

Indigenous Peoples in International Law

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Self-Determination: A Foundational Principle

No discussion of indigenous peoples' rights under international law is complete without a discussion of self-determination, a principle of the highest order within the contemporary international system. Indigenous peoples have repeatedly articulated their demands in terms of self-determination, and, in turn, self-determination precepts have fueled the international movement in favor of those demands.

Affirmed in the United Nations Charter¹ and other major international legal instruments,² self-determination is widely acknowledged to be a principle of customary international law and even *jus cogens*, a peremptory norm.³ Mention of self-determination within contemporary political discourse has at times raised the specter of destabilization and even violent turmoil. And indeed, as many have observed, self-determination rhetoric has been invoked in the world of late in association with extremist political posturing and ethnic chauvinism.⁴ Furthermore, a number of states have resisted express usage of the term *self-determination* in articulating indigenous peoples' rights.⁵ But notwithstanding rhetorical extremism or aversion to express invocation of the term *self-determination*, the *concept* underlying the term entails a certain nexus of widely shared values. These values and related processes of decision can be seen as a stabilizing force in the international system and as foundational to international law's contemporary treatment of indigenous peoples.

In the following pages, self-determination is identified as a universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies. Self-determination gives rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation, and cultural suffocation. This chapter defines the principle of self-determination generally and identifies its particular significance for indigenous peoples in light of contemporary developments.⁶

The Character and Scope of Self-Determination

The concept of self-determination derives from philosophical affirmation of the human drive to translate aspiration into reality, coupled with postulates of inherent human equality.⁷ Scholars frequently cite the normative precepts of freedom and

equality invoked in the American revolt against British rule and the overthrow of the French monarchy as progenitors of the modern concept of self-determination.⁸ The core values associated with self-determination, however, clearly are not solely within the province of the history of Western thought. In his concurring opinion in the *Namibia* case before the International Court of Justice, Judge Ammoun identified equality as a central precept of self-determination and linked it with “[t]wo streams of thought . . . established on the two opposite shores of the Mediterranean, a Graeco-Roman stream represented by Epictetus, Lucan, Cicero and Marcus Aurelius; and an Asian and African stream, comprising the monks of Sinai and Saint John Climac, Alexandria with Plotinus and Philo the Jew, Carthage to which Saint Augustine gave new lustre.”⁹

The term *self-determination* gained prominence in international political discourse around World War I.¹⁰ President Woodrow Wilson linked the principle of self-determination with Western liberal democratic ideals and the aspirations of European nationalists.¹¹ Lenin and Stalin also embraced the rhetoric of self-determination in the early part of this century, while viewing self-determination in association with Marxist precepts of class liberation.¹² World War II gave rise to the United Nations, and “self-determination of peoples” was included in the U.N. Charter among the organization’s founding principles.¹³ The international human rights covenants hold out self-determination as a “right” of “[a]ll peoples,”¹⁴ as do the African Charter on Human and Peoples’ Rights¹⁵ and the Helsinki Final Act.¹⁶

For a period in history, international law was concerned only with the rights and duties of independent sovereigns, disregarding the face of humanity beyond the sovereign.¹⁷ Under the modern rubric of human rights, however, international law increasingly is concerned with upholding rights deemed to inhere in human beings individually as well as collectively.¹⁸ Extending from core values of human freedom and equality, expressly associated with peoples instead of states, and affirmed in a number of international human rights instruments, the principle of self-determination arises within international law’s human rights frame and hence benefits human beings *as human beings* and not sovereign entities as such.¹⁹ Like all human rights norms, moreover, self-determination is presumptively universal in scope and thus must be assumed to benefit all segments of humanity.²⁰

While human beings fundamentally are the beneficiaries of the principle of self-determination, the principle bears upon the institutions of government under which human beings live. Self-determination is extraordinary as a vehicle for coalescing international concern for the essential character of government structures, a concern that may extend to the point of enjoining them to yield authority or territory. When first articulated as a principle of international relations around World War I, self-determination justified the breakup of the German, Austro-Hungarian, and Ottoman empires and served as a prescriptive vehicle for the redivision of Europe in the wake of the empires’ downfall.²¹ In its most prominent modern manifestation within the international system, self-determination has promoted the demise of colonial institutions of government and the emergence of a new political order for subject peoples.²² Also, the international community through the United Nations declared illegitimate, on grounds of self-determination, South Africa’s previous governing institutional order, with its entrenched system of apartheid.²³

In each of these contexts, values linked with self-determination comprised a standard of legitimacy against which institutions of government were measured. Self-determination is not separate from other human rights norms; rather, self-determination is a configurative principle or framework complemented by the more specific human rights norms that in their totality enjoin the governing institutional order. As discussed below, this framework concerns both the procedures by which governing institutions develop and the form they take for their ongoing functioning.

Implications of the Term *Peoples*

Although self-determination presumptively benefits all human beings, its linkage with the term *peoples* in international instruments²⁴ indicates the collective or group character of the principle. Self-determination is concerned with human beings, not simply as individuals with autonomous will but more as social creatures engaged in the constitution and functioning of communities. In its plain meaning, the term *peoples* undoubtedly embraces the multitude of indigenous groups like the Maori, the Miskito, and the Navajo, which comprise distinct communities, each with its own social, cultural, and political attributes richly rooted in history.²⁵

Many, however, have interpreted the use of the term *peoples* in this connection as restricting the scope of self-determination; the principle of self-determination is deemed only concerned with “peoples” in the sense of a limited universe of narrowly defined, mutually exclusive communities entitled a priori to the full range of sovereign powers, including independent statehood. This approach has encouraged controversy over whether indigenous peoples are “peoples” entitled to self-determination. There are three dominant variants of this approach, each of them problematic. One variant holds that self-determination only applies to the populations of territories that are under conditions of classical colonialism.²⁶ This view focuses on the international decolonization regime that resulted in independent statehood for colonial territories as integral units. This approach correctly identifies decolonization as a manifestation of the principle of self-determination, but it goes too far in effectively equating the scope of self-determination with the scope of decolonization procedures.²⁷ Limiting self-determination’s applicability to the peoples in territories of a classical colonial type denies self-determination’s relevance to all segments of humanity and thus undermines the principle’s human rights character.

A second variant holds that the “peoples” entitled to self-determination include the aggregate populations of independent states, as well as those of classical colonial territories.²⁸ The proposition that self-determination is concerned with the “peoples” of both states and colonial territories substantially approaches a conception of self-determination as a human rights principle benefiting all segments of humanity. The difficulty is in the underlying view that *only* such units of human aggregation—the *whole* of the population of an independent state or a colonial territory entitled to independent statehood—are beneficiaries of self-determination. This conception renders self-determination inapplicable to the vast number of substate groups whose claims represent many of the world’s most pressing problems in the

of increasingly overlapping and integrated political spheres, self-determination concerns the constitution and functioning of all levels and forms of government under which people live. Ordinarily, terms in international legal instruments are to be interpreted according to their plain meaning.⁴⁸ There should be no exception for the term *peoples*.

The Content of Self-Determination

At bottom, the resistance toward acknowledging self-determination as implying rights for literally all peoples is founded on the misconception that self-determination in its fullest sense means a right to independent statehood, even if the right is not to be exercised right away or is to be exercised to achieve some alternative status. This misconception is often reinforced by reference to decolonization, which has involved the transformation of colonial territories into new states under the normative aegis of self-determination.⁴⁹ Inextricably wedding self-determination to entitlements or attributes of statehood is misguided for reasons already discussed, and such a linkage does not necessarily follow from decolonization.

Given its prominence in the international practice of self-determination, decolonization indeed provides a point of reference for understanding the scope and content of self-determination. As already indicated, however, it is a mistake to equate self-determination with the decolonization regime, which has entailed a limited category of subjects, prescriptions, and procedures.⁵⁰ Decolonization prescriptions do not themselves embody the *substance* of the principle of self-determination; rather, they correspond with measures to *remedy* a sui generis deviation from the principle existing in the prior condition of colonialism in its classical form.

Self-determination precepts comprise a world order standard with which colonialism was at odds and with which other institutions of government also may conflict. The substantive content of the principle of self-determination, therefore, inheres in the precepts by which the international community has held colonialism illegitimate and which apply universally to benefit all human beings individually and collectively. The *substance* of the norm—the precepts that define the standard—must be distinguished from the *remedial* prescriptions that may follow a violation of the norm, such as those developed to undo colonization. In the decolonization context, procedures that resulted in independent statehood were means of discarding alien rule that had been contrary to the enjoyment of self-determination. Remedial prescriptions in other contexts will vary according to the relevant circumstances and need not inevitably result in the formation of new states.

Accordingly, while the substantive elements of self-determination apply broadly to benefit all segments of humanity, self-determination applies more narrowly in its remedial aspect. Remedial prescriptions and mechanisms developed by the international community necessarily only benefit groups that have suffered violations of substantive self-determination. Indigenous peoples characteristically are within the more narrow category of self-determination beneficiaries, which includes groups entitled to remedial measures; but the remedial regime develop-

ing in the context of indigenous peoples is not one that favors the formation of new states.⁵¹ Before the application and development of the principle of self-determination in the particular context of indigenous peoples is more specifically discussed, a description of the general contours of the principle's substantive and remedial aspects is in order.

Substantive Aspects

As discussed above, self-determination entails a universe of human rights precepts extending from core values of freedom and equality and applying in favor of human beings in relation to the institutions of government under which they live. In essence, self-determination comprises a standard of governmental legitimacy within the modern human rights frame. Despite divergence in models of governmental legitimacy, relevant international actors at any given point in time after the creation of the U.N. Charter have shared a nexus of opinion and behavior about the minimum conditions for the constitution and functioning of legitimate government. The substance of the principle of self-determination, which presumptively benefits all segments of humanity, is in that more or less identifiable nexus. In brief, substantive self-determination consists of two normative strains: First, in what may be called its *constitutive* aspect, self-determination requires that the governing institutional order be substantially the creation of processes guided by the will of the people, or peoples, governed. Second, in what may be called its *ongoing* aspect, self-determination requires that the governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis.

The framework articulated here differs from the dichotomy of “internal” vs. “external” self-determination that has appeared in much of the scholarly literature on the subject.⁵² The internal/external dichotomy views self-determination as having two discrete domains: one having to do with matters entirely internal to a people (such as rights of political participation) and the other having to do exclusively with a people's status or dealings vis-à-vis other peoples (such as freedom from alien rule). The internal/external dichotomy effectively is premised on the conception, rejected earlier, of a limited universe of “peoples” comprising mutually exclusive spheres of community (i.e., states). Given the reality of multiple human associational patterns in today's world, including but not exclusively those organized around the state, it is distorting to attempt to organize self-determination precepts into discrete internal vs. external spheres defined by reference to presumptively mutually exclusive peoples. The alternative framework presented here of constitutive and ongoing self-determination instead identifies two phenomenological aspects of self-determination that apply throughout the spectrum of multiple and overlapping spheres of human association, and that both have implications for the inward- and outward-looking dimensions of units of human organization.

In its constitutive aspect, self-determination comprises a standard that enjoins the occasional or episodic procedures leading to the creation of or change in institutions of government within any given sphere of community. When institutions are

born or merged with others, when their constitutions are altered, or when they endeavor to extend the scope of their authority, these phenomena are the domain of constitutive self-determination. Constitutive self-determination does not itself dictate the outcome of such procedures; but where they occur it imposes requirements of participation and consent such that the end result in the political order can be said to reflect the collective will of the people, or peoples, concerned. This aspect of self-determination corresponds with the provision common to the international human rights covenants and other instruments that state that peoples "freely determine their political status" by virtue of the right of self-determination.⁵³ It is not possible to identify precisely the bounds of international consensus concerning the required levels and means of individual or group participation in all contexts of institutional birth or change. Certain minimum standards, however, are evident.

Colonization was rendered illegitimate in part by reference to the processes leading to colonial rule, processes that today clearly represent impermissible territorial expansion of governmental authority.⁵⁴ The world community now holds in contempt the imposition of government structures upon people, regardless of their social or political makeup.⁵⁵ The world community now appears generally to accept President Woodrow Wilson's admonition, made as he was elaborating his view of self-determination in the midst of the European turmoil of World War I, that "no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property."⁵⁶ Today, procedures toward the creation, alteration or territorial extension of governmental authority normally are regulated by self-determination precepts requiring minimum levels of participation on the part of all affected peoples commensurate with their respective interests.⁵⁷

Apart from self-determination's constitutive aspect, which applies to discrete episodes of institutional birth or change, *ongoing* self-determination continuously enjoins the form and functioning of the governing institutional order. In essence, ongoing self-determination requires a governing order under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis. In the words of the self-determination provision common to the international human rights covenants and other instruments, peoples are to "freely pursue their economic, social and cultural development."⁵⁸

In this respect as well, the international community's condemnation of colonial administration represents a minimum standard. The world community has come to regard classical colonialism as an oppressive form of governance, independently of its origins. Despite the divergence of political theory at the height of the decolonization movement in the 1950s and 1960s, a divergence that fueled the polarization of geopolitical forces until recently, there was a certain consensus on precepts of freedom and equality upon which the international community viewed colonial governance as oppressive.⁵⁹ Accordingly, at least since the middle part of this century, colonial structures have been widely deplored for depriving the indigenous inhabitants of equal status vis-à-vis the colonizers in the administration of their affairs.⁶⁰ In more recent years, notions of democracy and cultural pluralism increasingly have informed the expectations of the international community in regard to the ongoing functioning of government at all levels of authority.⁶¹

Remedial Aspects

The international concern over conditions that deviate from the substantive elements of self-determination has given rise to remedial prescriptions and mechanisms, most prominently those of the decolonization regime. As already noted, decolonization manifests the remedial aspect of the principle of self-determination, rather than its substantive elements. The prescriptions promoted through the international system to undo colonization, while not themselves equal to the principle of self-determination, were contextually specific *remedial* prescriptions arising from colonialism's deviation from the generally applicable norm. As we have seen, colonialism violated both the constitutive and ongoing aspects of self-determination. Although the violation of constitutive self-determination in the context of colonial territories was mostly a historical one, it was linked to a contemporary condition of oppression including the denial of ongoing self-determination.

Decolonization demonstrates that self-determination's remedial aspect may trump or alter otherwise applicable legal doctrine. In particular, the doctrine of effectiveness ordinarily confirms *de jure* sovereignty over territory once it is exercised *de facto*, independently of the legitimacy of events leading to the effective control. Further, under the doctrine of intertemporality, events ordinarily are to be judged in accordance with the contemporaneous law. Historical patterns of colonization appear to be consistent with or confirmed by international law prior to the modern era of human rights. Around the turn of the century international law doctrine upheld imperial spheres of influence asserted by Western powers and deferred to their effective exercise of authority over lands inhabited by "backward," "uncivilized," or "semi-civilized" people.⁶²

The modern international law of self-determination, however, forges exceptions to or alters the doctrines of effectiveness and intertemporal law. Pursuant to the principle of self-determination, the international community has deemed illegitimate historical patterns giving rise to colonial rule and has promoted corresponding remedial measures, irrespective of the effective control exercised by the colonial power and notwithstanding the law contemporaneous with the historical colonial patterns. Decolonization demonstrates that constitutional processes may be judged retroactively in light of self-determination values—notwithstanding effective control or contemporaneous legal doctrine—where such processes remain relevant to the legitimacy of governmental authority or otherwise manifest themselves in contemporary inequities.

By the same token, remedies to redress historical violations of self-determination do not necessarily entail a reversion to the status quo ante, but rather are to be developed in accordance with the present-day aspirations of the aggrieved groups, whose character may be substantially altered with the passage of time. Liberation movements in Africa promoted decolonization through the establishment of new political orders organized on the basis of the territorial boundaries imposed by the colonial powers, despite the arbitrary character of most such boundaries in relation to precolonial political and social organization. This model of decolonization ultimately was adopted by the United Nations and confirmed by the Organization of

African Unity.⁶³ Ongoing self-determination—a governing institutional order in which people may live and develop freely—was deemed implemented for a colonial territory through “(a) [e]mergence as a sovereign independent State; (b) [f]ree association with an independent State; or (c) [i]ntegration with an independent State” on the basis of equality.⁶⁴ And because the decolonization remedy itself involved change in the governing institutional order, constitutive self-determination dictated deference to the aspirations of the people concerned for the purposes of arriving at the appropriate institutional arrangement. In most instances, independent statehood was the presumed or express preference.

