

American Society of International Law Proceedings
March/April, 1993

Challenges to International Governance
Theme II - Communities in Transition: Autonomy, Self-Governance and Independence

***190 INDIGENOUS PEOPLES AND THE RIGHT TO SELF-DETERMINATION**

Olivia Quittner Goldman [\[FNal\]](#)
Reporter

Copyright © 1993 by the American Society of International Law; Olivia

Quittner Goldman

In the Year of Indigenous Peoples, what are the major international legal challenges confronting indigenous peoples? How should conflicts between the rights and needs of indigenous peoples and international objectives (such as environmental protection, fundamental human rights, and democratic ideals) be resolved? What are legal and political strategies for achieving such objectives?

The panel, sponsored by the Indigenous Peoples Interest Group, was convened at 8:30 a.m., Friday, April 2, 1993, by its Chair, Howard R. Berman, who introduced the panelists: Oren Lyons, Onandaga Nation; and Richard A. Falk, Center of International Studies, Princeton University.

REMARKS BY HOWARD R. BERMAN [FNA2]

I will begin our panel with a few introductory words about the historical backdrop to indigenous peoples' claims for self-determination. These claims are deeply rooted in the experience, both historical and contemporary, of indigenous peoples. As we pass from the Columbus Quinquecentenary to the UN Year for the World's Indigenous Peoples, we should be aware of the profound link between 1492 and 1993 in the situation of indigenous peoples. In the Western Hemisphere, indigenous peoples were the first, and remain the most persistent, victims of colonialism. During the intervening centuries, the colonial process has caused uncounted indigenous peoples to cease to exist as distinct societies. Settler societies were established, many of which became successor states.

Throughout the nineteenth century, international law abetted the spread of European colonialism. Concepts such as the right of discovery, terra nullius ("land of no one") and the "standard of civilization" were devised and used to legitimize European domination. They remained unchallenged in the early twentieth century in the Cayuga Indians and Island of Palmas arbitrations, as well as the Eastern Greenland case before the Permanent Court of International

Justice. These doctrines were not directly repudiated until the World Court's advisory opinion in the Western Sahara case in 1975.

In a number of countries, these colonial doctrines of legitimization have continued to form the conceptual basis for the relationship between the state and indigenous peoples in municipal law. In other regions, the establishment of international frontiers on the basis of *uti possidetis* enclosed indigenous peoples within states without their consent. In either case, consensual incorporation into the state was a rare occurrence.

Indigenous peoples that have maintained their distinct identities into the present continue to face a very serious threat to their survival. Their relationships to dominant societies are structurally indistinguishable from classic colonialism. Indeed, it can be accurately termed a process of internal colonialism, in which indigenous peoples endure administrative control, dispossession from lands and resources, and forced or induced assimilation.

The counterpoint to colonialism has always been self-determination. The conceptual and political problem faced by indigenous peoples today, however, is that they are, for the most part, located within existing states. That raises difficult *191 questions: What does self-determination mean in these circumstances? To what degree can, or will, the international community respond to the requirements for indigenous survival? History is relevant in this area, but our solutions must be contemporary.

Let us shift focus now, to some of the solutions proposed within the international community that address the issue of self-determination for indigenous peoples. Some of these solutions take an active stance in relation to self-determination, such as those of the UN Working Group on Indigenous Populations. Others take a more tangential, possibly antagonistic, approach to the issue, such as the recent International Labour Organisation Convention 169.

I would like to begin with the Draft Declaration on the Rights of Indigenous Peoples, developed by the UN working group. [\[FN1\]](#) Although the text is fairly well advanced at this point, I want to emphasize that it remains a draft before an expert body within the UN human rights system. The final realization of the Declaration through the UN General Assembly is still some time away. After passage through the Sub-Commission on Prevention of Discrimination and Protection of Minorities, it will advance to the Human Rights Commission, probably at its 1995 session. If it is approved (possibly with some reshaping) by the Human Rights Commission, it will be transmitted to the General Assembly for adoption.

