to the I.C.C., simply gave flesh to the customary duty to either prosecute an accused within a State's national courts, or to extradite him or her to a competent tribunal. This author submits that the I.C.C. is such a competent tribunal.

Dispensing with the consent of the defendant's State of nationality, at least in certain circumstances, is not an arbitrary arrangement. It serves a real purpose. It bears recalling that the crimes over which the I.C.C. has subject-matter jurisdiction are often committed by or with the approval of States.[331] Moreover, historical experience shows that these States are the least likely to grant jurisdiction over their nationals to an international court.[332] This is the insurmountable problem faced by an international criminal court that may exercise jurisdiction only if the defendant's State of nationality consents. In the I.C.C. scheme, the Statute overcomes this predicament by validly dispensing with the consent of the defendant's State of nationality, at least when the territorial State consents to the jurisdiction of the Court. Article 12 of the Statute, therefore, furthers by great strides the international community's struggle against grave and heinous crimes for the mutual defense and safety of all.

331. *See, e.g.*, Report of the Ad Hoc Committee on Genocide, U.N. ESCOR, 7th Sess., Supp. No. 6 at 12, U.N. Doc. E/794 (1948) ("Those in favour of the principle of universal repression held that genocide would be committed mostly by the State authorities themselves or that these authorities would have aided and abetted the crime. Obviously in this case the national courts of that State would not enforce repression of genocide.").

332. Morris, *supra* note 11, at 13.

Self-Determination as "Defined" Under the United Nations Draft Declaration on the Rights of Indigenous Peoples: Secession or Autonomy?

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The author was Editor (2002 – 2003) and Staff (2001 – 2002) of the *Ateneo Law Journal*. He was Prime Minister (President) of the *St. Thomas More Debate Society* (2002 – 2003). He served as the Moderator of *The Colloquium on Indigenous Peoples*, convened under the auspices of the United Nations Development Programme (UNDP), International Labor Organization-INDISCO (ILO Inter-Regional Program to Support Self-Reliance of Indigenous and Tribal Communities Through Cooperatives and Other Self-Help Organizations), National Commission on Indigenous Peoples, Episcopal Commission on Indigenous Peoples (National Secretariat), Legal Assistance Center for Indigenous Filipinos (PANLIPI), Ateneo Human Rights Center (Katutubo Unit), Ateneo Law Journal, Justitia Hall, 4th Floor, Ateneo Professional Schools, Makati City, Philippines (November 14-15, 2002).

His past works published in the *Journal* include: *Ruiz v. Court of Appeals: A Moral Hazard*, 49 ATENEO L.J. 982 (2004); *A Synthesis of the Colloquium on Indigenous Peoples*, 47 ATENEO L.J. 775 (2002); and *The People Power and the Supreme Court in Estrada v. Arroyo*, 47 ATENEO L.J. 8 (2002).

He wrote THE LAW ON PEOPLE POWER: A JURISTIC THEORY OF SOVEREIGNTY (Manila: Central Lawbook Publishing, 2004) which was extensively

I. INTRODUCTION

After almost three decades of set backs, the Human Rights Council of the United Nations, by majority vote of all its members, finally approved the draft United Nations Declaration on the Rights of Indigenous Peoples on 29 June 2006.[1] The approval of the draft Declaration had been hailed as a

cited in the recent case of Lambino v. Commission on Elections, G.R. Nos. 174153 & 174299, Oct. 25, 2006. He is also the co-author of FUNDAMENTALS ON IMPEACHMENT (Manila: Central Lawbook Publishing, 2001).

His other works include: *A Treatise on Arbitration*, 27 UNIV. OF THE EAST L.J. 8 (2004); *A Treatise on Mediation*, 1 SAN SEBASTIAN L.J. 76 (2004); *Conservatorship, Receivership, and Liquidation Proceedings Under the New Central Bank Act*, THE LAWYERS REVIEW 3, 4-9 (May 31, 2004); *The Constitution of the Revolutionary Assembly: A Theory of Convergence of Assessments*, 2-3 BUDHI 123 (2003); *Abu Sayyaf: Terrorism or Banditry?* (Opinion Section) THE PHILIPPINE STAR (Manila), June 9, 2001, at 12; *People Power and the Constitution* (Cover Story), PHILIPPINE GRAPHIC (Manila), Nov. 20, 2000, at 19-20; *A Time for Martial Law?* MANILA TIMES (Manila), May 3, 2000, at 7A (also published in SUN STAR (Manila), May 6, 2000, at 4-5; NORTHERN MINDANAO CHRONICLE (Butuan City), June 7, 2000, at 1 (frontpage); THE PEOPLE'S GUARDIAN (Butuan City), June 2, 2000, at 2); and *The Sticky Problem of Amending the Constitution*, SUN STAR (Manila), Nov. 25, 1999, at 5.

The author would like to thank Kelvin Lester Lee and Michael Maté for their valuable research assistance.

Cite as 51 ATENEO L.J. 1039 (2007).

1. Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994); Working Group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994, A/HRC/1/L.3 (2006) [hereinafter, Working Group of the Commission on Human Rights]; Artemio Dumlao, *UN Declaration on Rights of Indigenous Peoples Signed*, THE PHILIPPINE STAR, July 3, 2006, at 6; United Nations Office at Geneva, *Human Rights Council Adopts Texts for Protection from Enforced Disappearance and Rights of Indigenous Peoples* (June 29, 2006), *available at* http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/BE82C77003776B9EC125719C005D5994?OpenDocument (last accessed Feb. 26, 2007).

> In a resolution, entitled Working Group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994 (A/HRC/1/L.3), after a roll-call vote by thirty in favor, two against, and twelve abstentions, the Human Rights Council adopted the United Nations Declaration on the Rights of Indigenous Peoples as proposed by the Chairperson-Rapporteur of the Working Group of the Commission on Human Rights to elaborate a draft declaration (proposal as contained in Annex I, Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session, E/CN.4/2006/79 (2006)).

2. Dumlao, *supra* note 1.
3. *Id. See also* Working Group of the Commission on Human Rights, *supra* note 1.
4. Dumlao, *supra* note 1; Working Group of the Commission on Human Rights, *supra* note 1.

milestone in the recognition of rights of indigenous peoples around the world and brings to an end their long struggle for self-determination.[2] "Enough time had gone during the last 20 years in drafting the Declaration on the Rights of Indigenous Peoples," declared Carla Rodriguez Mancia of Guatemala, after explaining his vote. "The Declaration would be a historical achievement in the efforts of the international community towards the rights of the indigenous peoples."[3] Xochiti Galvez of Mexico said they had "finally closed the circle." They were at a historic point in time where the UN member-states acknowledged the fundamental rights of the world's indigenous peoples. "Mexico was prepared to support the adoption of the draft Declaration," Galvez said. "Where there was a collective political will, they could achieve a great deal. That had been seen in the Working Group, where the spirit of cooperation and dialogue had prevailed." Mexico, following Guatemala, exhorted those countries that still had misgivings to vote favorably on the resolution: "It was important for the Human Rights Council to give a clear signal to indigenous peoples throughout the world that it was working to promote and protect their human rights."[4]

But Mexico's and Guatemala's call on all states to adopt the draft by consensus fell on deaf ears. The votes had been fixed well before the roll-call. Of forty-seven member-states, 30 voted in favor of the draft, but it came as no surprise to the devoted hardliners that a significant number of states either voted against it or abstained. The reasons were obvious. Many expressed concerns that even if it were purportedly non-binding under international law, the Declaration would set a precedent for secession and dismemberment of territories. Many of the provisions were vague and

purposefully crafted to elude precise definition. As India noted, no definition of "indigenous peoples" can be found among its provisions. The draft was checkered with references to the right of self-determination which, if given a loose interpretation, gave too much political power to non-state groups to shape their "destiny." The draft, if approved by the General Assembly, would fuel secessionist movements. Even Canada, having a long and proud tradition of actively advocating aboriginal and treaty rights at home and had prominently played a crucial role in the process of drafting the Declaration, explained its regret over its negative vote. Paul Meyer, the Canadian representative, said the Declaration did not receive the necessary support and noted that many states encountered difficulties with a process where all parties had failed to discuss the proposed language on several key issues.[5]

The sharpest objection came from the Russian Federation. In an explanation before the vote, Russian representative Alexey Akzhigitov said that although many provisions of the draft were "acceptable," to date, however, the proposed text which had been submitted to the Council failed to be an "effective" and "authoritative international document," as the text did not enjoy genuine consensus from all quarters. Its adoption would set a "negative precedent," and, for this reason, Russia could not support the draft Declaration in its "present form." Moreover, Russia pointed out that the procedural protocols leading to the draft were marked by irregularities. However, to Akzhigitov, Russia's objection did not mean that it was against a continuation of a discussion of the issue — Russia is still willing to work for international cooperation in the protection of the rights of indigenous peoples. Then, Russia cast its negative vote.

Despite their affirmative votes, Germany and the United Kingdom expressly stated that the Declaration was not legally binding, that the concept of self-determination cannot be exercised in such a way as to compromise their territorial integrity, and — most ominously — both asserted that their own national minorities do not fall under the scope of the Declaration. Their reservations, at least as to these two countries, in effect reduced the whole exercise into a formality, a symbol of goodwill, at best.

The Philippines, together with eleven others, abstained. But the reasons proffered were counter-intuitive. Enrique Manalo explained that the Philippines was fully committed to safeguarding and promoting the rights of its indigenous peoples, and, because of this commitment, the Philippine Government had enacted a national indigenous people's rights act and established two autonomous regions in the country. But if the draft resolution on the declaration were to be put to a vote, regrettably, Manalo said, the delegation of the Philippines would have to abstain.[6] These

5. Working Group of the Commission on Human Rights, *supra* note 1.

6. *Id.*

statements can be taken to imply that the Philippines had already exceeded international expectations in the promotion of indigenous peoples' rights in the domestic sphere, and, hence, there would be no need for additional international protocols — a very ambitious conjecture. But even if that were true, the reasons Manalo gave are not reasons for abstaining. On the contrary, his statements clearly strengthen the case for an unqualified adoption of the draft Declaration.