In its focus on the colonial territorial unit, this model of decolonization bypassed spheres of community—that is, tribal and ethnic groupings—that existed prior to colonialism; but it also largely ignored the ethnic and tribal identities that *continued* to exist and hold meaning in the lives of people. Hence, as to some enclave groups or groups divided by colonial frontiers, decolonization procedures alone may not have allowed for a sufficient range of choice or otherwise may not have constituted a complete remedy.⁶⁵ In any event, as far as they went toward the objective of purging colonial territories of alien rule, decolonization procedures adhered to the preferences of living human beings—if only the preferences of the majority voice in the colonial territories.

In the *Western Sahara* case,⁶⁶ the International Court of Justice affirmed that self-determination gives precedence to the present-day aspirations of aggrieved peoples over historical institutions. In an advisory opinion, the Court held that the Western Sahara was not *terra nullius* at the time it was acquired by Spain in the late nineteenth century, because of an immediately prior course of dealings between Europeans and indigenous political leaders demonstrating contemporaneous recognition of organized communities.⁶⁷ The Court refused to give weight to legal theory of that period treating all lands not under a Western sovereign as *terra nullius*. The Court then found legally relevant “historical ties” between the people of the Western Sahara and political communities corresponding with the modern (newly independent) states of Morocco and Mauritania.⁶⁸ In the end, however, the Court held that these historical ties of political community and allegiance were subordinate to the wishes of the present-day people of the Western Sahara in the decolonization of the territory.⁶⁹ The Court stressed that self-determination, the overriding principle in the decolonization of the Western Sahara, required regard for the freely expressed wishes of the people of the territory, notwithstanding their character or political status immediately prior to colonization.⁷⁰

To the extent the international community is generally concerned with promoting self-determination precepts, and as it develops and expands its common understanding about those precepts, it may identify contextual deviations from self-determination beyond classical colonialism and promote appropriate remedies in accordance with the aspirations of the groups concerned. With appropriate attentiveness to the particular character of deviant conditions or events, and with an understanding of the interconnected character of virtually all forms of modern human association, these remedies need not entail the formation of new states. Secession, however, may be an appropriate remedial option in limited contexts (as opposed to a generally available “right”) where substantive self-determination for a particular

group cannot otherwise be assured or where there is a net gain in the overall welfare of all concerned.⁷¹ In most cases in the postcolonial world, however, secession would most likely be a cure worse than the disease from the standpoint of all concerned.

Considerations of state sovereignty form a backdrop for the elaboration of self-determination remedies and influence the degree to which remedies may be subject to international scrutiny. The limitations of the international doctrine of sovereignty in its modern formulation are essentially twofold. First, sovereignty upholds a substantive preference for the status quo of political ordering through its corollaries protective of state territorial integrity and political unity.⁷² Second, the doctrine limits the capacity of the international system to regulate matters within the spheres of authority asserted by states recognized by the international community. This limitation upon international competency is reflected in the U.N. Charter’s admonition against intervention “in matters which are essentially within the domestic jurisdiction of any state.”⁷³

Under contemporary international law, however, the doctrine of sovereignty and its Charter affirmations are conditioned by the human rights values also expressed in the Charter and embraced by the international community.⁷⁴ In a global community that remains organized substantially by state jurisdictional boundaries, sovereignty principles continue, in some measure, to advance human values of stability and ordered liberty, and they guard the people within a state against disruptive forces coming from outside the state’s domestic domain. But since the atrocities and suffering of the two world wars, international law does not much uphold sovereignty principles when they would serve as an accomplice to the subjugation of human rights or act as a shield against international concern that coalesces to promote human rights. This of course is the lesson of decolonization and the modern human rights movement within the international system. Vattel’s conception of sovereignty principles as arising fundamentally from human interests carries weight today.⁷⁵

Thus, ideally, self-determination and sovereignty principles will work in tandem to promote a peaceful, stable, and humane world. But, where there is a violation of self-determination and human rights, presumptions in favor of territorial integrity or political unity of existing states may be offset to the extent required by an appropriate remedy.⁷⁶ Furthermore, heightened international scrutiny and even intervention is justified in the degree to which violations of human rights are prone to lingering unchecked by decision makers within the domestic realm. Such heightened international scrutiny, along with a limited suspension of state sovereignty presumptions, has been forged in the context of indigenous peoples.

Self-Determination and Contemporary International Practice Concerning Indigenous Peoples

The contemporary international concern for indigenous peoples already discussed at length in chapter 2 is based effectively on the identification of a long-standing *sui generis* deviation from the self-determination standard, one that is in addition to the *sui generis* deviation represented by twentieth-century classical colonialism. Indeed, the rubric of indigenous peoples or populations is generally understood to

refer to culturally cohesive groups that suffer inequities within the states in which they live as the result of historical patterns of empire and conquest.⁷⁷ Indigenous peoples of today typically share much the same history of colonialism suffered by those still living in this century under formal colonial structures and targeted for decolonization procedures. But despite the contemporary absence of colonial structures in the classical form, indigenous peoples have continued to suffer impediments or threats to their ability to live and develop freely as distinct groups in their original homelands. The historical violations of indigenous peoples' self-determination, together with contemporary inequities against indigenous peoples, still cast a dark shadow on the legitimacy of state authority, regardless of effective control or the law contemporaneous with historical events. Accordingly, the developing constellation of indigenous rights norms identified in chapter 2 in large measure comprises a remedial regime, although the constellation also contains prescriptions that detail the substantive elements of self-determination in the specific context of indigenous peoples.

The Draft United Nations Declaration on the Rights of Indigenous Peoples contains specific recognition of their right of self-determination. The draft declaration, borrowing from the self-determination language of the international human rights covenants, states: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."⁷⁸

This express affirmation of indigenous self-determination has been slow to command a broad consensus among governments participating in the standard-setting work of the United Nations, mostly as a result of the misguided tendency to equate the word *self-determination* with decolonization procedures or with an absolute right to form an independent state.⁷⁹ More and more governments, however, have moved away from this tendency and demonstrated a disposition toward express usage of the term *self-determination* in association with an articulation of indigenous peoples' rights. The Australian government signaled this trend in a statement to the 1991 session of the U.N. Working Group on Indigenous Populations, expressing "hope" that it would be possible to find an acceptable way to refer to self-determination in the declaration:

Events in all parts of the world show us that the concept of self-determination must be considered broadly, that is, not only as the attainment of national independence. Peoples are seeking to assert their identities, to preserve their languages, cultures, and traditions and to achieve greater self-management and autonomy, free from undue interference from central governments.⁸⁰

Along these same lines, the United States government delegation to the 1994 session of the working group expressed United States support for the "basic goals of the draft declaration" and added that "[s]ince the 1970's, the U.S. Government has supported the concept of self-determination for Indian tribes and Alaska Natives within the United States."⁸¹ The United States position was further indicated by its initial report to the U.N. Human Rights Committee, submitted in 1994, pursuant to its obligations under the International Covenant on Civil and Political Rights. As part of its effort to establish compliance with the right of self-determination affirmed in article 1 of the covenant, the United States gave an extensive account of its law and

policy concerning Native Americans, particularly in regards to rights of self-government.⁸² The Human Rights Committee has confirmed that the self-determination provision in article 1 has bearing upon the obligations of states toward indigenous peoples under the covenant.⁸³

Continuing rhetorical sensitivities toward usage of the term *self-determination* generally do not entail an aversion to self-determination's underlying normative precepts, if those precepts are understood not to require a state for every "people." Government statements to the U.N. working group and other international bodies are consistent with the widely held belief that indigenous groups and their members are entitled to be full and equal participants in the creation of the institutions of government under which they live and, further, to live within a governing institutional order in which they are perpetually in control of their own destinies.⁸⁴

Insofar as indigenous peoples have been denied self-determination thus understood, the international indigenous rights regime prescribes remedial measures that may involve change in the political order and hence, in keeping with constitutive self-determination, are to be developed in accordance with the aspirations of indigenous peoples themselves. Thus, ILO Convention No. 169 requires the development of "special measures" to safeguard indigenous "persons, institutions, property, labour, cultures and environment"⁸⁵ and specifies that the measures be consistent with "the freely-expressed wishes of the peoples concerned."⁸⁶ Also, the convention requires that consultations with indigenous peoples "be undertaken, in good faith . . . with the objective of achieving agreement or consent."⁸⁷

Professor Erica-Irene Daes, the chair of the working group, describes the requirements of self-determination in the context of indigenous peoples as entailing a form of "belated state-building" through negotiation or other appropriate peaceful procedures involving meaningful participation by indigenous groups.⁸⁸ According to Professor Daes, self-determination entails a process

through which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed upon and just terms, after many years of isolation and exclusion. This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.⁸⁹

In an illustrative case, the Inter-American Commission on Human Rights promoted such belated state building as a means of remedying the effective denial of self-determination suffered by the Miskito and other Indians of the Atlantic Coast region of Nicaragua. The Atlantic Coast region was incorporated within the Nicaraguan state by a series of nineteenth-century events that were devoid of adequate procedures of consultation with the indigenous population.⁹⁰ In the aftermath of the imposed incorporation, the indigenous Miskito, Sumo, and Rama Indians of the Atlantic Coast have lived at the margins of Nicaraguan society in terms of basic social welfare conditions.⁹¹ Moreover, having retained their distinct indigenous identities, the Indians have suffered the imposition of government structures that have inhibited their capacity to exist and develop freely as distinct cultural communities.⁹² Hence it can be said that the Indians of the Atlantic Coast have been deprived of self-determination in both its constitutive and ongoing aspects, espe-

cially if ongoing self-determination is understood to include precepts of cultural pluralism.

Not long after the revolutionary Sandinista government took power in 1979, it faced demands for political autonomy on the part of the Atlantic Coast indigenous communities. Early resistance to the demands led to a period of turmoil, exacerbated by the civil war that gripped the country during the 1980s. The Indians took their case to the Inter-American Commission on Human Rights, asserting violations of their human rights, including the right to self-determination.⁹³ Effectively equating self-determination with decolonization procedures, the commission found that the Indians were not self-determination beneficiaries.⁹⁴ However, defying its own limited articulation of self-determination, the commission acknowledged the inequitable condition of the Indians dating from their forced incorporation into the Nicaraguan state and found that their ability to develop freely in cultural and economic spheres was suppressed by the existing political order.⁹⁵ The commission thus suggested the elaboration of a new political order for the Indians⁹⁶—in effect, a remedy to implement an ongoing condition of self-determination where it had been denied. And in accordance with precepts of constitutive self-determination, which also had been denied, the commission further held that such a remedy “can only effectively carry out its assigned purposes to the extent it is designed in the context of broad consultation, and carried out with the direct participation of the ethnic minorities of Nicaragua, through their freely chosen representatives.”⁹⁷

Following the commission’s decision, the Nicaraguan government entered into negotiations with Indian leaders and eventually developed a constitutional and legislative regime of political and administrative autonomy for the Indian-populated Atlantic Coast region of the country.⁹⁸ Although the autonomy regime is widely acknowledged to be faulty, and its implementation has been difficult, it nonetheless is by most accounts a step in the right direction. More significantly for the present purposes, it represents the kind of context-specific effort at belated state building now promoted by the international community to remedy the long-standing denial of indigenous peoples’ self-determination.

Notes

1. U.N. Charter art. 1, para. 2.
2. See *infra* notes 14–16.
3. See Ian Brownlie, *Principles of Public International Law* 515 (4th ed. 1990); Héctor Gross Espiell, “Self-Determination and Jus Cogens,” in *U.N. Law/Fundamental Rights: Two Topics in International Law* 167 (Antonio Cassese ed., 1979); Hurst Hannum, *Autonomy, Sovereignty and Self-Determination* 45 (1990); Patrick Thornberry, *International Law and the Rights of Minorities* 14 (1991); Malcolm Shaw, *Title to Territory in Africa: International Legal Issues* 89 (1988); *The Right to Self-Determination: Implementation of the United Nations Resolutions Relating to the Right of Peoples under Colonial and Alien Domination to Self-Determination*, para. 74, U.N. Doc. E/CN.4/Sub.2/405/Rev.1, U.N. Sales No. E.79.XIV.5 (1980) (Héctor Gross Espeill, special rapporteur).
4. See Louis René Beres, “Self-Determination, International Law and Survival on Planet Earth,” 11 *Ariz. J. Int’l & Comp. L.* 1 (1994) (pointing out problems arising from use of self-

determination to justify militaristic ethnonationalism); Asbjorn Eide, “In Search of Constructive Alternatives to Secession,” in *Modern Law of Self Determination* 139 (Christian Tomuschat ed., 1993) (arguing that the “alleged right to self-determination all too frequently serves to justify” peace-threatening ethnonationalism); Ethan A. Klingsberg, “International Human Rights Intervention on Behalf of Minorities in Post-World War I Eastern Europe and Today: Placebo, Poison, or Panacea?” 1993 *U. Chi. L. Sch. Roundtable* 1, 10–21 (identifying a “self-determination syndrome” in connection with tactics of collective aggression among ethnic groups). See generally Daniel Patrick Moynihan, *Pandaemonium: Ethnicity in International Politics* (1993) (assessing nationalist movements in the aftermath of the cold war and their linkage to the principle of self-determination).

5. See, e.g., opposition to express recognition of indigenous peoples’ right to self-determination in the context of negotiating the text of ILO Convention No. 169, discussed in chapter 2, *supra*, notes 63–66 and accompanying text.

6. The conception of self-determination articulated here and its implications beyond the context of indigenous peoples are discussed more fully in S. James Anaya, “A Contemporary Definition of the International Norm of Self-Determination,” 3 *Transnat’l L. & Contemp. Probs.* 131 (1993).

7. See Edward M. Morgan, “The Imagery and Meaning of Self-Determination,” 20 *N.Y.U. J. Int’l L. & Pol.* 355, 357–58 (1988).

8. See, e.g., Umzurike O. Umzurike, *Self-Determination in International Law* 6–11 (1972); Dov Ronen, *The Quest for Self-Determination* ix (1979).

9. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 77–78.

10. See Umzurike, *supra* note 8, at 11–12.

11. *Id.* at 13–14.

12. See Vladimir I. Lenin, “The Right of Nations to Self-Determination,” in 20 *Collected Works* (English ed. 1947); Joseph Stalin, *Marxism and the National-Colonial Question* (1975). See generally Walker Connor, *The National Question in Marxist-Leninist Theory and Strategy* (1984).

13. U.N. Charter art. 1, para. 2.

14. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200(XXI), art. 1(1), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200(XXI), art. 1(1), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). The self-determination provision common to the international human rights covenants reads: “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.” Self-determination is affirmed by substantially the same language in other U.N.-sponsored international instruments, e.g., Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, Oct. 24, 1970, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971) [hereinafter U.N. Friendly Relations Declaration]; Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), Dec. 14, 1960, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, para. 2, U.N. Doc. A/4684 (1961).

15. African Charter on Human and Peoples’ Rights, June 27, 1981, Organization of African Unity, art. 20, 21 *I.L.M.* 59 (1981) (entered into force Oct. 21, 1986).

16. Final Act of the Conference on Security and Cooperation in Europe (Helsinki), Aug. 1, 1975, principle 8, 14 *I.L.M.* 1292 (1975).

17. See *supra* chapter 1, notes 47–52, 99–106, and accompanying text. See also Tom J.

Farer, "The United Nations and Human Rights: More Than a Whimper, Less Than a Roar" 9 *Hum. Rts. Q.* 550 (1987) ("Until the Second World War . . . international law did not impede the natural right of each equal sovereign to be monstrous to his or her subjects.").

18. See *supra* chapter 2, notes 19–23 and accompanying text.

19. See *The Right to Self-Determination: Historical and Current Developments on the Basis of United Nations Instruments*, U.N. Doc. E/CN.4/Sub.2/404/Rev.1, at 31, para. 220, U.N. Sales No. E.80.XIV.3 (1981) (Aureliu Cristescu, special rapporteur) (hereinafter U.N. Study on Self-Determination) ("The principles of equal rights and self-determination of peoples is [sic] part of the group of human rights and fundamental freedoms."); Yoram Dinstein, "Self-Determination and the Middle East Conflict," in *Self-Determination: National, Regional and Global Dimensions* 243 (Yonah Alexander & Robert A. Friedlander eds., 1980) ("Self-determination must be perceived as an international human right."); Hurst Hannum, "Self-Determination as a Human Right," in *Human Rights in the World Community: Issues and Action* 125 (Richard P. Claude & Burns H. Weston eds., 2nd ed. 1992).