For some governments attending meetings of the Working Group on Indigenous Populations, the issue of self-determination begins and ends with the threat of secession and dismemberment of the state. Indeed, some indigenous peoples do define their right to self-determination in terms of political independence. For the most part, however, indigenous participants have taken a functional approach to self-determination without proposing a particular formula for its ultimate implementation. They have posed self-determination as the right to control their institutions, territories, resources, social orders and cultures without external domination or interference, and the right to establish their relationships with the dominant society and the state on the basis of consent. Control and consent are the principal concepts underlying this approach.

From my observations, I would say that indigenous positions have manifested three general objectives in relation to the draft Declaration: (1), an unqualified affirmation of their right to self-determination consistent with language of Common Article 1 of the International Covenants on Human Rights (1976), [\[FN2\]](#) leaving the question of their mode of implementation open; (2) to

ensure that the substantive content of the instrument reflects a right of self-control in all areas: governance, lands and resources, social relations and culture; and (3) to ensure that nothing in the instrument contradicts or impairs the exercise of self-control in those areas. It is also my observation that over the years, and to varying degrees, the members of the working group have come to appreciate that functional aspects of self-determination are both a matter of fundamental justice and a necessity for indigenous survival as distinct peoples.

Article 1 of the draft Declaration states: "Indigenous peoples have the right to self-determination in accordance with international law, by virtue of which they may freely determine their political status and institutions, and freely pursue their ***192** economic, social and cultural development. An integral part of this is the right to autonomy and self-government."

The language of Article 1 is apparently broad. In the 1992 working group session, however, Chair Erica Daes stated that self-determination "as reflected in the draft Declaration was used in its internal character, that is, short of any implications which might encourage the formation of independent states." In other words, in her view the Declaration does not engage the issue of external self-determination. On close reading, her interpretation seems valid. The phrase "in accordance with international law" in Article 1 connects self-determination with the broader field of international law, in which the right to external self-determination has been commonly viewed as limited to non-self-governing territories, as defined through the political process of decolonization, and perhaps now to the disintegration of multinational states. Obviously, we are dealing with an evolving concept.

The neutrality of Article 1 is further supported by several other provisions of the draft Declaration that form a kind of scaffolding around it. Article 4, for example, states that "nothing in the declaration implies a right to engage in activities contrary to the UN Charter or the Declaration on Friendly Relations. [\[FN3\]](#) The Declaration on Friendly Relations is particularly relevant in that it affirms the right to territorial integrity for legitimately constituted states and describes a spectrum of modes for implementing the right of self-determination--including, but not limited to, political independence.

Nevertheless, Article 1 does not foreclose the possibility of external self-determination. The reference to international law also means that those indigenous peoples falling within accepted criteria, or the further evolution of those criteria, would have the legal option of independence. This interpretation is supported by Articles 35 and 37 and the fifteenth preambulatory paragraph, which protect rights under international law, including treaties, and which, by virtue of the language of Article 37, also refers to treaties between states and indigenous peoples. In sum, Article 1 states a general principle of self-determination for indigenous peoples and specifies self-government and autonomy as the minimum content of that principle. These issues are dealt with functionally in part 4 of the Declaration.

Part 4 is something of a grab bag, but the core provisions relate to political rights. Articles 25 and 26, dealing with political participation, are phrased in terms of participation of the peoples as such in the institutions of the state. Article 25 requires recognition of indigenous laws and customs in the legal system of the state, and Article 26 further requires states to obtain the free and informed consent of indigenous peoples before implementing measures that affect their rights.

Article 27 deals directly with what is termed a "right to autonomy in matters relating to their own internal and local affairs." Included in the list that follows are: education, information, mass media, culture, religion, health, housing, employment, social welfare in general, economic

activities, land and resources administration, environment, taxation, and entry by nonmembers into indigenous territories. Gudmundur Alfredsson of the UN Centre for Human Rights, who participated in the original drafting of the articles, has said that it was based on the Greenland Home Rule arrangement. Other provisions recognize the right to determine land tenures; the structure, process and membership of indigenous institutions; membership in indigenous societies as a whole; and, when compatible *193 with international human rights standards, to maintain customary laws and to determine the responsibility of individuals to their indigenous communities. The right to exercise general civil and criminal jurisdiction within their territories is not explicitly included in these provisions.

