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A Contemporary Definition of the International Norm of Self-Determination

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I. INTRODUCTION

The idea of a principle or right of self-determination is firmly embedded in the global consciousness. As one author has aptly observed, the concept of self-determination "has long been one of which poets have sung and for which patriots have been ready to lay down their lives."[1] Today a multitude of indigenous, ethnic, and other groups have invoked the concept of self-determination in formulating demands against actual or perceived oppression of the status quo.[2] While efforts to achieve some measure of political autonomy are framed in terms of self-determination, so too are movements to install or enhance democratic governance.[3]

Affirmed in the U.N. Charter[4] and other major international legal instruments,[5] self-determination was the normative grounds by which the territories of Africa, Asia, and elsewhere broke the formal bonds of colonialism and became independent states.[6] Although the extent to which self-determination operates as a norm of international law beyond the decolonization context has been a matter of much controversy, it is frequently held that self-determination is a generally applicable norm of the highest order within the international system.[7]

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1. John P. Humphrey, *Political and Related Rights, in* 1 HUMAN RIGHTS AND INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 193 (Theodore Meron ed., 1984).

2. *See generally* MORTON H. HALPERIN ET AL., SELF-DETERMINATION IN THE NEW WORLD ORDER 123-160 app. (1992) (cataloging self-determination movements worldwide).

3. *See Id.*

4. U.N. CHARTER art. 1, ¶ 2.

5. *See infra* notes 16-18.

6. *See Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961). The International Court of Justice recognized self-determination as the basis for the process of decolonization in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), 1971 I.C.J. 16, 31 (June 21) [hereinafter *Namibia Case*]; Western Sahara, 1975 I.C.J. 12, 31-32 (Oct. 16). *See also* AURELIU CRISTESCU, THE RIGHT TO SELF-DETERMINATION: HISTORICAL AND CONTEMPORARY DEVELOPMENTS ON THE BASIS OF UNITED NATIONS INSTRUMENTS, at 21-24, U.N. Doc. E/CN/4/Sub.2/404/Rev.1, U.N. Sales No. E.80.XIV.3 (1981) (Cristescu was Special Rapporteur of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities) [hereinafter U.N. STUDY ON SELF-DETERMINATION].

7. Professors Brownlie and Héctor Gros Espiell, for example, consider self-determination to be *jus cogens*, a peremptory norm. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 515 (4th ed. 1990); Héctor Gros Espiell, *Self-Determination and Jus Cogens, in* U.N. LAW/FUNDAMENTAL RIGHTS 167 (Antonio

In this essay, I attempt to give concrete meaning to the abstract notion of self-determination as a generally applicable international norm. More particularly, my aim is to shed light on the meaning of self-determination as it may concern the multitude of groups worldwide that have invoked the norm. In articulating a conception of self-determination, I deviate from the frequently invoked methodology of dissecting the words of international instruments in which the term self-determination appears. Such attempts have yielded inconsistent or normatively problematic results, or have led to formulations of the norm that do not reflect the actual behavior of relevant international actors.[8] While taking into account the words in written instruments, I focus here primarily on the common ground of normative precepts and patterns of behavior that are fairly associated with the concept of self-determination. Thus, I articulate a norm that is comprised of widely shared values, that accounts for the decolonization movement, and that is reflected in relevant aspects of contemporary life in an increasingly interconnected global community.

I first discuss the character and scope of the international norm of self-determination. I identify the norm to be rooted in core values of freedom and equality, to be within the realm of human rights as opposed to sovereign rights, and to be concerned broadly with individuals and groups as they relate to the structures of government under which they live. I reject conceptions of self-determination that consider the norm to be concerned only with "peoples" in the sense of narrowly defined, mutually exclusive territorial or ethnically homogenous communities.

Next, I articulate the content of the norm, distinguishing the substance of the norm from remedial prescriptions that may follow violations of the norm. I describe the substance of the norm as entailing two elements: First, self-determination entitles individuals and groups to meaningful participation, commensurate with their interests, in episodic procedures leading to the development of or change in the governing institutional order. Secondly, self-determination enjoins the governing institutional order *itself* to be one under which individuals and groups may live and develop freely on a continuous basis. I demonstrate how decolonization was based on remedial prescriptions developed in response to widely recognized

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Cassese ed., 1979). *See also* 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 90 (1986).

8. *See infra* notes 30-37 and accompanying text. *See generally* Deborah Z. Cass, *Rethinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21 (1992).

historical and contemporary violations of the substantive elements of self-determination, and how the international community is capable of promoting self-determination remedies in other contexts.

I conclude by discussing the relevance of the norm of self-determination to attempts at peaceful resolution of the array of contemporary group demands. I argue for a case by case approach which measures group claims against the substantive elements of self-determination and which identifies appropriate remedies where the norm has been violated.

II. THE CHARACTER AND SCOPE OF SELF-DETERMINATION

A. Generally

The concept of self-determination arises within international law's expanding lexicon of human rights, rooted in the idea that all human beings should be equally free to translate their impulses and desires into action.[9] 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.[10] Core human rights values associated with the concept of 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 linked 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."[11]

The term self-determination gained prominence in international political discourse around World War I.[12] President Woodrow Wilson linked the principle of self-determination with Western liberal democratic ideals and the aspirations of European

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9. *See* Edward M. Morgan, *The Imagery and Meaning of Self-Determination*, 20 INT'L LAW & POL. 355, 357-58 (1988).

10. *See, e.g.*, UMOZURIKE O. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 5-11 (1972); DOV RONEN, THE QUEST FOR SELF-DETERMINATION ix (1979).

11. *Namibia Case*, *supra* note 6, at 77-78.

12. *See* UMOZURIKE, *supra* note 10, at 11-12.

nationalists.[13] 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.[14] 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.[15] The International Human Rights Covenants hold out self-determination as a "right" of "[a]ll peoples"[16] as do the African Charter on Human and Peoples' Rights[17] and the Helsinki Final Act.[18]

Historically, international law was concerned only with the rights and duties of independent sovereigns, mostly disregarding the face of humanity beyond the sovereign.[19] Under the modern rubric of

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13. *Id.* at 13-14.

14. *See* VLADIMIR I. LENIN, THE RIGHT OF NATIONS TO SELF-DETERMINATION (Progress Publishers, 4th rev. ed. 7th prtg. 1979) (1947); JOSEPH STALIN, MARXISM AND THE NATIONAL-COLONIAL QUESTION (Proletarian Publishers 1975); *see generally* WALKER CONNOR, THE NATIONAL QUESTION IN MARXIST LENINIST THEORY AND STRATEGY (1984).

15. U.N. CHARTER art. 1, ¶ 2.

16. *International Covenant on Economic, Social and Cultural Rights*, art. 1, ¶ 1, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 360; *International Covenant on Civil and Political Rights*, art. 1, ¶ 1, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc A/6316 (1967), *reprinted in* 6 I.L.M. 368. 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 UN-sponsored international instruments. *See, e.g.*, G.A. Res. 1514, *supra* note 6, ¶ 2; *U.N. Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, princ. V, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. No. A/8028 (1971) [hereinafter *U.N. Declaration on Friendly Relations*].

17. African Charter on Human and Peoples' Rights, art. 20, OAU Doc. CAB/LEG/67/3 Rev. 5, *reprinted in* 21 I.L.M. 59.

18. Final Act of the Conference on Security and Cooperation in Europe, princ. VIII, *adopted* Aug. 1, 1975, Dep't St. Pub. No. 8826, *reprinted in* 14 I.L.M. 1292.