20. Burns H. Weston, "Human Rights," in *Human Rights in the World Community*, *supra* note 19, at 14, 17 ("If a right is determined to be a human right it is quintessentially general or universal in character, in some sense equally possessed by all human beings everywhere, including in certain instances even the unborn.").

21. See Umozurike, *supra* note 8, at 11–12.

22. See *id.* at 59–95.

23. See G. A. Res. 2775, U.N. GAOR, 26th Sess., Supp. No. 29, at 41, U.N. Doc. A/8429 (1971); G.A. Res. 3411, U.N. GAOR, 30th Sess., Supp. No. 34, at 36, U.N. Doc. A/10034 (1975). See also S.C. Res. 392, U.N. SCOR, 31st Sess., at 11, U.N. Doc. S/Res/392 (1976); International Convention on the Suppression and Punishment of the Crime of "Apartheid," Nov. 30, 1973, G.A. Res. 3068(XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1974).

24. See *supra* notes 14–16, and accompanying text.

25. See *Webster's Collegiate Dictionary* 860 (10th ed. 1993) (defining "peoples" as "a body of persons that are united by a common culture, tradition, or sense of kinship, that typically have common language, institutions, and beliefs, and that often constitute a politically organized group").

26. This view was implicit, for example, in India's reservation to article 1 of the International Covenant on Civil and Political Rights, *supra* note 14, made at the time of its ratification of the covenant:

With reference to article 1 . . . , the Government of the Republic of India declares that the words "the right of self-determination" appearing in this article apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation—which is the essence of national integrity.

U.N. Centre for Human Rights, *Human Rights: Status of International Instruments* 9 (1987), U.N. Sales No. E.87.XIV.2. In a subsequent statement to the U.N. Human Rights Committee, India reiterated its position that "the right to self-determination in the international context [applies] only to dependent Territories and peoples." Statement by the Representative of India to the Human Rights Committee, U.N. Doc. CCPR/C/SR.498, at 3 (1984).

27. See *infra* notes 49–60 and accompanying text (explaining the relationship between decolonization and self-determination).

28. See, e.g., David J. Harris, *Cases and Materials in International Law* 91–93 (1979); Rosalyn Higgins, *The Development of International Law through the Political Organs of the*

United Nations 104 (1963). Typical of this approach, many embrace the notion that self-determination includes *internal* and *external* aspects whose relative spheres are defined by reference to the state unit. See *infra* note 52 and accompanying text.

29. See Rosalyn Higgins, "Post-Modern Tribalism and the Right to Secession, Comments," in *Peoples and Minorities in International Law* 29, 32 (Catherine Brölmann et al. eds., 1993) (holding that substate groups—i.e., "minorities" as opposed to "peoples"—are not entitled to self-determination under international law).

30. This view has roots in the ethnonationalist thought of the early part of this century: see W. Ofuatye-Kodjoe, *The Principle of Self-Determination in International Law* 30–31 (1977), and is reflected in much of the political rhetoric of many contemporary self-determination demands and in much of the literature advocating self-determination for indigenous communities. See, e.g., Rachel S. Kronowitz et al., Comment, "Toward Consent and Cooperation; Reconsidering the Political Status of Indian Nations," 22 *Harv. C.R.-C.L. L. Rev.* 507, 597–600 (1987); John H. Clinebell & Jim Thomson, "Sovereignty and Self-Determination: The Rights of Native Americans under International Law," 27 *Buff. L. Rev.* 669, 707, 710–14 (1978).

31. See generally Ofuatye-Kodjoe, *supra* note 30, at 80–84 (discussing the application of allied policy at the close of World War I).

32. See Christopher C. Mojekwu, "Self-Determination: The African Perspective, in *Self-Determination: National, Regional and Global Dimensions*, *supra* note 19, at 221, 228–29 (explaining that U.N. policy was to pursue the independence of the colonial territories without regard to precolonial political units based primarily on ethnic affinity or tribal affiliation).

33. See generally Morton H. Halperin et al., *Self-Determination in the New World Order* 27–44 (1992) (discussing international responses to self-determination claims in the post-cold war era).

34. See *supra* chapter 1, notes 62–64 and accompanying text.

35. See "EFTA Signs Cooperation Accords," *Wall St. J.*, Dec. 11, 1991, at A13; (reporting that the European Free Trade Association signed cooperative agreements with Bulgaria, Romania, and the Baltic states to speed their integration into the European economy); R. C. Longworth, "New Europe Restructures Blocs of Past," *Haw. Trib.-Herald*, Sept. 14, 1990, at 23 (describing a proposal for revival of the Hanseatic League, a historic trade alliance linking Russia, the Baltic states, Scandinavia, Poland, Germany, and the Netherlands).

36. "New Europe Begins Taking Shape in Giant Common Market," *Agence France Presse*, Oct. 22, 1991, available in LEXIS, Nexis Library, AFP file.

37. In 1987 the Nicaraguan government adopted its Statute of Autonomy for the Atlantic Coast Regions of Nicaragua, Law No. 28 of 1987 [hereinafter Nicaraguan Statute of Autonomy], which established semiautonomous regional governing bodies. In 1990, the people of the autonomous regions elected for the first time delegates to the regional governing bodies as well as to the national legislature. See Mario Rizo Zeledón, "Identidad étnica y elecciones; El Caso de la RAAN," 8 *WANI*, July/Dec. 1990, at 28 (*WANI* is published by the Centro de Investigaciones y Documentación de la Costa Atlántica and the Universidad de Centro América) (analyzing the 1990 elections in the autonomous regions). Upon taking office in April 1990, the newly elected president Violeta Barrios de Chamorro established a cabinet-level agency for the autonomous regions and appointed as its director Brooklyn Rivera, the principal leader of the Atlantic Coast Indian organization, YATAMA. See S. James Anaya, "Indian Nicaraguan Struggle Continues," 18 *Americans before Columbus* no. 2 (1990), at 1 (published by the National Indian Youth Council).

38. Pursuant to the Nicaraguan Statute of Autonomy, *supra* note 37, art. 23, there are initiatives to demarcate local municipal boundaries and to formalize local authority. See

Anteproyecto de Ley de División Política Administrativa de la Región Autónoma Atlántico Norte (draft legislation developed by the Humboldt Center, Managua Nicaragua, at the request of the Northern Autonomous Regional Councils); Propuesta de Reglamento del Estatuto de Autonomía de las Regiones de la Costa Atlántica de Nicaragua (proposal developed by the Center for Research and Documentation of the Atlantic Coast [CIDCA] in conjunction with the Northern Autonomous Regional Council).

39. Interview with Brooklyn Rivera, director of the Instituto Nicaragüense para el Desarrollo de las Regiones Autónomas (Apr. 1992).

40. See Hannum, *supra* note 3, at 263–79 (discussing the system of regional autonomous governments in Spain, particularly as regards the Basque country and Catalonia).

41. See Elizabeth Pond, "Spain Lays Political and Economic Groundwork for EC Membership," *Christian Sci. Monitor*, Nov. 24, 1980, at 10.

42. Duane Champagne, "Beyond Assimilation as a Strategy for National Integration: The Persistence of American Indian Political Identities," 3 *Transnat'l L. & Contemp. Probs.* 109, 112 (1993).

43. *Id.* at 112–13.

44. *Id.* at 112–14.

45. See Oren R. Lyons, "The American Indian in the Past," in *Exiled in the Land of the Free* 13, 14, 37–39 (Oren R. Lyons & John C. Mohawk eds., 1992).

46. *Id.*

47. See, e.g., "Living History: Inauguration of the International Year of the World's Indigenous People," 3 *Transnat'l L. & Contemp. Probs.* 165 (1993) (statements by indigenous leaders).

48. The Vienna Convention on the Law of Treaties, which is considered to represent customary international law in this respect, states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 31, para. 1, 1155 U.N.T.S. 331. See also Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 8 ("If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.").

49. The decolonization regime is discussed *supra* chapter 2, notes 25–28 and accompanying text.

50. This point is emphasized in Efrén Rivera-Ramos, "Self-Determination and Decolonization in the Society of the Modern Colonial Welfare State," in *Issues of Self-Determination* 115, 127 (William Twining ed., 1991).

51. See *infra* notes 77–98 and accompanying text.

52. E.g., Rosalyn Higgins, *supra* note 29, at 31; Allan Rosas, "Internal Self-Determination" in *Modern Law of Self-Determination* 225 (Christian Tomuschat ed., 1993). But see Gudmundur Alfredsson, "The Right of Self-Determination and Indigenous Peoples," in *Modern Law of Self-Determination*, *id.* at 21, 50–54 (questioning the usefulness of the term "internal self-determination").

53. International Covenant on Economic, Social and Cultural Rights, *supra* note 14, art. 1(1); International Covenant on Civil and Political Rights, *supra* note 14, art. 1(1). The full text of art. 1(1) of the covenants is quoted *supra*, at note 14. See also United Nations Friendly Relations Declaration, *supra* note 14.

54. For a description of procedures for acquiring territorial title adopted by European states in the colonization of Africa, see Shaw, *supra* note 3, at 31–58. See also *supra* chapter 1 (discussing theoretical justifications historically advanced for such processes).

55. See Paul G. Lauren, *Power and Prejudice: The Politics and Diplomacy of Racial*

Discrimination 150–65 (1988) (discussing government statements at the San Francisco conference which gave rise to the United Nations Charter); Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 14, at para. 1 (declaring, *inter alia*, that "[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights"); *Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States*, U.N. Doc. E/CN.4/1989/22, HR/PUB/89/5, at 8 (1989) (Ted Moses, special rapporteur) [hereinafter *Report of Seminar on Racism*] ("The concepts of "terra nullius," "conquest" and "discovery" as modes of territorial acquisition are repugnant, have no legal standing, and are entirely without merit or justification.").

56. President Woodrow Wilson, Address to Congress of May 1917 (quoted in Umozurike, *supra* note 8, at 14).

57. This is evident, for example, in the steps of institution building of the European Community and the expansion of its territorial jurisdiction, see generally P. S. R. F. Mathijsen, *A Guide to European Community Law* 1–14 (5th ed. 1990) (background on the development of the European Community, now the European Union); in efforts at domestic constitutional reform, e.g., Canada's effort in the early 1990s in which representatives of aboriginal peoples and Quebec participated in reform negotiations, see Mary Ellen Turpel, "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition," 25 *Cornell Int'l L. J.* 579, 593–94 (1992); and in the dissolution of existing states, e.g., the peaceful break-up of Czechoslovakia, which followed supporting votes by the elected parliamentary delegates of both Czech and Slovak legislative bodies; but see Adrian Bridge, "Few Cheers as Two New States are Born," *The Independent* (London), Dec. 31, 1992, at 14 (criticizing the procedures leading to the dissolution of the Czechoslovakian federation).

58. Covenant on Economic, Social and Cultural Rights, note 14, art. 1(1); Covenant on Civil and Political Rights, *supra* note 14, art. 1(1). The full text of article 1(1) of the covenants is in note 14, *supra*. See also U.N. Friendly Relations Declaration, *supra* note 14, principle V.

59. Compare, for example, Stalin's anticolonial statements in Stalin, *supra* note 12, at 314–22, with the policy prescriptions of U.S. leaders as summarized in W. Ofuatey-Kodjoe, *supra* note 30, at 99–100.

60. See Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* 85 (1990) (discussing the preponderant view of the 1950s that colonialism is "an absolute wrong: an injury to the dignity and autonomy of those peoples and of course a vehicle for their economic exploitation and political oppression"). See also *supra* chapter 2, notes 25–28 and accompanying text.

61. Thus, for example, the "common position on the process of recognition" adopted by the European Community (which is now the European Union) reads in part:

The Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognize, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, have constituted themselves on a democratic basis.

Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, adopted by the Council of the European Community, Dec. 16, 1991, EC Bulletin 12-1992, p. 119; U.N. Doc. S/23293 (1991), Annex 2, 31 *I.L.M.* 1486 (1992) (emphasis added). Accordingly, the scholarly literature increasingly has linked rights of political participation

and notions of democracy to the principle of self-determination. *E.g.*, Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (1994); Jordan J. Paust, "Self-Determination: A Definitional Focus," in *Self-Determination: National, Regional, and Global Dimensions*, *supra* note 19, at 3; Patrick Thornberry, "The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism," in *Modern Law of Self-Determination*, *supra* note 52, at 101. *See also infra* chapter 4, notes 109–13 and accompanying text (discussing developments toward a "democratic entitlement" under international law). A discussion on international law's enhanced attention to values of cultural pluralism is in chapter 4, *infra*, notes 14–24 and accompanying text.

62. *See supra*, chapter 1, notes 101–22 and accompanying text. *See generally* Gerrit W. Gong, *The Standard of "Civilization" in International Society* (1984).

63. *See* Mojekwu, *supra* note 32, at 230–332; Radha K. Ramphul, "The Role of International and Regional Organizations in the Peaceful Settlement of Internal Disputes (with Special Emphasis on the Organization of African Unity)," 13 *Ga. J. Int'l & Comp. L.* 371, 377–78 (1983).

64. G.A. Res. 1541(XV), Dec. 15, 1960, principle 6, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1961). *See supra* chapter 2, notes 25–28 and accompanying text (discussing U.N. and related practice concerning decolonization).

65. *See supra* chapter 2, notes 29–31 and accompanying text (discussing the limitations of the decolonization regime in respect of enclave tribal or ethnic groups).

66. Western Sahara, Advisory Opinion, 1975 I.C.J. 12.

67. *Id.* at 38–40.

68. *Id.* at 68.

69. *Id.*

70. *See id.* at 33, 68.

71. *See* Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* 222 (1978) (arguing that international law provides for remedial secession in extreme cases of oppression); Ved Nanda, "Self-Determination outside the Colonial Context: The Birth of Bangladesh in Retrospect," in *Self-Determination: National, Regional, and Global Dimensions*, *supra* note 19, at 193, 204 (stating that secession may properly follow a persistent pattern of human rights abuses against a group); *see also* Allen E. Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania & Quebec* 38–45 (1991) (synthesizing arguments for secession, all of which relate to rectifying some form of injustice). While secession may in limited contexts comprise an appropriate remedy, it is doubtful that the world community will support—for any denomination of groups—a unilaterally exercisable right to secede in the absence of a remedial justification. *See* Thomas M. Franck, "Postmodern Tribalism and the Right to Secession," in *Peoples and Minorities in International Law*, *supra* note 29, at 3, 19 (surveying international practice and concluding that "[t]he international system does not recognize a general right of secession but may assist the government of a state which is a member in good standing to find constructive alternatives to a secessionist claim"); Halperin et al., *supra* note 33, at 27–44 (discussing international responses to recent secessionist efforts). At the very least, however, substantive self-determination implies that individuals and groups, even without a strong remedial justification, are entitled to petition for and work toward fundamental change, including secession, through peaceful means. And to the extent such initiatives engender real movement toward change, self-determination requires minimum levels of participation and consent on the part of all concerned, commensurate with their interests, in the decision-making procedures that will determine the outcome. Thus, while popular support for a secessionist movement may not be sufficient for the world community to act in favor of the movement, it is at least a necessary condition for secession

in both remedial and nonremedial contexts. International recognition of states emerging from the dissolution of the former Soviet Union and states in Eastern Europe followed referenda or other expressions of popular support by the constituents of the nascent independent states. *See generally* Marc Weller, Current Developments Note, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia," 86 *Am. J. Int'l L.* 569 (1992). Halperin et al., *supra* note 33, at 27–38 (discussing international responses to the break-ups of the former Soviet Union and Yugoslavia).

72. *See* U.N. Charter art. 2(4).

73. U.N. Charter art. 2(7).

74. *See* Hannum, *supra* note 3, at 19–20 (discussing the "limits of sovereignty"). *See also Report of the Secretary General: An Agenda for Peace; Preventive Diplomacy, Peace-making and Peacekeeping*, U.N. GAOR, 47th Sess., Agenda Item 10, U.N. Doc. A/47/277 (1992) (discussing the balancing of state sovereignty and humanitarian concerns at times of crisis).

75. *See supra* chapter 1, notes 57–61 and accompanying text (discussing Vattel and state sovereignty doctrine).

76. This is reflected in the U.N. Friendly Relations Declaration, *supra* note 14, principle V, which states: "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples.*" (emphasis added).