A great deal of scholarship has flourished during the past decade over the specific question of self-determination as exercised by indigenous peoples.[7]

7. *See generally* Kevin K. Washburn, *Tribal Self-Determination*, 38 CONN. L. REV. 777 (2006); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779 (2006); John D. Smelcer, *Using International Law More Effectively to Secure and Advance Indigenous Peoples' Rights Towards Enforcement in U.S. and Australian Domestic Courts*, 15 PAC. RIM L. & POL'Y J. 301 (2006); Klint A. Cowan, *International Responsibility for Human Rights Violations by American Indian Tibes*, 9 YALE HUM. RTS. & DEV. L.J. 1 (2006); Anna Moyers, *Linguistic Protection of the Indigenous Sami in Norway, Sweden, and Finland*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 363 (2005); Joshua Castellino, David Raic, *Statehood & the Law of Self-Determination*, 16 EUR. J. INT'L L. 791 (2005); Andrew Huff, *Indigenous Land Rights and the New Self-Determination*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 295 (2005); Marco Palau, *The Struggle for Dignity, Land, and Autonomy: The Rights of Mexico's Indigenous People a Decade After the Zapatista Revolt*, 36 COLUM. HUM. RTS. L. REV. 427 (2005); Bartolomé Clavero, *The Indigenous Rights of Participation and International Development Policies*, 22 ARIZ. J. INT'L & COMP. L. 41 (2005); Melissa A. Jamison, *Rural Electric Cooperatives: A Model for Indigenous Peoples' Permanent Sovereignty Over Their Natural Resources*, 12 TULSA J. COMP. & INT'L L. 401 (2005); Randall Lesaffer, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, 16 EUR. J. INT'L L. 25 (2005); John Crosetto, *The Heart of Fiji's Land Tenure Conflict: The Law of Tradition and Vakavanua, the Customary "Way of the Land,"* 14 PAC. RIM L. & POL'Y J. 71 (2005); Danielle Conway-Jones, *Safeguarding Hawaiian Traditional Knowledge and Cultural Heritage: Supporting the Right to Self-Determination and Preventing Co-Modification of Culture*, 48 HOW. L.J. 737 (2005); Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-Empowered*, 2005 UTAH L. REV. 443 (2005); Jacqueline Hand, *Government Corruption and Exploitation of Indigenous Peoples*, 3 SANTA CLARA J. INT'L L. 262 (2005); Angelique A. EagleWoman, *Re-Establishing the Sisseton-Wahpeton Oyate's Reservation Boundaries: Building a Legal Rationale From Current International Law*, 29 AM. INDIAN L. REV. 239 (2004-2005); William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1 (2005); David E. Cahn, *Homeless for Generations: Land Rights for the Chocoe Indians from Mogue, Panama*, 28 FORDHAM INT'L L.J. 232 (2004); William Bradford, *"Another Such Victory and We are Undone:" A Call to an American Indian Declaration of Independence*, 40 TULSA L. REV. 71 (2004); Montserrat Guibernau, *Nations Without States: Political Communities in the Global*

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Understandings of the United States and Japan, 33 N.Y.U. J. INT'L L. & POL. 419 (2001); Eric Ting-lun Huang, *The Evolution of the Concept of Self-Determination and the Right of the People of Taiwan to Self-Determination*, 14 N.Y. INT'L L. REV. 167 (2001); Charles Radlauer, *The League of the Iroquois: From Constitution to Sovereignty*, 13 ST. THOMAS L. REV. 341 (2000); Siegfried Wiessner & Marie Battiste, *The 2000 Revision of the United Nations Draft Principles and Guidelines on the Protection of the Heritage of Indigenous People*, 13 ST. THOMAS L. REV. 383 (2000); Patrick Cleveland, *Apposition of Recent U.S. Supreme Court Decisions Regarding Tribal Sovereignty and International Indigenous Rights Declarations*, 12 PACE INT'L L. REV. 397 (2000); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615 (2000); Julie Debeljak, *Indigenous Rights: Recent Developments in International Law*, 28 INT'L J. LEGAL INFO. 266 (2000); Lorie M. Graham, *Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination "Into Practice" and "Into Peace,"* 6 ILSA J. INT'L & COMP. L. 455 (2000); William C. Bradford, *Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute Resolution*, 76 N.D. L. REV. 551 (2000); Rudolph C. Ryser, *Between Indigenous Nations and the State: Self-Determination in the Balance*, 7 TULSA J. COMP. & INT'L L. 129 (1999); John P. LaVelle, *Sanctioning a Tyranny: The Diminishment of Ex Parte young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur D'Alene Tribe*, 31 ARIZ. ST. L.J. 787 (1999); Heather S. Archer, *Effect of United Nations Draft Declaration on Indigenous Rights on Current Policies of Member States*, 5 J. INT'L LEGAL STUD. 205 (1999); Larry Sager, *Rediscovering America: Recognizing the Sovereignty of Native American Indian Nations*, 76 U. DET. MERCY L. REV. 745 (1999); Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999); S. James Anaya, *Superpower Attitudes Toward Indigenous Peoples and Group Rights*, 93 AM. SOC'Y INT'L L. PROC. 251 (1999); J. Oloka-Onyango, *Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium*, 15 AM. U. INT'L L. REV. 151 (1999); Dean B. Suagee, *Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability*, 3 WIDENER L. SYMP. J. 229 (1998); Benedict Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414 (1998); Mark A. Michaels, *Indigenous Ethics and Alien Laws: Native Traditions and the United States Legal System*, 66 FORDHAM L. REV. 1565 (1998); Robert H. Berry III, *Indigenous Nations and International Trade*, 24 BROOK. J. INT'L L. 239 (1998); Julie Cassidy, *Sovereignty of Aboriginal Peoples*, 9 IND. INT'L & COMP. L. REV. 65 (1998); Max Minzner, *Alaska v. Native Village of Venetie*, 101 F.3d 1286 (9th Cir. 1996), Cert. Granted, 117 S. Ct. 2478 (1997), 107 YALE L.J. 863 (1997); Kara H. Ching, *Indigenous Self-Determination in an Age of Genetic Patenting Recognizing an Emerging Human Rights Norm*, 66 FORDHAM L. REV. 687 (1997); WILL KYMLICKA, THE RIGHT TO BE DIFFERENT: INDIGENOUS PEOPLES AND THE QUEST FOR A UNIFIED THEORY (1995); S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (1996); Chinedu Reginald Ezetah, *International Law of Self-Determination and the Ogoni Question: Mirroring Africa's Post-Colonial Dilemma*, 19 LOY. L.A. INT'L & COMP. L.J. 811 (1997); Karen E. Bravo, *Balancing Indigenous Rights to Land and*

Much of it discusses the hypothetical effects of the exercise of the collective right of self-determination upon the policies of nation-states. The June 2006 proceedings of the Human Rights Council, however, brought to fore significant concerns which member-states felt were left unsettled even after over twenty years of discussion and consensus-building. Their arguments and positions should be re-assessed in light of the rapid developments over the right of self-determination in the past fifty years.

In this article, I argue that the draft United Nations Declaration on the Rights of Indigenous Peoples already embodies pre-existing norms of international law, and, being such, the anxieties expressed by particular member-states over the definition (or lack thereof) on self-determination in the draft Declaration — more particularly, whether such a right includes the collective right of a cultural minority to secede — are groundless and moot, as these votes or "reservations" registered by member-states, made either during the recent June 2006 proceedings in the Human Rights Council or prospectively in the General Assembly, cannot in any manner chip away at the entrenched doctrine on self-determination understood either in its "external" or "internal" sense. The Declaration adds nothing new. If the general right to secede is already customary international law, then the draft Declaration is precisely just that — an instrument *declarative* of prior norms — and no more. Any negative vote, reservation, or protest lodged by any state, on the basis that the Declaration is a positive license for non-state groups to legitimately secede from the mother country, would amount to no more than a ceremonial, futile exercise, and, at best, such a protest would produce only a marginal effect upon the doctrinal force of the general right of self-determination as it now stands in international law.

I divide my argument into seven parts. In *Part II*, I give a summary of the policy statements made by the member-states during the roll-call in the June 2006 proceedings of the Human Rights Council. In *Part III*, I review

the Demands of Economic Development: Lessons from the United States and Australia, 30 COLUM. J.L. & SOC. PROBS. 529 (1997); Jennifer E. Brady, *The Huaorani Tribe of Ecuador: A Study in Self-Determination for Indigenous Peoples*, 10 HARV. HUM. RTS. J. 291 (1997); S. JAMES ANAYA, COMING TO GRIPS WITH INDIGENOUS RIGHTS (1996); Leon E. Trakman, *Native Cultures in a Rights Empire Ending the Domination*, 45 BUFF. L. REV. 189 (1997); Dean B. Suagee, *Human Rights of Indigenous People: Will the United States Rise to the Occasion?* 21 AM. INDIAN L. REV. 365 (1997); Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225 (1996); Julian Burger, *The United Nations Draft Declaration on the Rights of Indigenous Peoples*, 9 ST. THOMAS L. REV. 209 (1996); Feisal Hussain Naqvi, *People's Rights or Victim's Rights: Reexamining the Conceptualization of Indigenous Rights in International Law*, 71 IND. L.J. 673 (1996); Jerome Wilson, *Ethnic Groups and the Right to Self-Determination*, 11 CONN. J. INT'L L. 433 (1996).

the various definitions of "indigenous peoples" and offer a core definition for purposes of this essay. In *Part IV*, I revisit the five-hundred-year-old debate[8] on the right to self-determination accorded to the indigenous peoples of the world. *Part V* assesses the major strains of the arguments against the adoption of the draft Declaration, including the position of the Philippines. *Part VI* offers some plausible avenues for the resolution of disputes between the host state and the indigenous peoples within that state, should a conflict occur in the course of the exercise of the right of self-determination. *Part VII* discusses whether unilateralism, in light of the recent 2005 U.N. World Summit, can be a desirable remedy in cases of serious violations of indigenous peoples' rights under humanitarian law. And, finally, in *Part VIII*, I conclude, by way of summation, that the draft Declaration is essentially an affirmation of norms already well-settled under international law.

II. THE JUNE 2006 HRC PROCEEDINGS

Essentially, the draft United Nations Declaration on the Rights of Indigenous Peoples says indigenous peoples have the right to the full enjoyment, as a collective group or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, particularly those based on their indigenous origin or identity. Indigenous peoples have the right of self-determination. By virtue of that right, they may freely determine their political status and freely pursue their economic, social and cultural development. Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the mainstream political, economic, social and cultural life of the State.[9]

The result of the vote was as follows:

In favor (30):

Azerbaijan, Brazil, Cameroon, China, Cuba, Czech Republic, Ecuador, Finland, France, Germany, Guatemala, India, Indonesia, Japan, Malaysia, Mauritius, Mexico, Netherlands, Pakistan, Peru, Poland, Republic of

8. *See generally*, Chidi Oguamanam, *Indigenous Peoples and International Law: The Making of a Regime*, 30 QUEEN'S L.J. 348, 350 (2004) (assessing the five-hundred-year-old debate on the status of the international legal regime on indigenous peoples' rights, from its historical roots in colonialism through to contemporary developments that should generate optimism about the regime.).

9. Working Group of the Commission on Human Rights, *supra* note 1.

Korea, Romania, Saudi Arabia, South Africa, Sri Lanka, Switzerland, United Kingdom of Great Britain and Northern Ireland, Uruguay, Zambia.

Against (2):

Canada, Russian Federation.

Abstentions (12):

Algeria, Argentina, Bahrain, Bangladesh, Ghana, Jordan, Morocco, Nigeria, Philippines, Senegal, Tunisia, Ukraine.