19. The traditional view of international law is reflected, *inter alia*, in LASSA F. L. OPPENHEIM, INTERNATIONAL LAW (Ronald F. Roxburgh ed., 3d ed. 1920); CHARLES C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES (1922). *See also* Tom J. Farer, *The United Nations and Human Rights: More Than A Whimper, Less Than a Roar*, *in* HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 227 (Richard P. Claude & Burns H. Weston eds., 2d ed. 1992) ("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").

human rights, however, international law increasingly is concerned with upholding rights deemed to inhere in human beings individually as well as collectively.[20] 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 international norm of self-determination is properly understood to benefit human beings *as human beings* and not sovereign entities as such.[21] Like all human rights norms, moreover, self-determination is presumptively universal in scope and thus must be assumed to benefit all segments of humanity.[22]

While human beings are the beneficiaries of self-determination, the norm's objects are the institutions of government under which they live. Self-determination is extraordinary among human rights norms in its concern with the essential character of government structures, a concern which 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 re-division of Europe in the wake of the empires' downfall.[23] 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.[24] Also, the international community through the United Nations has declared illegitimate South Africa's governing institutional order, with its entrenched system of apartheid, on grounds of self-determination.[25] In each of

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20. *See generally* BURNS H. WESTON, ET AL., INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSE BOOK (2d ed. 1990); BROWNLIE, *supra* note 7, at 553-602; Richard A. Falk, *Theoretical Foundations of Human Rights*, *in* HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 19, at 31.

21. *See* U.N. STUDY ON SELF-DETERMINATION, *supra* note 6, at 31, ¶ 220 ("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, 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, *supra* note 19, at 175.

22. Burns H. Weston, *Human Rights*, *in* HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 19, at 12, 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").

23. *See* UMOZURIKE, *supra* note 10, at 11-12.

24. *See id.* at 59-95.

25. *See* G. A. Res. 2775, U.N. GAOR, 26th Sess., Supp. No. 29, at 39, U.N. Doc.

these contexts, values linked with self-determination comprised a standard of legitimacy against which institutions of government were measured. As I will discuss below, self-determination concerns both the procedures by which governing institutions develop and the form they take for their ongoing functioning.

B. Implications of the Term "Peoples"

The term "peoples" as used in international instruments in association with self-determination[26] indicates the collective or group context within which the norm operates: the constitution and functioning of the political order. The term can also be viewed as an affirmation of the value of community bonds within and among groups. In its plain meaning, the term "peoples" undoubtedly embraces non-state groups such as the Miskito, the Yanomami, and the Basque as well as groups defined by statehood boundaries like the Nicaraguans, the Brazilians, and the Spanish.[27] The characterization of self-determination as a right of "peoples," however, does not deny the individual as an important beneficiary of the norm. Dov Ronen argues that it is ultimately the individual that matters in the realization of self-determination values:

> When I say that the quest for self-determination is, basically, individual self-determination, I am not positing a goal or making a normative judgment, but observing and interpreting what I believe to be a fact: the most fundamental and necessary human aggregations provide, subjectively, individual (or personal) self-determination. *Individual self-determination, to rule one's self, to control one's own life, is a basic given of the human existence.*[28]

A/8429 (1971); G.A. Res. 3411, U.N. GAOR, 30th Sess., Supp. No. 34, at 35, 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,"* G.A. Res. 3068 , U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1974).

26. *See supra* notes 15-18 and accompanying text.

27. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 871 (9th ed. 1989) (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").

28. RONEN, *supra* note 10, at 55 (emphasis in original). *See also* JOSE MARTINEZ COBO, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, vol. V, ¶ 274, U.N. Doc. E/CN.4/Sub.2/1986/7/add.4, U.N. Sales No. E.86.XIV.3 (1986) (Martinez Cobo was Special Rapporteur to the U.N. Sub-commission on the Prevention of Discrimination and Protection of Minorities) ("The right to self-determination is also a right of individuals, in the sense that every person has the right to self-expression and

That the individual is in some way implicated in values associated with self-determination would seem to hold true pursuant to any modern formulation of those values, including formulations based upon communitarian or collectivist thought.[29]

Many have interpreted the use of the term "peoples" in this connection as restricting the scope of self-determination; the international norm of self-determination is deemed only concerned with "peoples" in the sense of a limited universe of narrowly defined, mutually exclusive communities. Within this framework of understanding, identifying the segments of humanity that qualify as "peoples" is of threshold importance since only such "peoples" are entitled to self-determination.[30] There are two dominant variants of this approach, both of them problematic.

One variant, which generally empowers the status quo, holds that a "people" entitled to self-determination is the whole of a population within the generally accepted boundaries of an independent state or a territory of a classical colonial type.[31] The proposition that self-determination is concerned with the *people* of a state or colonial territory is not inconsistent with the view of self-determination thus far suggested here, and it explains much of international practice including decolonization. The difficulty is in the underlying view that *only* such units of human aggregation—the *whole* of the people of a state or colonial territory—are beneficiaries of self-determination. This conception of the scope of self-

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to fulfill his or her human potential as he or she thinks best").

29. *See generally* WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY 199-237 (1990) (discussing communitarianism).

30. Thus, for example, in discussions within the United Nations and the International Labour Organisation concerning indigenous populations, the issue of whether these groups are entitled to self-determination frequently has revolved around whether or not they are "peoples." *See* S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1, 34 & n. 146 (1991).

31. *See, e.g.*, ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 104 (1963) ("Self-determination refers to the right of the majority within a generally acceptable political unit to the exercise of power"); DAVID J. HARRIS, CASES AND MATERIALS IN INTERNATIONAL LAW 95-96 (3d ed. 1993); *see also* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 91-93 (1979). Typical of this approach, Dr. Higgins embraces the notion that self-determination includes *internal* and *external* aspects: pursuant to external self-determination a state is bound to promote the demise of colonialism and other forms of alien occupation; pursuant to internal self-determination a state is bound to insure that the whole of its people is in control of its own destiny. Rosalyn Higgins, *The Evolution of the Right of Self-Determination: Commentary of Professor Franck's Paper*, 3-4 (1983) (unpublished manuscript for General Course in Public International Law, Hague Academy of International Law) (on file with author).

determination's concern renders the norm inapplicable to the vast number of contemporary claims of sub-state groups that represent many of the world's most pressing problems in the post-colonial age.[32] And by effectively denying *a priori* a right of self-determination to groups that in many instances passionately assert it as a basis for their demands, this limited conception may serve to inflame tensions. Moreover, as I will argue, an effectively state-centered conception of self-determination is anachronistic in a world in which state boundaries mean less and less.

Proponents of a second variant restricting the term "peoples" accept the premise of a world divided into mutually exclusive, territorial communities. This view, however, does not necessarily define the "peoples" entitled to self-determination by the status quo of recognized political geography, but rather by ethnographic characteristics embellished by accounts of historical community and suppressed territorial sovereignty.[33] This view, frequently invoked by self-determination claimants, partially explains the re-division of Europe at the end of World War I along ethnographic lines.[34] However, the view is problematic in that it overstates the value accorded ethnicity and historical community within the international system outside the highly charged political context of post World War I Europe. The right of self-determination affirmed in the decolonization context did not attach to groups by virtue of ethnic

32. *See* Higgins, *supra* note 31, at 4-5 (holding that sub-state groups—*i.e.* "minorities" as opposed to "peoples"—are not entitled to self-determination under international law).

33. This view has roots in the ethnonationalist thought of the early part of this century, see W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 30-31 (1977), and is reflected in much of the literature advocating self-determination for ethnically distinctive indigenous communities. *See, e.g.*, Rachel San 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 Clinebell & Jim Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFF. L. REV. 669, 707, 710-714 (1978).

34. *See generally* OFUATEY-KODJOE, *supra* note 33, at 80-84 (discussing the application of allied policy at the close of World War I).

make up or historical sovereignty.[35] And the international community has not in recent times generally responded favorably to self-determination claims simply on the strength of ethnic cohesion or accounts of historical sovereignty.[36]

More fundamentally, both variants of the narrow conception of the term "peoples" are flawed in their limited underlying vision of a world divided into mutually exclusive "sovereign" territorial communities. This vision corresponds with the traditional Western liberal theoretical perspective that limits humanity to two perceptual categories—the individual and the state—and which views states according to the post-Westphalian model of mutually exclusive spheres of territory, community, and centralized authority.[37] The limited focus on "peoples," accordingly, is largely inattentive to the multiple, overlapping spheres of community, authority, and interdependency that actually exist in the human experience. Humanity effectively is reduced to units of organization defined by a perceptual grid of statehood categories; the human rights character of self-determination is thereby obscured as is the relevance of self-determination values in a world that is less and less state-centered.

