Populations, Thirteenth Session, 24-28 July, 1995, Geneva, Switzerland and the Technical Meeting on the UN International Decade of the World's Indigenous People, 20-21 July, 1995, Geneva, Switzerland. *The Australian Contribution 1995*, ATSIC, Canberra, pp 97-99.

24 Communication, 17 October 1996 by the Federal Aboriginal Affairs Ministerial Adviser.

25 Article 1 (2) and Article 55.

26 See *International Covenant on Civil and Political Rights*, Article 1 (1); *International Covenant on Economic, Social and Cultural Rights*, Article 1 (1).

27 Prioritising the recognitions demanded by indigenous peoples world-wide, the inherent right to self-determination heads the list. See eg Cristescu, A, *The Right to Self-Determination. Historical and Current Development on the Basis of United Nations Instruments: Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, New York, United Nations, 1981, United Nations Document E/CN.4/Sub.2/404/Rev.1. International Indian Treaty Council, (IITC), E/CN.4.1995/WG.15/4. See also Article 3, *Draft Declaration on the Rights of Indigenous People*. Domestically, see eg Torres Strait Regional Authority, *An Act of Self Determination for the People of the Torres Strait: A Framework for achieving the aspirations of the people of the Torres Strait. Response to the Social Justice Task Force*, 1994, p 13.

To date the response from western industrialised countries such as Australia, New Zealand, Canada and the United States has been support to varying degrees of what has been termed internal self-determination or *internal* autonomy.[28] Legal scholars such as Professor James Crawford[29] have argued for the accommodation of such internal governing arrangements where under the current statist paradigm, indigenous peoples are not recognised as "peoples" for international law purposes. The impediment may be seen as arising through the doctrine which holds that sovereignty is an attribute having application only to states[30] the qualities of which were defined in the 1933 Montevideo Convention on Rights and Duties of States, Article 1:

> "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States." [31]

The status afforded indigenous peoples in international law is that of minorities within their respective dominant states. Hence are they not "peoples" accorded recognition to the right of self-determination under a variety of international instruments, including, the UN Charter, Article 1(2) and Article 55; the 1960 Declaration on the

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[28] For issues on *internal* autonomy and self-government, see "Implementation of the Programme of Action for the Second Decade to Combat Racism and Racial Discrimination: Report of the Meeting of Experts to review the experience of countries in the operation of schemes of internal self-government for indigenous peoples, Commission on Human Rights, Forty-eighth session, Item 14 of the provisional agenda, Nuuk, Greenland, 24-28 September 1991", United Nations: Economic and Social Council, 25 November 1991, and Addendum to this document.

[29] Crawford, J, "Outside the Colonial Context" in Macartney, W (ed), *Self-determination in the Commonwealth*, Aberdeen University Press, Aberdeen, 1988, pp 13-14. See also Iorns, C, "Indigenous Peoples and Self-Determination: Challenging State Sovereignty" (1992) 24 (2) *Case Western Reserve Journal of International Law* 199, p 286. Pritchard, S, "International Law" in Riordan, J (ed), *The Laws of Australia*, Law Book Company, Sydney, 1994, p 80.

[30] Hannum, H, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*, University of Pennsylvania Press, Philadelphia, 1990, p 15.

[31] Signed 26 December 1933, 165 LNTS 19. See Hannum, already cited n 30, pp 15-16.

Granting of Independence to Colonial Countries and Peoples, GA resolution 1514 (XV)[32]; the 1966 International Covenant on Civil and Political Rights (ICCPR)[33] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[34] common Article 1; and, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Resolution 2625 (XXV) of 1970.[35]

No member state of the United Nations has given unconditional support for the recognition of the unrestricted right to self-determination for indigenous peoples. There are already numerous models either proposed or already in existence to accommodate the limited form of self-determination which fits the "internal" paradigm. These may include limited autonomy in its many guises such as self-government, self-management, home rule, or some form of local government extension.[36]

The former UN Secretary-General, Boutros Boutros-Ghali, may also be quoted as advocating self-determination in its less virulent form, pointing out the dangers of infinite fragmentation, the chief argument against external self-determination being that of the necessity to maintain peace:

> "The United Nations has not closed its door. Yet if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become even more difficult...one requirement for solutions to these problems lies in commitment

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32 15 UN GAOR Supp (No 16), p 66, United Nations Document A/4684 (1961).

33 Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

34 GA resolution 220A (XXI), 21 UN GAOR Supp (No 16), p 49, United Nations Document A/6316 (1966), 993 UNTS 3, entered into force 3 January, 1976.

35 GA resolution 2625 (XXV) Annexure, 25 UN GAOR, Supp (No 28), United Nations Document A/5217 (1970).

36 See eg Alfredsson, G, "The Right of Self-Determination and Indigenous Peoples" in Tomuschat, C, (ed), *Modern Law of Self-Determination*, Martinus Nijhoff, Dordrecht, 1993, p 52. Cristescu, already cited n 27, pp 43-44.