Absent (3):

Djibouti, Gabon, Mali.[10]

The statements of each member-state, in brief, are as follows:

Guatemala

CARLA RODRIGUEZ MANCIA, in a general comment, said enough time had gone during the last 20 years in drafting the Declaration on the Rights of Indigenous Peoples. The declaration would be a historical achievement in the efforts of the international community towards the rights of the indigenous peoples. The adoption of the draft declaration would help the indigenous peoples. Guatemala called on all States to adopt the draft by consensus.

Switzerland

JEAN-DANIEL VIGNY, in a general comment, said the text was a compromise, one which had been formed by agreement by most of the delegations and most of the representatives of indigenous groups. Switzerland would have wished for the text to be adopted by consensus, but if this were not the case, it would still vote in favor of the text.

Mexico

XOCHITI GALVEZ, in a general comment, said that they had finally closed the circle. They were at a historic point in time, finally acknowledging the fundamental rights of the world's indigenous peoples. Mexico was prepared to support the adoption of the draft Declaration on the Rights of Indigenous Peoples. Where there was a collective political will, they could achieve a great deal. That had been seen in the Working Group, where the spirit of cooperation and dialogue had prevailed. Mexico exhorted those countries that still had misgivings to vote favorably on this resolution. It was important for the Human Rights Council to give a clear signal to

10. *Id.*

indigenous peoples throughout the world that it was working to promote and protect their human rights.

Canada

PAUL MEYER, in an explanation before the vote, acknowledged the important role that Canada, as well as other indigenous organizations, had played in the process of the drafting of the Declaration on the Rights of Indigenous Peoples. However, the proposal did not receive the necessary support: Canada, some other countries, and a few indigenous representatives noted in their statements certain difficulties with a process where all parties had not discussed the proposed language on several key issues. Canada had worked for a declaration that would promote and protect the human rights and fundamental freedoms of every indigenous person without discrimination and recognized the collective rights of indigenous peoples around the world. Canada had a long and proud tradition of not only supporting but also actively advocating aboriginal and treaty rights at home and was fully committed to working internationally on indigenous issues. Regrettably, because of the foregoing "difficulties," Canada would vote against the resolution.

India

AJAI MALHOTRA, in an explanation before the vote, said India had consistently favored the rights of indigenous peoples and had worked hard for the Declaration on the Rights of Indigenous Peoples. The text before the Council was the result of 11 years of hard work. The text did not contain a definition of "indigenous." The entire population of India was considered to be indigenous. With regards to the right to self-determination, this was understood to apply only to peoples under foreign domination, and not to a nation of indigenous persons. With this understanding, India was ready to support the proposal for the adoption of the draft Declaration and would vote in its favor.

Indonesia

GUSTI AGUNG WESAKA PUJA, speaking in an explanation before the vote, said that Indonesia had been following closely over 11 years the negotiations on this draft Declaration on the Rights of Indigenous Peoples. The Human Rights Council, as a new body, had to address such important issues as this draft declaration. Therefore, Indonesia supported the adoption of the draft Declaration to protect and support the rights of indigenous peoples worldwide. Indonesia was a multicultural nation that did not discriminate against its population on any grounds. All of Indonesia's citizens enjoyed the right to equal treatment before the law.

Bangladesh

TOUFIQ ALI, speaking in an explanation before the vote, said that the text did not follow the usual procedure before it was put as a final text for adoption. Bangladesh was a party to the International Covenants on Economic, Social and Cultural Rights, and Civil and Political Rights, and was making all efforts to implement them. Until some of the articles in the text were not amended, Bangladesh would abstain from the voting.

Russian Federation

ALEXEY AKZHIGITOV, in an explanation before the vote, said that great importance was given to defending the rights of indigenous peoples. The adoption by consensus of the draft would constitute a major step forward in ensuring the powers of indigenous peoples. Many provisions of the draft were acceptable. The draft should be effective and an authoritative international document. To date, the proposed text which had been submitted to the Council did not represent all of these characteristics, as the text did not enjoy genuine consensus, and had not been agreed upon by all sides. Its adoption would set a negative precedent, and in this context Russia could not support the draft Declaration in this form and because of the procedure that had been used. For these reasons, Russia would vote against it. However, this did not mean that Russia was against a continuation of a discussion of the issue, and would work for international cooperation in the protection of the rights of indigenous persons.

China

SHA ZUKANG, speaking in an explanation before the vote, said that China was in favor of the draft Declaration. The adoption of this United Nations instrument would be done after extensive consideration, China noted. China regretted that this instrument would have to be adopted by voting, and at this very early stage of the work of the Human Rights Council. China hoped that in the future work of the Council, members would conduct their work in a constructive spirit of cooperation.

Philippines

ENRIQUE MANALO, in an explanation before the vote, said the Government of the Philippines was fully committed to safeguarding and promoting the rights of its indigenous peoples. Because of that commitment, the Government had enacted a national indigenous people's rights act and had two autonomous regions in the country. If the draft resolution on the declaration were to be put for a vote, the delegation of the Philippines would abstain.

Brazil

CLODOALDO HUGUENEY, speaking in an explanation after the vote, said Brazil had voted for the resolution, and believed that the decision was a major achievement which augured well for the Council's work, and commended states and indigenous peoples who had made great efforts to ensure this memorable result. The Declaration asserted the importance of the indigenous peoples in societies, acknowledged diversity as a richness of countries, and aligned the past and present contribution of indigenous peoples to states. Brazil recognized the invaluable contribution of indigenous peoples to the political, economic, social, cultural and spiritual development of its society. The Declaration on the Rights of Indigenous Peoples would be of utmost importance to fight discrimination against indigenous peoples and distortion created by centuries of discrimination. It would help to create societal harmony. Brazil had no doubt that the declaration was a reaffirmation of the commitment of the international community to ensure the enjoyment of indigenous peoples of all human rights and fundamental freedoms and to respect the value of their indigenous cultures and identity.

Algeria

IDRISS JAZAÏRY, speaking in an explanation after the vote, said that he wanted it to be noted that he had joined in the standing ovation that had marked the adoption of this declaration by the Council. Unfortunately, Algeria had to abstain. He would like to plead for this Declaration to have the maximum number of positive votes. In fact, Algeria had numerous indigenous peoples and had hoped the Declaration would have been adopted unanimously, in which case it would have been able to join the consensus. And unfortunately, the Declaration was in conflict with the Constitution of Algeria, which contained a provision on political parties stipulating that they could not be on the basis of race, gender, or ethnicity. For that reason Algeria could not vote in favor.

Japan

HIROSHI MINAMI, speaking in an explanation after the vote, said the delegation of Japan had been participating in the Working Group for the drafting of the Declaration on the Rights Indigenous People for the last 12 years and it had voted in favor of the draft resolution. The Government would interpret the Declaration in a way that the grant of greater autonomy may not affect the territorial integration of state sovereignty. Further, the Government did not recognize collective rights.

Argentina

SERGIO CERDA, speaking in an explanation after the vote, said Argentina had abstained, and regretted it had not been able to vote favorably. Despite

Argentina's clear adhesion to the rights of indigenous peoples, Argentina regretted the lack of time to deal with certain provisions of the Declaration which were of particular importance, namely the process of self-determination and territorial integrity. Argentina hoped that the situation would be rectified in the General Assembly, and Argentina would be able to vote in favor there, especially as this was one of the most important and legitimate topics to be dealt with by the international community.

Ukraine

VOLODYMYR VASSYLENKO, speaking in an explanation after the vote, said that Ukraine had always supported the elaboration of an international instrument for the promotion and protection of the rights of indigenous peoples. The protection of indigenous peoples was one of the core rules of Ukrainian law. For that reason, Ukraine had been striving to elaborate an instrument that would provide the proper balance between the rights of indigenous peoples and those of sovereign States.

Ukraine said that the document just adopted by the Council contained important protections for the rights of indigenous peoples, but it also contained important flaws. It purported to define a right of self-determination for indigenous peoples. For that reason, and because it failed to fulfill the need to preserve the territorial and political integrity of sovereign States, Ukraine could not support it. Ukraine regretted that the text had been adopted without allowing member-states to improve the document so that it could reach consensus.

Mauritius

NARSINGHEN HAMTYRAGEN, speaking in an explanation after the vote, said the Declaration would consolidate the existing universal human rights. It was expected that all states would contribute in resolving the difficulties of indigenous peoples. There was a fear that some self-designated indigenous groups might threaten the sovereignty of a state by following a wrong interpretation of the declaration. The concept of autonomy should not be interpreted to jeopardize the sovereignty of a state.

Germany

ANDREAS PFAFFERNOSCHKE, speaking in an explanation after the vote, said along with other efforts undertaken during the past decade to improve the situation of indigenous peoples throughout the world, Germany had closely monitored the development of the Declaration on the Rights of Indigenous Peoples. The adoption of the document proved that the new Council was able to produce concrete results for the benefit of indigenous peoples, who were entitled to the same human rights and fundamental freedoms as everybody else. The respect and application of existing binding international human rights law remained essential. The primary importance of individual human rights protection was asserted in the Declaration. Germany understood the right to self-determination set out in the Declaration to be a new right, specific to indigenous peoples, and it could not influence the territorial integrity of a State. The Declaration, being an important instrument to enhance the rights of indigenous peoples was "non-legally binding." Germany's own national minorities and ethnic groups, which enjoyed protection of their human rights and fundamental freedoms, did not fall under the scope of the Declaration.

United Kingdom

NICHOLAS THORNE, speaking in an explanation after the vote, said that the United Kingdom welcomed the declaration as an important tool to enhance the promotion and protection of the rights of indigenous peoples, and regretted that the declaration had had to come to a vote. The United Kingdom felt that its concerns had been addressed in negotiations, as reflected in the Declaration, and it fully supported the provisions of the Declaration that recognized the rights of indigenous peoples under international law, on an equal footing with all.

However, the United Kingdom stated that it did not accept the concept of collective rights in international law. The United Kingdom clarified that it understood the right of self-determination as set out in the declaration as one which was to be exercised within the territory of a state and which was not designed to impact in any way on the territorial integrity of states. The United Kingdom emphasized that the Declaration was not legally binding and that the citizens of the United Kingdom and its territories overseas did not fall within the scope of the Declaration.

Morocco

MOHAMMED LOULICHKI, in an explanation after the vote, said the delegation of Morocco had abstained during the vote. The delegation of Morocco would have preferred that the resolution be adopted by consensus so that Morocco could have joined. Morocco was making progress in building its democratic system and in strengthening the human rights of its people.