C. Beyond Statehood Categories

At the same time local communities are gaining greater autonomy and new states are emerging, impulses toward greater integration in all spheres of life abound. Virtually at the same time the Baltic Republics gained independence from the former Soviet Union, for example, the Republics became part of the United Nations and its expanding web of authority and cooperation,[38] and Baltic

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35. *See* CHRISTOPHER C. MOJEKWU, *Self-Determination: The African Perspective in* SELF-DETERMINATION: NATIONAL, REGIONAL AND GLOBAL DIMENSIONS, *supra* note 21, at 221, 228-29. (Yonah Alexander & Robert A. Friedlander eds., 1980) (explaining that U.N. policy was to pursue the independence of the colonial territories without regard to pre-colonial political units based primarily on ethnic affinity or tribal affiliation). *Cf. Western Sahara Case*, *supra* note 6, at 45-49, 64-68 (while acknowledging that pre-colonial political communities linked peoples of the Western Sahara with adjoining Morocco and Mauritania through historical spheres of influence and allegiance, the Court held that such "legal ties" should not influence the application of the principle of self-determination in the decolonization of the Western Sahara).

36. *See generally* HALPERIN ET AL., *supra* note 2, at 27-46 (discussing international responses to self-determination claims in the post-cold war era).

37. S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, 1989 HARVARD INDIAN LAW SYMPOSIUM 1, 197-198 (1990).

38. *Three Baltic States Approved as U.N. Members*, L.A. TIMES, Sept. 13, 1991, at A7.

leaders pronounced intentions to enter into trade alliances with Nordic countries[39] and to seek eventual membership in the European Community.[40] As the Miskito Indians of Nicaragua achieve greater political autonomy, they simultaneously secure greater representation in the Nicaraguan government;[41] and they attempt to devolve authority to the village level[42] while opening their isolated region to more commerce and political linkages with the outside world.[43] And in the years following the death of its long-time dictator Francisco Franco, Spain devolved substantial authority to autonomous communities,[44] while moving toward greater

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39. *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*, CHI. TRIB., 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).

40. *New Europe Begins Taking Shape in Giant Common Market*, AGENCE FRANCE PRESSE, Oct. 22, 1991, *available in* LEXIS, Nexis library, AFP file.

41. In 1987 the Nicaraguan government adopted its Statute of Autonomy for the Atlantic Coast Regions of Nicaragua (Law No. 28, Sept. 7, 1987) [hereinafter Nicaraguan Statute of Autonomy], which established semi-autonomous regional governing bodies. In 1990, the people of the autonomous regions elected delegates to the regional governing bodies as well as to the national legislature. *See* Mario Rizo Zaledón, *Identidad Etnica y Elecciones: El Caso de la RAAN*, 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. S. James Anaya, *Indian Nicaraguan Struggle Continues*, 18 AMERICANS BEFORE COLUMBUS 2 (1990) at 1 (published by the National Indian Youth Council).

42. Pursuant to the Nicaraguan Statute of Autonomy, *supra* note 41, 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) (on file with author); 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) (on file with author).

43. Interview with Brooklyn Rivera (Apr. 1992).

44. *See* HANNUM, *supra* note 7, at 263-79 (discussing the system of regional autonomous governments in Spain, particularly as regards the Basque Country and Catalonia).

integration with Europe and the rest of the world.[45]

In his article in this volume, Duane Champagne discusses the traditional forms of political organization of the Iroquois Confederacy and the Creek Indians of North America.[46] Professor Champagne points out that these groups, typically of Native American tribes, do not represent singular political or national identities for the people they encompass.[47] He observes that both the Iroquois and the Creek people traditionally had—and to great extent continue to have—segmentary political structures defined by kinship, geography, and function.[48]

The political philosophy for the Iroquois Confederacy, or the Haudenosaunee, is expressed in the Great Law of Peace, which describes a Great Tree with roots extending in the four cardinal directions to all peoples of the earth; all are invited to follow the roots to the tree and join in peaceful coexistence and cooperation under its great long leaves.[49] The Great Law of Peace promotes unity among individuals, families, clans, and nations while upholding the integrity of diverse identities and spheres of autonomy.[50] Similar ideals have been expressed by leaders of other indigenous groups in contemporary appeals to international bodies.[51] Such conceptions outside the mold of classical Western liberalism would appear to provide a more appropriate foundation for understanding humanity, its aspirations, and its political development than the model of a world divided into exclusive, monolithic communities, and hence a more appropriate backdrop for understanding the subject matter of self-determination.

To understand self-determination as concerned only with narrowly defined, mutually exclusive "peoples" is to diminish the relevance of self-determination values in a world that is in fact evolving differently. Although the history of the world is of both integration and disintegration, the overriding trend appears now to

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45. *See* Elizabeth Pond, *Spain Lays Political and Economic Groundwork for EC Membership*, CHRISTIAN SCI. MONITOR, Nov. 24, 1980, at 10.

46. 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).

47. *Id.* at 112-13.

48. *Id.* at 112-14.

49. *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).

50. *Id.*

51. *See, e.g.*, *Living History: Inauguration of the International Year of the World's Indigeous People*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 165 (1993) (statements by indigenous leaders).

be one of enhanced interconnectedness. By this observation I am not foretelling the demise of diverse cultures or local authority, rather I am referring to the fact of increasing linkages, commonalities, and interdependencies among people, economies, and spheres of power. Group challenges to the political structures that engulf them appear to be not so much claims of absolute political autonomy as they are efforts to secure the integrity of the group while rearranging the terms of integration or rerouting its path. Even where secession and independent statehood is achieved it is but a step in an ongoing process of global interconnectedness.

Any model of self-determination that does not take into account the larger context of multiple patterns of human association and interdependency is at best incomplete (and is more likely distorted). To be treated as a generally applicable human rights norm relevant to modern trends and conditions, the international norm of self-determination must account for the multiple and overlapping spheres of human association and political ordering that actually exist. Appropriately understood, therefore, self-determination benefits individuals and groups throughout the spectrum of humanity's complex web of interrelationships and loyalties, and not just groups defined by existing or perceived sovereign boundaries; and in a world of increasingly overlapping and integrated political spheres, self-determination concerns human beings in regard to the constitution and functioning of all levels and forms of government under which they live.

III. THE CONTENT OF SELF-DETERMINATION

I have identified the international norm of self-determination as grounded in values of freedom and equality, and as applying in favor of human beings in regard to the institutions of government under which they live. In essence, self-determination entails a standard of governmental legitimacy based upon core precepts of human freedom and equality. Despite the divergence over time and space in models of governmental legitimacy, relevant international actors at any given point in time share a nexus of opinion and behavior about the minimum conditions of human freedom and equality for the constitution and functioning of government. The content of the international norm of self-determination may be found in that more or less identifiable nexus.

As stated at the beginning of this essay, self-determination is widely acknowledged as the normative grounds for the decolonization process. Given the prominence of decolonization in the international practice of self-determination, there has been a tendency to define self-determination by reference to the specific

prescriptions developed in that context,[52] which for most of the subject territories meant procedures resulting in independent statehood.[53] Thus it has been common to link self-determination with a right to independent statehood.[54] The proposition that self-determination means an international legal entitlement of independent statehood, however, can only be taken seriously if one accepts that self-determination only applies to "peoples" in the narrow sense of groups defined by existing state boundaries or colonial territories; the international community has not otherwise generally recognized attributes of statehood or promoted the emergence of new states. I have already discussed the difficulties encountered by such a narrow conception of the scope of self-determination.

If, however, self-determination fundamentally entails a standard of governmental legitimacy that benefits all segments of humanity, a different interpretation of decolonization ensues: Decolonization procedures did not themselves embody the *substance* of the norm of self-determination; rather they were measures to *remedy* a sui generis deviation from the norm that existed in the prior condition of colonialism. Self-determination precepts define a standard in the governing institutional order, a standard with which colonialism was at odds and with which other institutions of government also may conflict.

The substantive content of the international norm of self-determination, therefore, inheres in the precepts by which the international community held colonialism illegitimate and which apply universally to human beings in regard to their governing institutions. The *substance* of the norm—the precepts that define a standard of governmental legitimacy—must be distinguished from the *remedial* prescriptions that may follow a violation of the norm, such as those developed to undo colonization.

