Indigenous Self-Determination in the Final Draft Declaration of the UN Working Group

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Introduction

At its eleventh session on 19-30 July 1993, the United Nations Working Group on Indigenous Populations (Working Group)[1] finally completed and adopted the Draft Declaration on the Rights of Indigenous Peoples (Draft Declaration).[2] The Draft Declaration was submitted to the Commission on Human Rights for consideration, to be followed by the Economic and Social Council (ECOSOC) and the General Assembly.[3] The Working Group over the years reviewed developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples and the evolution of their international standards. In drafting this Declaration the Working Group has considered views sought and received by the Secretary-General annually from governments, specialised agencies, intergovernmental organisations, non-governmental voluntary organisations with consultative status and indigenous peoples' organisations. A number of individual scholars also expressed their opinions at the sessions of the Working Group.[4]

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1 The creation of this Working Group was proposed by the Subcommission on Prevention of Discrimination and Protection of Minorities in its resolution 2 (XXXIV) of 8 September 1981, endorsed by the Commission on Human Rights in its resolution 1982/19 of 10 March 1982, and authorised by the Economic and Social Council (ECOSOC) in its resolution 1982/34 of 7 May 1982.

2 For text see the Report of the Working Group of 16 August 1993, UN doc. E/CN.4/Sub.2/1993/29, Annex 1, at 50-60.

3 n 2 at 45.

4 The Report of the Working Group summarises some of these views at 19.

Of the indigenous rights embodied in the Draft Declaration, none has allured the attention and concern of the international community as intensely as has the right of indigenous peoples to self-determination. This article highlights and comments upon the following issues: the meaning and range of indigenous self-determination; the extent, if any, to which secession is permissible; the compatibility, or otherwise, of indigenous self-determination with the UN Charter regime; and the problem and prospect of final endorsement of indigenous self-determination in any future UN declaration on the rights of indigenous peoples.

Self-Determination

Self-determination has been regarded by the UN Charter regime as the inherent right of all peoples freely to determine their political status and to pursue their economic, social and cultural development.[5] On the surface, self-determination appears to be a self-evident right with an identified means and end: let the peoples decide its political, economic, social and cultural goals - a choice that must be free, genuine and voluntary presumably expressed through informed and democratic process. There is also a general agreement that self-determination certainly exists entailing rights and obligations under international law and the UN Charter. But its application in a fact situation is far from being simple. It is frequently hedged around by escape clauses. In some instances, self-determination has become a myth as it generates expectations without fulfilment, a right without a remedy.

The Wilsonian concept of self-determination in the form of the fundamental urge to self-government received considerable international blessing after the First World War.[6] Following the Second World War, many colonial peoples throughout the world gained their independence through the exercise of their right to self-determination under the 1960 UN Declaration on the Granting of Independence to Colonial Countries and

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[5] The International Covenant of Economic, Social and Cultural Rights, and of Civil and Political Rights, GA Res. 2200 (XXI) of 16 December 1966, for text see (1967) *6 ILM* at 360 at 368. The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN, GA Res. 2625 (XXV) of 24 October 1970, for text see (1970) 9 *ILM* at 1292, 1295.

[6] M Pomerance, "The US and Self-Determination: Perspectives on the Wilsonian Conception" (1976) 70 *Am JIL* 1.

Peoples.[7] The instrumentality of this right in the process of decolonisation is indisputable. But its relevance to peoples living in independent states is invariably contentious. Claims to self-determination by indigenous peoples, particularly living in independent states, have but added to the ongoing controversy over the delimitation of the meaning and range of self-determination. Can indigenous self-determination be appropriately subsumed in contemporary international law and the UN Charter?

Self-determination is understood to be a continuing right with two successive phases: external and internal. The external aspect refers to the right of peoples, who are yet to be independent, to freely determine their future political status in the international arena. When those peoples opt for independence by establishing their own independent state, they are deemed to have enjoyed their right to external self-determination. The same peoples, indeed the whole population, who are now nationals of an independent state, are entitled to their right to internal self-determination. This internal aspect may conceivably embrace a wide range of rights, notably the right to elect and maintain a government of their own choice, the right to democratic rule, the right to be free from oppression and discrimination by the government or by any other dominant group, the right to control over natural and economic resources and the right to socio-cultural development. Thus both aspects of self-determination entail political dimensions with economic, social and cultural ramifications.[8]

In other words, the right to external self-determination is deemed to have been exercised once independence is gained and is replaced by the right to internal self-determination. The exercise of external self-determination through independence is likely to be meaningless if the constituent peoples of a State are deprived of their right to internal self-determination. It is in this sense that self-determination may be viewed as a continuing right with a universal connotation.[9] It is not an end in itself but

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7 GA Res. 1514 (XV) of 1960, for the text see [1960] yearbook of the UN at 46.