Indigenous Peoples Caucus

ADELE WILDSCHUT of the Indigenous Peoples Caucus, said on the adoption of the Declaration on the Rights of Indigenous Peoples that the League of Nations had not acted on the demands of the envoys of the Maoris and others, and the roots of the discrimination went back to the 1970s, a time when the international community had been prompted to pay attention to the indigenous peoples in the Americas. The repeated demands

for the distinction of the status of the indigenous peoples had at last been addressed, after substantive debate, and with positions that had been consistent with international law. The international community had been educated as to the status, rights, and lives of indigenous peoples in every corner of the world. The true legacy of the Declaration would be the way in which the lives of the indigenous peoples would be affected on a daily basis. It was the implementation of the Declaration at the community level which would have the greatest impact. The states that had worked with the indigenous peoples would not be forgotten. It was hoped that each state would stand with the indigenous peoples at the General Assembly. Indigenous peoples wished for harmony in accordance with the natural world and hoped that all would be brought together to embrace the positive contribution that indigenous peoples made to mankind.[11]

III. WHO ARE INDIGENOUS PEOPLES?

The United Nations Working Group, in its 1993 Draft Declaration, consciously decided to forego any attempt at a definition of "indigenous peoples."[12] Likewise, the Inter-American Human Rights Commission, in presenting its 1997 Proposed American Declaration on the Rights of Indigenous Péoples, abandoned an effort in an earlier draft at delimiting the term.[13] But the vagueness of the term is not due to a lack of effort. According to Professor Siegfried Wiessner, it was J. Martínez Cobo, the first United Nations Special Rapporteur on the issue of discrimination against indigenous peoples, who offered what is perhaps the most widely acclaimed definition:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined

11. *Id.*

12. *See* Wiessner, *supra* note 7, at 110-115 (The Chairperson-Rapporteur stated in a recent report that it is her "considered opinion ... that the concept of 'indigenous' is not capable of a precise, inclusive definition which can be applied in the same manner to all regions of the world."); *See* Working Group on Indigenous Populations, Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people," U.N. ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 14th Sess., at 5, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996) [hereinafter Concept Paper Daes].

13. *See* Wiessner, *supra* note 7, at, 110-115; Proposed American Declaration on the Rights of Indigenous Peoples, Inter-American C.H.R., 1333d sess., OEA/Ser/L/V/II.95, Doc. 6 (Feb. 26, 1997) [hereinafter OAS Draft Declaration].

> to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[14]

But to Wiessner, the foregoing definition could be seen as underinclusive:

First. Focusing on the "historic continuity with pre-invasion and pre-colonial societies" might limit the concept of indigenous communities largely to peoples in the Americas and Oceania, potentially leaving out indigenous peoples in Africa, Asia and other places that are oppressed by equally "original" inhabitants of neighboring lands that have now become the dominant groups of their society.[15]

Second. The group's necessary determination "to preserve ancestral territories" could be used to exclude indigenous peoples forcibly or non-forcibly removed from their land who now find themselves residing in urban areas, but who nonetheless maintain their indigenous identity.[16]

Third. Although the phrase "non-dominant sectors of society" certainly covers the experience of most indigenous communities around the globe, still, this qualification could exclude from the protective scope of relevant international declarations those indigenous groups that have recently achieved preeminence in a nation-state, such as the indigenous Fijians.[17]

14. Study of the Problem of Discrimination Against Indigenous Populations, ¶ 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3 (1986); Wiessner, *supra* note 7, at 111. To Wiessner, this understanding presupposes the historical event of a community suffering invasion or colonization; the group's self-identification as distinct from other parts of the national society; a present non-dominant status of the community; and the group's determination to preserve its ancestral lands.

15. Wiessner, *supra* note 7, at 111 (citing Concept Paper Daes, *supra* note 12, ¶ 64, at 20).

16. *Id.* (citing René Kuppe, The Indigenous Peoples of Venezuela and the National Law, 2 L. & ANTHROPOLOGY 113 (1987)).

17. *Id.* (citing Nehla Basawaiya, *Status of Indigenous Rights in Fiji,* 10 ST. THOMAS L. REV. 197 (1997)).

> According to Wiessner, under the Constitution of 1990, the President of Fiji is appointed by the Bose Levu Vakaturaga, the Great Council of [Indigenous] Chiefs; the President appoints the Prime Minister, another Fijian; and the Fijians hold the absolute majority of seats in both Houses of Parliament. Eighty-three percent of the land in Fiji is still owned by Fijians, and the Native Lands Trust Act provides for its inalienability. At the time of the indigenous coup, the Fijian population was 46.0% Fijians, 48.7% descendants of immigrants from

Under the 1989 Convention on Indigenous and Tribal Peoples in Independent Countries (ILO 169), the International Labor Organization defines, in part,[18] the personal scope of application as including both[19]

> [T]ribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;[20]
>
> [and] peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographic region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[21]

The difference between "indigenous" and "tribal" communities, according to this definition, is minimal, since indigenous peoples are defined as not only encompassing descendants of the inhabitants of the territory "at the time of conquest or colonization," but also descendants of people residing there at the time of "establishment of present state boundaries."[22] To some authorities, the test, as it now stands, for tribal as well as indigenous peoples, is largely reduced to the factor of objective distinctiveness in social, cultural and economic conditions.[23]

Professor Magnarella notes, however, that in reading the foregoing ILO definitions in light of Article 1(3) of ILO 169, which, in turn, specifies 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," the ILO attempts to reassure states that it is not promoting secession by indigenous peoples.[24] And Professor Wiessner correctly argues that the foregoing definitions

East India, and the rest others. According to the latest census of August 25, 1996, the Fijians now constitute 51.1%, the Indo-Fijians comprise 43.6%, with Chinese, Solomon Islanders, Rotumans, Europeans, and people of mixed race making up the balance.

18. *See* Magnarella, *supra* note 7, at 427.

19. *See* Wiessner, *supra* note 7, at 111.

20. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, art. 1(1)(a), adopted June 27, 1989, *reprinted in* 28 I.L.M. 1382 (1989).

21. *Id.* art. 1(1)(b).

22. Wiessner, *supra* note 7, at 112 (citing Concept Paper Daes, *supra* note 12, ¶ 28, at 10-11).

23. *Id.* at 112.

24. Magnarella, *supra* note 7, at 427.

> potentially sweeps into the fold of indigenous peoples certain distinctive minority groups that have had a certain longevity of residence in a nation-state, dating back to the foundation of that state. A good example would be the Hungarian ethnic minority in Romania. Such a stretch would make it overinclusive. In the discussion of the Draft United Nations Declaration at the level of the Working Group established by the Human Rights Commission, some governments, notably in Asia, have demanded a definition prior to negotiating the individual rights listed. Among the demands of governments is a definition which includes only those indigenous groups who have suffered from colonization by people from other regions of the world, not from invasion by their neighbors. *Indigenous peoples in the Working Group would seem to prefer the flexibility of the absence of a formal definition. Instead, they focus on self-identification as an essential component of any definition which might be adopted.*[25]

To Wiessner, therefore, any attempt at delimitation or construction of the concept of "indigenous peoples" must essentially take into account "self-identification." But the fact that a definition is feasible, however, is not determinative of the issue at hand, since definitions ought not to be sought for definition's sake. The determinative issue should be: What do we want to achieve with this conceptual delimitation? More specifically, framed in light of the policy-oriented approach under the New Haven school of thought: does adding a definition contribute, in the aggregate, to a public order of human dignity?[26] In response to these questions, the search for a more accurate and formal definition would clearly help to protect indigenous peoples against governments who deny their existence,[27] and, thus, any definition should be predicated on the value of human dignity as the first principle. But even so, many authorities still argue against the establishment of any formal definition. In fact, during the sessions of the United Nations

25. Wiessner, *supra* note 7, at 112-113 (citing Concept Paper Daes, *supra* note 12, ¶ 35, at 12 (emphasis supplied)). Still, Wiessner argues that indigenous peoples must have some conception about who is part of their fold, given the fact that they put the number of indigenous persons around the globe at 300 million.

26. *Id.* The functional character of a definition has been emphasized by, *inter alia*, Walter Wheeler Cook:

> [A]ny concept ... is a tool which lawyers use, judges use, in determining what ought to be done in a concrete situation. As I see it, the same word is used in dealing with a great variety of situations ... I do not believe you can determine the exact scope of any legal concept unless you know what you are trying to do with it.

3 PROC. AM. L. INST. 226 (1925). For guidance on policy-oriented jurisprudence, see, e.g., MYRES S. MCDOUGAL, HAROLD D. LASSWELL, & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980).

27. Wiessner, *supra* note 7, at 113. This argument has been made forcefully by some indigenous representatives from Asia. *See* Concept Paper Daes, *supra* note 12, ¶ 38, at 13-14.

Working Group on Indigenous Populations, indigenous representatives themselves argued that an official legal definition of "indigenous people" is both unnecessary and unwise. The Group worried that such a definition would be limiting and might exclude some peoples who consider themselves to be indigenous. Instead, as with Professor Wiessner, the Group stressed the importance of self-identification.[28] Article 8 of the Draft Declaration on the Rights of Indigenous Peoples provides: "Indigenous peoples have the collective and individual right to maintain and develop their *distinct identities* and characteristics, including *the right to identify themselves as indigenous* and to be recognized as such."[29]

As Chairperson-Rapporteur of the U.N. Working Group on Indigenous Populations, and perhaps *the* leading authority on the subject, Professor Erica-Irene Daes is of the same view, specifically, that attempts at delimiting the concept of indigenous peoples might in the long run prove fatal, but she offers a set of "factors" she considers "relevant to the understanding" of the term "indigenous," *viz:*

a) Priority in time, with respect to the occupation and use of a specific territory;

28. Report of the Working Group on Indigenous Populations, U.N. Economic and Social Council, 14th Sess., at para. 35, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 *cited in* Magnarella, *supra* note 7, at 428.

29. Draft Declaration on the Rights of Indigenous Peoples, Working Group on Indigenous Populations, art. 8, 11th Sess., U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1. (emphasis supplied); Magnarella, *supra* note 7, at 428-29 (citing F. Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, at para. 568, U.N. Sales No. E.91.XIV.2 (1991)).

> Indigenous peoples are both similar to and different from minorities. Unlike minorities, indigenous peoples were the first peoples of their territory and have an ancestral link with their land. Professor Capotorti, Special-Rapporteur of the Sub-Commission offered the following definition of minorities: a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members, being nationals of the State, possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.
>
> A minority, like an indigenous people, is a politically subordinate group that possesses "ethnic, religious or linguistic characteristics differing from those of the rest of the population" and demonstrates "a sense of solidarity, directed towards preserving their culture, traditions, religion or language." Unlike an indigenous people, however, a minority does not constitute a "first people," who have a prior history of territorial occupation and an ancestral attachment to their land before it was conquered and occupied by others.

b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;

c) Self-identification, as well as recognition by other groups, or by state authorities, as a distinct collectivity; and

d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.[30]

In sum, Professor Daes suggests factors of voluntary distinctiveness, self-identification and recognition, as well as the experience of oppression. Professor Wiessner adds another factor, which is the element of indigenous peoples' strong ties to their ancestral lands, whether they are presently able to reside on these territories or not.[31]

In its Operational Directive 4.20, the World Bank concurs with the view of Professor Daes, among others, in that no single definition can capture the diversity of indigenous peoples. And, following Daes, the World Bank identified certain characteristics which are often applied to indigenous peoples. These include:

> (1) a close attachment to ancestral territories and to the natural resources in these areas; (2) self-identification and identification by others as members of a distinct cultural group; (3) an indigenous language, often different from the national language; (4) presence of customary social and political institutions; and (5) primarily subsistence-oriented production.[32]

In the same spirit, the International Work Group on Indigenous Affairs attempts to *describe* rather than *define* indigenous peoples as follows:

> Indigenous peoples are the disadvantaged descendants of those peoples that inhabited a territory prior to the formation of a state. The term indigenous may be defined as a characteristic relating the identity of a particular people to a particular area and distinguishing them culturally from other people or peoples. When, for example, immigrants from Europe settled in the Americas and Oceania, or when new states were created after colonialism was abolished in Africa and Asia, certain peoples became marginalized and discriminated against, because their language, their religion, their culture and their whole way of life were different and perceived by the dominant

30. Concept Paper Daes, *supra* note 12, ¶ 69, at 22.

31. Wiessner, *supra* note 7, at 115. *Compare with* the statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr. M. Dodson: "Above all and of crucial and fundamental importance is the historical and ancient connection with lands and territories." *See* Concept Paper Daes, *supra* note 12, ¶ 35, at 12.

