
Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples

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Abstract

This paper reports on the current negotiations on the draft Declaration on the Rights of Indigenous Peoples, taking place under the auspices of the UN Commission on Human Rights. The draft Declaration's provision for an indigenous peoples' right of self-determination provides an opportunity for the world community to articulate more clearly what is meant by the right to self-determination outside traditional contexts. Part 2 of the paper describes the international legal context in which representatives of indigenous peoples make claims to self-determination, focusing on indications that a requirement of self-determination is representative government. Part 3 of the paper develops the view that self-determination should accordingly be considered as a conceptual composite incorporating provision for political participation, autonomy, choice of community, and negotiated self-determination. From this model of self-determination will flow political structures and measures which specifically take into account the particular identity and situations of indigenous peoples. Should negotiations progress, and the United Nations General Assembly eventually adopt a Declaration on the Rights of Indigenous Peoples, the author considers that it would be likely to include a provision on self-determination in such terms. In this way, a provision on indigenous peoples' self-determination could make a valuable contribution to international law.

1 Introduction

Indigenous peoples' situations within the countries where they live, including within Europe, are often addressed under international law as human rights issues, including as minority rights issues. Representatives of indigenous peoples, however, also stake a

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claim to 'self-determination', as a foundation for all the human rights to which they are entitled. 'Self-determination' is the idea of a community's right to control its own future, and thus physically to survive and prosper to the fullest extent possible. A community's power of 'self-determination' is perceived as a crucial aspect of its identity, and so also, in holistic terms, of its health and survival. When the phrase 'self-determination' is part of a community's political lexicon it therefore becomes a very powerful expression, and carries great hope for the birth of physical changes in a community's circumstances.

This paper reviews the question of indigenous peoples' self-determination in the light of discussions in the UN Working Group on the Draft Declaration on the Rights of Indigenous Peoples, set up by the Commission on Human Rights in 1995. The paper takes the view that indigenous peoples may indeed be entitled in law to self-determination. If this entitlement becomes a right recognized in the Declaration on the Rights of Indigenous Peoples, the international legal understanding of self-determination outside traditional contexts stands to be clarified in the process. The issue of indigenous peoples' self-determination should be considered in this broad light.

Part 2 below describes the international legal context in which representatives of indigenous peoples make claims to self-determination. Part 3 identifies a number of starting points for further discussion of indigenous peoples' self-determination. The paper argues that self-determination as established under international law can be understood to require representative government. This in turn requires genuine avenues for political participation by individuals and by communities on the basis of their distinct identities. We must begin to consider self-determination as a complex conceptual composite addressing these issues as they relate to the functioning of societies.

Article 3 of the draft Declaration on the Rights of Indigenous Peoples reads:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.¹

The text is the same as Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, with the replacement of 'All peoples' by 'Indigenous peoples'. Apart from that one change, the draft Article consists of accepted language on the rights of peoples to self-determination. The reference to self-determination is a product of intense discussions with focused input from representatives of indigenous peoples.

The text of the draft Declaration was developed over a 10-year period by the United Nations Working Group on Indigenous Populations (WGIP), a group of five experts chaired by Professor Erica Irene Daes. Indigenous people travelled to Geneva every year to attend the WGIP sessions and to contribute to work on the draft Declaration. The draft Declaration includes a right to self-determination largely because representatives of indigenous peoples participating in this process emphasized that they placed

¹ UN Doc. E/CN.4/Sub.2/1994/2.

great importance on such a right. When the WGIP completed its work on the draft Declaration in 1994, the Commission on Human Rights (CHR) set up an intersessional working group to elaborate a draft Declaration on the Rights of Indigenous Peoples, taking into account the WGIP draft.² As a working group of the CHR, the group's membership consists of governments, although a unique procedure was set up to enable indigenous peoples' representatives to participate in an observer capacity.

The drafting process offers to international law an opportunity to explore and develop the legal concept of self-determination so that it becomes closer to ideas of 'self-determination' in the community, including as conceived by representatives of indigenous peoples attending the intersessional working group of the CHR. The challenge lies in understanding how strongly felt ideas of what is meant by 'self-determination' can be reconciled with a legal provision for self-determination in a Declaration dealing with the rights of indigenous peoples.

2 The Development of Self-determination in International Law

As Koskenniemi has observed, attempting to identify consistency in the application of self-determination is extraordinarily difficult.³ We must accept that in different situations self-determination has had different meanings. The language of self-determination has been employed in certain specific contexts: the self-determination of dependent or colonial peoples and of peoples under alien domination or foreign military occupation; the self-determination of racial groups suffering oppression in the nature of apartheid; and the ongoing self-determination of the whole population of a state. The last of these categories is particularly significant. Self-determination requires states to be governed by representative means. Accordingly, a government's policies should reflect the nature and interests of both the population of the state as a whole and of the peoples who are part of the population. The processes of self-determination considered in Part 3 below should facilitate the adoption of policies which are appropriate and successful for different peoples in states, including indigenous peoples.