8 For a discussion on these aspects and their contemporary relevance, see A Cassese, *Self-Determination of Peoples,* London, Cambridge University Press, 1995, at 5, 65 and ch. 4-5; J Salmon, "Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?" in C Tomuschat (ed), *Modern Law of Self-Determination,* Dordrecht, Maritinus Nijhoff Pub. 1993, at 253-82; A Cassese, "Political Self-Determination, Old Concepts and New Developments" in A Cassese (ed) *UN Law/Fundamental Rights* (1979), at 146; Z Mustafa, "The Principle of Self-Determination in International Law (1971) 5 *I Lawyer* 479; K Menon, "The Right to Self-Determination: A Historical Appraisal" (1975) 53 *Rev. droit Int'l* 187.

9 See Cassese (1995), n 8 at 55.

a means towards the promotion of and respect for human rights and dignity in providing justice to the people.

Perhaps the most perplexing question is: Does the independent political status of peoples extinguish altogether their right to external self-determination? Some authorities argue that particular colonial peoples are entitled to exercise their right to external self-determination within a specific geographic area against their metropolitan powers. Once independence is attained, the right is fulfilled and those peoples are no longer the beneficiary of that right.[10] In other words, the right to external self-determination can be exercised only once.

This "one time only" rule seems to suffer from some flaws. It places an unrealistic emphasis on the identity of a political association (state) which is temporal in reality. The history of the genesis of modern political community is a continuous process of making states, breaking of states and remaking of states as socio-political institutions.[11] It also presupposes that the initial choice of political destiny of a group had been made freely. Indigenous peoples, for example, have been trapped within the confines of states into which they had been shoved by invaders' forces since the time of the first contact. Even today, such a free choice of political status sounds utopian to many. An agreement between the colonial power, the United Kingdom, and the neighbouring China has determined the political destiny of six million peoples and their territory of Hong Kong by handing them over in 1997 to a geriatric autocracy.

Self-determination is intended to combat exploitation and discrimination. Whether such exploitation and discrimination are perpetrated by overseas colonial powers or by powers within an independent state is immaterial. If self-determination is a right of dependent peoples exploited and discriminated against by colonial powers, and not the right of peoples living in technically independent states but equally exploited and discriminated against, then self-determination becomes a right of territory, not the right of peoples. This is juridically contradictory and

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[10] R Emerson, "Self-Determination" (1971) 65 *Am JIL* 463-64; *Self-Determination Revisited in the Era of Decolonisation* (1964), at 28-30; LC Green, "Self-Determination and Settlement of the Arab-Israeli Conflict" (1971) 65 *Am. Soc. I.L. Procd.* 44. Trudeau has denied the right of Quebec to secede on the basis of this rule, see at Trudeau, *Federalism and French Canadians* (1968), at 151-55, 187, 190.

[11] H Lasswell, *Psychopathology and Politics* (1962), at 242; A Cobban, *The Nation-State and National Self-Determination* (1969), at 42-43.

unsubsumable as self-determination is a right of peoples, not of territory. The point is well presented by Judge Dillard in the *Western Sahara Advisory Opinion* of the International Court of Justice (ICJ): "It is for the people to determine the destiny of the territory and not the territory the destiny of the people".[12] Independence cannot be construed as mere political status in a technical sense. It must afford equal opportunity for unimpeded enjoyment of peoples' political freedoms, socio-economic rights and development of cultural heritage. It seems erroneous to argue that peoples deprived of all these rights within a state are enjoying their right to self-determination by the mere fact of their technical independent status.

This is not to suggest that such a group of peoples is entitled to pursue their rights and interests regardless of their duties. The act of formation and growth of a state requires every constituent peoples to render all reasonable attempt in good faith to make that state a workable political association. Every group is obliged to try to accommodate its rights and interests by bringing conflicting views into harmony with its own. This was precisely the reason why the secessionist bid by Katanga from the Republic of Congo in 1960 was proclaimed illegal by the UN.[13] Katanga made this abortive attempt within two weeks from the date of independence of the Republic of Congo.[14]

Similarly it may be difficult to appreciate why an identified group of peoples within a state must remain there without any right to redress even if it is deliberately and persistently exploited and discriminated against by the government or by any influential group. If it is impossible for that group to realise their equal rights and internal self-determination within that state, the group ought to have a right to opt out of that state to implement its rights. An analogy may be derived from an international treaty which once concluded requires faithful adherence by the parties. But the parties are not bound by the treaty under all circumstances. A fundamental change in circumstances after making the treaty permits modifications or termination of the treaty.[15] This principle seems to allow

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[12] [1975] *ICJ Rep.* 122.

[13] Security Council Res. 169 of 1961.