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52. This tendency is reflected, for example, in the U.N. STUDY ON SELF-DETERMINATION, *supra* note 6, at 46-50.

53. *See id.* at 48 (discussing the "Law of Decolonization"); OFUATEY-KODJOE, *supra* note 33, at 97-147 (discussing decolonization procedures in the United Nations and general international practice).

54. HANNUM, *supra* note 7, at 39 (observing that "[o]nce the 'self' has been identified, it is abundantly clear that full independence is considered to be the 'normal' result of the exercise of self-determination"). Accordingly, much of the contemporary literature concerning self-determination is focused on the question of when a group is entitled to secede and form an independent state. *See, e.g.*, Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991); Gregory Marchildon & Edward Maxwell, *Quebec's Right of Secession Under Canadian and International Law*, 32 VA. J. INT'L L. 583 (1992).

A. Substantive Aspects

The substance of the international norm of self-determination by which the international community held colonialism illegitimate, and which applies more generally in regards to the political order, comprises two elements. First, in what I will call its *constitutive* aspect, self-determination enjoins the episodic procedures by which the governing institutional order comes about. Secondly, in what I will call its *ongoing* aspect, self-determination applies continuously to enjoin the form, content, and functioning of the governing order itself.

1. Constitutive Self-Determination

In self-determination's constitutive aspect, core values of freedom and equality translate into a requirement that individuals and groups be accorded meaningful participation, commensurate with their interests, in procedures leading to the creation of or change in the institutions of government under which they live. Constitutive self-determination does not itself dictate the outcome of such procedures; but where they occur it imposes requirements of participation 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 which state that peoples "freely determine their political status" by virtue of the right of self-determination.[55] It is not possible to identify with precision 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. When European powers proceeded to divide among themselves the territories of Africa, Asia, and elsewhere and impose their administrative structures over them, they did so with little or no regard to the wishes of the indigenous inhabitants.[56] Lands not inhabited by "civilized" peoples—that is, peoples with European

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55. *International Covenant on Economic, Social and Cultural Rights*, *supra* note 16, art. 1, ¶ 1; *International Covenant on Civil and Political Rights*, *supra* note 16, art. 1, ¶ 1. The full text of art. 1, ¶ 1 of the Covenants is quoted at note 16, *supra*. *See also U.N. Declaration on Friendly Relations*, princ. V, *supra* note 16.

56. For a description of the procedures for acquiring title adopted by European states in the colonization of Africa, see MALCOLM SHAW, TITLE TO TERRITORY IN AFRICA 31-58 (1986).

characteristics of social and political organization—were deemed vacant, or *terra nullius*, and hence open to occupation by the "civilized."[57] At the Berlin Conference of 1885, which has been dubbed a meeting to moderate the "scramble for Africa," the Europeans agreed to respect the interests of the indigenous inhabitants.[58] This agreement, however, was pursuant to a philosophy that viewed the indigenous Africans, like other non-Europeans, as inferior and as needing "civilization."[59] Concern for the interests of the indigenous inhabitants thus translated more into justifying colonization than securing their consent to colonial rule.[60] The European powers did in many instances negotiate treaties with native rulers in order to secure territory or limited rights in territory.[61] However, the treaties, often negotiated under duress,[62] were never assumed to be the sole or sufficient basis for the full extension of colonial rule.[63]

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57. This view is evident in the works of late 19th-early 20th century legal theorists. *See, e.g.*, JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 136-45 (1894); OPPENHEIM, *supra* note 19, at 134-35, 383-84 (3d ed. 1920); *see also* W. E. HALL, A TREATISE ON INTERNATIONAL LAW 47-49 (P. Higgins ed., 8th ed. 1924). *See generally* GERRIT W. GONG, THE STANDARD OF "CIVILIZATION" IN INTERNATIONAL SOCIETY (1984).

58. *See* L. H. Gann, *The Berlin Conference and Humanitarian Conscience, in* BISMARCK, EUROPE AND AFRICA 321, 329-30 (Stig Forster et al. eds., 1988); THE SCRAMBLE FOR AFRICA: DOCUMENTS ON THE BERLIN WEST AFRICAN CONFERENCE AND RELATED SUBJECTS 1884-1885, at 291 (R. J. Gavin & J. A. Betley eds., 1973).

59. *See* General Act of the Berlin Conference, art. 6, *reprinted in* THE SCRAMBLE FOR AFRICA, *supra* note 58, at 291 (encouraging the promotion of the "blessings of civilization"). *See generally* PAUL G. LAUREN, POWER AND PREJUDICE: THE POLITICS AND DIPLOMACY OF RACIAL DISCRIMINATION 32-43 (1988) (discussing European ideologies that rendered non-white races inferior).

60. This is reflected in Snow's early twentieth century narrative concerning the "founding of the independent state of the Congo." ALPHEUS H. SNOW, THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS 129-154 (1974 ed.) (1919). *See also* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 59-225 (1991) (explaining justifications invoked by Europeans for colonization).

61. *See* C. H. Alexandrowicz, *The Role of Treaties in the European-African Confrontation in the Nineteenth Century, in* AFRICAN INTERNATIONAL LEGAL HISTORY 27 (A.K. Mensah-Brown ed., 1975); SHAW, *supra* note 56, at 38-45.

62. SHAW, *supra* note 56, at 42-43. *See also* MARK F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 175 (1926) (noting that treaties with "a backward people" were not disregarded on the grounds that they were negotiated under duress).

63. *See* Island of Palmas Case (Neth. v. U.S.), 2 INT'L ARB. AWARDS 831 (1928) (the tribunal held the Netherlands to have established sovereignty to the Island of Palmas on the basis of effective occupation and display of authority over the island; treaties of cession with native rulers were mere "facts" to be taken into account).

In the modern era of self-determination, the international community has rejected the theoretical grounding for colonization.[64] This rejection, together with a virtual absence of ongoing patterns of colonization in the classical sense, indicates that the world community now holds in contempt the imposition of government structures upon people, regardless of their social or political make-up.[65] The world community now appears generally to accept President Woodrow Wilson's admonition, made in the context of elaborating upon 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."[66]

Today, procedures toward the creation or territorial extension of governmental authority are regulated by self-determination precepts requiring minimum levels of participation on the part of all affected, as evident in the context of European integration. The steps of institution building within the umbrella of the European Community have been taken through processes of consultation involving government representatives who are presumed to be acting not simply on behalf of their state governments, but more fundamentally on behalf of the *people* of the countries they represent.[67] The Treaty of Rome,[68] the basic constitutive instrument of the Community, and the recently debated Maastricht Treaty,[69] which would enlarge the Community's competencies, have been subject to review by national legislatures and in some instances,

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64. *See* LAUREN, *supra* note 59, at 150-65 (discussing government statements at the San Francisco Conference which gave rise to the U.N. Charter); *Declaration on the Granting of Independence to Colonial Countries and Peoples*, *supra* note 6 (declaring, *inter alia*, that "[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights"); U.N. Centre for Human Rights, *The Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States: Report of a Seminar*, at 8, U.N. Doc. HR/PUB/89/5 (1989) ("The concept of '*terra nullius*,' 'conquest' and 'discovery' as modes of territorial acquisition are repugnant, have no legal standing, and are entirely without merit or justification").

65. Accordingly, under modern conceptions of *terra nullius*, territory is not legally vacant if inhabited by human beings even if they are not organized as a "sovereign" entity. *See Western Sahara Case*, *supra* note 6, at 39-40 (finding the Western Sahara not to be *terra nullius* at the time of its colonization by Spain, a finding not premised on the character of the political organization of the territory).

66. President Woodrow Wilson, Address to Congress (May 1917), *quoted in* UMOZURIKE, *supra* note 10, at 14.

67. For background on the development of the European community, see P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 1-14 (5th ed. 1990).

68. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY.