I have dealt with the draft Declaration on the Rights of Indigenous Peoples somewhat descriptively; I would like now to offer a few reflections on it. In my view, indigenous control and consent are the measure by which international action must be evaluated. In that light, the Declaration's provisions relating to indigenous political rights need to be strengthened, particularly in the areas of jurisdiction, with jurisdiction linked to a concept of territoriality. Moreover, the instrument fails to adequately protect indigenous rights to the control of natural resources. Finally, I am troubled by the amorphous concept of autonomy. Indigenous self-determination needs to be recognized as standing on its own right, not as devolving as a matter of will on the part of the state or the state's administration. In order to fully secure the rights of indigenous peoples, and their ability to survive as distinct societies, new forms of political association will have to be developed between indigenous peoples and states, perhaps with some elements of international personality recognized by the international community.

I have been asked by the other panelists to say a few words about International Labour Organisation Convention 169, the Indigenous and Tribal Peoples' Convention of 1989. From the perspective of the standards that I have identified as necessary for any international instrument on indigenous rights, particularly in the area of self-determination, the Convention is seriously inadequate.

Convention 169 was initially conceived as a revision of an earlier ILO instrument, the Convention Concerning the Protection and Integration of Indigenous . . . Populations in Independent Countries of 1957 (No. 107). Convention 107 is an artifact of the era in which it was developed. The thrust of the instrument was to promote the gradual integration of indigenous individuals into national societies while providing interim measures of protection designed to ameliorate the consequences of rapid assimilation. It therefore legitimized state action that resulted in the disintegration of a number of indigenous societies in ratifying states. At present, twenty-three states remain parties to Convention 107.

By the 1970s, the integrationist content of the instrument caused the ILO acute embarrassment. In 1986, the Governing Body decided to undertake a revision. The revision process actually produced a new convention, albeit one that thematically tracks the earlier instrument. Convention 169 differs from its predecessor in several important ways. First, the promotion of directed integration has been removed. Second, the focus of Convention 169 is on indigenous peoples as collectivities--when rights are recognized, as in the case of land ownership, indigenous peoples as such are identified as the rights-holding entities. There are a few references to indigenous individuals in the text, but the orientation of the Convention is toward the group and group survival. In several provisions, the existence of indigenous social and political institutions is given implicit recognition.

Third, the term of identification is indigenous peoples. Convention 107, in contrast, refers to indigenous populations, an amorphous term that simply aggregates individuals into a certain

category without conveying any sense of specific cultural or political identity, and one that indigenous peoples consider demeaning and racist. Unfortunately, Convention 169 also includes a qualifying clause on the term "peoples" that some have interpreted as limiting the scope of indigenous rights. ("The use of the term 'peoples' in this Convention shall not be construed *194 as having any implications as regards the rights which may attach to the term under international law.")

The clause represents a compromise formulation resulting from a determined effort by some governments to segregate indigenous peoples in international law. Several states, led by Canada, unsuccessfully attempted to include an explicit disclaimer referring directly to self-determination in the text. The adopted version, however, can also be read as a statement of abstention, based on the limited mandate of the ILO as a Specialized Agency within the UN system, in which the organization sought to avoid broader political implications of its language.

For the most part, Convention 169 is not an instrument in which indigenous rights are expressly recognized. There are very few references to rights. It is, in ILO parlance, a "procedural convention" that typically places generally worded requirements on states to behave in certain ways toward indigenous peoples. A consultative process is mandated, but there is no requirement of indigenous consent to governmental action, including removals from ancestral territories, and very few areas in which the instrument recognizes indigenous rights of self-control. Governments remain the arbiters of indigenous rights on all issues. The state retains the legislative prerogative to determine the affairs of indigenous peoples within a set of agreed principles.