> to human rights with a special sensitivity to those of minorities, either, ethnic, religious, social or linguistic." [37]

With the restricted construction which the term "peoples" has so far received, and the centrality of state sovereignty and state territorial integrity to the structure of international politics buttressed by the principle of *uti possidetis* protecting the status quo of colonially formed boundaries, Salmon presents arguments which hold that the whole current system of international law is not conducive to assistance for even the restricted non-official internal form of self-determination.[38]

States have thus rejected indigenous peoples' claims to self-determination on the grounds that indigenous peoples are not peoples for the purposes of self-determination and that the consequences of application of that right would lead to the violation of the principles of territorial integrity and non-interference in states' domestic affairs which have been central to the structure and desired stability of the statist paradigm.[39] The UN Committee on the Elimination of Racial Discrimination whilst continuing to be supportive of the right to self-determination as a fundamental principle of international law,[40] also does so within the restraints of non-violation to the territorial integrity or political unity of sovereign and independent states.[41]

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37 *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace Keeping*, United Nations Document A/47/277-S/24111, 17 June 1992, paragraph 17.

38 See Salmon, J, "Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle" in Tomuschat, already cited n 36, p 256.

39 See *The World Conference on Human Rights: Vienna Declaration and Programme of Action*, United Nations Document A/CONF.157/23, Part 1, paragraph 2. See also Iorns, already cited n 29, p 348. Note however the Canadian announcement at the inter-governmental working group of the Commission on Human Rights, 31 October 1996, accepting a right of self-determination for indigenous peoples: Pritchard, S, "The United Nations and the Making of a Declaration on Indigenous Rights" (1997) 3 (89) *Aboriginal Law Bulletin* 4, p 8.

40 General Recommendation XXI (48) on the Right to Self-Determination, 48th session, 8 March 1996, paragraph 7.

41 Id, paragraph 11.

With the inclusion of the right of self-determination in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights the claim is made that the right of self-determination is now to be viewed as a peremptory norm of general international customary law,[42] and the Human Rights Committee has in regard to the ICCPR reporting requirements stated:

> "With regard to paragraph 1 of Article 1, State Parties should describe the constitutional and political processes which in practice allow the exercise of this right."[43]

Working Group on Indigenous Populations (WGIP)

Created in 1982[44] the WGIP is a small working group of the Sub Commission on the Prevention of Discrimination and Protection of Minorities, meeting annually, reporting to the United Nations Commission on Human Rights.[45] Its functions include the review of current issues pertaining to indigenous peoples and the formulation of standards for minimum rights for these peoples. The resulting

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42 Pritchard, already cited n 29, pp 77-81. Tomuschat, C, "Democratic Pluralism: The Right to Political Opposition" in Rosas, A, and Helgesen, J, (ed), *The Strength of Diversity: Human Rights and Pluralist Democracy*, Martinus Nijhoff, 1992, p 38. Brownlie, I, *Principles of Public International Law*, (3rd ed), Clarendon Press, Oxford, 1979, p 287. Gros Espiell, H, "Self-Determination and Jus Cogens" in Cassese, A (ed), *UN Law/Fundamental Rights*, Alphen aan den Rijn, Sijthoff and Noordhoff, pp 167-173. But see Cristescu, already cited n 27, p 24, para 154: "No United Nations instrument confers such a peremptory character (as that of jus cogens) on the right of peoples to self-determination". Also Professor Verzijl, JHW, *International Law in Historical Perspective* Leyden, Sijthoff, 1968, p 325, holding that self-determination is "unworthy of the appellation of a rule of law."

43 General Comments published in accordance with Article 40 (4) of ICCPR, *Report of the Human Rights Committee* United Nations GAOR Supp (No 40), A/39/40 (1985), 142 cited by Pritchard, already cited n 29, p 80.

44 See Daes, E. I, *Discrimination Against Indigenous People, Report of the Working Group on Indigenous Populations on its Twelfth Session*, United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-Sixth Session, Agenda Item 15. United Nations Document E/CN.4/Sub.2/1994/30 17 August 1994, p 4.

45 Sanders, D, "The UN Working Group on Indigenous Populations" (1989) 11 *Human Rights Quarterly* 407.

formulation is to find its way through the Sub Commission, to the Commission on Human Rights, to the Economic and Social Council and finally for consideration by the UN General Assembly.

A key difference of the composition of the WGIP from other official UN bodies is that it includes not only State nominees but uncharacteristically provides for indigenous representation through non-governmental organisations (NGOs),[46] and its modus operandi allows for the widest input from individuals and groups.[47] To progress this process a Voluntary Fund for Indigenous Populations was set up in 1986. The role of formulation of standards for indigenous rights by the WGIP is thus informed by a larger constituency than has been the case for minorities where the Declaration on the Rights of Minorities was formulated almost without minority representation.[48]

The Sub Commission from which the WGIP is drawn has as its focus the elimination of discrimination and the goal of equality. In *Koowarta v Bjelke-Petersen*,[49] the High Court of Australia examined the term 'racial discrimination' in the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICEAFRD).[50] It was suggested in an examination of the issues that were perceived to flow from that case that the recognition of equality not to proceed on the basis of race would be discriminatory but that indigenous rights were claimed to extend beyond the pursuit of equality. The emphasis rather was upon the recognition and accommodation of difference. Sanders[51] differentiates the goal of combating racism as equality "while the goal of indigenous populations and cultural minorities is distinct group survival."

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46 Ibid, pp 418-419.

47 United Nations Document E/CN.4/Sub.2/1982/33, para 21. See also Pritchard, already cited n 29, p 68.

48 Burger, J, "United Nations Working Group on Indigenous Populations. A. The United Nations and Indigenous Peoples" in Van de Fliert, L, (ed) *Indigenous Peoples and International Organisations* Spokesman, Nottingham, 1994, p 92.