[14] LC Buchheit, *Secession: The Legitimacy of Self-Determination* (1978), at 141; EM Miller, "Legal Aspects of the UN Action in the Congo" (1961) 55 *Am JIL* 1; DW McNemar, "The Post-Independence War in the Congo" (1967) 61 *Am Soc IL Procd* 13.

[15] Article 62 of the 1969 Vienna Convention on Law of Treaty, see O Lissitzyn, "Treaties and Changed Circumstances" (1967) 61 *Am JIL* 895.

the renewal of a group's right to self-determination should the conditions and purposes of political association radically alter. The secession of Bangladesh from the Federation of Pakistan in 1971 illustrates this point. The peoples of Bangladesh exercised their right to external self-determination against the British colonial rule in 1947 and constituted the eastern province of the Federation of Pakistan. Notwithstanding this technical independent status, the peoples of East Pakistan had to endure internal colonialism for a quarter of a century. This act of deprivation in effect revived their right to self-determination which they successfully reasserted in 1971 by opting out of the Federation of Pakistan and becoming the Republic of Bangladesh.[16]

State practice has never ever accorded any precision, definiteness and specificity to the territorial integrity of a state. Any claim that such integrity is inviolable and non-negotiable will sound hollow in view of contemporary events of continuing disintegration of modern states (Soviet Union and Yugoslavia), their voluntary reunification (Vietnam and Germany) and forcible annexation (Tibet and East Timor). International law and the UN Charter regime (Art. 2.4) protect the territorial integrity of states to create conditions for the dignified human existence of peoples who live in those territories. The territorial integrity of a State serves as the external shield for the enjoyment of human rights - the primary concern shared by all peoples who live in that territory. Viewed from this perspective, every State needs greater integration and unity, not disintegration. This desire to preserve territorial integrity, however passionately asserted, warrants some specific measures to foster it. And the desire must be based on a foundation of strict respect for, not on a denial of, human and equal rights of the constituent peoples.

Far from respecting the human rights of the constituent peoples, there are ample instances of abuse of territorial integrity within the cloak of which violation of human rights and other international crimes are being perpetrated against these peoples. The governments in power with impunity under this protective garb conveniently conceal from the world community the plight of their own peoples brought to fruition by the deprivation of their equal rights and self-determination. This situation led the international community to recognise the relevance of self-determination in independent

[16] MR Islam, *Bangladesh Liberation Movement: International Legal Implications*, Dhaka, University Press Ltd, 1986, ch 3.

States.[17] The realisation of internal self-determination has largely been favoured as a mode of exercising the right in independent States.[18] This does not necessarily mean that there is no room for the exercise of external self-determination in independent states by way of secession which is not prohibited in international law.[19] This position perhaps explains why various international declarations on self-determination have not ruled out beyond doubt the scope of secessionist self-determination in member states. This is however not to imply any overemphasis on secession. The emerging normative trends seem to suggest that its scope is circumscribed by rigid conditions and circumstances. It is permissible only as a last resort in situations where that choice becomes unavoidable due to the practical impossibility of other means of realising the equal rights and self-determination of peoples.[20]

In this post-colonial era, self-determination continues to be the instrumentality of freely determining the political destiny and pursuing economic, social and cultural development of peoples. Decolonisation and secession are not the sole manifestations of this right. Situations involving claims to self-determination vary appreciably and pose their unique problems. Measures necessary for the realisation of self-determination in a given situation may not be worthy and/or feasible of adoption in another.

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[17] The International Law Commission considered the "Draft Code of Crimes Against the Peace and Security of Mankind" in 1988. In this discussion, all members were of the opinion that self-determination was of universal character and application, see (1988) vol II(II) Yearbook of ILC, at 64, para 266; also Cassese (1995) n 8, ch 11 particularly at 302-12; the statement of Ms E. Young, the UK representative to the UN, made in the General Assembly Third Committee on 15 October 1986, (1986) 57 *British Yr Book of Int'l Law*, 516; RS Bhalla, "The Right of Self-Determination in International Law" in W. Twining (ed), *Issues of Self-Determination*, Aberdeen Univ. Press, 1991, at 91; MK Nayer, "Self-Determination Beyond the Colonial Context: Biafra in Retrospect" (1975) 10 *Texas ILJ* 321.

[18] See Cassese (1995) n 8 at 346; A Rosas, "International Self-Determination" in C Tomuschat (ed) *Modern Law of Self-Determination*, Dordrecht, Martinus Nijhoff Pub., 1993, at 225.

[19] See Cassese (1995), n 8 at 340; D. Murswiek, "The Issue of a Right of Secession-Reconsidered" in Tomuschat (ed), Id. 21; note, "The Logic of Secession" (1980) 89 *Yale LJ* 802; E Suzuki, "Self-Determination and World Public Order: Community Response to Territorial Separation" (1975-76) 16 *Virginia JIL* 779.