Inclusion of the 'self-determination of peoples' in the UN Charter indicates the significant place the idea of 'self-determination' takes in the consciousness of international society. Self-determination appears in Articles 1 and 55 of the Charter. United Nations Special Rapporteur Aureliu Cristescu carried out a broad-ranging review of the historical and current development of self-determination in 1981. Cristescu noted that, according to the advice of the UNCIO Secretariat, the term 'peoples' was used in the phrase 'self-determination of peoples' in the UN Charter because it was in common usage in this context and no other term seemed

² CHR Resolution 1995/32, 3 March 1995.

³ Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', 43 *ICLQ* (1994) 241, at 249.

appropriate. ‘Peoples’ was considered to be a comprehensive term which could include ‘nations and States’.⁴ Cristescu also reached the conclusion that, apart from the UNCIO Secretariat’s advice:

it will be found that there is no accepted definition of the word ‘people’ and no way of defining it with certainty. . . There is no text or recognized definition from which to determine what is a ‘people’ possessing the right in question.⁵

Yet the idea that the reference to ‘peoples’ in the Charter could include ethnic groups within states and, specifically, indigenous peoples has always been around. The Belgian representative at the Charter negotiations later wrote that at the time the Charter was negotiated:

No one proposed that in the future provisions of a general scope would extend only to the territories traditionally considered as colonies or protectorates, and that the indigenous populations of the American, African and Asian States would from that time on be excluded from these provisions.⁶

The Charter provisions offer an umbrella under which an increasingly broad range of international legal understandings about self-determination take shelter. However, the references to self-determination in the Charter are general in nature and do not provide any detail about how it is to be implemented.

On the face of it, nor does self-determination’s history as an international legal concept used in the context of decolonization greatly assist. However, underlying issues in decolonization, including a people’s self-identification as a group and its degree of control over political structures and processes, may remain relevant, as can be seen from the discussion in Part 3 below.

The Declaration on the Granting of Independence to Colonial Countries and Peoples was adopted by the UN General Assembly on 14 December 1960, in Resolution 1514. The second operative paragraph set down the text later used in common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The fifth operative paragraph of Resolution 1514 stated that:

Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

As is well known, the following day, 15 December 1960, the General Assembly also adopted Resolution 1541, which dealt with non-self-governing territories and the

⁴ Aureliu Cristescu, UN Special Rapporteur, ‘The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments’, UN Doc. E/CN.4/Sub.2/404/Rev.1, para. 45 (author’s translation).

⁵ *Ibid.*, at para. 269.

⁶ Van Langenhove, ‘Le Problème de la protection des aborigènes aux Nations Unies’, 89 *Recueil des Cours* (1956) 321, at 404.

implementation of Chapter XI of the Charter. The Resolution was entitled 'Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter'. Resolution 1541 focused on territories which were geographically separate and ethnically or culturally distinct from the country administering them. Principle VI of the Resolution stated that:

A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

- (a) Emergence as a sovereign independent State;
- (b) Free association with an independent State; or
- (c) Integration with an independent State.

Although in precise terms their implementation is differently described in Resolutions 1514 and 1541, in practice the concept of self-government and the principle of self-determination have each blended into the development of the other.⁷

Self-determination as understood in the particular context of decolonization accounts for governments' concerns that recognizing a group's right to self-determination may legitimize secession. International law on the territorial integrity and political unity of states should, as a general matter, pre-empt such concerns from a strictly legal point of view.⁸ Yet there is an uneasy relationship between international law on the territorial integrity of states and the political reality when secession does occur. It is easy to understand that even though international law respects the territorial integrity of states, that may not remove all anxiety for governments where secessionist moves are a real possibility in political terms. However, it is quite clear that the right of self-determination as described in the context of decolonization is not intended to be a right to which indigenous peoples would be entitled in separation from the rest of the population of the territories they inhabit.

The 1966 Human Rights Covenants and the 1970 Friendly Relations Declaration provide a context, however, in which a right of self-determination which could be claimed by indigenous peoples begins to take a more particular and meaningful shape. As referred to above, common Article 1(1) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights 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.

⁷ This is reflected in the 1970 Friendly Relations Declaration, referred to below, which states that: "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that People." See also the *Western Sahara* Advisory Opinion, ICJ Reports (1975) 12, at 31–36, and *Oppenheim's International Law* (R. Jennings and A. Watts eds, 9th ed., 1992) 285.

⁸ See operative paragraph 6 of Resolution 1514 and the safeguard clause in the 1970 Friendly Relations Declaration, referred to below. In respect of particular cases, international law on the legality of secession should be consulted.