49 (1982) 153 CLR 168.

50 Id, at 235 per Mason J. See also Grose, P, "The Indigenous Sovereignty Question and the Australian Response" (1996) 3 (1) *Australian Journal of Human Rights* 40, p 53.

51 Sanders, already cited n 45, p 406.

A further issue of fundamental importance is that of communitarian rather than an individual rights focus which has characterised international human rights law.[52] Nationally also the focus has been directed to individual rights. Mason J in *Gerhardy v Brown*[53] speaking of individual rights acknowledged the inherent difficulties of defining or describing the concept of human rights where the societies concerned were not culturally homogenous.

The emphasis on individual rights at either national or international level may have the unintended effect of diminishing group coherency which is central to indigenous survival. In the Canadian context, Rosalie Tizya, United Native Nations historian has stated:

> "Genocide is the practice of wholesale physical slaughter of a people by means which would remove them as obstacles to taking the lands and its resources. Assimilation is the practice of using

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52 United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities *Discrimination Against Indigenous Peoples. Study on Treaties, Agreements and Other Constructive Arrangements Between States And Indigenous Populations*, Second Progress Report Submitted By Mr Miquel Alfonso Martinez, Special Rapporteur, United Nations Document E/CN.4/Sub.2/1995/27, 1995, para 79 (Hereafter E/CN.4/Sub.2/1995/27). For views supporting communitarian or collective rights vis-a-vis individual rights, see eg Bauman, RW, "The Communitarian Vision of Critical Legal Studies" (1988) 33 *McGill Law Journal* 295; Johnston, D, "Native Rights as Collective Rights: A Question of Group Self-Preservation" (1989) 2 *Canadian Journal of Law and Jurisprudence* 19; Corlett, J, "The Problem of Collective Moral Rights" (1994) 7 *Canadian Journal of Law and Jurisprudence* 237; Isaac, T, "Individual versus Collective Rights: Aboriginal People and the Significance of *Thomas v Norris*" (1991) 20(2) *Manitoba Law Journal* 618; Thornberry, P, *International Law & the Rights of Minorities*, Clarendon Press, Oxford, 1991; O'Donoghue, L, "Keynote Address: Australian Government and Self-Determination" in Fletcher, C (ed), *Aboriginal Self-Determination in Australia*, Aboriginal Studies Press, Canberra, 1994, pp 3-12. For the pronouncement that the right of self-determination is a collective right see *Western Sahara, Advisory Opinion*, 1975 *ICJ Reports* 12 at 31. In that case the ICJ also referred to the right of self-determination as a legal principle, at 31-33. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolutions 276 (1970), Advisory Opinion*, 1975 *ICJ Reports* 16 at 31. Compare and contrast the Canadian Government's reluctance to acknowledge indigenous collective rights: United Nations Document E/CN.4/Sub.2/AC.4/1988/2/Add.1, 14 June 1988.

53 (1985) 159 CLR 70 at 102.

> certain processes and tools for killing of a people's spirit. In assimilation, governments can tell their citizens, 'See, we are being good to the Indian people because we have not killed them. They are whole and living among us.' While at the same time they have our souls in their welfare pockets or have caused our death by other means not directly tied to them.
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> In the choices facing Canada for gaining control of Indian lands and resources, assimilation was the policy by which Canadian governments proceeded to weaken the Indian Nations. Their goal was to get the Indian to cease to be Indian and become white."[54]

The World Council of Indigenous Peoples (WCIP)[55] has submitted that assimilation is also an element of genocide:

> "Next to shooting indigenous peoples, the surest way to kill us is to separate us from our part of the Earth. Once separated, we will either perish in body or our minds and spirits will be altered so that we end up mimicking foreign ways, adopt foreign languages, accept foreign thoughts and build a foreign prison around our indigenous spirits, a prison which suffocates rather than nourishes as our traditional territories of the Earth do. Over time, we lose our identity and eventually die or are crippled as we are stuffed under the name of 'assimilation' into another society."[56]

Article 2 of the *Convention on the Prevention and Punishment of the Crime of Genocide*[57] defines genocide in

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54 Monet, D and Skanu'u (Ardythe Wilson), *Colonialism on Trial: Indigenous Land Rights and the Gitskan and Wet'suwet'en Sovereignty Case*, New Society Publishers, Philadelphia PA, 1992, p 9.

55 See chapter above: World Council of Indigenous Peoples.

56 "Rights of the Indigenous Peoples to the Earth", submission by the World Council of Indigenous Peoples to the United Nations Working Group on Indigenous Populations, Geneva, 30 July 1985 cited in Khan, S, Talal, H, *Indigenous Peoples: A Global Quest for Justice. A Report for the Independent Commission on International Humanitarian Issues*, Zed Books Ltd, London, 1987, p 85.

57 Adopted by Resolution 260 (III) A of the United Nations General Assembly, 9 December 1948. For text of the resolution see *Genocide Convention Act* 1949 (Cth), The Schedule. (In 1949 Australia became a

wide terms where there is "intent to destroy, in whole or in part, a national, ethnic, racial or religious group" involving:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article V calls for enactment of domestic legislation to make effective the intent of the Convention. Signatories as "civilised" nations are expected to abide by peremptory norms.[58]

In the United States, the separate but equal doctrine of *Plessy v Ferguson*[59] was eventually overturned by *Brown v Board of Education.*[60] The difference of situations between the combating of racism with the goal of equality, and the goal of indigenous peoples' striving for separate survival should be emphasised. The overturning of the separate but equal doctrine for Afro-Americans is laudatory where a minority group strives for inclusion in the dominant culture. The implementation of a separate but equal doctrine is equally laudatory where indigenous peoples, finding themselves enclaves in a colonial or post-colonial

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party to the Convention but has yet to comply with Article V requirements).