[20] In the Yugoslav situation, for example, the members of the world community and their forums have accepted the act of secession as "a fact of life" which "could no longer be stopped". In response, they have worked out "a number of conditions to be met before the recognition of the independent statehood of the seceding republic", thus "ensuring that separatist aspirations are only realized subject to a set of stringent requirements", Cassese (1995), n 8 at 260.

Consequently, the modes of exercising self-determination now inclusively embrace a number of outcomes ranging from the protection of minority rights, to the participation in internal decision-making process directly or through representatives, to the establishment of local self-rule with political and fiscal autonomy, to independent statehood.

Indigenous Self-Determination

Self-determination has generally been applied only in the traditional colonial context despite its consistent proclamation as a right of "all peoples" with no distinction between colonial and non-colonial.[21] The present state-centric international order is reluctant to extend the right beyond the classical colonial situation. Quite consistently with this posture, the international legal system has initially been unsympathetic to the recognition of the distinct identity of indigenous peoples. The predominant legal justification for the usurpation of indigenous peoples and their territories has been the principle of *terra nullius* or empty land. This principle was widely asserted and followed by British settlers to deny the existence of the native peoples, their law and government. The effect of this principle dispossessed native peoples of their rights and made them legally non-existent in their own land. An application of this principle in the *Status of Eastern Greenland* case[22] led the Permanent Court of International Justice (PCIJ) to hold that any territory inhabited by "backward" peoples without Western type political organisation was to be regarded as *terra nullius*, that is those peoples actually did not legally occupy their territory.

However, with the decolonisation of nearly all overseas colonies, the relevance of self-determination in independent states has been receiving considerable attention from the international community and the UN. Operating under the impetus of anti-colonial sentiment of the UN, the ICJ in its Advisory Opinion in the *Western Sahara* case in 1975 rejected the notion of discovery and *terra nullius* as legally fictional, engineered by colonial powers to serve their expansionist aspirations. In discarding this obsolete guise of colonialism, the ICJ held:

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[21] See n 5, Art. I of the 1966 Covenants and Principle V of the 1970 Declaration: also Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514(XV) of Dec. 1960.

[22] *Denmark v Norway* [1933] PCIJ Ser. A/B, No 53.

> Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples have a social and political organization were not regarded as *terra nullius*.[23]

The High Court of Australia in *Mabo v Queensland* (1992) 175 CLR 1 has questioned the legal validity of *terra nullius* as a ground of acquisition of Aboriginal land. The Court has held that Aboriginal land could only be acquired through some form of agreement. In the absence of such an agreement the Court has recognised the survival and continuation of native land right and title since the time of first contact.[24]

Indigenous peoples' quest for self-determination received a further boost in the 1983 Cobo Study of the UN.[25] This Study concluded that self-determination was the essence for the enjoyment by indigenous peoples of their fundamental human rights. Its approach to self-determination was that indigenous peoples should by free choice determine the specific content of the right, thus according a dynamic meaning to indigenous self-determination with all options for exercise open. It finally recommended that a declaration and/or a covenant of indigenous rights was essential. It is from this point that the UN Working Group on Indigenous Populations has assumed the task of drafting an instrument containing indigenous rights including self-determination.

The final Draft Declaration is destined "for the recognition, promotion and protection of the rights and freedoms of indigenous peoples".[26] And the right of indigenous peoples to self-determination is a keystone provision of this Draft Declaration. Its Article 3 formulates the right as follows:

> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural developments.[27]

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23 [1975] *ICJ Rep* 12.

24 For a discussion see RD Lumb, "Native Title to Land in Australia: Recent High Court Decisions" (1993) 42 *ICLQ* 84; GP McGinley, "Indigenous Peoples' Rights: Mabo and Others v State of Queensland – the Australian High Court Addresses 200 Years of Oppression" (1993) 21 *Denver JIL & Pol.* 311.

25 Study of the Problem of Discrimination Against Indigenous Populations, UN doc. E/CN. 4/sub.2/1987/7.

26 Preambular para, 18, see n 2 at 51.

27 n 2 at 52.

As it turns out, the Article has apparently been drafted in compliance with the terms expressed in Article I of the 1966 International Covenants on Human Rights and Paragraph 1 of Principle V of the 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN (Declaration on Friendly Relations).[28] The Working Group reaffirms, as a prelude to indigenous self-determination, "the fundamental importance of the right of self-determination of all peoples".[29] The realisation of indigenous self-determination is conceived as a precondition for any meaningful enjoyment of human rights by indigenous peoples. These peoples "in the exercise of their rights, should be free from discrimination of any kind".[30] Adherence to these preambular tenets of the Draft Declaration presumably has persuaded the Working Group to work out indigenous self-determination pursuant to, not inconsistent with, the principle of self-determination of peoples prescribed in the UN Charter regime. However, this formulation is slightly different from its predecessor, Operative Paragraph 1 of the 1992 Draft Declaration,[31] in that it does not recommend any mode of exercise as an integral part of the right.