32. The World Bank Operational Manual, Operational Directive, OD 4.20 (Sept. 1991).

society as being inferior. Insisting on their right to *self-determination* is *indigenous peoples'* way of overcoming these obstacles.[33]

To Wiessner, therefore, indigenous communities are thus best conceived of as peoples traditionally regarded, and self-defined, as descendants of the original inhabitants of lands with which they share a strong, often spiritual, bond. These peoples are, and desire to be, culturally, socially and/or economically distinct from the dominant groups in society, at the hands of which they have suffered, in past or present, a pervasive pattern of subjugation, marginalization, dispossession, exclusion and discrimination.[34] In line with Wiessner, Professor Magnarella offers a short set of criteria:

> Although there is no international legal definition of "peoples," the term is generally used to describe a population who shares the following characteristics: (1) a common historical tradition; (2) self-identity as a distinctive cultural or ethnic group; (3) cultural homogeneity; (4) a shared language; (5) a shared religion; and (5) a traditional territorial connection.[35]

33. Magnarella, *supra* note 7, at 428 (citing International Work Group for Indigenous Affairs, *available at* http://www.IWGIA.org (emphasis in the original)).

34. Benedict Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414, 417-18 (1998).

> This definition is largely compatible with the combination of essential requirements and relevant indicia advanced by Professor Kingsbury in his recent analysis, prompted by the politically difficult situation in Asia. He lists as "essential requirements" of an indigenous people self-identification as a distinct ethnic group; historical experience of, or contingent vulnerability to, severe disruption, dislocation or exploitation; long connection with the region; and the wish to retain a distinct identity. As "strong indicia," he mentions nondominance in the national (or regional) society (ordinarily required); close cultural affinity with a particular area of land or territories (ordinarily required); historical continuity (especially by descent) with prior occupants of land in the region. "Other indicia" would include socio-economic and socio-cultural differences from the ambient population; distinct objective characteristics such as language, race, and material or spiritual culture; regarded as indigenous by the ambient population or treated as such in legal and administrative arrangements.

See also Wiessner, *supra* note 7, at 115 n. 398.

> The definition suggested above has the advantage of appropriate inclusivity, brevity, and precision — virtues for the purposes of delimiting the scope *ratione personae* of an international document conferring rights — while Professor Kingsbury's formulation, especially in its treatment of the group's ties to the land and priority of occupation, would seem to provide a more flexible basis for negotiations between States and communities whose recognition as indigenous may have been initially denied.

After underscoring the difficulties and policy considerations that preempt any universal standard, it would seem, as discussed, that the standards of Wiessner, Magnarella, and Daes, are neither overbroad nor too minimalist for purposes of our analysis.

IV. WHAT IS SELF-DETERMINATION?

Traditionally, international law viewed the formation of new sovereign entities under the declarative theory: international law came into play only after the *de facto* existence of the new state.[36] During the period of decolonization in which more than 100 new sovereign countries were recognized, however, the creation of states was, for the first time, subject to international law in the form of the principle of self-determination. It was President Woodrow Wilson who first argued to elevate the principle of self-determination to the international level when, in 1916, he included it in his Fourteen Points during his address to the League of Nations.[37] The principle of self-determination is included in articles 1, 55, and 73 of the United Nations Charter.[38] This right has also been repeatedly recognized in a series of resolutions adopted by the U.N. General Assembly, the most important of which is Resolution 2625 (XXV) of 1970.[39] Important to note is that the resolutions of the General Assembly *per se* are not in themselves binding. Dean Bernas, quoting recognized authorities, underscores the important distinction between a mere declaration and a treaty or covenant:

> [A]t the core of an international covenant lies a meeting of minds of the contracting parties on the specific duties and obligations they intend to

35. Magnarella, *supra* note 7, at 426.

36. Scharf, *supra* note 7, at 377 (citing JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 47-48 (1979)).

37. *Id.* at 378 (citing President Woodrow Wilson, Address before the League of Nations to Enforce Peace (May 27, 1916), *in* 53 Cong. Rec. 8854 (May 29, 1916) ("We believe these fundamental things: First that every people have a right to choose the sovereignty under which they shall live...")). However, some have argued that President Wilson's call for self-determination was not so much intended to apply to the global empires of the victorious European powers as it was an effort to ensure that the vanquished empires of Europe did not rise again and to extend American commercial interests to new parts of the world. *See* C. Lloyd Brown-John, *Self-Determination, Autonomy and State Secession in Federal Constitutional and International Law*, 40 S. TEX. L. REV. 567, 572 (1999).

38. *See*, U.N. Charter art. 1, ¶ 2; *See also* U.N. Charter arts. 55 and 73.

39. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter G.A. Res. 2625].

> assume, and the agreement that the undertakings must be effectively performed. A declaration by contrast admits the presumption that something less than full effectiveness in terms of law is intended. A covenant leaves no doubt about the legal nature of the provisions it contains, whereas a declaration is often deemed to enunciate moral rules only. Moreover, the *vinculum juris* created by a covenant generally absent from a declaration, places a duty on the contracting parties to bring their laws and practices into accord with the accepted international obligations and not to introduce new laws or practices which would be at variance with such obligations.[40]

While U.N. resolutions are not in themselves binding, they do constitute an authoritative interpretation of the U.N. Charter and may come to represent *opinio juris* respecting customary international law.[41] In a series of cases, including the *Namibia Case* in 1970,[42] the *Western Sahara case* in 1975,[43] the *Frontier Dispute case* in 1986,[44] and the *Case Concerning East Timor* in

40. JOAQUIN G. BERNAS, S.J., FOREIGN RELATIONS IN CONSTITUTIONAL LAW 139 (1995) (*citing* Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights, in* LOUIS HENKIN, THE INTERNATIONAL BILL OF RIGHTS 35 (1981)).

> The Universal Declaration, after many intricate delays, was adopted and proclaimed by the General Assembly on December 10, 1948. It was, however, not seen as law but only as "a common standard" for nations to attempt to reach. Its authority was primarily moral and political. *See* John P. Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Juridical Character," *in* B.D. RAMCHARAN, ED., HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21 (1979).
>
> It would take another eighteen years before the United Nations could convert the aspirations of the Declaration into conventional international law embodied in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Optional Protocol to the Covenant on Civil and Political Rights. *See Bernas, supra,* at 138-139.

For a detailed history of the formulation of these Covenants, *see* Vratislav Pechota, "The Development of the Covenant on Civil and Political Rights" *in* HENKIN, *supra,* at 32-71.

41. Scharf, *supra* note 7, at 378 (citing HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 45 (1990)).

42. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),* 1971 I.C.J. 16, 31-32 (June 21).

43. *Western Sahara,* 1975 I.C.J. 12, 31-33 (Oct. 16).

44. *Concerning the Frontier Dispute (Burk. Faso v. Rep. of Mali),* 1986 I.C.J. 554, 566-567 (Dec. 22).

1995,[45] the International Court of Justice held that the principle of self-determination crystallized into a rule of customary international law, applicable to and binding on all states.

However, while these may have been the holding, it must be borne in mind that, like a diamond, there are *divisible* facets comprising the principle of self-determination where one, some, or all of them may or may not amount to customary law. So far the International Court of Justice has made no specific holding as to this matter. It can be easily observed that authorities are prone to make sweeping statements on the status of self-determination under international law, but certainly, as this article argues, the principle itself is really a *penumbra* of distinct and separable doctrines with *varying* doctrinal force. More discussion on these facets or doctrines shall be discussed below.

Self-determination as a *general* principle was further codified in the Universal Declaration on Human Rights,[46] the International Covenant on Civil and Political Rights, and in the International Covenant on Economic, Social, and Cultural Rights, which, all taken together, are considered to constitute the international "Bill of Rights."[47] The vast majority of countries of the world are parties to the two Covenants which constitute binding treaty law.[48]

Under the broad doctrine of self-determination, all self-identified groups with a coherent identity and connection to a defined territory are entitled to *collectively* determine their political destiny in a democratic fashion and to be free from systematic persecution.[49] For such groups, the principle of self-

45. *Concerning East Timor (Port. v. Austl.),* 1995 I.C.J. 90, 265-68 (June 30).

46. Universal Declaration of Human Rights, art. 22 (Dec. 10, 1948).

47. Scharf, *supra* note 7, at 378. Article 1, common to both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reads:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;
>
> 2. The States Parties to the present Covenant . . . shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1, 999 U.N.T.S. 171, 173; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3, 5.

48. Scharf, *supra* note 7, at 378-379.

49. *See* G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 123-124, U.N. Doc. A/8028 (1970) (emphasis supplied).

determination may be effectuated by a variety of means, including self-government, substantial autonomy, free association, or arguably, in certain circumstances, outright independence and full sovereignty.[50]

As stated, existing scholarship divides the broad penumbra of rights under "self-determination" into a number of facets. Self-determination may take on a number of meanings:

> 1. "External" self-determination, i.e., the right of peoples to freely determine their international status, including the option of political independence;
>
> 2. "Internal" self-determination, the right to determine freely their form of government and their individual participation in the processes of power;
>
> 3. Their rights as "minorities" within a given nation-state structure to special rights in the cultural, economic, social and political sphere (limited autonomy).[51]

Important to note is that the third meaning above may be subsumed under self-determination understood in its *internal* sense in number two.