58 Defined as: "a norm accepted and recognised by the international community of States as a whole as one from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character", Lachs, M, "General Course on International Law" 169 *RC* 9 cited in Dixon, M and McCorquodale, R, *Cases and Materials on International Law*, Blackstone Press, London, 1991, p 35. See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ 15 at 23. See also Lofgren, N and Kildruf, P, "Genocide and Australian Law" (1994) 3 (70) *Aboriginal Law Bulletin* 6, pp 6-8.

59 (1896) 210 US 537.

60 (1954) 349 US 294.

setting are striving to avoid cultural genocide.[61] Article 7 of the Draft Declaration on the Rights of Indigenous Peoples as revised by the Working Group on Indigenous Populations[62] proclaims protection from ethnocide and cultural genocide:[63]

> "Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:
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> (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

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61 Metaphorically expressed by the Yolgnu of East Arnhem Land: "Into Chaldean Bay, a largely land locked lagoon, flow two streams one fresh from the rainwatered hills and one tidal from the sea. In some places these streams flow side by side, to some degree spilling into one another, but retaining their separate identity and character even after both have entered and merged with the Bay itself." Cited in Coombs, H. C, *Aborigines Made Visible: From 'Humbug' to Politics*, National Library of Australia, Canberra, 1991, p 21. Compare and contrast the Iroquois "two-row wampum" ceremonial belt which symbolised two cultures existing side by side but not merging: see eg Prucha, F. P, "The Revolutionary War Years" in *American Indian Treaties: The History of a Political Anomaly*, University of California Press, Berkeley, 1994, pp 25-26. Compare and contrast the Treaty of Waitangi based on the concept of "treaty partners" suggesting the continued identity of separate Maori and Pakeha cultures. Compare and contrast also the ending of EM Forster's 1924 *A Passage to India* where the two cultures through the two representative characters of an Englishman and a Muslim Indian ride together, *and* remain apart: Harcourt Brace and World, New York, reprinted 1952, p 332.

62 45th Session, 23 August 1993. For texts of the *Draft Declaration*, see Aboriginal and Torres Strait Islander Commission *UN Working Group on Indigenous Populations. Eleventh Session 19-30 July, 1993, Geneva, Switzerland. The Australian Contribution 1993*, ATSIC, Appendixes 2 and 3. For the creation and role of WGIP see Sanders, already cited n 45, pp 407-433; Daes, already cited n 44, p 4; Pritchard, already cited n 29, pp 67-73; Burger, already cited n 48, pp 91-96.

63 Burger, already cited n 48, p 103, citing conclusions of the UNESCO Meeting of Experts on Ethno-development and Ethnocide in Latin America, San Jose, Costa Rica, December 1981 where ethnocide was defined as "the condition under which an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language."

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

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

(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;[64]

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

It needs to be understood that The *Draft Declaration* has a tortuous route to navigate before it should find itself before the UN General Assembly. Events at the 1996 Geneva Second Inter-sessional Working Group, (IWG) comprised of governmental representatives, clearly indicated the level of indigenous frustration when the current *Draft Declaration* was not adopted in its present form. Indigenous peoples had for the previous dozen years been working towards this specific acceptance. Their expectations were buoyed by the acceptance already won of the Sub-Commission for the Prevention of Discrimination and Protection of Minorities and The Working Group of Indigenous Peoples. Indigenous representatives at the October 21st IWG meeting,[65] led by the Maori, Cree and American Indian Movement contingents, staged a walk-out.[66] By October 24th both the

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64 Indian legal scholar, Williams, describes the effects of the restrictions within which internal self-determination is prescribed in the USA: "Tribes must exercise their 'rights' to self-determination so as not to conflict with the interests of the dominant sovereign. In effect, this form of discourse enforces a highly efficient process of legal auto-genocide, the ultimate hegemonic effect of which is to instruct the savage to self-extinguish all troublesome expressions of difference that diverge from the white man's own hierarchic, universalised world view." Williams, R, Jr, "The Algebra of Indian Federal Law: The Hard Trail of Decolonising and Americanising the White Man's Indian Jurisprudence" (1986) 7 *Wisconsin Law Review* 222, p 274.

65 See UNPO Monitor. *Unrepresented Nations and Peoples Organisation* 21-22 October 1996, <http://hookele.com/netwarriors/unpo1.html>.

66 See eg *Joint Report of the American Indian Law Alliance, Indigenous Women's Network and Teton Sioux Nation Treaty Council*, Open-Ended Inter-Sessional Working Group on the *Draft Declaration on the Rights*

Maori[67] and American Indian Movement[68] delegations gave notice of their withdrawal from any further participation in IWG meetings as long as effective indigenous contribution was to be denigrated to less than equal status with that of the constituted governmental representations.[69]

The previous year at the first open-ended IWG[70] there had been recorded support for the adoption of "a strong and effective declaration...within the International Decade of the World's Indigenous People",[71] (ie, acceptance within a decade of the period beginning 10 December 1994).[72] Even acceptance at that level does not confer upon a declaration the binding status of international law. The further steps required are for the General Assembly to request the drawing up of an appropriate convention and the setting up the necessary machinery to allow supervision of implementation.