Article 31 of the 1993 Draft Declaration separately deals with the modes of exercising indigenous self-determination. It recognises the right to autonomy or self-government as a specific form of exercising indigenous self-determination. This prescription of means of realising the right is not a novelty. It was quite explicit in Operative Paragraph 1 of the 1992 Draft Declaration. It is also inclusive in the list of modes of exercising self-determination contained in Paragraph 4 of Principle V of the 1970 UN Declaration on Friendly Relations.[32] Nevertheless, Article 31 is far more elaborative than the 1992 Draft Declaration and the 1970 UN Declaration on Friendly Relations. It identifies and spells out the specific spheres and areas where indigenous peoples are entitled to enjoy autonomy and/or self-government. It covers nearly every aspect of indigenous life and all matters to which their internal order and local affairs relate. These include their

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[28] n 5.

[29] Preambular para 14, n 2 at 51.

[30] Preambular para 4, n 2 at 50.

[31] The Draft Declaration on the Rights of Indigenous Peoples as agreed upon by the Working Group at its 10th session in July 1992, UN doc. E/CN.4/Sub.2/1992/33.

[32] n 5, 9 *ILM* 1295.

"culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions".[33]

Article 31 is inclusive in nature and scope, for it prescribes only "a", not "the", specific form of exercising indigenous self-determination. Its formulation, as it stands, does not appear to convey that autonomy and/or self-government is the sole or exclusive means of exercising indigenous self-determination. Given this posture, a logical appreciation of Article 31 may be that it recognises one of the permissible modes, at best the one preferred by the Working Group, of realising indigenous self-determination.

There is no specific limitation to be imposed uniquely on indigenous self-determination under the Draft Declaration. Article 45 however purports to disclaim the creation of any right for anyone, including state and indigenous peoples, to engage in and perform any act contrary to the UN Charter. This is a general restriction which also found expression in Operative Paragraph 4 of the 1992 Draft Declaration.[34] But the former differs from the latter in that the present draft does not make indigenous self-determination overtly subject to the 1970 UN Declaration on Friendly Relations.

States, especially with indigenous peoples in their territories, have been cautiously apprehensive of the potential effect of indigenous self-determination on their territorial integrity and political unity. As a result, they have been quite keen, indeed desperate, to see that indigenous self-determination be exercised in a manner not inimical to their territorial integrity and political unity.[35] To this end, state observers at the tenth session of the Working Group insisted upon and succeeded in including Operative Paragraph 4 in the 1992 Draft Declaration.[36] This Paragraph expressly referred to, among others, the 1970 UN Declaration on Friendly Relations. This formulation implied that indigenous self-determination

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[33] n 2 at 57-58.

[34] n 31 which made indigenous self-determination subject to both the UN Charter and the 1970 Declaration on Friendly Relations.

[35] For reservations expressed by state representatives on the scope of indigenous self-determination, see supra n 2, paras 50-55 at 16-17.

[36] Australian delegate Colin Milner for example made a formal statement and submitted a draft provision to this effect at the 10th session of the Working Group on 24 July 1992.

could be realised in compliance with, not in violation of, other basic principles of the UN Charter, the sustenance of territorial integrity and political unity of state being one of those principles. This entrenchment of the 1970 UN Declaration on Friendly Relations in Operative Paragraph 4 was construed by states as a limitation on indigenous self-determination and a mitigating factor in overcoming the anxiety over, indeed reaffirming, their territorial integrity and political unity.

The lack of an overt reference to the 1970 UN Declaration on Friendly Relations in the final Draft Declaration has but aggravated states' worry that indigenous self-determination in its present form with all options open for the exercise of the right is a potential recipe for the disintegration of existing territorial integrity. However, it may be erroneous to view this absence of the 1970 UN Declaration on Friendly Relations in the final Draft Declaration as a triumph for indigenous self-determination undermining the territorial integrity of state. In this state-centric international order, indigenous peoples may not be able to create conditions for their dignified existence short of the cloak of territorial integrity. It is the territorial integrity that may afford a stable institutional framework within which the minimum requirements of indigenous peoples' survival, their enjoyment of equal rights and self-determination, and their preferred values and dignity that they are desirous of pursuing can be secured. It is in this sense that one must appreciate the utility of territorial integrity which is not something different from, and independent of, its constituent peoples. A landmass alone cannot create territorial integrity. The territorial integrity of a state, standing alone devoid of allegiance of the peoples who live in it, has no inherent virtue but is rather hollow and self-defeating.