During negotiations on Article 1, there was considerable concern about the lack of clarity surrounding which ‘peoples’ were being referred to in Article 1(1) and the nature of their right. The vagueness of draft Article 1, and especially the term ‘peoples’, was the main explanation invoked for the negative votes cast on it by Australia, Belgium, Canada, Denmark, France, Luxembourg, the Netherlands, New Zealand, Sweden, Turkey and the UK.⁹ Australia, the UK and the Netherlands specifically suggested deleting the text ‘All peoples shall have the right of self-determination’, which had been proposed by the General Assembly in 1952. There were other proposals, for the provision to be put into the preamble, or a separate protocol, or a third, separate covenant, or indeed a declaration. New Zealand expressed concern that a possible result might be that the Human Rights Committee was confronted with problems of the same magnitude as those before the Security Council.¹⁰ The result of all the deliberations was, however, the provision in Article 1(1) which adopts the text in the second operative paragraph of Resolution 1514.

Article 1(3) refers specifically to non-self-governing and trust territories, and it is apparent that the right of self-determination described in the Article was intended to refer to the populations of those territories. There is no guidance in the Article about what other groups of people could be entitled to the right of self-determination, or how it can be implemented. Concerning the content of the right to self-determination, states’ representatives specifically addressed in the drafting process whether self-determination could be interpreted as a population’s right to democracy. However, ‘democracy’ was a contentious issue in the negotiations. Agreement was not reached on interpreting self-determination specifically as democracy or equating it directly with representative government and political participation. The US, the UK, Greece, Denmark, New Zealand and a number of developing countries put forward the view that self-determination should afford a right to be free from an authoritarian regime. Western states’ representatives made a number of arguments for rights of political participation and the need for governments to be representative of their people which are not reflected in the final text of Article 1.

In the text of the 1966 Human Rights Covenants, we are therefore faced with little advance on the previous texts in terms of light cast on how indigenous peoples’ self-determination can be understood in international law. However, the discussions of the negotiators at the time the Covenants were being developed, as referred to above, and the commentary of the UN Human Rights Committee in more recent times, discussed below, lead us a little further. They take us towards an interpretation of Article 1 of the Covenants dealing with internal governance, and questions of the functioning of groups within states. This line of authority can be used to argue for governments adopting understandings of self-determination which focus on

⁹ UN Doc. A/C.3/SR.676 (1955) 262. According to Duursma, the US had already decided it would not be signing the Covenant, and voted against the Article on the basis instead that prompt, adequate and effective compensation was not provided for in Article 1(2). Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (1996) 27.

¹⁰ UN Doc. A/C.3/SR.649 (1955) 124. See also the discussion below of admissibility before the Human Rights Committee of communications concerning Article 1.

guaranteeing avenues for participation in public policy-making and implementation, including through degrees of autonomy in relevant areas.

The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations includes among its seven principles 'the principle of equal rights and self-determination of peoples'. In respect of this principle, the language from the second operative paragraph of Resolution 1514 is reiterated and there is direct reference to both colonialism and alien domination as instances where self-determination should be promoted. Probably the most often-cited part of the Friendly Relations Declaration in discussions on draft Article 3 of the draft Declaration on the Rights of Indigenous Peoples is the so-called 'safeguard' clause in the Friendly Relations Declaration. The 'safeguard' clause reads:

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 as described above and *thus* possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.¹¹

A particularly significant aspect of this clause is the importance it attaches to representative government as an indicator of compliance with the principle of self-determination. Commentators have suggested that the principle of self-determination may no longer be restricted to a right which is exercised once, at the point when colonial government comes to an end, but may extend to a continuing right of a people to be governed by a representative government. The Friendly Relations Declaration 'safeguard' clause anchors this perspective, and the views on self-determination of the UN Human Rights Committee, referred to below, also support such an understanding of self-determination.

Text proposed by the United States in the course of negotiations on the safeguard clause would have provided a clearer guide for interpreting self-determination as involving a requirement of representative government:

The existence of a sovereign and independent State possessing a representative Government, effectively functioning as such to all distinct peoples within its territory, is presumed to satisfy the principle of equal rights and self-determination as regards those peoples.¹²

Other states were not prepared to accept this proposal and the representative government phrase in the 'safeguard' clause as it was finally adopted was a compromise. The text adopted nevertheless tells us that representative government is seen as a requirement of self-determination, without specifically eclipsing the other entitlements self-determination confers upon peoples in territories which have not yet gained independence or which are subject to foreign occupation.

According to one view, the reference to 'race, creed and colour' in the savings clause could be considered a list of the types of group who must be properly

¹¹ Emphasis added.