69. Maastricht Treaty, *reprinted in* 31 I.L.M. 247.

popular referenda.[70] Furthermore, the territorial expansion of the jurisdiction of the European Community—that is, the expansion of community membership—has occurred only following similar procedures of broad consultation involving all concerned.[71]

Self-determination precepts also are apparent in constitutive procedures of disintegration. In a recent survey of international practice, Professor Thomas Franck concludes that the international system does not provide a freestanding right of secession.[72] As recent events tell, nonetheless, political movements may well result in the breakup of states, and it is increasingly apparent that in such instances the international community expects the outcome to be minimally grounded in democratic procedures that can be said to reflect the aspirations of the people concerned.[73] International recognition of states emerging from the dissolution of the former Soviet Union, Yugoslavia, and Czechoslovakia followed referenda or other expressions of popular support by the constituents of the

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70. The Maastricht Treaty requires Member States to ratify according to their respective constitutional requirements. *Id.* art. R. *See, e.g., The Maastricht Bill: Sometime, Never?,* THE ECONOMIST, Mar. 13, 1993, at 64 (discussing British parliamentary procedures for ratifying the Maastricht treaty); *European Union: Germany and Greece Kick Off Maastricht Ratification*, EUR. REP., July 24, 1992, at No. 1788 (discussing German and Greek procedures for ratification).

71. *See, e.g.,* Paul Lewis, *Common Market to Discuss Entry of New Members*, N.Y. TIMES, Dec. 3, 1984, at A1; Edward Schumacher, *For Spain and Portugal, Isolation is About to End*, N.Y. TIMES, July 8, 1985, at A6.

72. *See* Thomas M. Franck, Post Modern Tribalism and the Right to Secession 20 (draft of a chapter for the General Course in Public International Law to be given at the Hague Academy of International Law, 1993) (on file with author) ("The 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"). *See also* HALPERIN ET AL., *supra* note 2, at 27-44 (discussing international responses to recent secessionist efforts). Compare *infra* notes 108 and accompanying text on secession as a potential remedy in limited contexts of persistent violation of the substantive elements of self-determination.

73. Thus, the "common position on the process of recognition" adopted by the European Community reads in part:

> The [European] Community and its member States confirm their attachment to the principles of the Helsinki 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. 17, 1991, *reprinted in* EUROPE, Dec. 18, 1991, at 3-4 (emphasis added).

nascent independent states.[74] While popular support for a secessionist movement is not alone sufficient for the world community to act in favor of the movement, it is at least a necessary condition. The ensuing conflicts in the former Yugoslavia attest to the volatility of political dissolution and the need for the international community to moderate disintegrative procedures more aggressively and carefully, particularly those procedures which involve discrete groups with antagonistic interests.[75]

Minimum standards of participation may additionally be discerned in the context of domestic constitutional reform. Mechanisms of broad constituent consultation and participation are the norm in the efforts at constitutional reform that have occurred throughout the globe in recent years. A noteworthy example is the recent constitutional reform effort in Canada.[76] Various interests were accorded participation in the development of a complex reform package. Representatives of Canada's aboriginal peoples and of Quebec, communities that saw themselves particularly affected by the outcome, took on especially active roles in the reform

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74. The Czeck and Slovak Republics gained widespread recognition among states and membership in the United Nations and other international organizations immediately upon their emergence as independent states on January 1, 1993. *Czechs and Slovaks Join U.N.*, N.Y. TIMES, Jan. 9, 1993, at 4. For background on the political developments leading to the break up of Czechoslovakia, see Katarina Mathernova, *Czecho? Slovakia: Constitutional Disappointments*, 7 AM. U.J. INT'L L. & POL'Y 471 (1992). The breakup of the Czechoslovakian Federation followed supporting votes by the elected parliamentary delegates of both the Czech and Slovak Republics. This procedure quite arguably was not optimal insofar as it did not involve a popular vote as required by the Czechoslovakian Constitution; initiatives for a popular referendum were rejected. Nonetheless, the procedures apparently were sufficient from the standpoint of the people concerned, given their apparent acquiescence in and even enthusiasm for the decision ultimately made. For criticism of the procedures leading to the dissolution of the Czechoslovakian federation, see, e.g., Adrian Bridge, *Few Cheers as Two New States are Born*, INDEPENDENT (London), Dec. 31, 1992, at 14; Eric Bourne, *Public Doubts Mark Eve of the Dissolution of Czech-Slovak State*, CHRISTIAN SCI. MONITOR, Dec. 15, 1992, at 5; Andrew Cohen, *Leaders Failed Their People with a 'Velvet Divorce,'* FIN. POST, Jan. 8, 1993, at 9. For a chronology of European Community, CSCE, and U.N. actions concerning Yugoslavia, see 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).

75. *See generally* Hurst Hannum, *Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 57 (1993); Danilo Türk, *Remarks Concerning the Breakup of the Former Yugoslavia*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 49 (1993).

76. For background on the recent constitutional reform effort in Canada, see *The Constitutional Debate: A Straight Talking Guide for Canadians*, MACLEANS, July 6, 1992, at 1.

negotiations.[77] Ultimately, the reform package was submitted to Canadian voters in a popular referendum. The voters, including a majority of aboriginal and Quebecois voters, rejected the proposal and sent the process back to square one, as was their prerogative pursuant to precepts of self-determination.[78] Although complaints abound on the part of some interests that their participation in the reform process has been inadequate,[79] and indeed some complaints may well be justified, it is evident that the underlying premise has been to accord *some* meaningful level of participation to all individuals and groups concerned commensurate with their interests. Especially under scrutiny for its treatment of aboriginal peoples, the Canadian government made a point of reporting to international human rights bodies its inclusion of aboriginal representatives in the constitutional talks.[80]

Similarly, the government of Colombia has reported to international bodies the participatory mechanisms used to achieve the 1991 reform of its constitution, in addition to reporting the substance of the reforms.[81] Highlighted in its report to the U.N. Working Group on Indigenous Populations were mechanisms to allow representatives of indigenous communities meaningful participation in the reform effort.[82]

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77. *See id.* Dalee Sambo discusses the participation of aboriginal peoples' representatives in the Canadian constitutional reform effort in her article in this volume. Dalee Sambo, *Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 13 (1993). *See also* 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).

78. *See* Clyde H. Farnsworth, *Canadians Reject Charter Changes*, N.Y. TIMES, Oct. 27, 1992, at A1; Jack Aubry, *Native Voters Said No Despite Historic Gains*, OTTAWA CITIZEN, Oct. 28, 1992, at A1.

79. For example, although the major aboriginal peoples organizations, including the Assembly of First Nations, participated prominently in the constitutional reform effort, Mikmaq representatives complained that the participation accorded them was not sufficient.

80. *See, e.g., Statement by the Observer Delegation of Canada*, U.N. Working Group on Indigenous Populations, at 4-5 (July 28, 1992, Geneva) (Statement by Gerald E. Shannon) (on file with author).

81. *See, e.g., Declaración de Colombia sobre la Situación de la Promoción y Protección de los Derechos de los Indígenas, Tema 5 de la Agenda de la Subcomisión de Prevención de Discriminaciones y Protección a las Minorías*, Statement to the U.N. Working Group on Indigenous Populations, at 82 (July 30, 1991, Geneva) (on file with author).

82. *Id.* at 2.

2. Ongoing Self-Determination

Apart from its constitutive aspect, which applies at discrete episodes of institutional birth or change, self-determination applies continuously in what I have designated its *ongoing* aspect. Ongoing self-determination requires a governing institutional 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."[83] In this respect as well, the international community's condemnation of colonialism represents a minimum standard.

At the height of the decolonization movement in the 1950s and 1960s, the political theory that supported colonialism had long been discredited and had faded in light of the major contending political theories of the time: Western democracy, Marxism, and variations thereof. Despite the divergence of mid-twentieth century political theory that fueled the polarization of geopolitical forces until recently, there was coincidence in precepts of freedom and equality upon which the international community viewed colonialism as an oppressive form of governance, independently of its origins.[84] Whether viewed through the lens of Marxism or Western democratic theory, the colonial structures were regarded negatively for depriving the indigenous inhabitants of self-government in favor of administration ultimately under the control and for the benefit of the peoples of the colonizing states.[85] (Hence the term "non-self-governing territories" was appropriated to designate the beneficiaries of decolonization.)[86]

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83. *International Covenant on Economic, Social and Cultural Rights*, *supra* note 16, art. 1; *International Covenant on Civil and Political Rights*, *supra* note 16, art. 1. For the full text of article 1, para. 1 of the Covenants see *supra* note 16. *See also U.N. Declaration on Friendly Relations*, *supra* note 16.