The impact of Convention 169 has been sparse to this point. Only five states ratified: Norway, Mexico, Bolivia, Colombia and Costa Rica. Other governments have cited particular provisions of the Convention during recent Working Group debates on the UN draft Declaration, seeking to lower UN standards to the ILO level. Again, I would point to Canada as a government that has played a negative role. Members of the Working Group have not been responsive to these efforts. However, the moment of truth for the draft Declaration will occur when it reaches the political organs of the United Nations.

REMARKS BY OREN LYONS [FNA3]

Before the term "indigenous peoples" came into contemporary use, we called ourselves Haudenosaunee Ongwehoway Onondaga-Ga. I am Onondaga from the Six Nations Iroquois Confederacy. Haudenosaunee means "the people of the longhouse," and it was our right, at the time we became a confederation of nations about one thousand years ago, to determine for ourselves our names and our direction.

A millennium ago there was a meeting at the Onondaga Lake, led by a man called the Great Peacemaker. He brought five warring nations together and consolidated them into a confederation. This "confederacy of laws" has prevailed until the present day; even recently we were forced to close certain businesses in order to bring the owners into line with Onondaga law, which is somewhat different from New York or United States law. During those days when we gathered together, the Great Peacemaker profoundly set forth the idea of peace.

The principle of our nation is peace. As a result, authority over the activities of the entire population was transferred from the power of the individual into the hands of the people. The people came forward, and it was they who determined who would be the leaders and what was the law. Apparently, we were swimming in democracy at the time, but we did not know the term, and it has been that way for other indigenous peoples as well. In 1975 we met on Vancouver Island, in one *195 of the first meetings of North, Central and South American indigenous

peoples. We decided at that time to use the term "indigenous." We discussed the use of the terms "aboriginal" and "native," and we finally decided that when we refer to ourselves we would do so as the indigenous peoples of the Western Hemisphere. The people from South America agreed to use the term as it relates to law and to the international body, but they asked that when we speak of them we call them "Indians," because much blood has been spilled over that term. We are proud, they said, to be called Indians--indios--because we have died, they have branded us, they made us, and so we will keep it. And so, as we said we would, we kept the name for them, right now, I am passing it on to you. So we understand.

So we have called ourselves indigenous peoples of the Western Hemisphere. As we struggled in 1977 to become the first indigenous group to challenge the United Nations as a body in Geneva, it was a historic moment. We gathered 140 or more representatives from North, Central and South America and traveled to Geneva at the invitation of the NGOs to have a historic meeting.

The Haudenosaunee, who had been asked to lead the group, decided that since they did not have a passport they had better make one, as expressing their self-determination and sovereignty. It is a simple definition but that is about what it amounts to; we constructed and issued our own passports. We figured if we were not going to be taken seriously we would know right away, because the borders we were crossing were taken very seriously. We arrived at the Geneva airport and waited for four hours until they eventually let us in on white slips of paper. We did not carry U.S. passports, and that was important to us; that was a definition, a statement being made. As soon as we go through, which was a victory, we said, "Now we can begin with the discussion--at least someone is taking us seriously here.

We received an invitation from the Mayor of Geneva. He asked if the Haudenosaunee--and he used our proper name--would come to a reception on the following day, as he would like to receive us. While this was amazing, it was nevertheless a possibility we had previously considered because we had sent people to Geneva in 1924 when they were discussing the League of Nations. Our presence at that time related to what Mr. Berman was talking about in regard to the activities of the Canadian Government concerning the Haudenosaunee Longhouse. The Canadian Royal Mounted Police had come in and forcibly shut down the Longhouse and installed an elective-style government against the will of the people, and a chief was there to complain. His name was Diskahay, Kiyuay chief, and he was sent by the Haudenosaunee to this great gathering, and although he made it there he was not allowed to attend the meeting.