¹² UN Doc. A/AC.125/L.75 (15 September 1969). The United Kingdom also put forward a similar proposal.

represented if a government is to be considered to be acting in accordance with the principle of self-determination.¹³ In considering this possible interpretation, it is helpful to consider the drafting history of the clause. The 'race, creed and colour' formula was agreed upon because it was previously accepted language from UN Resolution 1514. Subsequently, when the 1993 Vienna Declaration on Human Rights took up the Friendly Relations Declaration 'safeguard' clause wording, it was modified to read 'without distinction of any kind' instead of referring to 'race, creed or colour'.¹⁴ Taking into account this history, the non-discrimination clause probably operates simply as a general prohibition on discrimination in governance. We should not conclude too hastily, therefore, that it is possible to argue for indigenous peoples' rights of self-determination from the basis of the reference to 'race' in the 'safeguard' clause. Nor can indigenous peoples' self-determination necessarily be considered by analogy with the situations of overtly institutionalized racial oppression in the 1970s and 1980s in South Africa and Southern Rhodesia.¹⁵

On balance, probably the most robust and productive argument in respect of indigenous peoples' self-determination is that the content of an indigenous peoples' right to self-determination under international law can be explored through further consideration of self-determination's requirement of representative government.¹⁶ This exploration ought to encompass those understandings of self-determination which incorporate requirements of representative government and effective avenues of political participation for all citizens and groups within states. From this model of self-determination should flow political structures and measures which specifically take into account the particular identity and situations of indigenous peoples.

The consideration given to issues of self-determination by the UN Human Rights Committee supports an open-minded approach to the issues involved in indigenous peoples' self-determination. The Human Rights Committee has increasingly supported the rights of states' populations to political pluralism and a representative government, and has addressed these issues under Article 1 of the International Covenant on Civil and Political Rights, as well as under Article 25 of the Covenant. The Committee addresses self-determination in virtually every examination it conducts of a state party to the Covenant.¹⁷ Self-determination is considered to have many aspects and is in effect variously addressed as: (i) a right of a minority group within a state; (ii) a right of the population of a state as a whole; and (iii) a right of the population of a non-self-governing territory. In its 1984 General Comment on self-determination, the Committee encouraged states to include in their reports under the Covenant information on the performance of their obligations under each

¹³ Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995).

¹⁴ Vienna Declaration and Programme of Action, June 1993, [ST/]DPI/1394, para. 2.

¹⁵ On this question, see Iorns, 'Indigenous Peoples and Self-Determination: Challenging State Sovereignty', 24 *Case Western Reserve Journal of International Law* (1993) 165.

¹⁶ Much the same conclusion, with respect to minorities, is reached by Wright in 'Minority Groups, Autonomy, and Self-Determination', 19 *Oxford Journal of Legal Studies* (1999) 605.

¹⁷ Higgins, 'Postmodern Tribalism and the Right to Secession, Comments', in C. Brolmann, R. Lefeber and M. Zieck (eds), *Peoples and Minorities in International Law* (1993) 29, at 31.

paragraph of Article 1, including describing ‘the constitutional and political processes allowing the exercise of the right’.¹⁸

The Committee’s General Comment on Article 25 recorded its understanding of the relationship between Article 1 and Article 25 as follows:

The rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1(1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs.¹⁹

The Committee has declined to consider communications in relation to Article 1 of the International Covenant on Civil and Political Rights, on the basis that the Covenant’s first Optional Protocol deals only with individuals’ claims of violation of their rights as individuals.²⁰ The Committee also made this position clear in its General Comment on Article 27. The Committee observed that:

The Covenant draws a distinction between the right to self-determination and the rights protected under Article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant.²¹

The Committee has, however, declared admissible in part²² the subject matter of a communication filed in respect of the New Zealand Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The signatories of the communication claim that the legislation denies them the right freely to determine their political status and interferes with their right freely to pursue their economic, social and cultural development.²³ The Human Rights Committee’s views on this communication will be particularly relevant to the issues being discussed in the Working Group on the Draft Declaration on the Rights of Indigenous Peoples, as the communication concerns Maori interests. The Committee may break new ground on the subject of indigenous peoples’ self-determination.

The Committee has also begun to comment on indigenous peoples’ self-determination when considering states’ periodic reports under the Covenant. The Committee criticized Canada’s fourth periodic report for its brevity and absence of reference to ‘the concept of self-determination as applied by Canada to the aboriginal peoples’.²⁴ The

¹⁸ 12 April 1984.

¹⁹ 12 July 1996.

²⁰ Communication No. 167/1984, *Lubicon Lake Band v. Canada*; Communication No. 413/1990, *Appellate Body et al. v. Italy*.

²¹ HRI/GEN/1/Rev 1.

²² *Tangiora v. Wellington District Legal Services Committee* [2000] 1 NZLR 17, at 18, lines 24–25.

²³ *Ibid.*, at lines 19–24.

²⁴ UN Doc. CCPR/C/79/Add.105, paras 7–8; for Canada’s report, see UN Doc. CCPR/C/103/Add.5. See also the UN press release on consideration of Canada’s report, where Cecilia Medina Quiroga (Chair of the Committee) observed that ‘the issue of the aboriginal community and its link to land did not seem to have been given enough consideration, in accordance with articles 1 and 27 of the Covenant’. Press Release HR/CT/530, 1,738th Meeting (PM), 26 March 1999; and see the Committee’s General Comment on Article 1, *supra* note 18, para. 5.