Viewed from perspectives referred to, there need not be any conflict between the right of state to territorial integrity and the right of indigenous peoples to self-determination. An effective balance between these rights is warranted which is attainable only through mutual respect for each other's right. By subjecting both states and indigenous peoples to the UN Charter under Article 45 of the final Draft Declaration the Working Party appears to have reinforced the need for such a balance between the two rights. Such a general limitation based on the principle of non-discrimination seems to be in order and perhaps indispensable. This is likely to maximise the enjoyment of both rights whilst minimising their abuses and denial. The omission of the 1970 UN Declaration on Friendly Relations from Article 45 of the final Draft Declaration has not apparently compromised the

integrity of the UN Charter limitations. Nor does it set a double yet diluted international standard either for states or for indigenous peoples. Both indigenous self-determination and territorial integrity, however widely interpreted and passionately asserted by their claimants, must be exercised within the limits of the UN Charter regime.

Secession and Indigenous Self-Determination

Historically, secession has always been a permissible method of exercising self-determination and the former is as old as the latter. The post World War I peace settlement on the strength of which self-determination became operative involved secession. Wilson himself favoured an orderly international sanction for secessionist claims "by reason of changes in present racial conditions and aspirations or present social and political relationship".[37] It has been argued that "it is nonsense to concede the right [self-determination] to all peoples if secession is excluded".[38] Eagleton has depicted self-determination as "a two-edged concept which can disintegrate as well as unify".[39] There is no rule of international law that proscribes secession which, if successful, is acceptable as valid in international law as a revolutionary act.[40]

Secession is neither permitted nor prohibited explicitly in the UN Charter. The 1970 UN Declaration on Friendly Relations has been described as "the most authoritative statement of the principle of international law relevant to the questions of self-determination and territorial integrity".[41] Paragraph 7 of Principle V of the 1970 UN Declaration on Friendly Relations deals with, and provides protection for, the territorial integrity of state in the event of any self-determination claim. The Paragraph begins with an injunction on any act or action emanating from the principle of

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[37] See Wilson's first draft of the League of Nations Covenant quoted in DH Miller, *The Drafting of the Covenant* (1928, Vol.2) at 12-13.

[38] R Emerson, "Self-Determination" (1971) 65 *Am JIL* 464.

[39] C Eagleton, "Excesses of Self-Determination" (1952-53) 31 *For. Aff.* 593.

[40] See the sources cited in n 19; also R Higgins, "International Law, Rhodesia and the UN" (1967) 23 *World Today* 94-96; RW McGee, "A Third Liberal Theory of Secession" (1992) 14 *Liverpool Law Review* 45.

[41] *The Event in East Pakistan*, 1971, Geneva, The Secretariat of the International Commission of Jurists, 1972, at 67.

equal rights and self-determination of peoples (Principle V) "which would dismember or impair, totally or in part, the territorial integrity - or political unity of sovereign and independent states". This protection has not been made unconditional; nor is it extended to all states. The Paragraph has singled out states entitled to this protection. And these states include only those that are "conducting themselves in compliance with the principle of equal rights and self-determination of peoples".[42]

The territorial integrity of a state under the 1970 UN Declaration on Friendly Relations is not absolute but tempered by the duty to govern its constituent peoples ensuring their equal rights and self-determination. Should a state comply with this duty, self-determination of its peoples is not to be interpreted so as to sanction any action that would impair the territorial integrity and political unity of that state. The peoples within that state are deemed to have been realising self-determination by way of possessing a representative government of their own choice, of enjoying protection for their equal rights and fundamental freedoms, and of having a right not to be discriminated against by the government or by any dominant group. Such peoples are prevented from any attempt aimed at undermining the territorial integrity of the state to which they belong.

Now what would happen if a state violates its duty to provide equal rights and self-determination to its constituent peoples? The 1970 Declaration on Friendly Relations affords no protection to such a state. Nor does it preclude, expressly or impliedly, peoples within that state from resorting to any measures to realise their right irrespective of the effects of those measures on the territorial integrity of that state. These measures, otherwise forbidden, seem to derive validity from the noncompliance by the state with equal rights and self-determination of its constituent peoples. It is therefore erroneous, if not a distortion, to pretend that the 1970 UN Declaration on Friendly Relations recognises an unfettered right of state to territorial integrity. It poses a covert threat to the territorial integrity of a state that deprives its peoples of their equal rights and self-determination.