84. Compare, for example, Stalin's anti-colonial statements in STALIN, *supra* note 14, at 314-22, with the policy prescriptions of United States leaders as summarized in OFUATEY-KODJOE, *supra* note 33, at 99-100.

85. *See generally* OFUATEY-KODJOE, *supra* note 33, at 99-128; LAUREN, *supra* note 59, at 205-06.

86. Chapter XII of the U.N. Charter concerns obligations of member states with regard to "Non-Self-Governing Territories," which territories were generally understood at the time of the Charter's adoption to include territories of a classical colonial type. *See* OFUATEY-KODJOE, *supra* note 33, at 104-113. The criteria for identifying non-self-governing territories subject to UN-promoted decolonization procedures were set forth in G.A. Res. 1541 (XV), U.N. GAOR, 15th Sess., Supp. No. 14,

The normative nexus by which the international community deemed classical colonialism an illegitimate form of governance also has operated against systems of apartheid, most notably South Africa's. As previously noted, the international community has deemed South Africa's system of racial segregation and white minority rule to violate the self-determination of the black majority.[87]

Two significant developments in dominant conceptions about the requirements of governmental legitimacy have emerged since the height of the decolonization movement, developments which have expanded the common denominator of global opinion that defines the normative content of self-determination particularly in its ongoing aspect. One is the dramatic decline of Marxism, accompanied by a worldwide movement toward an ever greater embrace of non-authoritarian democratic institutions.[88] Especially since the demise of the Soviet Union, this democratic movement is reflected in developments worldwide[89] and has been promoted through the United Nations and other international institutions.[90] Accordingly, there is a budding scholarly literature articulating emerging rights of "political participation" and "democratic governance" under international law.[91] Closely linked with modern precepts of democracy is the idea that, consistent with the values promoted by patterns of political integration, decisions should be made at the most local level possible.[92] Thus, for example, an important part of

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at 29, U.N. Doc. A/4684 (1960).

87. *See supra* note 25 and accompanying text.

88. *See generally* Jonathan R. Macey & Geoffrey P. Miller, *The End of History and the New World Order: The Triumph of Capitalism and the Competition Between Liberalism and Democracy*, 25 CORNELL INT'L L.J. 277 (1992).

89. *See* Mark Falcoff, *The Democratic Prospect in Latin America*, WASH. Q., Spring 1990; ELIE ABIEL, THE SHATTERED BLOC: BEHIND THE UPHEAVAL IN EASTERN EUROPE (1990); Carol Lancaster, *Democracy in Africa*, FOREIGN POL'Y, Winter 1991-92; SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991).

90. *See* David Stoelting, *The Challenge of UN-Monitored Elections in Independent Nations*, 28 STANFORD 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"); HALPERIN ET AL., *supra* note 2, at 63 (discussing Organization of American States resolutions deploring authoritarian coups against elected officials in Haiti and Peru).

91. *See, e.g.*, HALPERIN ET AL., *supra* note 2,.at 420-424; 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).

92. Emphasis within Western democratic theory on the importance of local government within a larger political framework is longstanding. *See* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 4-17 (1988)

the Russian Federation's reform movement is the devolution of authority to its constituent parts.[93] And while Europe moves toward greater integration, the principle of "subsidiarity" has taken hold to guard against unnecessary centralization of power that might come at the expense of local units of governance.[94] As already noted, indigenous communities of North America and elsewhere traditionally have maintained decentralized systems of governance.[95]

A second major development is the ever greater embrace of notions of cultural pluralism. Contemporaneous with the early periods of the decolonization movement, previously existing and newly emergent states held out assimilation and rights of full citizenship as means of bringing the members of culturally distinctive groups within self-determination's fold of freedom and equality.[96] The ideal model was that of the culturally homogenous independent nation-state. To the extent the international community valued cultural diversity, it favored European cultural minorities within European states, but even then only with minimal results.[97]

Over the last several years the international community increasingly has come to value and promote the integrity of diverse cultures, including non-European cultures. This tendency is manifested *not* in a growing sentiment in favor of independent statehood for each of the world's cultural or ethnic groups, but rather in a discernible trend in the world's multiple systems of governance toward the accommodation of diverse cultural

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(discussing the dominant strands of political theory adopted by the framers of the U.S. Constitution). For a British perspective, see DILYS M. HILL, DEMOCRATIC THEORY AND LOCAL GOVERNMENT (1974). *See generally* FEDERALISM AND DECENTRALIZATION: CONSTITUTIONAL PROBLEMS OF TERRITORIAL DECENTRALIZATION IN FEDERAL AND CENTRALIZED STATES (Thomas Fleiner-Gerster & Silvan Hutler eds., 1987) (Reports from the Regional Conference of the Int'l Assoc. of Constitutional Law in Murten, Switzerland, 1984).

93. *See* David K. Shipler, *Four Futures for Russia*, N.Y. TIMES, Apr. 4, 1993, at § 6, at 28.

94. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, THE PRINCIPLE OF SUBSIDIARITY: COMMUNICATION OF THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT (1992) (on file with author); *See also European Union: Commission Report on Subsidiarity*, EUR. REP., Nov. 3, 1992, no. 1808, *available in* LEXIS, Nexis Library, EURRPT File (summarizing EC Commission report).

95. *See supra* notes 46-51 and accompanying text.

96. "Nation-building" was a euphemism for policies of breaking down competing ethnic or cultural bonds. RODOLFO STAVENHAGEN, THE ETHNIC QUESTION: CONFLICTS, DEVELOPMENT, AND HUMAN RIGHTS 5-6, U.N. Sales No. E.90 III.A.9 (1990).

97. *See* HANNUM, *supra* note 7, at 49-53 (discussing the "ultimate failure" of the post World War I minority rights treaties).

identities.[98] This break from the decolonization era model of state-centered homogeneity is promoted by the international community through its emboldened system of minority rights protections[99] and the burgeoning body of international norms to protect the integrity and survival of indigenous communities.[100]

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98. *See* Anaya, *supra* note 30, at 33-34 (discussing a "worldwide trend . . . [in the] use of constitutional, legislative, and other official measures to reorder governing institutional matrixes in response to indigenous peoples' demands"); HANNUM, *supra* note 7, at 247-79 (discussing developments in Scandinavian countries and in Spain).

99. At its forty-seventh session in 1992 the U.N. General Assembly adopted the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities*, G.A. Res. 47/135, U.N. GAOR, 47th Sess., U.N. Doc. A/47/135 (1992). The declaration is essentially an elaboration upon article 27 of the *International Covenant on Civil and Political Rights*, *supra* note 16, which provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Article 27 has been the grounds for decisions by the U.N. Human Rights Committee favorable to demands of cultural survival. *See, e.g.*, *Ominayak and the Lubicon Lake Band v. Canada*, Hum. Rts. Comm., U.N. GAOR, 45th Sess., Supp. No. 40, Annex IX, U.N. Doc. A/45/40 (1990) (cultural rights guarantees extended to protect Indian band's subsistence activities associated with woodlands); *Kitok v. Sweden*, Hum. Rts. Comm., U.N. GAOR, 43rd Sess., Supp. No. 40, Annex VII.G, ¶ 9.2, U.N. Doc. A/43/40 (1988) (article 27 extends to economic activity "where that activity is an essential element in the culture of an ethnic community").

For a description of the minority rights regimes developing within the framework of the Conference on Security and Cooperation in Europe and within the framework of the Council of Europe, see HALPERIN ET AL., *supra* note 2, at 57-60. *See also* PATRICK THORNBERRY, MINORITIES AND HUMAN RIGHTS LAW (1991).

100. In 1989 the International Labour Organisation adopted its Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989 (entered into force Sept. 5, 1990). Ambassador España-Smith of Bolivia, the chair of the ILO Conference Committee that drafted Convention No. 169, described the thrust of the Convention as follows:

> The proposed Convention takes as its basic premise respect for the specific characteristics of the differences among indigenous and tribal peoples in cultural, social and economic spheres. It consecrates respect for the integrity of the value, 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 lifestyles as long as this is freely and voluntarily chosen.