Committee's concluding observations on the report also drew attention to aboriginal peoples' land and resources issues in reference to Article 1 of the Covenant.

3 Political Participation, Autonomy, Choice of Community, and Negotiated Self-determination

Part 2 of this paper submitted that self-determination requires representative government. Part 3 now fleshes out the picture, referring to a number of additional sources from which concepts of self-determination in international law may be derived for the purposes of understanding such self-determination. These concepts are by nature closely related to one another. It is submitted that this approach to self-determination is a canvas on which an indigenous peoples' right of self-determination can be drawn.

The CHR Working Group on the Draft Declaration on the Rights of Indigenous Peoples meets annually, and met most recently in late October 1999. Progress on the draft Declaration has been extremely slow so far and there is a very broad range of issues covered by the draft Declaration. Many of the issues in the draft text are interrelated, and some participants have said they see all the rights the Declaration would recognize as connected to a right or concept of self-determination. Most participants are conscious that the draft provision on self-determination is one of the most challenging aspects of the proposed Declaration.²⁵ Some governments are taking a relatively open approach to the issues concerned and, assuming that it is possible to reach an eventual conclusion to the negotiations, the Declaration can be expected to contribute to developing international law with respect to self-determination.

An underlying theme of this paper is the acknowledgment of the considerable tension between international legal definitions of self-determination and powerful ideas of 'self-determination' both inside and outside international law. This tension characterizes the issue of including a right to self-determination in the draft Declaration. The draft Declaration will be an international legal document and governments will seek to craft its provisions to take account of that, including with respect to self-determination. This means that they will analyze proposals for draft Article 3 in the light of existing international law on self-determination. Yet there seems to remain a hope that the draft Declaration's provision on self-determination will transcend the nature of the Declaration in which it is contained.²⁶ Representatives of indigenous peoples have been reluctant to consent to any change to the draft provision. Ideas of what may be encompassed by 'self-determination' are strongly held, and the view has been expressed that the holder of the right should define the

²⁵ See e.g. the opening statement of the United States at the 1999 session of the CHR intersessional working group.

²⁶ Philip Allott has described self-determination situations as struggles of desires, power and ideas. Allott, 'Self-Determination — Absolute Right or Social Poetry?', in Christian Tomuschat (ed.), *Modern Law of Self-Determination* (1993) 177, at 177–178. Allott also discusses the transvaluation of self-determination, the idea of elevating it to a higher status within international law. He concludes that self-determination is not by nature suitable for this.

content of the right. This paper acknowledges these very powerful conceptions of 'self-determination', while remaining conscious that it is desirable also that the project of the Declaration on the Rights of Indigenous Peoples be brought to completion. Ground for compromise needs to be identified. This paper contends that fertile ground is available, if we turn our minds to the nature of representative government.

Part 2 of this paper drew attention to the interpretation of self-determination as requiring representative government, with respect in particular to the 1966 Human Rights Covenants and the 1970 Friendly Relations Declaration. Discussions at the working group on the draft Declaration have specifically referred to issues of political participation.²⁷ Canada stated in 1999 that:

self-determination is now seen by many as a right which can continue to be enjoyed in a functioning democracy in which citizens *participate in the political system and have the opportunity to have input in the political processes that affect them*.²⁸

Norway also included in its statement in 1999 the view that within the context of existing independent and democratic states:

the right to self-determination includes the right of indigenous peoples *to participate at all levels of decision-making in legislative and administrative matters* and the maintenance and development of their political and economic systems.²⁹

Representative government by definition requires effective avenues for political participation by all individuals and groups subject to a particular government. In this respect, there is only a fine line between the requirements of Article 25 of the ICCPR, as described by the Human Rights Committee and referred to in Part 2 above,³⁰ and Article 1 of the ICCPR. Political participation and representative government also depend on affording freedom to individuals and groups to define and identify themselves, and this point is picked up below.

The draft Declaration on the Rights of Indigenous Peoples places its provisions on political participation in separate Articles not referring to self-determination.³¹ To the extent that self-determination can be read to require representative government, the nature of groups' and individuals' participation in the making and implementation of public policy should be considered more frequently in the context of self-determination. These links should be reflected, rather than ignored, in the draft Declaration on the Rights of Indigenous Peoples.

'Democracy' as an expression of self-determination was referred to in the joint report of the 'five wise people' on Quebec in 1992. Thomas Franck, Rosalyn Higgins, Alain Pellet, Malcolm Shaw and Christian Tomuschat suggested that, while for

²⁷ On links between representative government and political participation, see Fox, 'The Right to Political Participation in International Law', 17 *Yale Journal of International Law* (1992) 539, particularly at 606.

²⁸ Statement of Canada to the CHR intersessional working group, October 1999 (emphasis added).