The indigenous philosophy underlying self-determination is that indigenous peoples will be afforded real choice. For those indigenous peoples who choose assimilation there should be no barriers against such choice. It should however, be readily acceptable that the indigenous peoples of this land do not share some sort of monolithic, homogenised philosophy and that indigenous aspirations will be, at least, equally subject to diversity and flux as are non-indigenous aspirations.

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of Indigenous Peoples, Second Session, October 19-November 1, 1996, <http://hookele.com/netwarriors/law-alliance.html> (pp 2-3).

67 *Statement on Behalf of the Maori Delegation*, United Nations Inter-Sessional Working Group on the *Draft Declaration on the Rights of Indigenous Peoples*, 24 October 1996, <http://hookele.com/netwarriors/maori2.html>.

68 *Statement of the American Indian Movement International Confederation of Autonomous Chapters*, Geneva Switzerland, 24 October 1996, <http://hookele.com/netwarriors/aim.html>

69 See *Resolution of the Indigenous Nations and Peoples Delegates*, Geneva, Switzerland, 21 October 1996, <http://hookele.com/netwarriors/resolution.html>.

70 United Nations Document E/CN.4/1995/WG.15/2, 10 October 1995.

71 "Organisation of the Work of the Session", Economic and Social Council, Commission on Human Rights, Fifty-second Session, United Nations Document E/CN.4/1996/ 84, 4 January 1996, p 2.

72 GA Resolution 48/163, 21 December 1993.

Indigenous rights: contingency v inherency

The most fundamental point which is yet to engage mainstream thinking is the categorisation of the source of indigenous rights.[73] Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, recorded in 1987:[74] "indigenous populations...by virtue of their very existence...have a natural and original right to live freely on their own lands." Indigenous rights, however, at both international and national state levels in law remain at the uncrystallised stage, awaiting both substantive and procedural clarifications.[75] Several recent international declarations articulate the source of indigenous rights as unequivocally inherent. At the 1993 World Indigenous Peoples' Conference: Education (WIPCE) the following declaration was made:

> "We, the indigenous people of the world, assert our inherent right to self-determination in all matters. Self-determination is about making informed choices and decisions. It is about creating appropriate structures for the transmission of culture, knowledge and wisdom."[76]

The *Kari-Oca Declaration* recites, inter alia, in the Preamble:

> "The indigenous peoples of the Americas, Asia, Africa, Australia, Europe and the Pacific, united in one voice at KARI-OCA..."

And in the Declaration:

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73 See Iorns, already cited n 29, pp 210, 224, 301-304, 338.

74 Cobo, J, *Study of the Problem of Discrimination Against Indigenous Populations: Conclusions, Proposals and Recommendations*, Volume V, United Nations, New York, United Nations Document E/CN.4/Sub.2/1986/7/Add.4, at paragraph 578.

75 For an assessment of international developments see Turpel, M. E, "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition" (1992) 25 (3) *Cornell International Law Journal* 579. For national issues in a Canadian setting see: Hogg, P. W, and Turpel, M. E, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues, (1995) 74 (2) *Canadian Bar Review* 189.

76 WIPCE, Wollongong, New South Wales, 11-17 December 1993.

> "We, the indigenous peoples, maintain our inherent right to self-determination, we have always had the right to decide our own forms of government, to use our own laws, to raise and educate our children, to our own cultural identity without interference."[77]

And the *Draft Declaration on the Rights of Indigenous Peoples* in its sixth preambular paragraph states:

> "Recognising the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies."[78]

Responding on behalf of the Australian Government at the thirteenth session of the United Nations Working Group on Indigenous Populations, Colin Willis, Deputy Permanent Representative, Australian Mission, Geneva, paid tribute to WGIP in its articulation of indigenous aspirations through the *Draft Declaration on the Rights of Indigenous Peoples* and its continuing input as to such standards. He observed:

> "Standard-setting activities in themselves will not satisfy the legitimate aspirations of indigenous peoples. In the end, it is up to Governments to accept and discharge fully the obligations codified in those standards."[79]

In similar fashion responding on behalf of the Australian Government at the fourteenth session of the United

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77 For text of the *Kari-Oca Declaration* adopted at the World Conference of Indigenous Peoples on Territory, Environment and Development, Rio, 25-30 May 1992, see Van de Fliert, already cited n 48, Annexure 3, pp 182-183.

78 *Draft Declaration on the Rights of Indigenous Peoples*, as agreed upon by the Members of the Working Group of Indigenous Populations at its Eleventh Session. United Nations Document E/CN.4/Sub.2/1993/29.

79 Willis, C, "Evolution of Standards Concerning the Rights of Indigenous Peoples", UN Working Group on Indigenous Populations, Thirteenth Session, 24-28 July 1995, Geneva, Switzerland. *The Australian Contribution 1995*, ATSIC, Canberra, Agenda Item 4, p 10.