The 1970 UN Declaration on Friendly Relations has accomplished a balance between territorial integrity and self-determination. Its "right implies duty" oriented approach has driven the two rights from confrontation to conciliation through mutual respect. There appears to be no overemphasis on either right. Both rights are equally stressed and one is as important as

[42] n 5, 9 *ILM* 1295.

the other. The correlationship and interdependence of both rights has been reinforced in the 1970 Declaration on Friendly Relations. Disregard for duty may at times be counterproductive, even militating against right. It could not reasonably be argued that the enjoyment of self-determination by the peoples depends upon and varies with the goodwill and good faith of a State. Instead every State is obliged to undertake positive steps towards the realisation of equal rights and self-determination of its constituent peoples.

This duty of a State to provide equal rights and self-determination to its own peoples has consistently been endorsed and enriched by a number of international instruments subsequent to the 1970 UN Declaration on Friendly Relations. The 1975 Helsinki Declaration of the Conference on Security and Cooperation in Europe (CSCE) and its Follow-Up Meeting in Vienna in 1989 have delineated the attributes of internal self-determination which every member State is obliged to observe.[43] The Paris Charter of 21 November 1990 has established links between self-determination and democracy, multiracialism and human rights within a State.[44] The Helsinki Summit Declaration of 10 July 1992 has included in self-determination the rights of minority groups.[45] The unanimously adopted Vienna Declaration on Human Rights of 25 June 1993 by 160 members of the UN has reinforced the saving clause of the 1970 UN Declaration on Friendly Relations. It requires the establishment of a pluralistic democratic government "representing the whole people ... without distinction of any kind" as a means of realising self-determination within a State.[46] The UN Declaration amid its fiftieth anniversary in 1995 reasserts the right of peoples to self-determination and stresses the significance of its fulfilment within a State. To this end, the Special Committee on the Charter of the UN is exploring ways and means of enhancing the effectiveness of the Organisation to encounter the challenges of the changing world.[47]

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[43] A Bloed, *From Helsinki to Vienna: Basic Documents of the Helsinki Process*, Dordrecht, 1990; See Cassese (1995), n 8 at 277-96.

[44] (1991) 30 *ILM* 194-215.

[45] (1992) 31 *ILM* 1396-99 at 1411.

[46] UN doc. A/Conf. 157/23, para. 2.

[47] CL Willson, "Changing the Charter: The UN Prepares for the Twenty-First Century" (1996) 90 *AM. JIL* 115.

Parallel to this development, the world community is not totally unwilling to concede any right to secession under certain circumstances. The international response for the secessionist bid of the Bengalis was largely favourable, contributing significantly to the birth of Bangladesh in 1971.[48] The extraordinary circumstances of the Bengalis within the Federation of Pakistan were undoubtedly influential factors in the decisions of many members of the world community to support the secession of Bangladesh at the expense of the territorial integrity of the Federation of Pakistan where the most minimal of human rights were in jeopardy. This posture was also reflected in the 1971 Annual Report of the UN Secretary-General to the General Assembly.[49]

Cassese is of the opinion that "the body of international rules on self-determination has had a remarkable bearing on the whole process of secession".[50] He identifies the five different versions of self-determination and the right to secede is one of them which is applicable in exceptional cases, such as irremediably oppressive and/or despotic regimes, where factual conditions render internal self-determination impracticable. In such cases, self-determination serves as a tool in setting political and legal rationales; legitimising the secession of the oppressed peoples from their oppressive states, exemplified by the secession of the former Soviet republics where referendums were held to verify the will of the peoples concerned.[51] The Peace Conference on Yugoslavia set up in 1991 by the European Community and CSCU, which adopted the Helsinki Principle on internal self-determination, accepted the will of a number of republics to secede from Yugoslavia. The Conference merely prescribed some conditions to be complied with in order to be recognised as independent States.[52] The ongoing support particularly of the West for the separation of the Kurds from Iraq seems to derive indirectly from the UN Security Council Resolution 688 and 689 of 1991 (on the oppression of the Iraqi Kurds).

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[48] MR Islam, "Secessionist Self-Determination: Some Lessons From Katanga, Biafra and Bangladesh" (1985) 22 *J of Peace Research* 211-20.

[49] 26 GAOR Supl (No 1A) 1 at 18, UN doc. A/8401/Add.1 (1971).

[50] Cassese (1995), n 8 at 273.

[51] Id at 316-17, 359.

[52] Id at 268-72, 360.

Secessionist self-determination seems to be a consequential or derivative right, exercisable only as an extreme alternative following the failure of a State to provide equal rights and self-determination of its own peoples. In other words, if a State complies with this duty, secession is completely inoperative in that peoples within that state are obliged to refrain from engaging in any action subversive to the territorial integrity and political unity of that state. It is quite evident that secession under the 1970 Declaration on Friendly Relations is a very limited choice. In exercising self-determination, the peoples within an independent state must first exhaust all available constitutional remedies and arrangements. Secessionist option is circumscribed by circumstances where it is totally unavoidable because of impossibility of other means of implementing the right.