Well, the Mayor of Geneva greeted us that day in 1977, and it was worth the trip to be accorded the dignity and respect that he presented to us. He told us a story. He said there was a man by the name of Diskahay and he asked if Diskahay was present. Well, he was not able to attend because the original Diskahay would be one thousand years old. The current Diskahay was not able to attend, but he had sent a message because he thought someone might remember that he was there in 1924--and the Mayor did. When he asked whether Diskahay were there, we replied that although he was not we had a message from him, and one of our people presented the message. The Mayor responded, "I am very pleased that he remembered. In 1924 I remember a meeting that was so crowded that people spilled out onto the streets. I remember a speaker, a very dignified gentleman who was an American Indian, and he talked to me. Amongst all the people that *196 were there, he took the time to talk to a ten-year-old boy--me. I remember, and that is why you came through that frontier, that border. I made them let you in, and you can come here anytime; you will be welcome with your passport."

In 1924 we had people acting on behalf of the Haudenosaunee. In 1774 we had a man named Joseph Brant travel to England to talk to the King about the war that was coming, the revolution.

In the 1770s we already had scholars at Oxford. As such, we have a sense of ourselves in terms of self-determination. It is very difficult. I know that throughout the United States over the past few years there has been meeting after meeting on sovereignty; Indians are always meeting on sovereignty. I explained to them that they were having meetings on sovereignty because they were looking for something they do not have; somebody else has it and tells you you may have it, and so you try to find it; but every time you try to find it it is not there.

It is curious how sovereignty works in the United States; if something serves the purpose of the state it is sovereign. For instance, in 1991 President Bush appointed a Nuclear Waste Negotiator from the Office of the President to go to Indian land and negotiate a place to put nuclear waste. He appointed this negotiator to speak to poor people and offer them whatever they want in return for taking nuclear waste. We mounted a campaign against that. I am curious as to how long Mr. Clinton will allow that office to function, because as far as I know it is still functioning, but it was created by presidential appointment and therefore can just as easily be eliminated. Now in this case, it serves the government's purpose to recognize Indian sovereignty, because it then does not have to abide by the rules and regulations that govern nuclear wastes elsewhere in the United States. "Indian land is sovereign, and they do not have any rules on the subject there, so let's dump the waste. Now they are sovereign." Of course, people are not going to accept that.

Last year it was discovered that the very poorest people in the United States are the Pine Ridge Lakota people, the Sioux. There is some reason for their poverty, because at one time they exercised their sovereignty: they defeated General Custer at Little Big Horn, and they still have the standard of the U.S. Seventh Cavalry. That is why the U.S. Government presses so hard: they will not give it up--they have not submitted. And the Haudenosaunee have not submitted.

There are people who have not submitted, and there is history. Let me read you an interesting quote: "As for the six nations [Haudenosaunee], having acknowledged themselves subjects of the English, that I conclude, must be a very gross mistake, and I am well satisfied that were they told so they would not be well pleased. I know I would not venture to treat them as subjects unless there was a resolution to make war upon them, which is not very likely to happen, but I believe they would, on such an attempt, very soon resolve to cut our throats." This was in a letter from General Thomas Gage to Sir William Johnson in 1772. In other words, they knew very well that the Haudenosaunee considered themselves sovereign and independent. Indian nations across this country were like that--they all understood freedom and who they were, and they fought very hard.

Today when we struggle for self-determination and make these efforts that we must make, we are gathering support just by dint of a better-educated public. People are becoming more concerned with the broader aspects of human cohabitation, which includes the right to self-determination and peace for all peoples. In the process of living together in this land that we call the Great Turtle Island, prior to the landfall of Columbus, people lived together very well. They had confederacies *197 up and down and across this country--great confederacies. The confederacy was chosen because that structure allows the sovereignty of each nation to stand forward, and no one is subject to another. That is a great principle.