77. The U.N. Study of the Problem of Discrimination against Indigenous Populations contains the following 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 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.

U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, at 29, para. 379 (1986).

78. Draft United Nations Declaration on the Rights of Indigenous Peoples, adopted by the Subcommission on Prevention of Discrimination and Protection of Minorities by its res. 1994/45, Aug. 26, 1994, art. 3, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 105 (1994), reprinted in the appendix, *infra*. The development of the draft declaration and its status are discussed in *supra* chapter 2, notes 84–87 and accompanying text.

79. For an analytical discussion of the resistance that has existed toward express usage of the term *self-determination* in association with indigenous peoples' rights, *see* Catherine J. Iorns, "Indigenous Peoples and Self-Determination: Challenging State Sovereignty," 24 *Case W. Res. J. Int'l L.* 199 (1992).

80. Australian Government Delegation, Speaking Notes on Self-Determination, at 2 (July 24, 1991).

81. Observer Delegation of the United States of America, Statement to the Working Group on Indigenous Populations, Geneva, at 1 (July 26, 1994). *See also, e.g.*, Intervention by the Delegation of Canada to the Main Committee of the World Conference on Human Rights on the Subject of Indigenous People, Vienna, at 2 (June 22, 1993) (referring to proposed self-determination wording for draft declaration); Supplemental Statement by the

Government of New Zealand to the Working Group (July, 1990) (seeking to “put the record straight” to rebut any inference that New Zealand is not willing to recognize the “right to self-determination” of indigenous peoples); Statement of the Representative of Chile, Pedro Oyarce, Working Group on Indigenous Populations, 11th Sess., at 2–3 (July 21, 1993) (stating that Chile favors affirmation of the right of self-determination in the indigenous rights declaration).

82. U.S. Department of State, *Civil and Political Rights in the United States: Initial Report of the United States of America to the U.N. Human Rights Committee under the International Covenant on Civil and Political Rights*, July 1994, at 36–46, Dept. State Pub. 10200 (1994). The reporting obligations under the covenant are discussed *infra* in chapter 6, notes 25–34 and accompanying text.

83. See *infra* chapter 6, notes 31–32 and accompanying text.

84. Government attitudes in favor of the *concept* of self-determination in association with indigenous peoples (as opposed to their reservations about express use of the term in this context) is especially evident in government statements on domestic policies and initiatives. See generally *Report of the Working Group on Indigenous Populations on Its Eleventh Session*, U.N. Doc. E/CN.4/Sub.2/1993/29, at 22–23 (Aug. 23, 1993) (synthesizing government statements on developments under the heading “Right of Self-Determination and Political Participation”).

85. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, art. 4(1), International Labour Conference (entered into force Sept. 5, 1990), reproduced in the appendix, *infra*.

86. *Id.* art. 4(2).

87. *Id.* art. 6(2).

88. Erica-Irene A. Daes, “Some Considerations on the Right of Indigenous Peoples to Self-Determination,” 3 *Trans’l L. & Contemp. Probs.* 1, 9 (1993).

89. *Id.*

90. The history of the Atlantic Coast region is summarized in Jorge Jenkins Molieri, *El Desafío indígena en Nicaragua: El Caso de los Miskitos* 33–114 (1986); and in Theodore Macdonald, “The Moral Economy of the Miskito Indians: Local Roots of a Geopolitical Conflict,” in *Ethnicities and Nations: Processes of Interethnic Relations in Latin America, Southeast Asia, and the Pacific* 107, 114–22 (Remo Guidieri et al. eds., 1988).

91. See Jenkins Molieri, *supra* note 90, at 175–229 (discussing the social and economic conditions in the Atlantic Coast region at the time of the 1979 revolution in Nicaragua).

92. See John N. Burnstein, Student Note, “Ethnic Minorities and the Sandinist Government,” 36 *J. Int’l Aff.* 155, 155–59 (1982) (discussing the imposition of government structures both before and after the 1979 revolution).

93. See Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure Regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin*, O.A.S. Doc. OEA/Ser.L/V/II.62, doc. 10, rev. 3 (1983), OEA/Ser.L/V/II.62, doc. 26 (1984) (Case No. 7964 (Nicaragua)) [hereinafter *Miskito Report and Resolution*].

94. *Miskito Report and Resolution* at 78–81.

95. *Id.* at 1–7, 81.

96. *Id.* at 81–82.

97. *Id.* at 82. For further discussion of the case, particularly in regards to its procedural aspects, see *infra* chapter 6, notes 127–31, 134–37, and accompanying text.

98. See Macdonald, *supra* note 90, at 138–47.

4

Norms Elaborating the Elements of Self-Determination

As indicated in the foregoing discussion, the principle of self-determination and related human rights precepts undergird more particularized norms concerning indigenous peoples. Newly developing norms contain substantive and remedial prescriptions and, in conjunction with already established human rights standards of general applicability, form the benchmarks for ensuring indigenous peoples of ongoing self-determination. This body of international norms indicates the minimum range of choices to which indigenous peoples are entitled in remedial-constitutive procedures (that is, in belated state-building procedures that aim to secure redress for historical and continuing wrongs). The international norms concerning indigenous peoples, which thus elaborate upon the requirements of self-determination, generally fall within the following categories: nondiscrimination, cultural integrity, lands and resources, social welfare and development, and self-government. The general contours of these norms are identified and discussed in the following synthesis of relevant conventional and customary law, including new and emergent law.

Nondiscrimination

A minimum condition for the exercise of self-determination, particularly in its ongoing aspect, is the absence of official policies or practices that invidiously discriminate against individuals or groups. In its statement of guiding principles, the U.N. Charter admonishes “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹ This norm of non-discrimination is emphasized and elaborated upon in numerous existing international and regional human rights instruments, including the U.N.-sponsored Convention on the Elimination of All Forms of Racial Discrimination,² the American Convention on Human Rights,³ the Declaration on the Elimination of All Forms of Discrimination Based on Religion or Belief,⁴ the American Declaration of the Rights and Duties of Man,⁵ and the Universal Declaration of Human Rights.⁶ It is generally accepted, moreover, that states are enjoined by customary international law not to promote or condone systemic racial discrimination.⁷

The nondiscrimination norm is acknowledged to have special implications for indigenous groups which, practically as a matter of definition, have been treated adversely on the basis of their immutable or cultural differences. A seminar of experts convened by the United Nations to discuss the effects of racial discrimination on indigenous-state relations concluded that “[i]ndigenous peoples have been, and still are, the victims of racism and racial discrimination.”⁸ The report on the seminar elaborates:

Racial discrimination against indigenous peoples is the outcome of a long historical process of conquest, penetration and marginalization, accompanied by attitudes of superiority and by a projection of what is indigenous as “primitive” and “inferior.” The discrimination is of a dual nature: on the one hand, gradual destruction of the material and spiritual conditions [needed] for the maintenance of their [way of life], on the other hand, attitudes and behaviour signifying exclusion or negative discrimination when indigenous peoples seek to participate in the dominant society.⁹

The “problem of discrimination against indigenous populations”¹⁰ was in fact the point of departure for the surge of U.N. activity concerning indigenous peoples over the last several years. International Labour Organisation Convention No. 169 and the Draft United Nations Declaration on the Rights of Indigenous Peoples reiterate the norm against discrimination with specific reference to indigenous peoples.¹¹ Clearly, it is no longer acceptable for states to incorporate institutions or tolerate practices that perpetuate an inferior status or condition for indigenous individuals, groups, or their cultural attributes.

Both Convention No. 169 and the draft declaration, furthermore, prescribe that governments take affirmative steps to eliminate the incidents and legacies of discrimination against indigenous individuals and aspects of indigenous group identity.¹² The requirement of such affirmative action is today generally accepted, although the precise nature of the measures needed to eliminate discrimination against indigenous peoples will vary in practice according to circumstances.¹³

Cultural Integrity

The nondiscrimination norm, viewed in light of broader self-determination values, goes beyond ensuring for indigenous *individuals* either the same civil and political freedoms accorded others within an existing state structure or the same access to the state’s social welfare programs. It also upholds the right of indigenous *groups* to maintain and freely develop their cultural identities in coexistence with other sectors of humanity. The notion of respect for cultural integrity was a feature of treaties among European powers, negotiated at the close of World War I.¹⁴ In its advisory opinion on *Minority Schools in Albania*,¹⁵ the Permanent Court of International Justice explained the minority rights provisions of the European treaties as deriving from equality precepts:

The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that popu-

lation and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.

In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.

The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.

The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.¹⁶

Accordingly, the states participating in the Conference on Security and Cooperation in Europe (CSCE) have declared the right of national minorities to “maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will.”¹⁷ Extending beyond the CSCE context, the Convention Against Genocide, the first U.N.-sponsored human rights treaty, upholds that *all* cultural groupings have a right to exist.¹⁸ Respect for cultures in addition to those of European derivation is promoted further by article 27 of the International Covenant on Civil and Political Rights.¹⁹ Article 27 affirms in universalist terms the right of persons belonging to “ethnic, linguistic or religious minorities . . . , in community with other members of their group, to enjoy their own culture, to profess and practise their own religion [and] to use their own language.”²⁰ Such rights are reaffirmed and elaborated upon in the 1992 U.N. Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities.²¹

Affirmation of the world’s diverse cultures was the central concern of a resolution by the Fourteenth General Conference of the United Nations Educational, Scientific and Cultural Organization. The 1966 UNESCO Declaration of the Principles of International Cultural Cooperation proclaims in its first article:

1. Each culture has dignity and value which must be respected and preserved.
2. Every people has the right and duty to develop its culture.
3. In their rich variety and diversity, and in the reciprocal influence they exert on one another, all cultures form part of the common heritage belonging to all mankind.²²

Article 27 of the covenant, the U.N. Minority Rights Declaration, and the UNESCO Declaration are each framed by preambular language establishing their derivation from the human rights principles of the United Nations Charter.²³ A number of other human rights instruments also have provisions upholding rights of cultural integrity.²⁴

While rights of cultural integrity outside the specific context of indigenous peoples have been associated with “minority rights,”²⁵ indigenous rights advocates have frequently rejected calling indigenous groups minorities in their attempts to establish indigenous peoples within a separate regime with greater legal entitlements. For example, in a communication to the U.N. Human Rights Committee concerning the Mikmaq of Canada,²⁶ the author of the communication asserted that the “Mikmaq

tribal society" was not a "minority" but rather a "people" within the meaning of article 1 of the Covenant of Civil and Political Rights, which holds that "[a]ll peoples have the right to self-determination." International practice has not endorsed such a formalistic dichotomy but rather has tended to treat indigenous peoples and minorities as comprising distinct but overlapping categories subject to common normative considerations. The specific focus on indigenous peoples through international organizations indicates that groups within this rubric are acknowledged to have distinguishing concerns and characteristics that warrant treating them apart from, say, minority populations of Western Europe. At the same time, indigenous and minority rights issues intersect substantially in related concerns of nondiscrimination and cultural integrity.²⁷

The cultural integrity norm, particularly as embodied in article 27 of the covenant, has been the basis of decisions favorable to indigenous peoples by the U.N. Human Rights Committee and the Inter-American Commission on Human Rights of the Organization of American States. Both bodies have held the norm to cover all aspects of an indigenous group's survival as a distinct culture, understanding culture to include economic or political institutions, land use patterns, as well as language and religious practices. In the case concerning the Indians of Nicaragua, discussed in chapter 3, the Inter-American Commission on Human Rights cited Nicaragua's obligations under article 27 and found that the "special legal protections" accorded the Indians for the preservation of their cultural identity should extend to "the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands."²⁸

In its 1985 decision concerning the Yanomami of Brazil, the commission again invoked article 27 and held that "international law in its present state . . . recognizes the right of ethnic groups to special protection on their use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity."²⁹ The commission viewed a series of incursions into Yanomami ancestral lands as a threat not only to the Yanomami's physical well-being but also to their culture and traditions.³⁰ Significantly, the commission cited article 27 to support its characterization of international law even though Brazil was not a party to the International Covenant on Civil and Political Rights, thus indicating the norm's character as customary international law.

A similarly extensive view of the cultural integrity norm as applied to indigenous peoples has been taken by the U.N. Human Rights Committee, although clearly in the context of applying treaty obligations assumed under the covenant. In *Ominayak v. Canada*³¹ the committee construed the cultural rights guarantees of article 27 to extend to "economic and social activities" upon which the Lubicon Lake Band of Cree Indians relied as a group.³² Thus the committee found that Canada, a signatory to the covenant and its Optional Protocol, had violated its obligation under article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and for timber development within the aboriginal territory of the Band. The committee acknowledged that the Band's survival as a distinct cultural community was bound up with the sustenance that it derived from the land.³³

Article 27 articulates "rights of persons belonging to" cultural groups,³⁴ as opposed to specifying rights held by the groups themselves. It is apparent, however,

that in its practical application article 27 protects group as well as individual interests in cultural integrity. As the cases just discussed indicate, the enjoyment of rights connected with culture are mostly meaningful in a group context. It would be impossible or lacking in meaning, for example, for an indigenous individual to *alone* partake of a traditional indigenous system of dispute resolution, or to *alone* speak an indigenous language or engage in a communal religious ceremony.³⁵ This understanding is implicit in article 27 itself, which upholds rights of persons to enjoy their culture "*in community* with other members of their group."³⁶ Culture, ordinarily, is an outgrowth of a collectivity, and, to that extent, affirmation of a cultural practice is an affirmation of the associated group.

Conversely, and as more clearly expressed by article 27, the individual human being is in his or her own right an important beneficiary of cultural integrity. The relationship of the individual to the group entitlement of cultural integrity was signaled by the U.N. Human Rights Committee in the case of Sandra Lovelace.³⁷ Lovelace, a woman who had been born into an Indian band residing on the Tobique Reserve in Canada, challenged section 12(1)(b) of Canada's Indian Act, which denied Indian status and benefits to any Indian woman who married a non-Indian. The act did not operate similarly with respect to Indian men. Because she had married a non-Indian, section 12(1)(b) denied Lovelace residency on the Tobique Reserve. She alleged violations of various provisions of the covenant, including articles proscribing sex discrimination, but the committee considered article 27 as "most directly applicable" to her situation. In ruling in her favor, the committee held that "the right of Sandra Lovelace to access to her native culture and language 'in community with the other members' of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists."³⁸

While the Lovelace case emphasizes the rights of the individual, the Human Rights Committee's decision in *Kitok v. Sweden*³⁹ demonstrates that the group interest in cultural survival may take priority. Ivan Kitok challenged the Swedish Reindeer Husbandry Act, which reserved reindeer herding rights exclusively for members of Saami villages. Although ethnically a Saami, he had lost his membership in his ancestral village, and the village had denied him readmission. The Human Rights Committee acknowledged that reindeer husbandry, although an economic activity, is an essential element of the Saami culture. The committee found that, while the Swedish legislation restricted Kitok's participation in Saami cultural life, his rights under article 27 of the covenant had not been violated. The committee concluded that the legislation was justified as a means of ensuring the viability and welfare of the Saami as a whole.