Nations Working Group on Indigenous Populations, Ms Robyn Forester reiterated these same words.[80]

As ever the gap is between the rhetoric and the reality. Put more specifically:

> "'In principle' support from Brisbane or Canberra [or Geneva], however well intentioned is truly meaningless if it is not translated into practice at Kowanyama or Aurukun or our other client communities."[81]

In 1990, at the time of the work commissioned to the Queensland Legislation Review Committee,[82] the LRC stated: "The long term goal of the international law is to develop a special charter of rights for indigenous people that resolves the balance between individual and community rights. But no such Charter of rights has yet been formulated."[83] Progress since that time has seen agreement in 1993 by the Working Group on Indigenous Populations (WGIP) on a final draft text[84] which has since

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80 Forester, R, "Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Peoples", UN Working Group on Indigenous Populations, Fourteenth Session, 29 July-2 August 1996, Geneva, Switzerland, Agenda Item 4.

81 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 1994, *Inquiry into the Implementation of the Recommendations of RCIADIC* Deaths in Custody Unit, Tharpuntoo Legal Service Aboriginal Corporation Submission, p 3. Compare and contrast the first report of the Aboriginal and Torres Strait Islander Overview Committee Brisbane, The State of Queensland (Department of Families, Youth and Community Care), *An Agenda for Action*, 1996, Recommendation 7, p 26, hereafter called "Overview Committee".

82 Goss Cabinet approval for the establishment of the LRC, August 1990. See Queensland. Legislation Review Committee, *Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland: Final Report*, 1991, p 1.

83 Queensland Legislation Review Committee 1991, *Towards Self-government: a discussion paper*, p 24. Clarification on this would acknowledge work carried out from 1988. See eg United Nations Document E/CN 4/Sub 2/1988/25; United Nations Document E/CN 4/Sub 2/1989/33; *Report of the Working Group on Indigenous Populations on its Ninth Session*, United Nations Document E/CN 4/Sub 2/1991/40/Rev 1, Annexure IIA.

84 United Nations Document E/CN.4/Sub.2/1993. See also Organisation of American States, Inter-American Commission on Human Rights, *Draft of the Inter-American Declaration on the Rights of Indigenous Peoples*, 18 September 1995, text cited in *Australian Indigenous Law Reporter*, (1996) 1 (3) *AILR* 495.

moved from the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission) through to the Commission on Human Rights (CHR). Following the March CHR resolution in 1995 the *Draft Declaration* is now subject to consideration by the open-ended Inter-sessional Working Group of the CHR.[85] This open-ended inter-sessional working group is comprised, we should recall, of governmental representatives. Australia, as one of these 61 governmental representatives,[86] has already made response (30 November 1995),[87] acknowledging, in restricted form, the central tenet encapsulated in the *Draft Declaration*, Article 3:

> "Indigenous people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[88]

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85 United Nations Document E/CN.4/1995/WG.15/2, 10 October 1995.

86 "Organisation of the Work of the Session", Economic and Social Council, Commission on Human Rights, Fifty-second Session, United Nations Document E/CN.4/1996/ 84, 4 January 1996, paragraph 2.

87 "Consideration of a Draft Contained in the Annexure to Resolution 1994/45 of 26 August of the Sub-Commission of Prevention of Discrimination and Protection of Minorities, Entitled Draft 'United Nations Declaration on the Rights of Indigenous Peoples.' Information received from the Government of Australia. Self-Determination — The Australian Position", Economic and Social Council, Commission on Human Rights, Fifty-second Session, United Nations Document E/CN.4/1995/WG.15/2/Add.2, 30 November 1995.

88 Compare and contrast the earlier 1993 *Draft Declaration* Article 3 formulation: "Indigenous peoples have the right of self-determination, in accordance with international law, subject to the same criteria and limitations as apply to other peoples in accordance with the Charter of the United Nations. By virtue of this, they have the right, inter alia, to negotiate and agree upon their role in the conduct of public affairs, their distinct responsibilities and the means by which they manage their own interests. An integral part of this is the right to autonomy and self-government." For comment on the change see United Nations Document E/CN.4/1995/WG.15/2/Add.2, 30 November 1995, para 13. See also Magallanes, CI, "The *Draft Declaration on the Rights of Indigenous Peoples*" Australian and New Zealand Society of International Law, Proceedings of Second Annual Meeting 1994, Australian National University, Canberra, 27-29 May 1994, p 285, pp 289-291.

The statements by the Australian Government, Items 4-7, delivered at the 14th WGIP Session, 29 July to 2 August 1996, indicate no reference to self-determination.[89]

The basic tensions in international law which need be acknowledged here are those of territorial (State) integrity and the right of self-determination. The former is exemplified through the *Charter of the United Nations*, Article 2 (4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state...". The latter is exemplified through common Article 1 of *the International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

GA Resolution 1514 brings the tensions into one document by repeating verbatim in Article 2, the "All peoples have the right of self-determination" common Article 1 of *ICCPR* and *ICESCR* and the paramountcy of territorial integrity through its Article 6:

> "Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."[90]

The open-ended inter-sessional working group of the CHR will continue to debate this point.[91]

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89 "Australian Government Statements to WGIP 14", Items 4-7, Department of Foreign Affairs and Trade, Facsimile, 30 January 1997.

90 Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Resolution 1514 (XV), 15 UN GAOR Supp (No 16) at 66, United Nations Document A/4684 (1960). For discussion of this tension see eg Iorns, already cited n 29.

91 See eg "Organisation of the Work of the Session", Economic and Social Council, Commission on Human Rights, Fifty-second Session, United Nations Document E/CN.4/1996/84, 4 January 1996, paragraphs 41-57.