Fr. Bernas, S.J. correctly points out that the concern for minorities has a two-fold aspect. The first is the fear of a secessionist movement by minorities, threatening territorial integrity of the state, or about the danger of interference by other states with which the minorities are connected by ties of race, national origin, language, or religion. The second is a genuine concern for the human rights of minorities and the desire that minorities will flourish so as to preserve the diversity of the human race, which, since the beginning of mankind, has provided a motivational power for the development of civilization and culture by weaving many strands into a single multi-colored tapestry.[52] During the June 2006 proceedings of the

50. *Id.*

51. Wiessner, *supra* note 7, at 116; *See* BERNAS, *supra* note 40, at 153.

> Bernas also adopts similar categories. To Bernas, self-determination has an internal and an external aspect. The *internal* right of self-determination consists of the elements enumerated in the first two paragraphs of Article 1 of the International Covenant on Civil and Political Rights, namely, the right "freely to determine their political status and freely pursue their economic, social and cultural development" and the right, "for their own ends, [to] freely dispose of the natural wealth and resources without prejudice to any obligations arising out of international cooperation, based upon the principle of mutual benefit, and international law." These also necessarily include the other related political rights. The *external* right of self determination belongs to colonies and to non-self-governing and Trust Territories.

52. BERNAS, *supra* note 40, at 151 (citations omitted).

Human Rights Council, both concerns were openly discussed during the deliberations and the statements made before and after the voting.

After a comprehensive review of related scholarship and authorities, Professor Wiessner concludes that under international law, secession may amount to an appropriate remedial option for indigenous peoples, but only in very limited contexts:

> The controversy over self-determination and group rights of indigenous peoples is clouded by semantics. The battle over the political independence option of self-determination, the right to secede, is one that has to take into account recent successful divorces of countries in Eastern Europe, the breakup of the Soviet Union, the velvet dissolution of the unhappy marriage between the Czechs and the Slovaks, and the fragmentation of Yugoslavia. . . . In particular, the recent world community recognition of the unilateral secessions from the Socialist Federal Republic of Yugoslavia as well as the establishment of Eritrea as an independent state would appear to bolster a claim of peoples to break away from established nation-states outside and beyond the colonial context. Even the companion doctrine of *uti possidetis* has been called in question.
>
> History cannot be frozen. If any traditional criteria of "people" exist, indigenous groupings may very well meet them. They have their own language, culture, traditions, identity — they answer, in the affirmative, to "le plébiscite de tous les jours." They might not want to choose political independence, but should they not at least be afforded the option? . . . . Considered in [a] comprehensive context, [and] taking into account the interests and concerns of both the indigenous peoples and the states in which they reside, *the option should be granted if, in the aggregate, it promotes the values of a public order of human dignity*. In most cases, both the preferences of indigenous communities and the aggregate interest as just defined will coincide, and indigenous needs and claims will be satisfied by the granting of various forms of autonomy. *In cases of serious injustice, however, where there is no other remedy available, there should be at least a moral, if not a legal right, to secede. The last-resort rationale has also been stressed by the Canadian Supreme Court in its recent opinion on the secession of Quebec.*[53]

53. Wiessner, *supra* note 7, at 118-120 (emphasis supplied) (citing Glenn T. Morris, *In Support of the Right of Self-Determination for Indigenous Peoples under International Law*, 29 GERMAN Y.B. INT'L L. 277, 280-88 (1986)); Catherine J. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199 (1992); Russel L. Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, at 45 n.51 (1994); Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992); Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L.J. 29 (1995); Dominic McGoldrick, *Yugoslavia—The Responses of the International Community and of International Law*, 49 CURRENT LEGAL PROBS. 375 (1996); Minasse Haile, *Legality of Secessions: The Case of*

Professor Graham is also of the view that many of the states that oppose the use of the terms "peoples" and "self-determination" do so on the grounds that it would signify some right to secession. However, Graham argues that these comments suggest a fundamental misunderstanding about the "substantive" and "remedial" aspects of indigenous self-determination, as

Eritrea, 8 EMORY INT'L L. REV. 479 (1994); Robert McCorquodale, *The Eritrean Question: The Conflict Between the Right of Self-Determination and the Interests of States (book reviews)*, 54 CAMBRIDGE L.J. 187 (1995); *The Southern Sudan: A Compelling Case for Secession*, 32 COLUM J. TRANSNAT'L L. 419 (1994) (asserting a "unique African right to self-determination", but basing this claim on criteria that can readily be universalized, i.e., the identity of the Southern Sudanese as a people, "the systematic discrimination and abuse they have suffered, the regional cohesion they have displayed, and the repeated refusal of the Khartoum regime to implement compromise alternatives to secession"); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 163-65 (1995); An Agenda for Peace, Report of the Secretary-General, 17, U.N. Doc. S/24111 (1992), *reprinted in* 31 I.L.M. 953, 959; Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991); Lawrence S. Eastwood, Jr., *Secession: State Practice and International Law after the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE J. COMP. & INT'L L. 299 (1993); Steven R. Ratner, *Drawing A Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590 (1996); Burkina Faso v. Republic of Mali), 1986 I.C.J. 554, 563-67 (Dec. 22, 1986); Conference of Yugoslavia Arbitration Commission, Opinions on Questions Arising from the Dissolution of Yugoslavia, Jan. 11, 1992, and July 4, 1992, 31 I.L.M. 1488 (1992); Matthew C. R. Craven, *The European Community Arbitration Commission on Yugoslavia*, 66 BRIT. Y.B. INT'L L. 333 (1995); 87 PROC. AM. SOC'Y INT'L L. 258-59, 264-65 (1993); ERNEST RENAN, QU'EST-CE QU'UNE NATION? (1882); Gudmundur Alfredsson, *The Right of Self-Determination and Indigenous Peoples*, *in* MODERN LAW OF SELF-DETERMINATION 41, 46-47 (Christian Tomuschat ed., 1993). Louis Henkin, *The Mythology of Sovereignty*, ASIL NEWSLETTER, March-May 1993, at 1. 1 JEAN BODIN, LES SIX LIVRES DE LA REPUBLIQUE, ch. 8, at 182 (1576, reprinted 1986); W. Michael Reisman, *Autonomy, Interdependence, and Responsibility*, 103 YALE L.J. 401 (1993); W. Michael Reisman, 87 PROC. AM. SOC'Y INT'L L. 249 (1993); ALLEN E. BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC, 27-85 (1990); Allen E. Buchanan, *The Right to Self-Determination: Analytical and Moral Foundations*, 8 ARIZ J. INT'L & COMP. L. 41, 48 (1991); Allen E. Buchanan, *Federalism, Secession, and the Morality of Inclusion*, 37 ARIZ. L. REV. 53, 54 (1995); Reference Re Secession of Quebec, Aug. 20, 1998, 138, reprinted in 37 I.L.M. 1340, 1373-74 (1998) (The Court did not find it necessary to rule directly on self-determination claims of Canada's indigenous peoples, since they were contingent on the secession of Quebec. It emphasized that "a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account.").

well as a desire to apply different international standards where indigenous peoples are concerned. Quoting Professor Anaya, another leading authority, substantive self-determination includes the right to participate "in the creation of or change in institutions of government" as well as the right "to make meaningful choices in matters touching upon all spheres of life on a continuous basis" such as economic, cultural, and social development.[54] "The substance of the norm," however, "must be distinguished from the remedial prescriptions that may follow from a violation of the norm."[55] Graham stresses that secession is only one possible remedy to a violation of the right of self-determination and a limited one at that. Traditionally, secession was seen as the primary remedy for undoing colonization. It has also been considered an appropriate remedy in cases of alien occupation or subjugation. The more recent trend, however, as Graham notes, shows that secession has been viewed more and more as an appropriate remedy where denials of self-determination involve serious human rights violations. Professor Scharf confirms this view: evidenced by the writing of numerous scholars,[56] U.N. General Assembly resolutions,[57] declarations of international

54. Lorie M. Graham, *Resolution of Claims to Self-Determination: The Expansion and Creation of Dispute Settlement Mechanisms*, 10 ILSA J. INT'L & COMP. L. 385, 394 (2004) *citing* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 80-85 (1996).

55. ANAYA, *supra* note 54, at 80.

56. Scharf, supra note 7, at 381 (citing Curtis G. Berkey, International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples, 5 HARV. HUM. RTS. J. 65, 79 n.88 (1992)); Deborah Z. Cass, Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories, 18 SYRACUSE J. INT'L L. & COM. 21 (1992); ANTONIO CASSESE, THE SELF-DETERMINATION OF PEOPLES, IN THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 92, 101 (Louis Henkin ed., 1981); Thomas M. Franck, Postmodern Tribalism and the Right to Secession, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 2, 13-14 (Catherine Brolmann et al., eds, 1993); OTTO KIMMINICH, A "FEDERAL" RIGHT OF SELF-DETERMINATION? IN MODERN LAW OF SELF-DETERMINATION 83 (Christian Tomuschat, ed., 1993); Frederic L. Kirgis, Jr., The Degrees of Self-Determination in the United Nations Era, 88 AM. J. INT'L L. 304 (1994); W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 181-190 (1977); Gerry J. Simpson, Judging the East Timor Dispute: Self-Determination at the International Court of Justice, 17 HASTINGS INT'L L. & COMP. L. REV. 323, 340 (1994), CHRISTIAN TOMUSCHAT, SELF-DETERMINATION IN A POST-COLONIAL WORLD, IN MODERN LAW OF SELF-DETERMINATION 1, 2-8 (Christian Tomuschat, ed., 1993).

57. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

conferences,[58] judicial pronouncements,[59] decisions of international arbitral tribunals,[60] and some state practice, all support the right of non-colonial "people" to secede from an existing state when the group is collectively denied civil and political rights and subject to egregious abuses. This has become known as the "remedial" right to secession. The Canadian Supreme Court in its decision on the possibility of secession for Quebec summed up the right of secession as follows:

> [T]he international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social, and cultural development.[61]

The Court found that because the people of Quebec were *not* denied meaningful access to government to pursue their political, economic, cultural and social development, they were not entitled to secede from Canada without the agreement of the Canadian government. Professor Scharf observes that implicit in this decision, however, is the proposition that had the Court found that the people of Quebec were indeed denied any such right of democratic self-government and respect for human rights, unilateral secession from Canada would have been permissible under international law.[62]

The main question, therefore, is, *does the broad doctrine of self-determination include the right of an oppressed cultural minority to secede?* Does "self-determination" under the draft Declaration include both its *internal* and *external* aspects? The answer to these questions is, yes—with or without the Declaration. But for the exercise of such a drastic right, customary law has laid down many qualifications.

58. Vienna Declaration and Programme of Action, World Conference on Human Rights, U.N. Doc. A/CONF.157/23 (1993), reprinted in 32 ILM 1661 (1993).

59. *See, e.g.*, Decision of the Supreme Court of Canada in the Matter of Section 53 of the Supreme Court Act, and in the matter of a Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1497, dated September 30, 1996, [1998] 2 S.C.R. 217, ¶ 154.

60. *See, e.g.*, Conference on Yugoslavia Arbitration Commission Opinion No. 1, Opinions on the Questions Arising from the Dissolution of Yugoslavia, Nov. 1992, 31 I.L.M. 1488, 1494-1497 [hereinafter Conference on Yugoslavia].