When Columbus landed we really got into trouble because of different ideas. In this quest for sovereignty and self-determination that indigenous people make in their struggle, we began to find out things that people never told us. Nations with which we had agreements never told us the underpinnings of their activities. Specifically, I am speaking of Christian "dominion" over "pagans and heathens," which was expressed in the Papal Bulls of 1452, 1493 and so forth. These Papal Bulls directed Christians to go out and subject and bring into the fold all heathens and

pagans, and their lands as well. Thus, when Columbus landed he had a kind of mandate, and that mandate was developed in law; U.S. law regarding American Indians is based on that. This theory of Christian domination, which was a product of European thought, landed here with the Europeans, and our problems from that time have seemed to increase continually.

Some people wonder why, at this point in time in the United States, it is necessary to have an Indian Religious Freedom Act. Out of all the people in this country, why is it that the Indians are currently struggling to get amendments to the Indian Religious Freedom Act. Why do Indians need a religious freedom guarantee? Why is it not necessary to have a religious freedom act for Jews, or Catholics, or Presbyterians, or any other denomination? The answer goes back to the theory of Christian domination.

When Chief Justice John Marshall made many of his famous statements and positions on Native Americans back in 1823 in *Johnson v. Mackintosh*, [\[FN1\]](#) he instilled Christian domination theories in U.S. law. He used them, he cited them, and based the decision on them. So the law of the United States (and also probably of Australia, New Zealand, Africa, and anywhere Christians have overrun indigenous peoples) has this underpinning. It is very difficult to deal with. In 1955 the Supreme Court, in *Tee-Hit-Ton Indians v. United States*, [\[FN2\]](#) used the same theories. The decision is very explicit; it says not only that the federal government can take our lands, but also that it can do so without compensation, and that we cannot use the Fifth Amendment. That is your law. This is five hundred years since Columbus landed.

In 1991, in the *Gitskan* case [\[FN3\]](#) in British Columbia, the Law of Nations as it is called, the Doctrine of Discovery was cited again, and the *Gitskan* Indians were told in effect, "No, you cannot have a lands claim because you do not have standing. You do not have standing because of the Law of Nations, which says we have dominion over you because you are heathens and we are Christians." That is a very difficult law for us to live with. If the international community is serious about self-determination and helping people, it is about time someone takes up this issue--one of you international lawyers. We have enough problems just trying to stay alive. This issue should interest you, and it is vital to us; it stands there, it is clear, and it is voiced.

Not long ago, when I was speaking to the Department of the Interior about subjects like this they said, in all seriousness, that the alternative to sovereignty is war. In 1993 they are telling us "If you do not like it, take us on." How is that for self-determination? Well, we do not give up, we do not submit, and since the *198 United States is a nation of laws we are finding very clearly that land claims made by indigenous peoples and nations do have authority and standing, because the United States declared itself a nation of laws. Now it finds that it has violated these laws and that native people are bringing these violations forward, and they must be addressed.

In this discussion I have presented some of the concerns I have to deal with day to day as a leader--the law and how the ILO works and how they try to contain us because indigenous peoples means land claims. The argument gets reduced to "We were here first." Indigenous peoples means land, and that is why we have had such a difficult time existing. You must exterminate, extinguish title and people. In some case, as in the United States, it is easier to extinguish the people and their culture than the agreement. Today there are two ways to accomplish this: take the land forcefully, or have an agreement made and give it away. This is what this money and many of the issues currently confronting Indian peoples, such as gaming, are all about. Indian people are giving up things that leaders like Sitting Bull, Tecumseh, Osceola and Red Shirt fought and died for. Now we have "teflon" leaders of Indian nations who are willing to give all of it up for the quick money of casinos, which will not be around long anyway. A weak spot was found, and it is being exploited to the fullest extent. Not everyone agrees with that. The

system of governance in place in the United States allows those in Washington to control activities and decisions being made elsewhere--for example, in Guatemala; there are many ways to control people.

So this is what I bring here for your consideration, because in the field, where we live, we will continue to struggle to be sovereign and independent, and to determine for ourselves who and what we are and how we will live. How it will turn out, who knows? Maybe you can help us.