In addition to Articles 3[92] and Articles 7[93] of the *Draft Declaration on the Rights of Indigenous Peoples* already cited, the identification of specific other Articles are posited as appropriate for close scrutiny as to their appropriateness in reflecting indigenous aspirations as to, inter alia, the right to maintain indigenous characteristics,[94] to decision-making,[95] to legislative and administrative procedures and measures,[96] to resources,[97] to self-government,[98] to their own institutional structures,[99] and to the benefit of the States' implementation of the provisions of the declaration.[100]

In a fashion analogous to s 25 of the Canadian Charter of Rights and Freedoms,[101] Article 44 proclaims:

> "Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire."

The Draft Declaration on the Rights of Indigenous Peoples represents the most important document yet produced in this evolution of international law standards for indigenous peoples. The draft articles separately and collectively will demand sustained attention from member States of the United Nations as they debate the issues of recognition, accommodation and protection of these claims.

Antagonists of 'special' rights for indigenous peoples may view such claims as destructive of the unity of the State.[102]

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92 Above n 86 and accompanying text.
93 Above nn 60-61 and accompanying text.
94 Article 4.
95 Article 19.
96 Article 20.
97 Article 26.
98 Article 31.
99 Article 33.
100 Article 37.
101 *Constitution Amendment Proclamation* 1983 (SI/84-102): S 25 "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including..." *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B of the *Canada Act* 1982 (UK), 1982, c 11.
102 See eg Brunton, R, "Carving Up Australia" (1996) July *The Independent Monthly*, pp 23-24.

The English jurist, Brownlie, views claims made by indigenous peoples *as* indigenous peoples, as claims "not of equality but of privilege."[103] This would be refuted by those who hold that human rights and indigenous rights are not synonymous or interchangeable terms. Further, to hold to Brownlie's line of thinking would in effect remove any real meaning from having a category which acknowledged "indigenous peoples."[104] Indigenous peoples will proceed on the basis of inherent rights claims.[105]

The response in 1995 of the International Indian Treaty Council in its consideration of the *Draft United Nations Declaration on the Rights of Indigenous Peoples* proceeds on the inherent rights paradigm:

> Para 19: "The ITTC emphasises that the Right of Self-Determination is not dependent on the Draft Declaration; Indigenous Peoples had that right even before the United Nations and many of its member states were conceived, even before many colonial societies themselves were formed. The Draft Declaration merely presents standards to which the World should aspire, if, as stated in the Charter, the UN is to 'promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'" (Article 55)
>
> Para 20: "it is not a proper role for the United Nations to invent human rights and fundamental freedoms, nor is its role to pick and choose to whom those rights belong. Its role is simply to assist in the realisation of human rights and fundamental freedoms, and to conduct studies and make recommendations for the purpose of promoting

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[103] Brownlie, I, *Treaties and Indigenous Peoples*, OUP, Oxford, 1992, p 73.

[104] United Nations Document E/CN.4/Sub.2/1995/27, already cited n 52, paragraph 184.

[105] See eg "Consideration of a *Draft United Nations Declaration on the Rights of Indigenous Peoples*", United Nations Document E/CN.4.1995/WG.15/4, Paragraph 19. See Articles 62 (2) and 68, establishing the Economic and Social Council to fulfil these functions. See also Article (56). Regarding the International Indian Treaty Council (ITTC) see Sanders, already cited n 45, p 414.

> respect for, and observance of these rights and freedoms." (United Nations Charter Article 13(1))

A final outcome of the World Conference on Human Rights, held in Vienna, 1993 was the declaration for the protection of indigenous peoples.[106] This declaration is cited by the European Parliament as one of three benchmark texts in this regard.[107] Preambular paragraph 10 of the Vienna declaration for the protection of indigenous peoples recites:

> "Welcoming the International Year of the World's Indigenous People in 1993 as a reaffirmation of the commitment of the international community to ensure their enjoyment of all human rights and fundamental freedoms and to respect the value and diversity of their cultures and identities."

Part II — Declaration of Principles , paragraph 11 recites:

> "The World Conference recognises the inherent dignity and the unique contribution of indigenous people to the development and plurality of society and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development. States should ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them. Considering the importance of the promotion and protection of the rights of indigenous people, and the contribution of such promotion and protection to the political and social stability of the States in which such people live, States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination and recognise the value and diversity

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106 For text, see Van de Fliert, already cited n 48, Annexure V.

107 Resolution (A3-0059/93, 9 February 1994), on action required internationally to provide protection for indigenous peoples, (the other two are ILO Convention 169 and the Kari Oca Declaration, Rio, June 1992), cited in Van de Fliert, already cited n 48, Annexure 1, p 172.

> of their distinct identities, cultures and social organisation."[108]

Australian legal scholar, Sarah Pritchard, notes, "The view that indigenous peoples are to be integrated or assimilated [has] become unacceptable."[109] The mammoth task which lies ahead is to educate the non-indigenous population of this fact.

The educative challenge may be seen in delivering curricula which inform the public that self-determination for indigenous peoples is in keeping not only with indigenous aspirations but also with contemporary crystallising developments in international law. The long term outcome of such endeavours would be institutional, legal and constitutional reforms acknowledging the inherency of indigenous rights. To date mainstream accommodation of cultural difference has displayed itself through a parsimonious attitude to "accommodate" those which are inherent rights diminished only by the very colonial intrusions which grudgingly now acknowledge, if at all, indigenous patrimony.