International practice related to articulating standards in the field of indigenous rights is in accord with the foregoing interpretations of the norm of cultural integrity, and the practice is probative of the norm's status as customary law. Ambassador España-Smith of Bolivia, chair of the International Labour Organisation Conference Committee that drafted ILO Convention No. 169, summarized the consensus of the committee, as ultimately reflected in the text:

The proposed Convention takes as its basic premise respect for the specific characteristics and the differences among indigenous and tribal peoples in the cultural,

social and economic spheres. It consecrates respect for the integrity of the values, practices and institutions of these peoples in the general framework of guarantees enabling them to maintain their own different identities and ensuring self-identification, totally exempt from pressures which might lead to forced assimilation, but without ruling out the possibility of their integration with other societies and life-styles as long as this is freely and voluntarily chosen.⁴⁰

The same cultural integrity theme is at the core of the Draft United Nations Declaration on the Rights of Indigenous Peoples and previous drafts that were produced by the chair of the U.N. Working Group on Indigenous Populations pursuant to that body's standard-setting mandate. States have joined indigenous rights advocates in expressing widespread agreement with that essential thrust even while diverging in their views on particular aspects of the drafts.⁴¹ In 1990, the working group chair concluded, on the basis of comments by governments and nongovernmental organizations, that a consensus supported all but three of the preambular paragraphs of the chair's first revised draft declaration.⁴² Representative of the preambular paragraphs for which the working group chair reported widespread support is the following: "Endorsing calls for the consolidation and strengthening of indigenous societies and their cultures and traditions through development based on their own needs and value systems and comprehensive participation in and consultation about all other relevant development efforts . . ."⁴³

The working group chair also reported general agreement among governments and NGOs with regard to the following operative provisions of the first revised draft:

3. the [collective] right to exist *as distinct peoples* and to be protected against genocide. . . .
4. the [collective] right to maintain and develop their ethnic and cultural characteristics and distinct identity, including the right of peoples and individuals to call themselves by their proper names.⁴⁴

Additionally, support for such precepts is a thread running throughout government comments solicited by the OAS Inter-American Commission on Human Rights as part of its preliminary work toward developing an OAS instrument on indigenous peoples' rights.⁴⁵

While in principle the cultural integrity norm can be understood to apply to all segments of humanity, the norm has developed remedial aspects particular to indigenous peoples in light of their historical and continuing vulnerability. Until relatively recently in the history of societies in the Western Hemisphere, the Pacific, and elsewhere that have developed from patterns of settlement and colonization, those societies did not value indigenous cultures and instead promoted their demise through programs of assimilation.⁴⁶ Even as such policies have been abandoned or reversed, indigenous cultures remain threatened as a result of the lingering effects of those historical policies and because, typically, indigenous communities hold a nondominant position in the larger societies within which they live.⁴⁷

As the international community has come to consider indigenous cultures equal in value to all others, the cultural integrity norm has developed to entitle indigenous groups to affirmative measures to remedy the past undermining of their cultural survival and to guard against continuing threats in this regard. It is not sufficient, there-

fore, that states simply refrain from coercing assimilation of indigenous peoples or abandonment of their cultural practices. ILO Convention No. 169 provides: "Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity."⁴⁸ The draft U.N. declaration echoes the requirement of "effective measures" to secure indigenous culture in its many manifestations.⁴⁹ Comments by governments to the working group and other international bodies, as well as trends in government initiatives domestically, indicate broad acceptance of the requirement of affirmative action to secure indigenous cultural survival.

States have manifested their assent to a requirement of affirmative action with particular regard to language, although with some divergence of views. The trend, nonetheless, is in favor of greater efforts to promote the revitalization of indigenous languages and accommodate their use.⁵⁰ Indigenous peoples' representatives have advocated that their peoples be permitted to use their mother tongue in legal proceedings, and that position has found support among some states.⁵¹ Other states, while demonstrating support for the use of indigenous languages in legal proceedings and other official contexts, have appeared reluctant to accede to a strict requirement to that effect.⁵² But normative expectations converge at least to the extent that states feel an obligation to provide *some* affirmative support for the use of indigenous languages and to ensure that indigenous people do not suffer discrimination for failure to speak the dominant language of the state in which they live.

As for religion, states have conceded that the preservation of sacred sites and guarantees of access to them are among the affirmative measures that may be required in particular circumstances. Thus the government of Australia reported to the U.N. working group that it had halted the construction of a dam that would have submerged a number of sacred sites near Alice Springs.⁵³ The Australian government also reported that it had stopped a mining project that would have damaged an area of significant cultural and religious import to the aboriginal Jawoyn people.⁵⁴ Similarly, the government of New Zealand reported to the U.N. working group on newly established protections for sites of special religious significance to the indigenous Maori of that country.⁵⁵ Rights of access to sacred sites, however, are generally not held to be absolute. Canada, for example, has agreed with rights of access to sacred sites and burial grounds, but while stressing the need to balance such rights with competing claims and interests of nonindigenous groups and the state itself.⁵⁶ It is clear in any case that states are held, and hold themselves, to an increasingly higher standard of care to ensure indigenous peoples the free exercise of their religious traditions.⁵⁷

Related issues of indigenous cultural integrity requiring special attention have to do with indigenous peoples' works of art, scientific knowledge (especially with regard to the natural world), songs, stories, human remains, funerary objects, and other such tangible and intangible aspects of indigenous cultural heritage. These issues have been the subject of a study by the working group chair, Erica-Irene Daes, under the sponsorship of the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities. The 1993 *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*⁵⁸ identifies widespread historical and continuing practices that have unjustly deprived indigenous peoples of the enjoy-

ment of the tangible and intangible objects that comprise their cultural heritage.⁵⁹ The study identifies legislative and policy initiatives in a number of countries to correct these practices and proposes additional such initiatives as well as measures for greater international cooperation in this regard.⁶⁰

At the request of the subcommission, the chair of the working group followed her study with a draft statement of principles on indigenous cultural heritage for consideration by the working group's parent bodies.⁶¹ These principles build upon the consensus reflected in international instruments already adopted by states, including resolutions of the 1992 United Nations Conference on Environment and Development. The Rio Declaration on Environment and Development recognizes the "vital" role indigenous peoples may play in sustainable development "because of their knowledge and traditional practices."⁶² Additionally, the conference resolution adopted as "Agenda 21" calls upon states, in "full partnership with indigenous people and their communities," to adopt or strengthen appropriate policies and legal mechanisms to empower indigenous peoples in the enjoyment of and control over the knowledge, resources and practices that comprise their cultural heritage.⁶³

International practice thus indicates affirmative duties protective of culture to be commensurate with the broad interpretation of the cultural integrity norm that has been advanced by the Inter-American Commission on Human Rights and the U.N. Human Rights Committee. In statements to international human rights bodies, governments have reported a broad array of domestic initiatives concerning indigenous peoples, including constitutional and legislative reforms, and have characterized those initiatives as generally intended to safeguard the integrity and life of indigenous cultures.⁶⁴ The reported reforms, which vary in scope and content, owe that variance at least in part to the diversity of circumstances and characteristics of the indigenous groups concerned. The indigenous peoples of the United States, for example, who to one degree or another have developed pervasive linkages with the global economy, are properly regarded as having requirements different from those of the isolated forest-dwelling tribes of Brazil. Government representatives have been quick to point out the diversity among indigenous groups in the context of efforts to articulate prescriptions protective of indigenous rights.⁶⁵ That diversity, however, does not undermine the strength of the cultural integrity norm as much as it leads to an understanding that the norm requires diverse applications in diverse settings. In all cases, the operative premise is that of securing the survival and flourishing of indigenous cultures through mechanisms devised in accordance with the preferences of the indigenous peoples concerned.

Lands and Natural Resources

The Inter-American Commission on Human Rights and the U.N. Human Rights Committee in the cases previously mentioned acknowledged the importance of lands and resources to the survival of indigenous cultures and, by implication, to indigenous self-determination. That understanding is a widely accepted tenet of contemporary international concern over indigenous peoples.⁶⁶ It follows from indigenous

peoples' articulated ideas of communal stewardship over land and a deeply felt spiritual and emotional nexus with the earth and its fruits.⁶⁷ Indigenous peoples, furthermore, typically have looked to a secure land and natural resource base to ensure the economic viability and development of their communities.

Relevant to indigenous land claims is the self-determination provision, common to both the international human rights covenants, which affirms: "In no case may a people be deprived of its own means of subsistence."⁶⁸ This prescription intersects with the idea of property, a long established feature common to societies throughout the world. The concept of property includes the notion that human beings have rights to lands and chattels that they, by some measure of legitimacy, have reduced to their own control.⁶⁹ Legal systems have varied in prescribing the rules by which the rights are acquired and in defining the rights. The most commonly noted dichotomy has been between the system of private property rights in Western societies and classical Marxist systems in which the state retains formal ownership of all real estate and natural resources while granting rights of use.⁷⁰ The common feature, however, is that people *do* acquire and retain rights of a proprietary nature in relation to other people, and respect for those rights is valued.

Property has been affirmed as an international human right. The Universal Declaration of Human Rights states that "[e]veryone has the right to own property alone as well as in association with others," and that "[n]o one shall be arbitrarily deprived of his property."⁷¹ These prescriptions are repeated in the American Convention on Human Rights.⁷²

Early international jurisprudence invoked property precepts to affirm that indigenous peoples in the Americas and elsewhere had original rights to the lands they used and occupied prior to contact with the encroaching white societies.⁷³ That jurisprudence made its way into the legal and political doctrine of some of the countries that were born of colonial patterns, most notably the United States.⁷⁴ That doctrine, however, developed without valuing indigenous cultures or recognizing the significance of their ongoing relationship with the land. Thus the United States, while upholding original rights to lands, has traditionally treated indigenous peoples' lands as fungible with cash. Within the Western liberal frame adopted into the political and juridical culture of the United States, indigenous land claims could be satisfied by a simple money transfer.⁷⁵

In contemporary international law, by contrast, modern notions of cultural integrity and self-determination join property precepts in the affirmation of *sui generis* indigenous land and resource rights, as evident in ILO Convention No. 169. The land rights provisions of Convention No. 169 are framed by article 13(1), which states:

In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

The concept of indigenous territories embraced by the convention is deemed to cover "the total environment of the areas which the peoples concerned occupy or otherwise use."⁷⁶

Indigenous land and resource—or territorial—rights are of a collective character, and they include a combination of possessory, use, and management rights. In its article 14(1), Convention No. 169 affirms:

The rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.

Article 15, furthermore, requires states to safeguard indigenous peoples' rights to the natural resources throughout their territories, including their right "to participate in the use, management and conservation" of the resources. The convention falls short of upholding rights to mineral or subsurface resources in cases in which the state generally retains ownership of those resources.⁷⁷ Pursuant to the norm of non-discrimination, however, indigenous peoples must not be denied subsurface and mineral rights where such rights are otherwise accorded landowners. In any case, the convention mandates that indigenous peoples are to have a say in any resource exploration or extraction on their lands and to benefit from those activities.⁷⁸

The convention adds that indigenous peoples "shall not be removed from the lands which they occupy" unless under prescribed conditions and where necessary as an "exceptional measure."⁷⁹ When the grounds for relocation no longer exist, they "shall have the right to return to their traditional lands" and when return is not possible "these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them."⁸⁰ The convention also provides for recognition of indigenous land tenure systems,⁸¹ which typically are based on long-standing custom. These systems regulate community members' relative interests in collective landholdings, and they also have bearing on the character of collective landholdings vis-à-vis the state and others.

Thus Convention No. 169 affirms the notion promoted by the Inter-American Commission on Human Rights and the U.N. Human Rights Committee that indigenous peoples as groups are entitled to a *continuing* relationship with lands and natural resources according to traditional patterns of use or occupancy. Use of the words "traditionally occupy" in article 14(1), as opposed to use of the past tense of the verb, suggests that the occupancy must be connected with the present in order for it to give rise to possessory rights. In light of the article 13 requirement of respect for cultural values related to land, however, a sufficient present connection with lost lands may be established by a continuing cultural attachment to them, particularly if dispossession occurred recently.

Also relevant in this regard is article 14(3), which requires "[a]dequate procedures . . . within the national legal system to resolve land claims by" indigenous peoples. This provision is without any temporal limitation and thus empowers claims originating well in the past. Article 14(3) is a response to the historical processes that have afflicted indigenous peoples, processes that have trampled on their cultural attachment to ancestral lands, disregarded or minimized their legitimate property interests, and left them without adequate means of subsistence. In light of the acknowledged centrality of lands and resources to indigenous cultures and economies,

the requirement to provide meaningful redress for indigenous land claims implies an obligation on the part of states to provide remedies that include for indigenous peoples the option of regaining lands and access to natural resources.⁸²

The essential aspects of Convention No. 169's land rights provisions are strongly rooted in an expanding nexus of international opinion and practice. In responding to a questionnaire circulated by the International Labour Office in preparation for the drafting of the new convention, governments overwhelmingly favored strengthening the land rights provisions of ILO Convention No. 107 of 1957, including governments not parties to that convention.⁸³ Although Convention No. 107 is generally regarded as flawed, it contains a recognition of indigenous land rights that has operated in favor of indigenous peoples' demands through the ILO's supervisory machinery.⁸⁴ The discussion on the new convention proceeded on the premise that indigenous peoples were to be accorded greater recognition of land rights than they were in Convention No. 107.⁸⁵ Convention No. 169's land rights provisions were finalized by a special working party of the Labour Conference committee that developed the text of the convention, and the committee approved the provisions by consensus.⁸⁶

Government statements to the U.N. Working Group on Indigenous Populations and other international bodies confirm general acceptance of at least the core aspects of the land rights norms expressed in Convention No. 169. The statements tell of worldwide initiatives to secure indigenous possessory and use rights over land and to redress historical claims.⁸⁷ And discussions over language for the U.N. indigenous rights declaration have included efforts to build on the already recognized rights.⁸⁸ The acceptance of indigenous land rights is further evident in the preparatory work for the proposed OAS juridical instrument on indigenous peoples' rights,⁸⁹ Chapter 26 of Agenda 21 adopted by U.N. Conference on Environment and Development,⁹⁰ and the World Bank's Operational Directive 4.20 for bank-funded projects affecting indigenous peoples.⁹¹ It is evident that certain minimum standards concerning indigenous land rights, rooted in otherwise accepted precepts of property, cultural integrity, and self-determination, have made their way not just into conventional law but also into customary law.

Social Welfare and Development

As just indicated, indigenous peoples' interests in a secure land base are both cultural and economic. Related to these interests are entitlements of social welfare and development, entitlements also grounded in the U.N. Charter and adjoined to the principle of self-determination. Chapter IX of the Charter, under the heading "International Economic and Social Co-Operation," states in part:

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation. . . .

Article 56

All members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

Building upon the Charter provisions, the International Covenant on Economic, Social, and Cultural Rights⁹² affirms an array of social welfare rights and corresponding state obligations that are to benefit "everyone."⁹³ Emphasized in the covenant are rights to health, education, and an adequate standard of living. The United Nations Educational, Scientific and Cultural Organization, the Food and Agricultural Organization of the United Nations, the World Health Organisation, and the International Labour Organisation have been sources of a number of additional instruments or programs establishing generally applicable standards and policies within the realm of social welfare concerns.

Linked with those rights of social welfare that generally are articulated as benefiting the individual is the right to development, which has been deemed to extend also to "peoples."⁹⁴ In December of 1986 the U.N. General Assembly adopted by an overwhelming majority the Declaration on the Right to Development.⁹⁵ The declaration defines the right to development as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."⁹⁶ The greater part of the declaration is occupied with articulating a series of duties on the part of states to promote and ensure the realization of the right to development through international cooperation and domestic programs.⁹⁷

Within the framework of the foregoing precepts, a special rubric of entitlements and corresponding duties has developed with regard to indigenous peoples. These norms are aimed at remedying two distinct but related historical phenomena that place most indigenous communities in economically disadvantaged conditions. The first phenomenon is the progressive plundering of indigenous peoples' lands and resources over time, processes that have impaired or devastated indigenous economies and subsistence life, and left indigenous people among the poorest of the poor.⁹⁸ The second is the discrimination that has tended to exclude members of indigenous communities from enjoying the social welfare benefits generally available in the states within which they live.⁹⁹

In response to these historical phenomena, ILO Convention No. 169 establishes as "a matter of priority" the "improvement of the conditions of life and work and levels of health and education of [indigenous] peoples," and it mandates "[s]pecial projects . . . to promote such improvement."¹⁰⁰ The convention, furthermore, specifies duties on the part of states to ensure the absence of discriminatory practices and effects in areas of employment, vocational training, social security and health, education, and means of communication.¹⁰¹ The convention emphasizes, in accordance with core precepts of self-determination, that the special programs devised to ensure

the social welfare and development of indigenous peoples are to be established in cooperation with the indigenous peoples concerned¹⁰² and in accordance with their own collectively formulated priorities.¹⁰³ The draft U.N. declaration follows in the same vein, stating that indigenous peoples are entitled "to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political economic, social, cultural and spiritual development."¹⁰⁴

The provisions of Convention No. 169 and the draft U.N. declaration just noted represent a consensus that extends well beyond the members of the U.N. subcommission that adopted the draft and the states that have ratified Convention No. 169. Although there is controversy about the outer bounds of state obligation to promote indigenous social welfare and development, a core consensus exists that states are in some measure obligated in this regard. In reports on domestic initiatives to the U.N. working group and other international bodies, states increasingly have indicated their assent to duties to take steps and commit resources to advance the social welfare and development of indigenous individuals and communities.¹⁰⁵

Self-Government

Self-government is the overarching political dimension of ongoing self-determination. Along with variance in political theory, conceptions about the normative elements of self-government vary. It is possible, however, to identify a core of widely held convictions about the self-government concept. That core consists of the idea that government is to function according to the will of the people governed. Self-government stands in opposition to institutions that disproportionately or unjustly concentrate power in the reins of government, whether the concentration is centered *within* the relevant community—as in cases of despotic or racially discriminatory rule—or *outside* of the community—as in cases of foreign domination. The international community recognized classical colonial institutions of government as contrary to self-government because they subjected people to "alien subjugation, domination and exploitation."¹⁰⁶ Hence, the term *non-self-governing territories* designated the beneficiaries of decolonization,¹⁰⁷ and the beneficiary territories were deemed self-governing upon "(a) emergence as an independent state; (b) [f]ree association with an independent State; or (c) [i]ntegration with an independent state" on the basis of equality.¹⁰⁸

Two significant developments in dominant conceptions about the requirements of governmental legitimacy have emerged since the height of the decolonization movement, developments which bear upon contemporary understanding of the functional elements of self-government. One is the dramatic decline of Marxist systems, accompanied by a worldwide movement toward nonauthoritarian democratic institutions. Especially since the demise of the Soviet Union, this democratic movement is reflected in developments worldwide¹⁰⁹ and has been promoted through the United Nations and other international institutions.¹¹⁰ Accordingly, there is a budding scholarly literature articulating emerging rights of "political participation" and a nascent "democratic entitlement" under international law.¹¹¹ Closely linked with modern precepts of democracy is the idea that, consistent with values promoted by patterns

of political integration, decisions should be made at the most local level possible,¹¹² an idea reflected not only in Western societies but also in indigenous communities that traditionally have maintained decentralized systems of governance.¹¹³

A second major development is the ever greater embrace of notions of cultural pluralism identified earlier. Over the last several years, the international community increasingly has come to value and promote the integrity of diverse cultures within existing state units, including non-European indigenous cultures.¹¹⁴ In the particular context of indigenous peoples, notions of democracy (including decentralized government) and of cultural integrity join to create a *sui generis* self-government norm. The norm upholds spheres of governmental or administrative autonomy for indigenous communities, while seeking to ensure the effective participation of those communities in all decisions affecting them that are appropriated by the larger institutions of government.