²⁹ Statement of Norway to the CHR intersessional working group, October 1999 (emphasis added).

³⁰ Fox, *supra* note 27, at 560, compares the situation under Article 25 with that under Article 3 of the First Protocol to the European Convention on Human Rights, pointing out that the Protocol's provision is narrower.

³¹ Draft Articles 4, 19 and 20.

colonial peoples self-determination includes a right to independence, for others it signifies:

le droit à une identité propre, celui de choisir et celui de participer. . . Identité et démocratie sont ses deux composantes essentielles.³²

One could say that the authors perceptively identify these two key aspects of how self-determination is ‘felt’ to mean. Taking the view that as a matter of law self-determination already includes a requirement of representative government, issues of ‘democracy’ must also already be to the fore in a legal analysis of self-determination.

However, ‘democracy’ is a broad concept, broader than ‘representative government’ alone. Sometimes the term ‘democracy’ hides too easily the need to address many of the issues arising every day in respect of how governments and societies function. Particularly significant for indigenous peoples as minorities within larger societies are questions relating to how effectively different forms of representative government can protect and advance the interests of minorities. Certain political systems offer possibilities for improving the effectiveness of democracy in representing all parts of a society, including proportional representation systems and, where different segments of a society are roughly the same size, consociational democracy.³³ Ensuring appropriate degrees of autonomy is one of the means of helping to ensure government is representative. Accordingly, any consideration of political participation should investigate options for local autonomy, autonomy on specific issues, and structures for dialogue with groups having a particular interest in certain matters.³⁴ This is acknowledged by Australia in the Working Group on the Draft Declaration on the Rights of Indigenous Peoples:

Australia recognizes that the intention of Article 3 is to enunciate . . . the legitimate aspirations of indigenous peoples to enjoy more direct and meaningful participation in decision-making and political processes and greater autonomy over their own affairs.³⁵

In contrast with the question of political participation, the idea of autonomy is linked in the draft Declaration to the self-determination of indigenous peoples. Draft Article 31 of the draft Declaration would provide that indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local

³² ‘[T]he right to their own identity, to make choices and to participate . . . Identity and democracy are its two key elements.’ Franck *et al.*, ‘L’intégrité territoriale du Québec dans l’hypothèse de l’accession à la souveraineté’, in *Les Atributs d’un Québec Souverain, Commission d’Etude des Questions Afférentes à l’Accession du Québec à la Souveraineté, Exposés et Etudes*, vol. I (1992) 377, at 424.

³³ Eide, ‘In Search of Constructive Alternatives to Secession’, in Christian Tomuschat (ed.), *Modern Law of Self-Determination* (1993) 139, at 165. The theory of consociational democracy is described by Eide as ‘a form of power-sharing through a multiple balance of power among the segments of a plural society . . . an alternative to the majoritarian type of democracy’. Eide cites Arent Lijphart as the main theoretical analyst of consociational democracy. See also the discussion in Wright, *supra* note 16, at 621.

³⁴ Eide, *supra* note 33, also refers to a number of such possible devices to address the situation of minorities under democratic government, drawing on the discussion at a seminar in Geneva in July 1991 organized by the Conference on Security and Cooperation in Europe.

³⁵ Statement of Australia to CHR intersessional working group, October 1999 (emphasis added). See also Norway’s statement, in the text at note 29 above.

affairs, as a specific form of exercising their right to self-determination. As noted in this paper, as a matter of law the exercise of self-determination outside the contexts of traditional decolonization or foreign occupation is not envisaged by states to extend to secession. The text of the draft Declaration as a whole also reflects a general intention that indigenous peoples will exercise rights under the Declaration within the societies of which they are part.

Canada has suggested further discussion in the context of the CHR intersessional working group to clarify the meaning of 'autonomy' and 'self-determination'. Other governments have also indicated that they are willing to discuss different ways to understand these terms. These are promising signs, and in New Zealand's case reflect the growing autonomy of Maori in health and education matters in particular.

International commentators have suggested that an emerging general right to autonomy may be capable of solving difficulties which are beyond the capacity of either the individualistic human rights system or the concept of self-determination.³⁶ It is difficult to envisage at this stage that such a broad concept as 'autonomy' could be understood as a right, but the opportunities it offers provide useful insights for working with the question of indigenous peoples' self-determination. At the same time, we should acknowledge that when self-determination is understood to refer to representative government this can include different levels of autonomy as appropriate to different situations. As discussed above, representative government requires avenues for political participation, and in certain circumstances autonomous structures may be the best basis both for feeding into broader political processes and for decision-making on issues specific to communities, as well as for implementation of policies and delivery of services. Autonomy in the delivery of services should help ensure that the services provided are the most suitable for the needs of the group concerned.