Conclusion

As matters now stand either at municipal or international fora, current mechanisms either do not exist or the barriers remain virtually insurmountable for successful indigenous claims of the recognition of inherent indigenous rights of control over their own destinies.[110] The pressure for the recognition of indigenous rights however is not likely to abate. A recent recommendation

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108 See Van de Fliert, already cited n 48, Annexure V.

109 Pritchard, already cited n 29, p 67.

110 See eg the Human Rights Committee dealing with *Mikmaq Tribal Society v Canada*, United Nations Document CCPR/C/43/D/205/1986 (1991); E/CN.4/Sub.2/1995/27, already cited n 51, paragraph 120. See also Lofgren, N, "Keeping the Colonisers Honest: The Implications of Recommendation 333" in Bird, G, et al, (ed), *Majah: Indigenous Peoples and the Law*, Federation Press, Sydney, 1996, p 95. Note developments however such as the 1993 Hawaiian non-governmental International Tribunal of Peoples in bringing charges of illegal annexation and genocide, see Hasager, U, "International Tribunal of Peoples, Hawaii, 1993" in *Indigenous Issues*, Copenhagen, IWGIA, 1994, No 1 (Jan/Feb/Mar), pp 4-10. Compare and contrast Watson, I, "First Nations' International Court of Justice: A Time to Begin" (1996) 3 (79) *Aboriginal Law Bulletin* 9.

from an Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims comprised of representatives from governments, indigenous organisations, UN organs and specialised agencies called for governments to "review their laws and policies in order to address the concept of the *inherent* rights to self-government and self-management of indigenous peoples."[111]

The Aboriginal and Torres Strait Islander Overview Committee, provides a recent and local example of the increasing focus which will be placed upon international developments. Recommendation 54 of the Overview Committee Report[112] recognising the value of international developments calls for the systematic study and dissemination to indigenous peoples of such information as that contained in the *Draft Declaration on the Rights of Indigenous Peoples.* The Queensland Electoral and Administrative Review Committee (EARC) has also identified the rising role of international law.[113] Justice Brennan (as he then was) in *Mabo v Queensland* (No.2)[114] stated:

> "If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law

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111 *Report of the Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims.* The Whitehorse Conclusions and Recommendations on Indigenous Land Rights and Claims. United Nations Document E/CN4/Sub 2/AC4/1996/6, 29 March 1996, Recommendation 33 (Emphasis added).

112 Overview Committee, already cited n 80, p 201.

113 EARC *Report on Review of OPC,* 1991, at [2.2], cited in Sampford, C, "Fundamental Legislative Principles: Their Meaning & Rationale" (1994) 24 *Queensland Law Society Journal* 531, p 539. See also Parker, C, "Legislation of the Highest Standard? Fundamental Legislative Principles in the Queensland Legislative Standards Act 1992" (1993) 2 (2) *Griffith Law Review* 123, pp 133-134. For a recent expansion of the impact of international law see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 69 ALJ 423. For a response to the government's response to the *Teoh* decision see Chen, D. J, "Anti-Teoh Bill: A Wrong Course for a Wrong Reason, and a Wrong Message" (Draft) Australasian Law Teachers Association 50th Anniversary Conference, School of Law and Legal Studies LaTrobe University 28 September-1 October 1995, pp 1-31. For an "inherent rights" perspective see Walsh, B, "'Remarks' International Human Rights before Domestic Courts" (1996) 70 (1) *St John's Law Review* 77.

114 (1992) 175 CLR 1.

> should neither be nor be seen to be frozen in an age of racial discrimination."[115]

Justice Kirby, now of the High Court of Australia since 1996, has frequently championed the broadening of Australian jurisprudence to heed developments beyond our own parochial boundaries.[116] Those developments which advance recognition of indigenous rights will be keenly monitored and nurtured by indigenous peoples. While it is true that non-indigenous people are not responsible for the actions of their forbears, they should be held accountable to help resolve current legacies of indigenous dispossession and accompanying travail. International law may assist that process as it slowly grinds towards recognition of inherent indigenous rights.

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[115] Id, at 41-42. See also at 42-43.

[116] A sample of his advocacy in this field includes: Kirby, M "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *ALJ* 514; Kirby, M, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol — A View from the Antipodes" (1993) 16 *UNSW Law Journal* 363; Kirby, M, "Relationship of International Law and Domestic Law" (1993) 67 (1) *ALJ* 63; Kirby, M, "In Defence of Mabo" (1994) 1 *James Cook University Law Review* 51; Kirby, M, "Implications of the Internationalisation of Human Rights Law" in Alston, P, (ed) *Towards an Australian Bill of Rights*, Centre for International and Public Law, Human Rights and Equal Opportunity Commission, 1994, pp 267-297; Kirby, M, "The Impact of International Human Rights Norms: 'A Law Undergoing Evolution'" (1995) *Western Australian Law Review* 30; Shearer, IA, "The Growing Impact of International Law on Australian Domestic Law — Implications for the Procedures of Ratification and Parliamentary Scrutiny" (1995) 69 (6) *The Australian Law Journal* 389 (Extracts from President Kirby's (as he then was) Occasional Lecture for the Senate Department of the Australian Parliament). For the recognition of the impact of a norm of customary international law see also *Koowarta v Bjelke-Petersen* (1982) 56 ALJR 625, p 647 per Stephen J; p 653 per Mason J; p 656 per Murphy J.