Many indigenous communities have retained *de facto* their own institutions of autonomous governance, which are at least partly rooted in historical patterns of social and political interaction and control. These systems often include customary or written laws as well as dispute resolution and adjudicative mechanisms developed over centuries.¹¹⁵ For some indigenous groups, such as Indian tribes within the United States, such autonomous institutions have also existed *de jure* within legal systems of the states within which they live.¹¹⁶ Pursuant to precepts of constitutive self-determination, any diminishment in the authority or altering of *de facto* or *de jure* indigenous institutions of autonomous governance should not occur unless pursuant to the wishes of the affected groups. To the contrary, states are enjoined to uphold the existence and free development of indigenous institutions. Hence, ILO Convention No. 169 upholds the right of indigenous peoples to “retain their own customs and institutions;”¹¹⁷ and requires that “the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.”¹¹⁸ Similarly, the draft U.N. declaration states: “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.”¹¹⁹

Independently of the extent to which indigenous peoples have retained *de facto* or *de jure* autonomous institutions, they generally are entitled to develop autonomous governance appropriate to their circumstances on grounds instrumental to securing ongoing self-determination. In general, autonomous governance for indigenous communities is considered instrumental to their capacities to control the development of their distinctive cultures, including their use of land and resources. In the context of indigenous Hawaiians, for example, Michael Dudley and Keoni Agard echo the demand for “nationhood” and “sovereignty”—that is, some form of autonomous political status for Native Hawaiians—as a means of securing space for the education of children in Hawaiian language, for reclaiming Native Hawaiian spiritual heritage and connection with the natural world, and, in general, for the natural evolution of Hawaiian culture cushioned from the onslaught of outside influences that have thus far had devastating effects.¹²⁰

Autonomous governance, furthermore, is understood as a means of enhancing democracy. Because of their nondominant positions within the states in which they

live, indigenous communities and their members typically have been denied full and equal participation in the political processes that have sought to govern over them.¹²¹ Even as indigenous individuals have been granted full rights of citizenship and overtly racially discriminatory policies have diminished, indigenous groups still typically constitute economically disadvantaged numerical minorities within the states in which they live.¹²² This condition is one of political vulnerability. To devolve governmental authority onto indigenous communities is to diminish their vulnerability in the face of powerful majority or elite interests and to enhance the responsiveness of government to the unique interests of indigenous communities and their members.

Hence, the draft U.N. declaration states:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.¹²³

Although differing in their willingness to accept such a formulation of a “right to autonomy,” states increasingly have expressed agreement that indigenous peoples are entitled to maintain and develop their traditional institutions and to otherwise enjoy autonomous spheres of governmental or administrative authority appropriate to their circumstances.¹²⁴

Following the decision of the Inter-American Commission on Human Rights in favor of a new political order for the Indians of the Atlantic Coast region of Nicaragua, the Nicaraguan government entered into negotiations with Indian leaders and eventually developed a constitutional and legislative regime of political and administrative autonomy for the Indian-populated region.¹²⁵ The Nicaraguan government held out the autonomy arrangement as advancing the self-determination of the Atlantic Coast indigenous peoples. Manifesting the growing consensus of global opinion and expectation in this regard, several other states in recent years have reported to international bodies the use of constitutional, legislative, and other official measures to reorder governing institutional matrices in response to indigenous peoples’ demands for autonomous governance and recognition of their culturally specific institutions of social and political control.¹²⁶

While the norm of indigenous self-government upholds the development of autonomous institutions for indigenous peoples, it also upholds their effective participation in the larger political order. The draft U.N. declaration affirms the overwhelmingly accepted view that “[i]ndigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making which may affect their rights.”¹²⁷ Similarly, ILO Convention No. 169 requires effective means by which indigenous peoples “can freely participate . . . at all levels of decision-making” affecting them.¹²⁸ It is evident that this requirement applies not only to decision making within the framework of domestic or municipal processes but also to decision making within the international realm. United Nations bodies and other international institutions increasingly have allowed for, and even solicited, the participation of indig-

enous peoples' representatives in their policy-making and standard-setting work in areas of concern to indigenous groups.¹²⁹

The dual thrust of the normative regime concerning indigenous peoples' self-government—on the one hand autonomy and on the other participatory engagement—reflects the view, apparently held by indigenous peoples themselves, that they are not to be considered a priori unconnected from larger social and political structures. Rather, indigenous groups—whether characterized as communities, peoples, nations, or other—are appropriately viewed as simultaneously distinct from yet parts of larger units of social and political interaction, units that may include indigenous federations, the states within which they live, and the global community itself. This view challenges traditional Western conceptions that envisage mutually exclusive states as the primary factor for locating power and community, and the view promotes a political order that is less state-centered and more centered on people in a world of distinct yet increasingly integrated and overlapping spheres of community and authority.

Self-government for indigenous peoples, therefore, typically is established in the consensual development of a nuanced political order that accommodates both inward- and outward-looking associational patterns. International law does not require or allow for any one particular form of structural accommodation for all indigenous peoples—indeed, the very fact of the diversity of indigenous cultures and their surrounding circumstances belies a singular formula. The underlying objective of the self-government norm, however, is that of allowing indigenous peoples to achieve meaningful self-government through political institutions that reflect their specific cultural patterns and that permit them to be genuinely associated with all decisions affecting them on a continuous basis. Constitutive self-determination, furthermore, requires that such political institutions in no case be imposed upon indigenous peoples but rather be the outcome of procedures that defer to their preferences among justifiable options.

Notes

1. U.N. Charter art. 1(3).
2. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, G.A. Res. 2106 A(XX), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).
3. American Convention on Human Rights, Nov. 22, 1969, OAS Treaty Ser. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) (affirming, *inter alia*, in article 24 that "all persons are equal before the law").
4. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, Nov. 25, 1981, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc A/36/684 (1981).
5. American Declaration on the Rights and Duties of Man, adopted by the Ninth International Conference of American States (Mar. 30–May 2, 1948), O.A.S. Res. 30, O.A.S. Doc. OEA/Ser.L/V/II.4, rev. (1965) (affirming, *inter alia*, in article II that "[a]ll persons are equal before the law . . . without distinction as to race, sex, language, creed or any other factor").
6. Universal Declaration of Human Rights, G.A. Res. 217 A(III), Dec. 10, 1948 (affirming, *inter alia*, in arts. 1 and 2 that "[a]ll persons are born free and equal in dignity and rights"

and entitled to the enjoyment of human rights "without distinction of any kind"), reprinted in *Human Rights: A Compilation of International Instruments*, U.N. Doc. ST/HR/1/rev.4 (vol. 1, pt. 1), at 1, Sales No. E.93.XIV.1 (1993) [hereinafter *U.N. Compilation of Instruments*].

7. Restatement of the Law (Third): The Foreign Relations Law of the United States, sec. 702 (1987); Richard Lillich, "Civil Rights," in *Human Rights in International Law* 115, 133, 151 (Theodor Meron ed., 1984). See also *Barcelona Traction (Belg. v. Spain)*, 1970 I.C.J. 3, 32.

8. *Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States*, U.N. Doc. E/CN.4/1989/22, HR/PUB/89/5 at 5 (1989).

9. *Id.* at 5.

10. E.S.C. Res. 1589(L), May 21, 1971, U.N. ESCOR, 50th Sess., Supp. No. 1, at 16, U.N. Doc. E/5044 (1971) (Economic and Social Council resolution authorizing the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities to conduct a "[c]omplete and comprehensive study of the problem of discrimination against indigenous populations").

11. See Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, art. 3(1), International Labour Conference (entered into force Sept. 5, 1990), reprinted in the appendix, *infra* [hereinafter ILO Convention No. 169] ("Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination."); Draft United Nations Declaration on the Rights of Indigenous Peoples, adopted by the Subcommission on Prevention of Discrimination and Protection of Minorities by its res. 1994/45, Aug. 26, 1994, art. 2, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 105 (1994), reprinted in the appendix, *infra* [hereinafter Draft United Nations Declaration] ("Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination."). The development of the draft declaration and its status are discussed *supra* chapter 2, notes 84–87, 100–02, and accompanying text.

12. *E.g.*, ILO Convention No. 169, *supra* note 11, art. 2(2) ("Such action shall include measures for . . . ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population.").

13. The consensus on the need for affirmative measures is reflected, for example, in a summary of government and indigenous peoples' comments on the proposed Organization of American States instrument on indigenous rights, in the part of the summary under the heading "Equality before the law and equal protection under the law." Inter-American Commission on Human Rights, *Report on the First Round of Consultations Concerning the Future Inter-American Legal Instrument on the Rights of Indigenous Populations*, reprinted in *Annual Report of the Inter-American Commission on Human Rights, 1992–1993*, O.A.S. Doc. OEA/Ser.L/V/II.83, at 263, 283–84 (1993) [hereinafter *Report on First Round of Consultations on Inter-American Instrument*].

The Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 2, requires states to pursue the eradication of racial discrimination by "all appropriate means," *id.* art. 2(1), but considers "[s]pecial measures" aimed at particular groups to be transitory and "not to lead to the maintenance of separate rights for different racial groups," *id.* art. 1(4). It is apparent that this caveat was drafted without consideration of the particular circumstances of indigenous groups whose goal is not complete assimilation and who thus may require more than transitory measures to be maintained in a position of equality vis-à-vis other segments of the population of the states in which they live. In its application, article 1(4) of the convention has not been a barrier to such measures; to the contrary, the Committee on the Elimina-

tion of Racial Discrimination, charged with overseeing compliance with the convention, has promoted measures to secure the survival of indigenous peoples as distinct groups. See *infra* chapter 6, notes 25, 35–38, and accompanying text (discussing the committee's review of government reports under the convention).

14. See Natan Lerner, *Group Rights and Discrimination in International Law* 7 (1991) (listing European treaties with provisions protecting the rights of religious and ethnic minorities).

15. Minority Schools in Albania, Advisory Opinion, 1935 P.C.I.J. (Ser. A/B) No. 64.

16. *Id.* at 17. See also European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, art. 14, Europ. T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) (prohibiting discrimination on grounds, *inter alia*, of "language, religion, . . . [and] association with a national minority").

17. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 29, 1990, art. 32. See also *id.* arts. 32.1–32.6 (detailing this right). Similarly, the states participating in the CSCE affirmed in the Charter of Paris for a New Europe, CSCE, Nov. 21, 1991, 30 *I.L.M.* 193 (1991) "that the ethnic, cultural, linguistic and religious identity of national minorities will be protected and that persons belonging to national minorities have the right freely to express, preserve and develop that identity without any discrimination and in full equality before the law." The CSCE is now called the Organization for Security and Cooperation in Europe.

18. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, G.A. Res. 260 A(III), 78 U.N.T.S. 277 (entered into force Sept. 3, 1953) (defining, at art. 2, genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such").

19. International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200(XXI), art. 27, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

20. *Id.*

21. Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, Dec. 18, 1992 [hereinafter *Minority Rights Declaration*], reprinted in *U.N. Compilation of Instruments*, *supra* note 6, vol. 1, pt. 1 at 140.

22. Declaration of the Principles of International Cultural Cooperation, proclaimed by the general conference of the United Nations Educational, Scientific and Cultural Organization at its 14th session, Nov. 4, 1966, art. 1, reprinted in *U.N. Compilation of Instruments*, *supra* note 6, vol. 1, pt. 2 at 591.

23. See International Covenant on Civil and Political Rights, *supra* note 19, preambular para. 4 ("Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms"); Minority Rights Declaration, *supra* note 21, preambular para. 3 ("Desiring to promote the realization of principles contained in the Charter of the United Nations"); UNESCO Declaration of the Principles of International Cultural Cooperation, *supra* note 22, preambular para. 9 (proclaiming the declaration "to the end that governments, authorities, [etc.] . . . may constantly be guided by these principles; and for the purpose . . . of advancing . . . the objectives of peace and welfare that are defined in the Charter of the United Nations").

24. *E.g.*, Convention against Discrimination in Education (UNESCO), Dec. 14, 1960, art. 5, 429 U.N.T.S. 93 (entered into force May 22, 1962) (recognizing "the right of all members of national minorities to carry out educational activities of their own, among them that of establishing and maintaining schools, and according to the policy of each state on education, to use their own language").

25. An extensive survey of the topic is in U.N. Subcommittee on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic,*

Religious and Linguistic Minorities, U.N. Doc. E/CN.4/Sub.2/38/Rev.1 (1979), Sales No. E.78.XIV.1 (Francesco Capotorti, special rapporteur). See also Patrick Thornberry, *International Law and the Rights of Minorities* (1991).

26. See Mikmaq Tribal Society v. Canada, Communication No. 78/1980, *Report of the Human Rights Committee*, U.N. GAOR, 39th Sess., Supp. No. 40, at 200, 202, U.N. Doc. A/39/40, Annex 16 (1984) (decision on admissibility adopted July 29, 1984).

27. See Ian Brownlie, "The Rights of Peoples in Modern International Law," in *The Rights of Peoples* 1, 5 (James Crawford ed., 1988) ("[H]eterogeneous terminology which has been used over the years—references to 'nationalities', 'peoples', 'minorities', and 'indigenous populations'—involves essentially the same idea.").

28. Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure Regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin*, O.A.S. Doc. OEA/Ser.L/V/II.62, doc. 10 rev. 3 (1983), O.A.S. Doc. OEA/Ser.L/V/II.62, doc. 26 (1984) (Case No. 7964 (Nicaragua)), at 81 [hereinafter *Miskito Report and Resolution*]. The commission noted that the requirement of special measures to protect indigenous culture is

based on the principle of equality: for example, if a child is educated in a language which is not his native language, this can mean that the child is treated on an equal basis with other children who are educated in their native language. The protection of minorities, therefore, requires affirmative action to safeguard the rights of minorities whenever the people in question . . . wish to maintain their distinction of language and culture.

Id. at 77 (quoting U.N. Secretary-General: *The Main Types and Causes of Discrimination*, U.N. Publ. 49.XIV.3, paras. 6–7).

29. Case No. 7615 (Brazil), Inter-Am. Commission Res. No. 12/85 (March 5, 1985), *Annual Report of the Inter-American Commission on Human Rights, 1984–1985*, O.A.S. Doc. OEA/Ser.L/V/II.66, doc. 10, rev. 1, at 24, 31 (1985).