Autonomy also brings its own benefits in terms of identity, establishing a formal place for groups in the public world, giving further opportunity for them to reinforce the values of the group and to interact with other parts of society as a group. Where there are tensions, negotiation may be one of the most useful tools for dealing with specific situations. The possibility of including a reference to negotiation in the provision on self-determination in the draft Declaration is discussed below. Whatever the mechanisms used, the complex processes needed for working out appropriate levels and structures of autonomy in different situations include explorations of the identity of the communities involved, and how that identity can be expressed, preserved and developed. It will be recalled that identity was also touched on by Franck, Higgins, Pellet, Shaw and Tomuschat in the extract quoted above with regard to political participation. The next part of this paper, dealing with choice of community, equally bears a strong connection with issues of identity.

The draft Declaration reflects an idea that indigenous peoples should have their own citizenship system, in draft Article 32, as well as the right to belong to an

³⁶ H. Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (1996) 365.

indigenous community or nation, which is set out in draft Article 9. These issues are not linked with the question of self-determination in the draft Declaration, but clearly they are conceptually connected.³⁷ As discussed above, where self-determination requires representative government, effective political participation is called for. In order to produce effective political participation people need to be able to develop and express their identities as members of different communities within larger societies.

Governments involved in negotiations on the draft Declaration can be expected to have a range of difficulties with issues of nationality, citizenship and self-determination, depending on the situation in the country represented by each government. For example, in the New Zealand context, under the Treaty of Waitangi Maori and non-Maori alike share New Zealand citizenship. Complex issues arise in respect of the relationships between indigenous peoples' communities, nationality and citizenship. Some commentators have advocated the idea of separating ethno-cultural differences from the notion of the state,³⁸ but there is considerable further work to be done in gauging the extent to which the world community identifies such approaches as real possibilities. In most cases, the synonymy of 'nation' and 'state' may be too entrenched. That said, we should acknowledge the flexibility of individuals and groups in respect of identity, including their ability to assume multiple identities and to belong to a wide range of different communities and types of community.³⁹

The Badinter Commission, asked to address the question whether the Serbian population in Croatia and Bosnia-Herzegovina has the right to self-determination, considered that such groups within states have 'the right to recognition of their identity under international law'. The Commission referred primarily to the rights of minorities, but also stated that:

Article 1 of the two 1966 international covenants on human rights establishes that the principle of the right to self-determination serves to safeguard human rights. By virtue of that right every individual may choose to belong to whatever ethnic, religious or language community he or she wishes.⁴⁰

The Commission additionally went further and said that in its view one possible consequence of this principle might be for the members of the Serbian population in Bosnia-Herzegovina and Croatia to be recognized as having the nationality of their choice under agreements between the republics, i.e. that the republics should, where appropriate, afford them the right to choose their nationality. Extremely intricate questions arise in such a situation unless nationality is differentiated from citizenship.

³⁷ See e.g. the New Zealand statement to the CHR working group in October 1999: 'we offer the following comment on Article 3. New Zealand supports *the right of indigenous people to exist as a community with their own cultural identity*, and to be involved in determining their own economic and social destiny' (emphasis added).

³⁸ Hannum, *supra* note 36, at 506.

³⁹ Franck, 'Clan and Superclan: Loyalty, Identity, and Community in Law and Practice', 90 *AJIL* (1996) 359.

⁴⁰ Opinion 2 (11 January 1992), 3 *EJIL* (1992) 182–185, para. 3; 92 *ILR* 162. Note that the Badinter Commission's first opinion viewed the situation in the Federal Republic of Yugoslavia as the dissolution of a federation, rather than seeing it as the exercise of self-determination.

The Commission's suggestion that the possible Serbian nationality of Serbs in Bosnia-Herzegovina and Croatia extend to 'all the rights and obligations which that entails' would seem to pose enormous difficulties, if taken literally. Only by restricting nationality purely to a statement of identity can it be easily dealt with in such a way. Self-determination is undeniably a process of self-identification. However, to take choice of community further, and to begin considering nationality without clearly differentiating such nationality from citizenship, raises a whole host of practical matters. Choice of community issues should be dealt with first at a more local and personal level, in terms primarily of cultural identity.⁴¹

A wealth of state practice can be canvassed in the context of decolonization demonstrating that the exercise of self-determination has in practice nearly always taken place through agreement with the parent state.⁴² Self-determination has been in the first instance a right to which the colonial authority must give effect. The United Nations has supported unilateral secession only if the colonial authority has stood in the way of self-determination. This does not dispose of the difficult questions surrounding indigenous peoples' self-determination. As discussed above, indigenous peoples' self-determination fits within a model that is different to self-determination in the context of decolonization. However, state practice in the context of decolonization is a reminder that societies consist of interactive individuals and groups constantly talking with one another and passing through different political structures, by agreement and by default.