61. Reference Re Secession of Quebec, [1998] 37 I.L.M. 1340.

> This interpretation is further supported by the United Nations' 1970 Declaration on Friendly Relations, which suggests limitations on the territorial integrity and sovereignty of a state when that state fails to conduct itself "in compliance with the principle of equal rights and self-determination of peoples." Indeed, during the December 2002 working group consultations, Norway proposed amending the UN Draft Declaration to include an expres reference to the 1970 Declaration on Friendly Relations. *See* Graham, *supra* note 54, at 395.

62. Scharf, *supra* note 7, at 383.

The remedial right to secession has its origin in the advisory opinion in the 1920 *Aaland Islands* Case.[63] After excluding the existence of a general right to secede, the Commission observed that "[t]he separation of a minority from the State of which it forms part and its incorporation into another State may only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees [for the protection of minorities]."[64] Scharf argues that the denial of the exercise of the right of democratic self-government as a precondition to the right of a non-colonial people to dissociate from an existing state is supported most strongly by the United Nations' 1970 Declaration on Principles of International Law Concerning Friendly Relations, which frames the proper balance between self-determination and territorial integrity as follows:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity of political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.[65]

To Professor Scharf, by this declaration, the General Assembly indicated that the right of territorial integrity takes precedence over the right to self-determination only so long as the state possesses "a government representing the whole people belonging to the territory without distinction as to race, creed or color."[66] Reasoning *a contrario*, failing such a condition, the "peoples" within existing states are entitled to exercise their right to self-determination through secession.[67]

63. Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, League Of Nations O.J. Spec. Supp. 3 (1920).

64. *Id. See*, Scharf, *supra* note 7, at 381.

65. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 124, U.N. Doc. A/8028 (1970).

66. Scharf, *supra* note 7, at 381, *citing* G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 124, U.N. Doc. A/8028 (1970).

67. *Id.* at 382 (citing Vienna Declaration and Programme of Action, World Conference on Human Rights, U.N. Doc. A/CONF.157/23 (1993), at ¶ 2).

Recall that indigenous self-determination embodies something much more than a claim to secession. In its fullest sense, it embodies the right of indigenous peoples to live and develop as culturally distinct groups, in control of their own destinies and under conditions of equality. Graham argues that *if* these rights are honored, secession becomes a moot point[68] — which is a big *if*.

A similar clause was included in the 1993 Vienna Declaration of the World Conference on Human Rights, which was accepted by all United Nations member states. However, unlike the 1970 Declaration on Friendly relations, the Vienna Declaration did not confine the list of impermissible distinctions to those based on "race, creed, or color," indicating that distinctions based on religion, ethnicity, language or other factors would also trigger the right to secede.

Further references by U.N. bodies to the right to "remedial secession" can be found in the 1993 Report of the Rapporteur to the U.N. Sub-Commission Against the Discrimination and the Protection of Minorities on Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities (*see* Scharf, *supra* note 7, at 382, *citing* Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, Commission on Human Rights: Sub-commission on Prevention and Protection of Minorities, 45th Sess., Agenda Item 17, at ¶ 84, U.N. Doc. E/CN.4/Sub.2/1993/34 (1993)), and in General Recommendation XXI adopted in 1996 by the Committee on the Elimination of Racial Discrimination (citing Report of the Committee on the Elimination of Racial Discrimination, UN GAOR, 51st Sess., Supp. No. 18 at 125-26, para.11, U.N. Doc. A/51/18 (1996)).

As for actual State practice, the existence of a right to remedial secession is supported by the 1971 secession of Bangladesh from Pakistan (with the aid of India), which was justified on the ground that the Bengali population was victim of massive economic and political discrimination as well as violence and repression. Another development that lends credence to the idea that a new post-colonial right to remedial secession may be on the point of crystallizing is the U.N.-sanctioned intervention on behalf of the Kurds in May 1991. The rationale for this intervention was that the Kurds in northern Iraq were suffering massive human rights deprivations inflicted by the Iraqi government. Subsequent to the intervention, the Kurds enjoyed the benefits of de facto intermediate sovereignty from Baghdad's harsh rule as a consequence of the U.S.- and British-enforced no-fly zone over northern Iraq. More recently, in the case of the dissolution of the former Yugoslavia, the republics of Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia were deemed entitled to secede on the basis that they were denied the proper exercise of their right of democratic self-government, they possessed clearly defined borders within the umbrella state, and, in some cases, they were subject to ethnic aggression and crimes against humanity committed by the forces of the central government of Belgrade (*see* Scharf, *supra* note 7, at 383).

68. Graham, *supra* note 54, at 396.

V. THE 2005 U.N. WORLD SUMMIT: UNILATERALISM IS ON THE RISE

The United Nations 2005 World Summit brought together representatives from more than 170 countries. The Summit culminated with an agreement that the international community, acting through the United Nations, bears a responsibility to help protect populations from genocide and other atrocities when their own governments fail to do so.[69] It has been argued, however, that the Summit failed to address a critical issue: What can and should be done by individual states if the United Nations fails to fulfill its pledge? The answer, as implied by the results of the proceedings, is unilateralism under the pretext of humanitarian intervention.[70] However, the Summit agreement only supports unilateral action under a narrow set of circumstances. First, the agreement is limited to a small set of extreme human rights abuses, such as genocide, war crimes, ethnic cleansing, and crimes against humanity.[71] Second, the agreement implies a hierarchy of actors and of interventions: good faith U.N. action is privileged over unilateralism and peaceful action is privileged over violent means. Finally, the agreement limits the scope of intervention to the goal of protection.[72] In other words, the actor-intervenor must show that there is institutional failure on the part of the U.N. as well as strong evidence that a government is currently failing to protect its population against such atrocities.[73] Quite clearly, under the context of humanitarian intervention, and after exhausting the hierarchy of institutional actors, a state may act unilaterally, and principally through peaceful means, ostensibly to save an indigenous population from serious harm inflicted upon them by the host state. The implications of the Summit in relation to violations of indigenous peoples' rights are alarming, since many indigenous peoples, as Bernas noted above, have strong cultural or ethnic ties to other peoples who may be under the dominion of another state or who may in fact comprise the controlling majority of that state. Having established this link, should extensive human rights violations occur, an appeal can be made to the U.N., and, failing U.N. action — a strong possibility since, admittedly, U.N. action is politically and diplomatically very slow and costly — a sympathetic foreign government may, in vindication of indigenous peoples' rights, intervene into the affairs of the host state which, no doubt, may heighten regional as well as international tension. If such tension does occur and rises to a magnitude

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69. Comment, *The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism*, 115 YALE L.J. 1157, 1157 (2006).

70. *Id.*

71. *Id.* at 1158 & 1163.

72. *Id.* at 1158. For these reasons, the U.S. invasion of Iraq could not have been justified using the Summit agreement.

73. *Id.* at 1162 & 1164.

requiring other forms of intervention, the ramifications caused by the U.N. Summit agreement may well turn out to contradict the very spirit and purpose of the U.N., that is, the maintenance of international peace and order.

VI. PRINCIPAL ARGUMENTS AGAINST THE DRAFT DECLARATION

As earlier stated, two member-states, Russia and Canada, registered negative votes during the roll-call of the June 2006 Human Rights Council proceedings. Russia positively asserted that the text suffered from serious flaws, failed to be an effective and authoritative international instrument, sets a negative precedent if adopted by the General Assembly in its current form, and noted irregularities during the process leading to the draft. Canada underscored that the draft failed to receive the necessary support from the international community and pointed out, as with Russia, that several key issues had been left hanging. Not that Russia and Canada were alone. Concerns over the irregularity in the process, the uncertainty over pressing issues (mostly over the definitional issues), and the evident lack of consensus, had been equally shared by member-states who even voted favorably or abstained from the voting, such as Algeria, India, Bangladesh, and Argentina.

Though many of the foregoing concerns refer to "procedural protocols," the real issue lies with the interpretation of "self-determination" as an established doctrine under customary international law. Germany declared that the right to self-determination was *not* binding and that it could not in any way be interpreted to compromise its territorial integrity or sovereignty. More frighteningly, however, was its reservation that its own national minorities do not fall under the scope of the Declaration. As with Germany, the United Kingdom demurred that the Declaration is not binding, that the right to self-determination should not affect territorial integrity, and that its citizens, *as well as its territories overseas*, did *not* fall within the scope of the Declaration. But the most disturbing objection was that the U.K. positively refused to accept the concept of "collective rights," which, as extensively discussed by previous scholarship, lies at the heart of indigenous self-determination. This view was also shared by Japan. All in all, the objections converged on the possible interpretation of self-determination as a positive grant of authority to whole populations to secede from the mother state and, therefore, the adoption of the draft Declaration would jeopardize state sovereignty. This concern was felt by Mauritius, Ukraine, Argentina, and Japan, among others. Out of the total membership of forty-seven in the Human Rights Council, only three countries argued for an unqualified adoption of the Declaration: Brazil, Mexico, and — surprisingly — China, whose human rights record is certainly far from spotless. Curiously, Algeria, before abstaining, stated that the Declaration was in open conflict with its constitution, despite the time-honored rule that a state may not plead municipal law to exempt itself from the observance of international law. At

the end of the day, the question again arises: do the foregoing objections and "reservations" grounded on the fear that states, by virtue of the adoption of the Declaration, may suffer from a wholesale surrender of territorial integrity and state sovereignty to cultural minorities — reservations which really do amount to self-serving interpretations of the right of self-determination — modify or otherwise diminish the doctrinal force of self-determination as it stands today? The answer, clearly, is no. Because, as comprehensively discussed, and as Professor Scharf correctly argues, the writings of numerous scholars, U.N. General Assembly resolutions, declarations of international conferences, opinions and decisions of both domestic and international tribunals, and state practice, all at bottom point to secession as an ultimate remedial measure inseparable from the broad doctrine of self-determination as a collective right belonging to a "people," provided, of course, that they are collectively denied civil and political rights to such an extent that would justify extreme measures under international law. It is pointless for the member-states, such as Canada and Russia, to object or abstain on the basis that the adoption of the draft Declaration would necessarily trigger a secessionist movement, because the ultimate remedy of secession — and, as a result, the fragmentation of state territory — already exists as customary law even without the Declaration. This view is not necessarily a pejorative or pessimistic one. If truth be told, this argument presupposes that massive and grave human rights violations are being committed by the host state, and, as a consequence, the hope that an oppressed cultural minority may unfasten its juridical ties with an abusive host state through legitimate measures is a very welcome field and rich source for further investigation and scholarship. The existence of this right to secede also produces a deterrent effect against human rights abuses, and, as Mexico correctly argues, the affirmation of the doctrine of self-determination by consensus — if this is still possible — sends a strong and clear signal to the international community that the status of indigenous peoples of the world has been significantly elevated to an extent that the traditional argument of state sovereignty can no longer be an unqualified defense when abuses do in fact occur.