30. *Id.* at 29–31.

31. Ominayak, Chief of the Lubicon Lake Band v. Canada, Communication No. 267/1984, *Report of the Human Rights Committee*, U.N. GOAR, 45th Sess., Supp. No. 40, Vol. 2, at 1, U.N. Doc. A/45/40, Annex 9 (A) (1990) (views adopted March 26, 1990). The case is discussed and analyzed in Dominic McGoldrick, "Canadian Indians, Cultural Rights and the Human Rights Committee," 40 *Int'l & Comp. L.Q.* 658 (1991).

32. *Ominayak v. Canada*, *supra* note 31, at 27. See also Human Rights Committee, General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights: General Comment No. 23(50) (art. 27), U.N. Doc. CCPR/C/21/Rev. 1/Add. 5 (1994) ("Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specially in the case of indigenous peoples.").

33. The *Lubicon Lake Band* case is discussed further *infra* chapter 6, notes 87–99 and accompanying text.

34. Covenant on Civil and Political Rights, *supra* note 19, art. 27 (emphasis added).

35. This point is made and elaborated upon in Douglas Sanders, "Collective Rights," 13 *Hum. Rts. Q.* 368 (1991).

36. Covenant on Civil and Political Rights, *supra* note 19, art. 27 (emphasis added).

37. Lovelace v. Canada, Communication No. R.6/24, *Report of the Human Rights Committee*, U.N. GOAR, 36th Sess., Supp. No. 40, at 166, U.N. Doc. A/36/40, Annex 18 (1977) (views adopted Dec. 29, 1977).

38. *Id.* at 173 (quoting article 27).
39. Communication No. 197/1985, *Report of the Human Rights Committee*, U.N. GOAR, 43rd Sess., Supp. No. 40, at 207, U.N. Doc. A/43/40, Annex 7(G) (1988) (views adopted July 27, 1988).
40. International Labour Conference, Provisional Record 31, 76th Sess., at 31/4–5, (1989) [hereinafter 1989 ILO Provisional Record 31]. See also government statements in International Labour Conference, Provisional Record 32, 76th Sess., at 32/11–32/13 (1988) [hereinafter 1988 ILO Provisional Record 32].
41. This is evident, *inter alia*, in the documents produced by the working group chair synthesizing or summarizing government and other statements commenting on the drafts: *Analytical Commentary on the Draft Principles Contained in the First Revised Text of the Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc E/CN.4/Sub.2/AC.4/1990/39 (1990) [hereinafter 1990 *Analytical Commentary*]; *Analytical Compilation of Observations and Comments Received Pursuant to Sub-Commission Resolution 1988/18*, U.N. Doc. E/CN.4/Sub.2/1989/33/Add.1–3 (1989) [hereinafter 1989 *Compilation of Observations*]; *Draft Declaration on the Rights of Indigenous Peoples: Revised Working Paper submitted by the Chairperson/Rapporteur, Ms. Erica-Irene Daes, Pursuant to Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolution 1990/26*, U.N. Doc. E/CN.4/Sub.2/1991/36 (1991) [hereinafter 1991 *Revised Working Paper*].
42. See 1990 *Analytical Commentary*, *supra* note 41, at 3.
43. First Revised Text of the Draft Universal Declaration on Rights of Indigenous Peoples, preambular para. 7, U.N. Doc. E/CN.4/Sub.2/1989/33 (1989).
44. *Id.* operative paras. 3, 4.
45. This thread of support for indigenous cultural integrity is especially evident in the comments summarized under the headings “Right to have differences accepted,” “Right to preserve and develop their traditional economic structures, institutions and lifestyles,” and “Rights relative to their own cultural development.” *Report on First Round of Consultations on Inter-American Instrument*, *supra* note 13, at 293, 295–98.
46. See *supra* chapter 1 (discussing such patterns of colonization and the underlying premise of indigenous inferiority).
47. Rodolfo Stavenhagen observes that many elites in the Americas still regard “Indian cultures [as] backward, traditional, and not conducive to progress and modernity.” Rodolfo Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights* 49, U.N. Sales No. E.90.III.A.9 (1990).
48. ILO Convention No. 169, *supra* note 11, art. 2(1).
49. See Draft United Nations Declaration, *supra* note 11, art. 13 (with particular regard to religion), art. 14 (historiography, language, philosophy, and literature), art. 15 (education), art. 12 (restitution of cultural and intellectual property).
50. See, e.g., 1989 Statement by the Government of Brazil to the U.N. Working Group under Item 5, at 2 (reporting on the new provisions of the Brazilian Constitution affirming indigenous language rights); 1991 Statement of the Government of Colombia to the U.N. Working Group (reporting on the provisions of the new Colombian Constitution giving the languages of indigenous groups official character and establishing bilingual education); *Information Submitted to the Working Group by the Government of Finland*, U.N. Doc. E/CN.4/Sub.2/AC.4/1991/1, at 3 (1991) (reporting on recent legislation that will allow the use of the Saami language in courts of law and that will require official documents relevant to Saami interests be published in the Saami language); 1989 Statement of the Government of New Zealand to the U.N. Working Group Under Item 5, at 5 (reporting on the Maori Language Act of 1987, which “declares Maori to be an official language and establishes a commission to promote the Maori language as an ordinary means of communication”). See also

statements of Colombia, Egypt, Finland, Mexico, New Zealand, Norway, Sweden, the United States, and Australia in *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report 4(2A), International Labour Conference, 76th Sess., at 29 (1989); and in *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report 6(2), International Labour Conference, 75th Sess. at 86–88 (1988).

51. During the drafting of Convention No. 169, for example, the government delegate from Ecuador posed an amendment to allow indigenous peoples to use their languages in legal proceedings. The delegate from Argentina responded that, although the amendment was laudable, it was impractical. The amendment was withdrawn. *Report of the Committee on Convention No. 107*, International Labour Conference, Provisional Record 25, 76th Sess. at 25/16 (1989) [hereinafter 1989 ILO Provisional Record 25].

52. Canada, for example, has reported to the U.N. working group that it “encourages and financially supports its aboriginal citizens in maintaining, using and promoting their own languages and cultures in their own communities, in educating their children, in legal proceedings, etc. However, . . . it would be administratively and financially difficult, if not impossible, to provide for the use of over 50 aboriginal languages for administrative or other official purposes.” *Information Submitted by the Government of Canada*, U.N. Doc. E/CN.4/Sub.2/AC.4/1990, at 3 (1990). Similarly, the government of New Zealand stated to the working group that it can “fully support” the concept of the right of indigenous peoples to use their language in judicial administrative proceedings but suggested that the principle be couched in terms of being an objective for states to work toward “in a determined and thorough-going manner.” Text of New Zealand Statement to the U.N. Working Group on Indigenous Populations, Agenda Item 4: Standard Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Populations, at 3–4 (July 22, 1991).

ILO Convention 169 provides that “[m]easures shall be taken to ensure that members of [indigenous peoples] can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.” ILO Convention No. 169, *supra* note 11, art. 12. In this vein, Argentina suggested the following for inclusion in the proposed Universal Declaration on Indigenous Rights: “The right to develop and promote their own languages, including an own [sic] literary language, and to use them for cultural and other purposes. In legal and administrative proceedings, when the indigenous person does not know the national language, the State shall obligatorily provide and/or make available the services of interpreters” U.N. Doc. E/CN.4/Sub.2/1991/36, at 57 (1991). Similar suggestions have been made by Mexico, Guatemala, and Colombia in commenting on the proposed inter-American instrument on indigenous rights. See *Report on First Round of Consultations on Inter-American Instrument*, *supra* note 13, at 283, 309.

53. 1991 Statement of the Government of Australia to the U.N. Working Group on Indigenous Populations at 8.

54. *Id.*

55. 1989 New Zealand Statement to the U.N. Working Group at 5 (“All Crown agencies responsible for the management and disposal of Crown land must follow a procedure [prior to disposal of any land] in order that wahi tapu [sacred sites] be protected.”).

56. 1989 *Compilation of Observations*, *supra* note 41, at 20.

57. See comments by Chile, Canada, Peru, Guatemala, and Colombia summarized in *Report on the First Round of Consultations on Inter-American Instrument*, *supra* note 13, at 300–01.

58. Subcommission on Prevention of Discrimination and Protection of Minorities, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1993/28 (1993) (Erica-Irene Daes, special rapporteur) [hereinafter *U.N. Study on the Protection of Cultural Property*].

59. The study identifies these practices in association with historical patterns of European exploration and settlement, and as an element of continuing industrial and commercial forces of both European and non-European societies:

18. As industrialization continued, European States turned to the acquisition of tribal art and the study of exotic cultures. Indigenous peoples were, in succession, despoiled of their lands, sciences, ideas, arts and cultures.

19. This process is being repeated today, in all parts of the world. . . . Ironically, publicity about the victimization of indigenous peoples in these newly-exploited areas has also renewed Europeans' interest in acquiring indigenous peoples' arts, cultures and sciences. Tourism in indigenous areas is growing, along with the commercialization of indigenous arts and the spoiling of archaeological sites and shrines.

20. At the same time, the "Green Revolution," biotechnology, and demand for new medicines to combat cancer and AIDS are resulting in a renewed and intensified interest in collecting medical, botanical and ecological knowledge of indigenous peoples. . . . There is an urgent need, then, for measures to enable indigenous peoples to retain control over their remaining cultural and intellectual, as well as natural, wealth, so that they have the possibility of survival and self-development.

Id. at 7. Similar observations were included in U.N. Secretary-General, *Intellectual Property of Indigenous Peoples: Concise Report of the Secretary-General*, U.N. Doc. E/CN.4/Sub.2/1992/30 (1992). See also *Information Concerning the Report of the Special Rapporteur on the Study of the Cultural and Intellectual Property of Indigenous Peoples: Information Submitted by the Movement "Tupay Katari,"* U.N. Doc. E/CN.4/Sub.2/AC.4/1993 (1993).

60. As examples of initiatives already taken, the study cites, *inter alia*, the Native American Graves Protection and Repatriation Act of 1990 (United States), and the Aboriginal Affairs and Torres Strait Islander Heritage Act of 1984 (Australia). *U.N. Study on the Protection of Cultural Property*, *supra* note 58, at 10. The study also surveys existing international legal instruments and mechanisms regulating the transfer and control over intellectual and cultural property (e.g. the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970)) and points out the inadequacies of these existing mechanisms for the purposes of securing indigenous peoples' enjoyment and control over their cultural heritage. *Id.* at 30–35.

61. See *Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, Preliminary Report of the Special Rapporteur, Mrs. Erica-Irene Daes, Submitted in Conformity with Sub-Commission Resolution 1993/44 and Decision 1994/105 of the Commission on Human Rights*, U.N. Doc. E/CN.4/Sub.2/1994/31, Annex (1994). After considering comments by governments, international institutions, indigenous peoples, and NGOs, the working group chair revised the set of principles and guidelines. See *Protection of the Heritage of Indigenous People: Final Report of the Special Rapporteur, Mrs. Erica-Irene Daes, in Conformity with Sub-Commission Resolution 1993/94 and Decision 1994/105 of the Commission on Human Rights*, U.N. Doc. E/CN.4/Sub.2/1995/26 (1995). The revised "Principles and Guidelines for the Protection of the Heritage of Indigenous People" appears in *id.*, at 9. Ms. Daes recommended that her text be the basis for a declaration by the U.N. General Assembly in 1996. *Id.* at 8.

62. Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, Rio de Janeiro, June 13, 1992, principle 22, U.N. Doc. A/CONF.151/26 (vol. 1), Annex 1 (1992).

63. Agenda 21, U.N. Conference on Environment and Development, Rio de Janeiro, June 13, 1992, paras. 26.3, 26.4(b), U.N. Doc. A/CONF.151/26 (vol. 3), Annex 2 (1992), reprinted in the appendix, *infra*.

64. Representatives of the following governments reported on such domestic initiatives to the committee of the International Labour Conference that drafted Convention No. 169: New Zealand, Brazil, Soviet Union, United States, Mexico, and Honduras. These reports are summarized in 1989 ILO Provisional Record 25, *supra* note 51, at 25/2–25/4 (paras. 9–14). The following additional governments reported on similar initiatives to the plenary of the 1989 International Labour Conference upon submission of the revised convention for a record vote: Bangladesh, India, Argentina, and Peru. International Labour Conference, Provisional Record 32, 76th Sess. at 32/11–32/12 (1989).

Additional domestic initiatives reflective of the norm of cultural survival and flourishing have been reported to the U.N. working group and other U.N. bodies. *E.g.*, Pekka Aikio, president of the Finnish Saami Parliament, Statement by the Observer Delegation of the Government of Finland to the U.N. Working Group on Indigenous Populations: Review of Developments (July 1993) (describing initiatives to amend the Finnish Constitution to enhance guarantees for maintenance and development of Saami culture); Intervention of the Mexican Delegation to the 50th Session of the U.N. Commission on Human Rights (Feb. 1994) at 3 (describing provisions of the Mexican Constitution to provide recognition of and protection for indigenous peoples and their cultures); Declaración de Colombia en Nombre del Grupo Latinoamericano y del Caribe en la Conmemoración del Año Internacional de Poblaciones Indígenas, Conferencia Mundial de Derechos Humanos, Vienna (June 18, 1993) (statement of Colombia on behalf of Latin American and Caribbean Group reporting developments in Latin America).

65. See, *e.g.*, *Information Submitted by the Government of Canada in Regard to the Revised Draft Declaration on Indigenous Rights*, U.N. Doc. E/CN.4/Sub.2/AC.4/1990/1/Add.3, at 1–2 (1990); 1991 Statement of the Government of New Zealand to the U.N. Working Group under Agenda Item 4, at 2.

66. See U.N. Subcommittee on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7, Add.4, at 39 (1986) (Jose R. Martínez Cobo, special rapporteur) [hereinafter *U.N. Indigenous Study*] ("It must be understood that, for indigenous populations, land does not represent simply a possession or means of production. . . . It is also essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture.").

67. For a compilation of indigenous people's statements about the land and its meaning, see *Touch the Earth: A Self Portrait of Indian Existence* (T. C. McLuhan ed., 1971); Thomas R. Berger, *Village Journey: The Report of the Alaska Native Review Commission* (1985) (documenting the testimony of Alaska Natives concerning their feelings about the lands and resources that traditionally have sustained them); Julian Burger, *Report from the Frontier: The State of the World's Indigenous Peoples* 13–16 (1987) (on indigenous "land and philosophy").

68. Covenant on Civil and Political Rights, *supra* note 19, art. 1(2); International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200(XXI), art. 1(2), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

69. See generally Rene David & John E. C. Brierly, *Major Legal Systems in the World Today* 290–95 (3d ed. 1985) (comparative discussion of "ownership").

70. The following literature reflects many of the dimensions of this dichotomy: Edward J. Epstein, "The Theoretical System of Property Rights in China's General Principles of Civil

Law: Theoretical Controversy in the Drafting Process and Beyond," 52 *L. & Contemp. Probs.* 177 (1989); Randy Bergman & Dorothy C. Lawrence, "New Developments in Soviet Property Law," 28 *Colum. J. Transnat'l L.* 189 (1990); Symposium, "Property: The Founding, the Welfare State, and Beyond," the Eighth Annual National Federalist Society Symposium on Law and Public Policy-1989, 13 *Harv. J.L. & Pub. Policy* 1-165 (1990).

71. Universal Declaration of Human Rights, *supra* note 6, art. 17.

72. American Convention on Human Rights, *supra* note 3, art. 21.

73. A common theme of the classical theorists of international law (1500s through early 1700s) was that non-European aboriginal peoples had territorial and autonomy rights which the Europeans were bound to respect. See *supra* chapter 1, notes 17-71 and accompanying text.

74. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 554, 559 (1832) (drawing upon the "law of nations" to affirm the "original natural rights" of Indians to their lands); United States *ex. rel. Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1942) (affirming that "aboriginal title" exists until Congress by clear and unambiguous action authorizes its extinguishment); see generally Felix S. Cohen, "Original Indian Title," 32 *Minn. L. Rev.* 28 (1947).

75. See S. James Anaya, "Native Land Claims in the United States: The Unatoned for Spirit of Place," in *The Cambridge Lectures* (Frank McArdle ed., 1993) (criticizing the scheme, under the Indian Claims Commission Act of 1946, to settle Indian land claims by cash payments).