International Labour Conference, Provisional Record 31, 76th Sess., at 31/4 (1989).

Many have viewed the minority and indigenous rights regimes as existing apart from the concept of self-determination. This view, however, does not fully appreciate the relationship between cultural integrity precepts, which are central to the minority and indigenous rights regimes, and notions of freedom and equality implicit in the concept of self-determination. If the cultures of diverse groups are not valued, neither are their distinctive ways of life or interactive patterns which extend well into the social and political realms.[101] Under such a perceptual gloss, freedom and equality may be considered satisfied by simple inclusion of the groups' individual members as participants in political systems based on traditional Western liberal conceptions of democracy (or, until recently, Marxist proletarianism). But once diverse cultural groupings are acknowledged and valued, their associational patterns and community aspirations become factors that must be reflected in the governing institutional order if self-determination notions are to prevail.

Accordingly, the contemporary global trend is toward securing for cultural groups and their members contextually appropriate accommodations in the governing order. A number of groups, particularly indigenous peoples, are pursuing spheres of autonomy over a range of policy and administrative matters, while at the same time enhancing their effective participation in all decisions affecting them left to the larger institutions of government.[102] Although there

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Indigenous peoples' rights have been the focus of considerable discussion within the United Nations, particularly its Working Group on Indigenous Populations, a sub-organ of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities. For background on the U.N. focus on indigenous peoples, 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. Since 1985 the U.N Working Group on Indigenous Populations has been drafting, in consultation with member states and indigenous peoples' representatives, a declaration on the rights of indigenous peoples for adoption by the U.N. General Assembly. *See id.* at 676-82. Although there is still a divergence of views about the precise language of the declaration, states have joined indigenous rights advocates in expressing widespread agreement with core precepts of indigenous cultural survival. *See Analytical Compilation of Observations and Comments Received Pursuant to Sub-Comm'n Resolution* 1988/18, U.N. ESCOR Comm. on Hum. Rts. 41st Sess., Agenda Item 13, U.N. Doc. E/CN..4/Sub.2/1989/33/Add.1-3 (1989) (synthesizing government and non-governmental organization comments to the Working Group); Report of the Working Group on Indigenous Populations on its Tenth Session, U.N. Doc. E/CN.4/Sub.2/1992/33 (1992). *See generally* Anaya, *supra* note 30 (discussing new and emergent conventional and customary norms concerning indigenous peoples).

101. On the relationship between culture and social and political spheres, *see generally* STAVENHAGEN, *supra* note 96.

102. *See* Anaya, *supra* note 30, at 32-33 & nn. 140-45 (discussing developments in Nicaragua, Colombia, Canada, Australia, Philippines, Norway, Bangladesh, the former

is no one formula of structural accommodation in this global trend—and indeed the very fact of the diversity of cultures and their surrounding circumstances belies a singular formula—the underlying and increasingly widespread premise is that of promoting the free development of diverse cultures.

The norm of self-determination, therefore, promotes an ongoing condition of freedom and equality among and within peoples in relation to the institutions of government under which they live, a condition today substantially defined by precepts of democracy and cultural pluralism. The norm thus understood is reflected in Colombia's 1991 statements to the U.N. Working Group on Indigenous Populations as well as in its recent third periodic report to the U.N. Human Rights Committee concerning compliance with its obligations under the self-determination provision of the International Covenant on Civil and Political Rights. The Colombian government reported on its newly revised constitution, emphasizing its guarantees of democracy as well as pointing out aspects of the constitution's political-administrative subdivision of the country calculated to promote the free development of indigenous communities and their cultures.[103]

In a world of interconnected and overlapping spheres of authority, self-determination can be seen to empower human beings with regard to all levels of governance, from the most local to the most encompassing. The democratic institutions of states and their political subdivisions are complemented by the substantially democratic procedures ordained for decision-making within the United Nations and other international institutions.[104] Today's international institutions remain substantially state-centered, thus limiting the opportunity for direct participation in international governance by non-state interests and groups.[105] The United Nations and other major international bodies, however, increasingly allow for some level of participation by non-state groups in respect to issues about which they are particularly interested.[106] Traditionally,

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Soviet Union, and Honduras).

103. *See Declaración de Colombia, supra* note 81; HIGGINS, *supra* note 31, at 4.

104. For a description of decision-making procedures in the United Nations and other major intergovernmental bodies, see D. W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS (4th ed. 1982).

105. *See generally* CHIANG PEI-HEING, NON-GOVERNMENTAL ORGANIZATIONS AT THE UNITED NATIONS: IDENTITY, ROLE, AND FUNCTION (1981); PHILLIP TAYLOR, NON-STATE ACTORS IN INTERNATIONAL POLITICS (1984).

106. For example, indigenous peoples and their organizations have participated actively in discussions within the United Nations concerning the development of an indigenous rights declaration and related topics. *See* Williams, *supra* note 100, at 676-85. Under article 71 of the U.N Charter, non-governmental organizations (NGOs) may

individuals and sub-state groups are presumed represented in international organizations by their respective states. As the international community becomes increasingly attentive to non-state-centered patterns of association and interests, self-determination precepts will promote increasing opportunity for non-state groups to participate in decision-making in international settings.

In summary, the international norm of self-determination entails a universe of precepts extending from core values of freedom and equality and applying in favor of human beings in regard to the institutions of government under which they live. In its *constitutive* aspect, the norm entitles individuals and groups to meaningful participation in episodic procedures leading to the creation of or change in the governing institutional order. In its *ongoing* aspect, self-determination requires that the governing institutional order itself be one in which individuals and groups live and develop freely on a continuous basis.

B. Self-Determination Remedies

Where substantive elements of the norm of self-determination are violated, a remedy should be forthcoming. The prescriptions promoted through the international system to undo colonization, while not themselves equal to the norm of self-determination, were contextually specific *remedial* prescriptions arising from colonialism's deviation from the generally applicable norm. As we have seen, the violation of the norm was in both self-determination's constitutive and ongoing aspects. Although the violation of constitutive self-determination in the colonial context was mostly an historical one, it was linked to a contemporary condition of oppression including the denial of ongoing self-determination.

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obtain consultative status with the U.N. Economic and Social Council, and pursuant to such status NGOs have gained increasing influence in U.N. deliberations. *See generally* PEI-HEING, *supra* note 105. The U.N. Working Group on Indigenous Populations allows all indigenous groups to participate in its deliberations, regardless of official U.N. status. Similarly, the International Labour Organisation relaxed its rules of procedures in order to allow indigenous groups limited direct participation in the development of ILO Convention No. 169. *See* Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY U. L. REV. 677, 686-87 (1990). In general, the ILO procedures depart notably from the mostly state-centered models of decision-making of the United Nations and other international organizations. The ILO employs a "tripartite" system of governance such that not all the delegates to the ILO governing organs are representatives of governments; voting delegates also include representatives of worker organizations and representatives of employer groups. *See* BOWETT, *supra* note 104, at 141.

Significantly, the remedy for this infraction of self-determination did not entail a reversion to the status quo prior to the historical patterns of colonization but rather to the creation of an altogether new institutional order viewed as appropriate to "implementing" self-determination. Ongoing self-determination—a governing institutional order in which people may freely develop—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.[107] 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.

To the extent the international community is generally concerned with the promotion of self-determination precepts, and as it expands its common understanding about those precepts, it may identify other contextual deviations from self-determination and promote appropriate remedies. 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 remedy in limited contexts (as opposed to a generally available "right") where substantive self-determination for a particular group cannot otherwise be ensured.[108]

The case of the Indians of the Atlantic Coast region of Nicaragua illustrates the kind of remedial measures promoted by the international system in the post-colonial era. The Atlantic Coast region was incorporated within the Nicaraguan state by a series of nineteenth century events devoid of minimal procedures of

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107. G.A. Res. 1541, *supra* note 86, at princ. IV. *See* OFUATEY-KODJOE, *supra* note 33, at 115-28 (concluding that G.A. Res. 1541 is generally reflective of international practice in the application of the principle of self-determination to the colonial territories).