In the CHR Working Group on the Draft Declaration on the Rights of Indigenous Peoples, Canada has said that prescriptive solutions to the self-determination question must be avoided, and has laid emphasis on the role of negotiations between governments and indigenous groups as the best way to determine the political status of indigenous peoples and to pursue their economic, social and cultural development.⁴³ Indigenous peoples' representatives have also said that:

harmonization would be sought by viewing the right of self-determination as containing a procedural right that could be exercised through *negotiations between indigenous peoples and Governments*.⁴⁴

Consensus on any strict version of such a right is unlikely to be reached, but the

⁴¹ For comment on the Badinter Commission's second opinion, see *inter alia* Koskenniemi, *supra* note 3, at 266.

⁴² See Crawford, 'State Practice and International Law in Relation to Unilateral Secession', 19 February 1997, 18. This report can be read on the internet at www.canada.justice.gc.ca/news/communiques/1997/factum/craw_en.html.

⁴³ Canadian statement to CHR intersessional working group of 31 October 1996, 2. Recognition of the inherent right of aboriginal self-government in Canada is based on the view that 'the aboriginal people of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.' Canadian Federal Policy Guide on Aboriginal Self Government, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (1995) 3.

⁴⁴ Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, First Session, 11. UN Doc. E/CN.4/1996/84 (emphasis added).

notion of negotiation should not be excluded in understanding indigenous peoples' self-determination.

The 1993 version of draft Article 3, developed in the WGIP, was rejected by indigenous peoples' representatives. It read:

Indigenous peoples have the right of self-determination, in accordance with international law, subject to the same criteria and limitations as apply to other peoples in accordance with the Charter of the United Nations. By virtue of this, they have the right, *inter alia*, to *negotiate and agree* upon their role in the conduct of public affairs, their distinct responsibilities and the means by which they manage their own interests. An integral part of this is the right to autonomy and self-government.⁴⁵

This 1993 draft Article conveyed a sense of the interaction of different aspects of self-determination, including political participation and the autonomous nature of communities within society, which has been lost. One option is for the CHR working group to revisit this kind of concept of self-determination, together with representatives of indigenous peoples, and to seek to describe a mutually acceptable understanding of how self-determination can work in practice. A focus on relationships with indigenous peoples is required, which works towards the future in a spirit of sustained and open-ended commitment.⁴⁶ In the framework of a 'relational' approach, based on the key notion of representative government, autonomy can be considered as a form of political participation, and complex issues of identity and community can be acknowledged.

4 Conclusion

This paper seeks to contribute to developing understandings of self-determination in international law by putting forward the view that there may be many different elements making up the composite whole of self-determination. The clearest requirement of self-determination is representative government. This requires avenues for genuine political participation, and there must be the capacity to participate on the basis of individual and shared identities. To some extent, autonomy within societies is captured within the concept of self-determination, and the role which may be played by informal or formal negotiation needs to be considered.

The self-determination of indigenous peoples under international law should derive from such a principle of self-determination. It should also reflect the particular nature of indigenous peoples, their identities, their communities and their ways. Self-determination must enable not only the free determination of their political status, but also the free pursuit of their economic, social and cultural development.

In respect of the draft Declaration on the Rights of Indigenous Peoples, Canada seems to have been the first government in the CHR working group to contemplate the

⁴⁵ Emphasis added.

⁴⁶ McHugh describes a 'relational' approach in 'Aboriginal Identity and Relations in North America and Australasia', in K. Coates and P. McHugh, *Living Relationships* (1998).

project of more detailed discussion about indigenous peoples' self-determination, with its statement in 1996 that:

Our goal at this Working Group will be to develop a common understanding, consistent with evolving international law, of how this right is to apply to indigenous collectivities, and what the content of this right includes.⁴⁷

Governments need to consider both the position of indigenous peoples and the long-term broader implications of their work on self-determination in this context. The writer believes that, if the UN General Assembly eventually succeeds in adopting a Declaration on the Rights of Indigenous Peoples, it is likely to include a provision on self-determination in the kind of terms discussed in this paper. This will be a valuable contribution to international law. Even if it does not prove possible to reach agreement on the text of a declaration, statements made in the course of the negotiations in the working group, such as those referred to earlier in this paper, constitute evidence of significant contemporary *opinio juris* on the subject of self-determination.

Postscript

There was no formal discussion on Article 3 of the draft Declaration on the Rights of Indigenous Peoples at the November 2000 session of the intersessional working group. More importantly, however, the UN Human Rights Committee issued its views on the communication of *Apirana Mahuika et al. v. New Zealand* in November 2000. As noted above, this communication concerned the New Zealand Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The Committee, while not finding a breach of the Covenant, reiterated its earlier jurisprudence according to which the provisions of Article 1 of the ICCPR, while not being sufficient in themselves to ground a complaint, may nonetheless be relevant in the interpretation of other rights protected by the Covenant. (See Communication No 547/1993, UN Doc. CCPR/C/70/D/547/1993 of 16 November 2000.)

⁴⁷ Statement of Canada to the CHR working group, 1996.