REMARKS BY RICHARD A. FALK [FNA4]

I would first like to mention how powerfully Oren Lyons's presentation expressed the degree to which the concreteness of the specific circumstances-- what happens on the ground--is in tension with the broad doctrinal pursuit of a more supportive normative climate for the struggles of indigenous peoples. I think one has to keep both of those perspectives in view: the quest at the global level for an adequate normative acknowledgment of the victimization of indigenous peoples, and the entitlements drawn from that victimization-- centering, ultimately I think, on the appropriate realization of claims of self-determination--as well as the concreteness of the practice by which self-determination is shaped as a historical reality. The U.S. Constitution's promise of equal protection for minority peoples meant little until a struggle of resistance made those words begin to count in the lives of people.

As such, it is extremely important for those of us concerned with the analysis of international legal issues of this sort to appreciate the fluidity of the legal doctrine in response to practice that can go in two directions, either ignoring the normative claims or reshaping them by a political process that extends the horizon of what is legitimated. Recently, this has become apparent in relation to the principle of self-determination. If one examines the doctrinal formulations of the principle, which admittedly are somewhat ambiguous, they would seem rather clearly to preclude the international communities' actual response to the breakup of the Soviet Union and of Yugoslavia. Even an extreme deconstructionist literary critic *199 would have difficulty reading formulations such as those found in General Assembly Resolution 2625 on Friendly Relations, [\[FN1\]](#) which talks about the limit on self-determination in terms of territorial unity, that is, the avoidance of the dismemberment of existing states (and there is no parenthesis except for those that are federal states). In other words, I am suggesting that the contours of self-determination are an outcome of history and struggle, and that these contours are only partially a matter of legal craftsmanship and analysis, particularly in an area where entrenched interests and power seek to maintain the status quo to the fullest extent possible.

In the broad area of human rights and the rectification of injustice, there is often a provisional willingness by states to give ground normatively because they do not believe that they will be required to pay a political price by way of behavioral adjustment. It is easy to give lip service to normative expectations and then not deliver in terms of implementation. One of the striking examples of both sides of this dynamic is connected with the Helsinki Accords of 1975, in which the agreements were mainly understood at the time as validating the postwar European boundaries in a Cold War setting, particularly the division of Germany. The leadership here, and in the West generally, was strenuously criticized for effectively conceding the legitimacy of the Soviet occupation of Eastern Europe. The insertion in the Helsinki Accords of the so-called Basket Three human rights provisions was seen as a kind of meaningless propaganda gift to the West, void of political consequences. We now know, looking back on the Helsinki process, that exactly the reverse was the case. The boundaries that were validated have of course been completely obliterated. Germany is reunified and the peoples of Eastern Europe have achieved self-determination. So, in the course of the life of the Helsinki Accords, Basket Three was much more important than the legitimization of the boundaries.

In one sense, one can say this shows that the struggles of peoples take precedence over the formal decisions and policies of governments and states. From another perspective, one can say that normative expectations become historically relevant when the political context changes and makes them so. Of course, the meaningfulness of the human rights promises embedded in the Helsinki Accords was activated in part by the emergence of the Gorbachev leadership in the Soviet Union that began to practice what these human rights declarations preached. It was also brought alive by the change in orientation of the peace movement in Europe "from hardware to software," after the long struggle against the cruise and Pershing missiles. This struggle was basically lost with the deployment of the cruise and Pershing missiles in the early 1980s, and the peace movement shifted its emphasis to human rights and democracy, both East and West. This was very encouraging to the dissident movements in Eastern Europe; it gave them the political will to challenge the established authority structure. Thus, these two forces created a new political context--and it is the creation of a new political context that makes a shift in the normative context historically significant and decisive.