108. *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 35, at 193, 204 (stating that secession may properly follow a persistent pattern of human rights abuses against a group); *see also* ALLEN 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).

consultation with the indigenous population.[109] 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.[110] 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.[111] 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, especially 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 Human Rights Commission of the Organization of American States, asserting violations of their human rights including the right to self-determination.[112] Effectively equating self-determination with decolonization procedures, the Commission found that the Indians were not self-determination beneficiaries.[113] However, defying its own formalism, 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.[114] The Commission thus suggested the elaboration of

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109. The history of the Atlantic Coast region is summarized in JORGE JENKINS MOLIERI, EL DESAFÍO INDIGENA EN NICARAGUA: EL CASO DE LOS MISKITOS 33-114 (1986); Theodore Macdonald, *The Moral Economy of the Miskito Indians: Local Roots of Geopolitical Conflict*, *in* ETHNICITIES AND NATIONS: PROCESSES OF INTERETHNIC RELATIONS IN LATIN AMERICA, SOUTHEAST ASIA, AND THE PACIFIC 107, 155-22 (Remo Guidieri et al. eds., 1988).

110. *See* MOLIERI, *supra* note 109, at 175-229 (discussing the social and economic conditions in the Atlantic Coast region at the time of the 1979 revolution in Nicaragua).

111. *See* John N. Burnstein, 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).

112. OAS 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*, Inter-Am. C.H.R., OAS Doc. No. OEA/Ser.L/V/II.62, doc. 10 rev.3 (1983), OEA/Ser.L/V/II.62, doc. 26 (1984).

113. *Id.* at 78-81.

114. *Id.* at 1-7, 81.

a new political order for the Indians[115]—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."[116]

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.[117] 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 illustrates the kind of context-specific remedies that may be promoted through the international community in response to a self-determination claim.

Sovereignty precepts form a backdrop and potentially limiting factor for the elaboration of self-determination remedies within the international system. The limitations of the state-centered doctrine of sovereignty are essentially twofold. First, 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 essentially within the domestic jurisdiction of any state."[118] Second, sovereignty upholds a substantive preference for the status quo of political ordering through its corollaries protective of state territorial integrity and political unity.[119]

Under modern 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.[120] In a global community that

115. *Id.* at 81-82.

116. *Id.* at 82.

117. *See* Macdonald, *supra* note 109, at 107.

118. U.N. CHARTER art. 2, ¶ 7.

119. These corollaries also are reflected in the charter. *See id.* art. 2, ¶ 4 (stating that "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . .").

120. *See* HANNUM, *supra* note 7, at 19-20. *See also Report of the Secretary General:*

remains organized substantially by state jurisdictional boundaries, sovereignty principles continue, in some measure, to advance human values of stability and ordered liberty. Thus in both its traditional and modern formulations, sovereignty principles 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. The proliferation of a floor of human rights norms that are deemed applicable to all states as to their own citizens and the decolonization remedy itself both demonstrate the yielding of sovereignty principles to human rights imperatives in modern international law. Ideally, then, sovereignty principles and human rights precepts, including the norm of self-determination, work in tandem to promote a stable and peaceful world. Where there is a trampling of self-determination, however, the presumption in favor of non-intervention, territorial integrity, or political unity of existing states may be offset to the extent required by an appropriate self-determination remedy.[121]

IV. CONCLUSIONS

The foregoing portrays a norm of self-determination that benefits all segments of humanity, by virtue of their humanity. In a diverse yet interconnected world with overlapping spheres of authority and community, all are entitled to participate equally in the constitution and development of the governing institutional order under which they live and, further, to live continuously within a governing order in which freedom abounds. Self-determination includes the right of cultural groupings to the political institutions necessary to allow them to exist and develop freely according to their distinctive characteristics. It is in this way that we may understand self-determination to be a right of "all peoples" without formalistic attempts to narrowly define the term "peoples." Rather the term

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An Agenda for Peace; Preventive Diplomacy, Peacemaking and Peacekeeping, U.N. GAOR, 47th Sess., Agenda Item 10; U.N. Doc. A/47/277 (1992).

121. *Cf. U.N. Declaration on Friendly Relations*, *supra* note 16, princ. V (which includes the following along with the affirmation of the principle of self-determination: "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).

"peoples" is appropriately understood as simply denoting the collective character of the human impulse toward self-determination and as affirming the value of community bonds, notwithstanding traditional categories of human organization associated with statehood or sovereignty.

To say that literally all peoples have the right to self-determination, however, is not to say that all are entitled to a self-determination remedy. A remedy is only possible if there is a violation of the norm. In the context of classical colonialism, a remedial regime was developed to address the particular dysfunction widely identified with that genre of political ordering. Whether in any other situation there is a violation of self-determination, and if so, the particular remedy that might be forthcoming, must be determined according to the relevant circumstances. What is called for, then, is a case-by-case approach to address the multitude of contemporary group demands that invoke the principle or right of self-determination.

Admittedly, like many fundamental juridical principles or doctrines, the international norm of self-determination as articulated here is lacking in specificity and hence is of limited utility for prescribing results in the abstract. Nonetheless, the norm has a core of certainty about it, particularly in the framework it provides for evaluating group demands and for promoting peaceful solutions in concrete situations. This framework is in the following inquiries and attendant considerations.

1. Has there been a violation of self-determination?

This inquiry has two parts:

1(a). *Is there a violation of self-determination in its constitutive aspect?* More particularly, the question is whether the claimant group or its members have been denied meaningful participation in discrete episodes that have given rise to or changed the governing institutional order under which they live. An extreme form of such denial is where a government has extended its rule over an inhabited territory without regard for the wishes of the people already living in the territory. In such a situation, whether or not there was a prior sovereignty in the territory is not necessarily a controlling factor; what matters is that human beings, however organized (or not organized), were not sufficiently consulted. This of course was the experience of peoples living under classical colonialism, and it is also characteristic of the past of other groups now asserting self-determination, including groups now denominated in international discourse as "indigenous" and some European minorities who were unwitting victims of territorial transfers. The proximity in time to a violation of constitutive self-

determination is a factor in assessing the weight to be accorded the violation. In general, the farther away in time, the less consequential the violation is for contemporary life. This presumption diminishes, however, in the degree to which the victims or their progeny remain differentiated from others by inequitable conditions traceable to the past wrong or have persisted in protesting the violation.

1(b) *Is there a violation of self-determination in its ongoing aspect*? This inquiry focuses on the contemporary day-to-day life of the claimant group and its members, as related to the form and functioning of the governing institutional order under which they live. Relevant here are the stories, which are usually central to self-determination claims, about oppressive government that impedes the ability of a group to develop freely in all spheres of life—stories of discrimination, suppression of democratic participation, and cultural suffocation. Ideally the life of any group of people should be governed by truly democratic institutions that maximize local decision-making and that appropriately reflect the group's character and cultural preferences. Culture in this context should be understood to mean more than narrow categories of language, religion, ritual, art, or philosophy. Culture may also include a complex web of interrelationships, land use patterns, and institutions that extend into political and economic spheres.

2. If there has been an infraction of self-determination, what is the appropriate remedy?

The goal in fashioning an appropriate remedy is to eliminate any existing institutional impediment to the continuous realization of self-determination values and to undo any current inequities resulting from past deprivations of self-determination. Remedies are to be determined according to the particular circumstances, including circumstances defined by cultural patterns as well as patterns of group interdependency, and with deference to the preferences of the aggrieved group. A wide range of possibilities exists for developing within a remedial context a new institutional order within which all concerned can be said to be in control of their own destiny. Only in limited circumstances would secession be a cure better than the disease, and even then it would most likely be only a partial step toward the full realization of self-determination values.

Considerations of state sovereignty will regulate the extent to which the international community will become involved in identifying a self-determination violation and in promoting an appropriate remedy. But where a violation of self-determination lingers unchecked by decision-makers within the domestic realm,

the international community cannot remain idle. Just as international procedures developed to undo the scourge of colonization, international procedures must exist to ensure that groups shown still to be particularly vulnerable to oppresive and unresponsive governance are able to enjoy self-determination. And precepts of state territorial integrity and political unity will properly constrain a self-determination remedy only to the extent that such precepts ultimately promote a peaceful, stable, and humane world. If there is to be a new world order, the international community cannot be deaf to the plea for self-determination.