In stark contrast to the foregoing exchanges, the Philippine case for abstention, however, is unacceptable. In brief, the Philippines argues that because of the government's strong commitment to respect indigenous peoples' rights, it would then abstain if the declaration were put to a vote. Not only is this case shockingly counter-intuitive, the statement itself is presumptuous and bold. By these same reasons the Philippines should have joined hands with Mexico, Brazil, and Guatemala — which are among the most fervent advocates of the draft — but it did not, and no further explanation had been given for the abstention. Undeniably the Philippines's human rights record has in the recent past been somewhat almost

comparable to China's — not a good thing.[74] Because of its waning track record, the Philippines' very membership in the Human Rights Council had even been questioned. The plight of indigenous peoples of Muslim Mindanao as well as those in the Northern regions is to this day a thorny and unresolved national issue and has in fact fueled terrorism and other forms of criminality at the present time.[75]

VII. DISPUTE RESOLUTION & ENFORCEMENT

To protect the rights of, and degree of autonomy, if granted, to indigenous peoples, and to promote harmonious relationships, both the states and indigenous peoples would benefit greatly from the ability to have recourse to an independent, international judicial forum to settle their disputes.[76] Article 36 of the U.N. Draft Declaration on the Rights of Indigenous Peoples states, in part: "[c]onflicts and disputes [between a State and its indigenous peoples] which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned."[77] Magnarella argues that a potential candidate is the International Court of Justice, one of the United Nations' most important organs for the peaceful settlement of disputes. "Third party adjudication in international disputes is not only the civilized way to settle those disputes, but is also more economical and less traumatic than the other means to that end."[78] Unfortunately, Magnarella

74. *Cf.* Marissa Leigh Hughes, *Indigenous Rights in the Philippines: Exploring the Intersection of Cultural Identity, Environment, and Development,* 13 GEO. INT'L ENVTL. L. REV. 3 (2000) (arguing that the Philippine government has been consistently violating international human rights laws).

75. *See, Sedfrey M. Candelaria, Introducing the Indigenous Peoples Rights Act,* 47 ATENEO L.J. 571 (2002) (introducing the Colloquium on Indigenous Peoples and discussing the framework of IPRA.); Werner Blenk, *ILO Partnership with Indigenous Peoples,* 47 ATENEO L.J. 556 (2002) (defining the historical involvement of the International Labor Organization in the situation of indigenous and tribal peoples.); Terence D. Jones, *The United Nations Development Programme and the Indigenous Peoples,* 47 ATENEO L.J. 562 (2002) (discussing the situation of indigenous peoples in light of internal conflict and sustainable development.). Incidentally, the recent case of *Heirs of Dicman v. Cariño,* G.R. No. 146459, June 8, 2006, to the author's knowledge, is the very first time in the history of the Supreme Court that the Ateneo Law Journal was cited three consecutive times as found in footnote 56 of the case.

76. Magnarella, *supra* note 7, at 443.

77. Draft Declaration on the Rights of Indigenous Peoples, Working Group on Indigenous Populations, art. 36, 11th Sess., U.N. Doc.E/CN.4/Sub.2/1994/2/Add.1.

78. Magnarella, *supra* note 7, at 443 (citing JOSE M. RUDA, PRESIDENT, INTERNATIONAL COURT OF JUSTICE, AS QUOTED IN SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS, x (1989)).

observes that Article 2(7) of the United Nations Charter, which prohibits U.N. interference in intra-state matters, and Article 34(1) of the Statute of the International Court of Justice (ICJ), which limits standing in contentious cases to state parties, effectively preclude the U.N. and the ICJ from playing a continuously active and positive role in the peaceful resolution of intra-state disputes involving indigenous peoples. Thus, Magnarella argues for the inclusion of "quasi-states" within the Court's jurisdiction. "Quasi-states" are either ethnic republics within a federal system (for instance, the former Yugoslavia) or autonomous, ethnic regions within pluralistic states whose distinct political, legal and ethnic status has been officially recognized by a central government (for instance, the Trentino-Alto Adige Region of Italy). To Professor Magnarella,

> [s]uch inclusion would be especially useful in those cases where the central government and the representatives of an indigenous autonomous region have entered into a governance agreement that delineates the two parties' realms of authority, rights, duties and obligations. The U.N. could encourage such parties to add provisions to such agreements that obligate the parties to resort to the ICJ for an advisory opinion whenever they cannot agree on the interpretation of their agreement, for arbitration whenever they cannot agree on the proper outcome of a dispute, and for a hearing on the merits (contentious litigation) whenever they cannot satisfactorily settle a contested claim. In this way, the Court would gain jurisdiction by the consent of both the central government and the government of the ethnic, autonomous region.[79]

But states historically have been reluctant to grant their cultural minorities or indigenous peoples sufficient international legal personality to enjoy standing before world bodies. However, the times have changed:

> Western European States now permit their citizens to have standing before the European Court of Human Rights to raise claims against their own governments. The European governments apparently believe that this arrangement will promote their long-term interests of legitimacy and social stability. With the rising tide of politicized ethnicity around the world, other governments would find it in their interests to extend autonomy offers to their rebellious regional minorities and indigenous peoples and to assure these peoples of their sincerity by providing for ICJ jurisdiction to deal with any future disputes over the interpretation of autonomy terms and the adjudication of claims.[80]

But to achieve standing for "quasi-states" would require an amendment to article 34 of the Court's Statute, which would certainly prove to be a cumbersome process.[81] In case such an amendment is passed, however, any

79. *Id.* at 445.

80. *Id.*

81. *Id.* at 445-46 (citing U.N. CHARTER, art. 108).

state and internal autonomous government wishing to have the option of utilizing the ICJ to settle their future disputes need only add a choice of forum clause to their agreement that declares their mutual recognition of ICJ jurisdiction and then register that agreement with the U.N. Secretariat in accordance with U.N. Charter article 102.[82]

According to Professor Wiessner, a better solution for addressing indigenous rights violations would be to create a Permanent Forum for Indigenous People as envisioned by the United Nations Working Group:

> Treaties and provisions of these emerging prescriptive documents, to the extent they constitute norms of international law, partake in the general enforcement scheme of this area of jurisprudence. Like any other international law prescriptions, they are potentially invocable before international bodies, such as the United Nations Human Rights Committee. Indigenous peoples may also resort to the diplomatic, the economic, the ideological, and the military instrument, within the bounds of the modern law of war. Since they lack the formal quality of states, indigenous peoples have no access, as parties in a contested proceeding, to the International Court of Justice. Still, their legitimate concerns should be taken into account by the World Court to ensure that their legal interests are protected in any litigation that might affect them. The better solution for addressing claims of Indian treaty or other indigenous rights violations would be to create a Permanent Forum for Indigenous People as envisioned by the United Nations Working Group.
>
> ... Its mandate, powers, structure, and location within the United Nations system are, however, far from being defined. Various governments as well as representatives of indigenous peoples have expressed the view, in recent discussions of the U.N. Working Group, that the Forum should have a broad mandate. It should cover human rights as well as cultural, political, economic, civil, social, environmental, developmental, and educational issues. Indigenous representatives from Australia, in particular, stated that the Permanent Forum should be capable of receiving complaints about the abuse of human rights, in particular, those included in the future U.N. Declaration of the Rights of Indigenous Peoples. According to the Asian Indigenous Caucus, it should be entrusted with the power to "take appropriate action to protect the human rights of indigenous peoples." Institutionally, several governments supported the idea of placing the Forum at a high level within the United Nations structure, within the Economic and Social Council. Many indigenous representatives would like to see it established at the highest possible level, at a minimum as a subsidiary body of the Economic and Social Council. One suggestion was made to name the institution the "United Nations Commission on the Status of Indigenous Peoples." ... Also, indigenous leaders have asserted that the forum should "have teeth" and be empowered to "take action" on serious violations of human rights of their people.
>
> The idea of a Permanent Forum of Indigenous People should be applauded for providing an important meeting ground between governments and indigenous peoples, as well as between indigenous peoples themselves. . . . . Even if governments viewed the vesting of the Forum with the power of making binding decisions as too great an intrusion into their realm of sovereignty, they might still be amenable to conferring upon the Forum the measure of authority that regional human rights commissions and the United Nations Human Rights Committee enjoy, i.e., the power to receive complaints, to investigate them, to make findings of fact, and to attempt to bring about a friendly solution to the issues raised. Such complaints could go specifically to the violations of international indigenous law, be it constituted by treaties or customary law or, ultimately, the United Nations Declaration on the Rights of Indigenous Peoples.[83]

This is not to leave out the operation of domestic legal systems as the main engines of enforcing international law. "In most domestic legal systems," says Wiessner, "the authoritative and controlling prescriptions of international law have been incorporated as standards of domestic legal systems, invited into the categorically different normative system of internal law through, usually, prescriptions of the highest rank, such as a constitutive document."[84] Domestic courts, therefore, remain important "battlegrounds" for the enforcement of international indigenous rights.[85]

VIII. CONCLUSION

The major strain of the arguments in this essay may ostensibly tend to support the case for the fragmentation of territories whose "peoples" suffer from an oppressive regime, regardless of whether the circumstances pertain to a colonial context or not. But the real point is beyond that. An extensive review of scholarship on this field leads to the conclusion that the multi-faceted right of self-determination under the context of indigenous peoples already embraces the remedial right to secede from a state, the government of which clearly denies any such right of democratic self-government and respect for human rights. This right to secede is extant regardless of the status of the draft Declaration which, after all, is a non-binding instrument at that.

Any U.N. Member State or the Court itself may propose such an amendment. Article 70 of the Statute empowers the Court to propose amendments to the Statute through written communications to the Secretary-General. To be successful, a motion must receive a favorable vote of two thirds of the members of the General Assembly and ratification in accordance with their respective constitutional processes by two thirds of the members of the U.N., including all the permanent members of the Security Council.

82. *Id.* at 446.

83. Wiessner, *supra* note 7, at 122-125.

84. *Id.* at 125.

85. *Id.*

There are many qualifications and conditions that must be satisfied before a "people" may secede which, as stressed, is a last resort, especially if there arises an institutional failure on the part of the United Nations. If this thesis holds, then our argument in the last analysis is a marked demonstration of an international regime that is more respectful of a public order of human dignity in its most abstract sense. Hence, the overriding value is human dignity in its most abstract sense. Hence, the overriding value is human dignity and respect, both in the individual and in the collective plane. The 2006 June HRC proceedings clarified the positions of many member-states, and, evidently, many explanations during the vote show that there is a marked divergence of opinion on the right to self-determination. Unexpectedly, even countries such as China argued for nothing less than an unqualified consensus and lamented over the fact that a vote had to be conducted at all and at so early a stage, that is, before the submission of the draft Declaration to the General Assembly. What was also worrisome is that quite a few countries abstained on the sole and feeble reason that a consensus had not been formed before the roll call. This is no reason for abstention, and worse, nor is it a substantive one. But the hope remains that any future work should be conducted in a constructive spirit of cooperation, especially considering that the issue at hand involves the fate of almost 400 million individuals in the world. They are the living morsels of these once great civilizations the ruins of which have been eroded by the mad current of the mainstream.

Is the Head of State Above International Law? The Applicability of Head of State Immunity to the Commission of International Core Crimes

*Joseph Anthony P. Lopez**