Another example of this dynamic is especially telling in the setting of our discussion. For many years the moral and legal case against the Vietnam War was very powerfully advanced in this country on a doctrinal level. That case, however, began to be taken seriously only after the Tet offensive in February 1968. In other words, what happened on the ground in Vietnam changed the relevance of the *200 discussion of legal issues, and for the first time mainstream media were interested in hearing the legal arguments of those opposed to the war. Before 1968, it was virtually impossible to gain access to the mainstream media because the political elite in the country had maintained a sufficient consensus that it was not within the domain of legitimate discussion to question the legal and moral basis of U.S. involvement in Vietnam. Once the Tet offensive occurred, however, the political elite was divided, an oppositional part feeling that the costs of the war, its unwinnability and its domestic repercussions were so significant that it was not worth pursuing. Although it was not uniformly agreed upon, it was significantly agreed upon that there was a division among the political elite, and this created an opening for the discussion of normative implications of the policy from various viewpoints.

The same pattern--silence and then voice--is also evident in the debate about the legality of nuclear weapons. The moral and legal case has been there all along, like a virus in the body politic. But what activates that virus? What makes it take political hold? This may seem to many of you to be much too large a digression in a discussion of self-determination as it applies to indigenous peoples; if so, I plead guilty. My justification, however, is that there has been a remarkable degree of normative progress in relation to the definition of the rights of indigenous peoples; there has been a clarification of the core grievance that Howard Berman so clearly expressed in his comments about attaining effective functional control and making participation in the control of all aspects of life a reality.

That normative case has been won in a manner that could not have been anticipated a decade ago. Then, one could not have imagined the United Nations declaring a Year of Indigenous Peoples. One could not have imagined a militant activist in the movement for indigenous peoples receiving the Nobel Peace Prize as Rigoberta Menchu of Guatemala did in 1992. One could not have imagined that the Seville Universal Expo, which began a year earlier as a celebration of Christopher Columbus and the Era of Discovery, would end with the Spanish Prime Minister and King feeling it inappropriate even to mention Columbus in the closing ceremonies because the mood had so decisively shifted.

These developments are very important as a background for understanding the overall circumstance. They do not, however, tell us how to move forward from that remarkable set of developments. Those developments include a substantial shift from the integrationist, assimilationist paternalism of the ILO approach to indigenous peoples. The new approach is a grudging but nevertheless definite acknowledgment that the core of the issue is one of self-determination, and the realization that such self-determination does not necessarily imply, and in most cases does not entail at all, the redrawing of the boundaries of existing sovereign states. It does entail, I think, as Oren Lyons suggested, a need to alter our conception of sovereignty, so that it is associated much more with effective authority over the lives of individuals and peoples, and is considered something that any autonomous political community can, to a substantial degree, possess. The sovereignty of nonstate actors is part of the reality of the future as well as of the vision of a desirable future. It is the only concept that I can see to deal with horrifying ethnic conflicts such as those in Yugoslavia and the former Soviet Union at the present time.

Let me move to my essential conclusion, which is that the movement on behalf of indigenous peoples still faces a very difficult transition; it must find the political paths that lead from doctrinal coherence and persuasive normative arguments to effective implementation. In other words, although we have had this remarkable decade or more of normative achievement, the circumstances of specific peoples *201 around the world continue to be disastrous. There has not, in other words, been a behavioral amelioration corresponding to the normative amelioration. To identify this problem is not to solve it. It is, I think, a challenge to international lawyers concerned with human rights to remember that our commitment is not only to doctrinal elaboration, but also to effective implementation--to changing behavioral patterns, as well as to drafting better instruments. Drafting better instruments may or may not be connected with improving behavior--indeed, it can be used as a way to pacify political movements through deflection.

One has to examine this connection between normative elaboration and the politics of implementation, which are, in my view, both a very local matter related to each concrete set of circumstances, and a matter of great concern to the shaping of what I call global civil society: the emergence of a real consciousness, beyond the territorial state, of commitment to human betterment and sustainable patterns of cohabitation on the planet. And it is as a project of this emerging global civil society that I see the possibility of an effective politics of implementation taking shape. This has occurred in other substantive settings in which results have appeared difficult to achieve, such as efforts to protect Antarctica from destruction, and the environmental movements associated with protecting various endangered species. It is very important to look at these successes in global civil society to discover clues for an effective politics to implement the struggle for self-determination of indigenous peoples being waged so courageously in many settings.