76. ILO Convention No. 169, *supra* note 11, art. 13(2).

77. See *id.* art. 15(1).

78. *Id.* art. 15(2).

79. *Id.* art. 16.

80. *Id.* art. 16(3).

81. *Id.* art. 17.

82. For a concurring analysis of the land rights provisions of Convention No. 169 by the legal officer of the International Labour Organisation primarily involved in the drafting of the Convention, see Lee Swepston, "A New Step in the International Law on Indigenous and Tribal Peoples," 15 *Okl. City U. L. Rev.* 677, 696-710 (1990).

83. Responses to the land rights part of the questionnaire are summarized and analyzed in *Partial Revision of Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report 4(2), International Labour Conference, 75th Sess. at 45-64 (1988).

84. For example, the ILO Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Standards have been influential in resolving problems concerning the land and territorial rights of tribal peoples in the Chittagong Hill Tracts of Bangladesh and in addressing land rights, as well as basic human rights, concerns of the Yanomami of Brazil. See *Note by the International Labour Office*, U.N. Doc E/CN.4/Sub.2/AC.4/1991/6, at 2 (1991); *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report 3(4A), International Labour Conference, 78th Sess. at 349-51, 353-54 (1991). The ILO's supervisory machinery is discussed *infra* chapter 6, notes 18-24, 62-75, and accompanying text.

85. Although the drafting of the land rights provisions of Convention No. 169 was controversial, the controversy was a result of resistance to efforts by indigenous peoples' representatives, worker delegates, and some governments to attain specification of greater land and resource rights than that ultimately included in the convention. See Swepston, *supra* note 82, at 696-98.

86. 1989 ILO Provisional Record 25, *supra* note 51, at 25/21.

87. See, e.g., Statement of the Hon. Mr. Robert Tickner, M.P. federal minister for

Aboriginal and Torres Strait Island affairs, speaking on behalf of the government of Australia, U.N. Working Group on Indigenous Populations, 12th Sess. (July 27, 1994) (discussing recently adopted Native Title Act of 1994 to confirm indigenous possessory rights and to provide compensation for the dispossessed); Statement by the Observer Delegation of Brazil, U.N. Working Group on Indigenous Populations, 12th Sess. (July 1994) (discussing legislative initiative to implement constitutional provisions regarding indigenous land rights and to revise nonconforming laws); Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous Populations, Statement by the Observer Delegation of Canada—Delivered by Gerald E. Shanon, ambassador and permanent representative, U.N. Working Group on Indigenous Populations, 11th Sess. (July 29, 1993) (discussing land claim settlement procedures involving indigenous groups throughout Canada); *Information Received from Governments*, U.N. Doc. E/CN.4/Sub.2/AC.4/1991/4 (June 5, 1991) (information from Colombia regarding government measures to secure indigenous territorial rights); *Information Received from Governments*, U.N. Doc. E/CN.4/Sub.2/AC.4/1989/2, at 7-8 (1989) (information from Brazil reporting constitutional guarantees and efforts to demarcate indigenous lands).

88. See 1990 *Analytical Commentary*, *supra* note 41, at 10-15 (discussing commentary by government and indigenous observers on the land rights provisions of the first revised text of the U.N. draft declaration on indigenous rights).

89. See *Report on First Round of Consultations on Inter-American Instrument*, *supra* note 13, at 306-07 (summarizing government and indigenous organizations' comments on "territorial rights").

90. Chapter 26 recognizes indigenous peoples' "historical relationship with their lands," Agenda 21, *supra* note 63, para. 26.1 (emphasis added), and prescribes a number of measures to protect and strengthen that relationship, *id.* paras. 26.1, 26.3, 26.4.

91. *World Bank Operational Manual*, Operational Directive 4.20: "Indigenous Peoples," para. 15(c) (1991) (establishing recognition of customary or traditional indigenous land tenure systems as a premise of bank-assisted projects).

92. Covenant on Economic, Social, and Cultural Rights, *supra* note 68.

93. E.g., *id.* art. 6(1) (regarding the "right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts").

94. See generally Roland Rich, "The Right to Development: A Right of Peoples?" in *The Rights of Peoples* 39 (James Crawford ed., 1988) (providing justification for the right to development and defending it against skeptics).

95. Declaration on the Right to Development, G.A. Res. 41/128, Dec. 4, 1986, reprinted in *U.N. Compilation of Instruments*, *supra* note 6, vol. 1, pt. 2 at 544 (adopted by a vote of 146 in favor, 1 against, and 8 abstentions). Although the United States (alone) voted against the declaration, its express reason was not concerned with the essential normative thrust of the declaration; rather, it alleged "imprecise and confusing" language, the declaration's linkage of disarmament and development, and disagreement with a perceived emphasis on transfers of resources from the developed to the developing world as the primary means of achieving development. Rich, *supra* note 94, at 52.

A precursor to the 1986 declaration was the Declaration on Social Progress and Development, G.A. Res. 2542(XXIV), Dec. 11, 1969, reprinted in *U.N. Compilation of Instruments*, *supra* note 6, vol. 1, pt. 1 at 497.

96. Declaration on the Right to Development, *supra* note 95, art. 1(1).

97. *Id.* arts. 2-8, 10.

98. See generally Burger, *supra* note 67, at 17-33 (describing "life at the bottom" for the world's indigenous peoples).

99. See generally *U.N. Indigenous Study*, *supra* note 66, Add. 4, paras. 54-119, 163-90,

(describing discriminatory rendering of government services in areas of health, housing, education, and employment).

100. ILO Convention No. 169, *supra* note 11, art. 7(2).

101. *Id.* arts. 20–31.

102. *E.g.*, *id.* art. 20(1) (“[S]pecial measures” regarding conditions of employment are to be adopted “in co-operation with the peoples concerned.”).

103. *See id.* art. 7(1) (“The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions.”).

104. Draft United Nations Declaration, *supra* note 11, art. 38.

105. *See, e.g.*, Statement by Mr. Robert Tickner, minister for aboriginal and Torres Strait Islander Affairs, on behalf of the government of Australia, U.N. Working Group on Indigenous Populations, 10th Sess. at 2, 10–13 (July 28, 1992) (reporting measures to implement and “[f]oster a commitment from [Australian] governments at all levels to cooperate to address progressively aboriginal disadvantage and aspirations in relation to land, housing, law and justice, cultural heritage, education, employment, health, infrastructure, economic development and other relevant matters”); 1994 Statement of Brazil to the U.N. Working Group, *supra*, note 87, at 3 (discussing recent executive decree establishing an interagency commission to address environmental and health concerns of indigenous communities); New Zealand Statement on Recent Developments (delivered by Miriama Evans to the U.N. Working Group on Indigenous Populations, 11th Sess. (July 27, 1993)) (discussing health care reforms and initiatives to benefit the indigenous Maori; also reporting government support for Maori educational programs).

106. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514(XV), Dec. 14, 1960, para. 1, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1961).

107. Chapter XII of the U.N. Charter concerns the obligations of member states with regard to “Non-Self-Governing Territories,” which were generally understood at the time of the Charter’s adoption to include those of a classic, colonial type. *See* W. Otuatay-Kodjoe, *The Principle of Self-Determination in International Law* 104–13 (1977). The criteria for identifying non-self-governing territories subject to U.N.-promoted decolonization procedures were set forth in the General Assembly resolution, Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for in Article 73(e) of the Charter of the United Nations (Declaration on Non-Self-Governing Territories), G.A. Res. 1541(XV), Dec. 15, 1960, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1961), discussed *supra* chapter 2, notes 27–28 and accompanying text.

108. G.A. Res. 1541, *supra* note 107, principle 6.

109. *See* Mark Falcoff, “The Democratic Prospect in Latin America,” 13 *Wash. Q.*, Spring 1990, at 183; Elie Abel, *The Shattered Bloc: Behind the Upheaval in Eastern Europe* (1990); Carol Lancaster, “Democracy in Africa,” *Foreign Pol’y*, Winter 1991–92, at 148; Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (1991).

110. *See* David Stoelting, “The Challenge of UN-Monitored Elections in Independent Nations,” 28 *Stan. J. Int’l L.* 371, 375 (1992) (discussing the “United Nations’ emerging role in monitoring independent states’ elections” in the context of “an emerging right to political participation under international law”); Morton Halperin et al., *Self-Determination in the New World Order* 63 (1992) (discussing Organization of American States resolutions deploring authoritarian coups against elected officials in Haiti and Peru).

111. *E.g.*, Halperin et al., *supra* note 110, at 420–424 (“Toward a Democratic Entitlement”); Gregory H. Fox, “The Right to Political Participation in International Law,” 17 *Yale J. Int’l L.* 539 (1992); Thomas M. Franck, “The Emerging Right to Democratic Governance,” 86 *Am. J. Int’l L.* 46 (1992).

112. Emphasis within Western democratic theory and the importance of local government within a larger political framework is long-standing. *See* Mark Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law 4–17* (1988) (discussing the dominant strands of political theory adopted by the framers of the U.S. Constitution). *See generally* *Federalism and Decentralization: Constitutional Problems of Territorial Decentralization in Federal and Centralized States* (Thomas Fleiner-Gerster & Silvan Hutter eds., 1987) (reports from the Regional Conference of the International Association of Constitutional Law in Murten, Switzerland, 1984).

113. *See supra* chapter 3, notes 42–47 and accompanying text.

114. *See supra* notes 15–24 and accompanying text.

115. *See* Instituto Indigenista Interamericano and Instituto Interamericano de Derechos Humanos, *Entre ley y la costumbre: El Derecho consuetudinario indigena en América Latina* (1990) (a compilation of studies on indigenous customary laws and institutions in Latin America).

116. *See generally* David H. Getches et al., *Federal Indian Law: Cases and Materials* 395–736 (3d ed. 1993) (materials on institutions of tribal self-government, including tribal courts, and the scope of their jurisdiction within the United States legal framework).

117. ILO Convention No. 169, *supra* note 11, art. 8(2).

118. *Id.*, art. 9.

119. Draft United Nations Declaration, *supra* note 11, art. 33.

120. Michael Kioni Dudley & Keoni Kealoaha Agard, *A Hawaiian Nation*, vol. 2, *A Call for Hawaiian Sovereignty* 89–99 (1990).

121. The U.N. *Indigenous Study*, *supra* note 66, observes that “[v]arious factors, economic and social ones for the most part, everywhere influence the effectiveness of political rights,” *id.* Add. 4, para. 255, and concludes that political “representation of indigenous peoples remains inadequate and is sometimes purely symbolic” *id.* Add. 4, para. 261.

122. *See* Julian Burger, *supra* note 67, at 17–33 (describing “life at the bottom” for the world’s indigenous peoples); *see also* U.N. *Indigenous Study*, *supra* note 66, Add. 4, paras. 54–190 (describing social and economic conditions of indigenous peoples).

123. Draft United Nations Declaration, *supra* note 11, art. 33.

124. *See, e.g.*, 1991 *Revised Working Paper*, *supra* note 41, at 89 (proposed language by Argentina for U.N. declaration on indigenous rights); *Information received from Governments*, U.N. Doc. E/CN.4/Sub.2/AC.4/1991/1(1991) (comments from Mexico on first revised text of indigenous rights declaration); *Report on First Round of Consultations on Inter-American Instrument*, *supra* note 13, at 293–98 (comments by Costa Rica, Mexico, Peru, Colombia, Canada, Chile, and Guatemala).

125. *See supra* chapter 3, notes 93–98 and accompanying text.

126. *See, e.g.*, Statement by the Delegation of the Observer Government of Brazil on Item 5 of the Agenda: Review of Developments, U.N. Working Group on Indigenous Populations, 11th Sess. at 3–4 (July 29, 1993) (recounting efforts of the government of Brazil to implement “special policies” to ensure indigenous people the enjoyment of their traditions and autonomous organization of their communities”); *Information Received from Governments*, U.N. Doc. E/CN.4/Sub.2/AC.4/1991/4, at 4–5 (June 5, 1991) (information received from the government of Colombia) (outlining steps to afford indigenous groups in Colombia “the necessary conditions to organize themselves in accordance with their own usages and customs and to strengthen indigenous participation in decision making on policies and programs affecting them”); Canadian Statement to United Nations Working Group on Indigenous Populations on the Review of Developments at 4–5 (July 29, 1991) (government program by which the country’s “first nations . . . can negotiate self-government through new legislative arrangements that reflect more closely their particular circumstances” and “open discussions

[involving indigenous representatives] leading toward the constitutional entrenchment of aboriginal self-government"); Intervention of the Delegation of Canada to the Main Committee of the World Conference on Human Rights on the Subject of Indigenous Peoples, Delivered by Denis Marantz, Canadian Delegation, Vienna, at 1 (June 22, 1993) (describing efforts at constitutional recognition of aboriginal self-government and legislation for self-government negotiations across Canada, initiatives aimed at "transfer[ing] to the aboriginal peoples of Canada . . . increased responsibility for planning and managing their own affairs"); 1994 Statement by the Hon. Robert Tickner, M.P. federal minister on behalf of Australia, *supra* note 105, at 12–13 (describing the establishment of the Torres Strait Regional Authority—an elected body of Torres Strait Islanders—in which is vested certain powers of decision making); 1989 Statement by the Philippine Government to the U.N. Working Group, at 2–3 (constitutional and legislative measures for the creation of autonomous regions in the Muslim Mindanao and the Cordilleras, characterized as "the granting of autonomy to indigenous populations"); Statement by the Observer Delegation of Norway to the Seventh Session of the U.N. Working Group at 2 (1987 legislation concerning the establishment of a "Sami assembly" which will "comprise all matters affecting the Sami people in Norway, and will be elected by direct elections"); Nordic Contributions to the International Year for the World's Indigenous People, Statement by Jens Brosted, Nordic Council of Ministers, representing Denmark, Finland, Iceland, Norway, Sweden, and the three self-governing territories of the Faroe Islands, Greenland, and Åland, U.N. Working Group on Indigenous Populations, 11th Sess. at 2 (July, 1993) (describing decision of Nordic Council of Ministers "to provide major support for a joint meeting between the Sami Parliaments in Norway, Sweden, and Finland").

After a campaign of criticism against the government of Bangladesh concerning its treatment of the tribal peoples in the Chittagong Hill Tracts, the government of Bangladesh reported on legislation in that regard. *Information Received from Governments*, U.N. Doc. E/CN.4/Sub.2/AC.4/1989/2/Add.1, at 2–5 (1989) (information received from Bangladesh government reporting that the legislation sets up three "local elected and autonomous government councils . . . with adequate power for the tribal power to run their own affairs and preserve their socio-cultural heritage and separate identity").

See also 1989 Provisional Record 25, *supra* note 51, at 25/2. The government of the Soviet Union informed the ILO about "associations of indigenous peoples [that] would be set up to improve the legal status of autonomous groups." *Id.* "The government member of Honduras drew the [ILO] Committee's attention to a new law precluding state interference in matters within the competence of indigenous peoples, which was drafted [sic] following extensive consultations with their representatives." *Id.*

127. Draft United Nations Declaration, *supra* note 11, art. 19. Canada, Chile, Costa Rica, and various indigenous peoples' organizations have stressed the importance of this right in commenting on the proposal for an inter-American instrument on indigenous rights. *Report on First Round of Consultations on Inter-American Instrument*, *supra* note 13, at 282–83.

128. ILO Convention No. 169, *supra* note 11, art. 6.1(b).

129. Thus, indigenous peoples and their organizations have been permitted to participate actively in discussions within the United Nations concerning the development of an indigenous rights declaration and related topics. See Robert A. Williams Jr., "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World," 1990 *Duke L.J.* 660, 676–85 (1990). The U.N. subcommission's Working Group on Indigenous Populations solicited written commentary from indigenous peoples in the course of developing the draft U.N. declaration, and the group allowed any indigenous representative attending its meetings to participate in the discussion of the declaration. The Commission on Human Rights, which is now considering the draft declaration,

established a special procedure for indigenous representatives to participate in its drafting working group. See *supra* chapter 2, note 86. Although it will likely result in a lower level of access to the drafting process than that which indigenous peoples enjoyed in the subcommission's working group, the commission's procedure is designed to provide for greater participation by nonstate entities than that ordinarily allowed in the commission's proceedings. Similarly, the International Labour Organisation relaxed its rules of procedure in order to allow indigenous groups limited direct participation in the development of ILO Convention No. 169 of 1989. See Sweptson, *supra* note 82, at 686–87.