The final Draft Declaration does not deal with the secessionist aspiration of indigenous peoples. Nor does it impose any additional limitation on indigenous self-determination. In other words, the restrictive scope of secession as an ultimate remedy to be resorted to as a last resort is also available to indigenous peoples. This is quite consistent with the UN Charter regime governing secession. Taking away this limited scope of secession from indigenous peoples would have been tantamount to a double yet diluted international standard of human rights for them.

All indigenous peoples entitled to self-determination may not necessarily be alike in terms of their specific conditions of existence, plight, deprivations and desires. This dissimilarity permits flexibility in the adoption of different measures towards fulfilling indigenous self-determination. Perhaps the overwhelming majority of cases may reasonably be redressed through internal measures. Indeed some measures of goodwill and cooperation to reconcile, not to aggravate, the marginalised condition of indigenous peoples are now forthcoming from many states. The internal realisation of equal rights and self-determination of indigenous peoples through the establishment of indigenous self-government with political and fiscal autonomy is becoming increasingly popular.[53]

The scheme of indigenous self-rule and local autonomy in all matters, except health services, in Greenland established in 1978 within the unity of Danish state ensures the highest degree of indigenous self-determination.

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[53] JF Tremblay and PG Forest, *Aboriginal Peoples and Self-Determination: A Few Aspects of Government Policy in Four Selected Countries*, Quebec, 1993 examines steps taken towards aboriginal self-government in the US, Australia, New Zealand and Greenland.

The Home Rule has been quite successful and exemplary in many respects.[54] Ever since the First Ministers' Conference in March 1984, the Canadian constitutional reform process relating to First Nations has actively been considering the ways and means of establishing indigenous self-government within Canadian Federalism. The devolution of authority onto indigenous authority has been conceived to be the best way of ensuring the enjoyment of indigenous self-determination in Canada.[55] In Australia, the Mabo decision and its aftermath have augmented the ongoing process of reconciliation with Aborigines. Following this decision, the Federal Government has enacted the *Native Land Title Act* 1993 recognising the continuation of native land title which had never been extinguished pursuant to the Mabo decision. The Native Land Title Claims Tribunal, to hear and decide claims, has already been set up. A federal fund has been created for the purchase of lands for Aborigines who have been dispossessed but not compensated by the Mabo rule. These measures, together with some earlier initiatives,[56] could well be viewed as concrete steps towards Aboriginal self-government.

Admittedly, the realisation of indigenous self-determination internally has received greater appreciation from both indigenous peoples and their states. Yet it may be quite naive to pretend that there could not be any situation, present or future, which is grave enough to warrant secession. Such a presumption seems superficial and deceptive. The excessive deprivation of rights and values of an indigenous people in a state, where domestic means to realise the right have been exhausted in vain, may leave no room for the restoration of conditions for their dignified human existence short of outright secession. The plight of the Kurds in Turkey and Iraq is in point. Whilst the Kurds in Turkey have violently been denied of their equal

[54] Report of the Meeting of Experts to review the experience of countries in the operation of schemes of internal self-government for indigenous peoples, Greenland, 1991, UN doc. E/CN.4/1992/42/Add 1.

[55] CO Mercredi, "First Nations and Self-Determination" in KE Mahoney and P Mahoney (eds) *Human Rights in the Twenty-First Century: A Global Challenge* (1993) at 161; GR Hall, "The Quest for Native Self-Government: The Challenge of Territorial Sovereignty" (1992) 50 *U Toronto Faculty of Law Review* 39; B Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 *Canadian Bar Review* 261.

[56] BW Morse, *Aboriginal Self-Government in Australia and Canada* (1984) examines a number of such initiatives such as the land tenure system in Northern Territory and South Australia, the Aboriginal Benefit Trust Account, the *Pitjantjatjara Land Rights Act 1981*, the *Maralinga Tjarutja Land Rights Act 1984*, the Aboriginal Land Council and the Aboriginal and Torres Strait Islander Commission etc.

rights and internal self-determination, the Iraqi Kurds enjoy only a limited degree of autonomy superimposed by the UN Security Council declaring their territory as a "safe haven". Instead of reconciliation guaranteeing their equal rights and self-rule within the unity of the states to which they belong, the states concerned are engaged in frustrating, often forcibly, the Kurds' rights. Given this situation, what palatable options do the Kurds have to realise their rights? If their rights cannot be materialised within their existing state structures, their right to assert a separate political status as a last resort may not be gainsaid. The international legal order must protect the exercise of all recognised rights and prevent their denial. For a group such as the Kurds, indigenous self-determination devoid of secession is likely to generate false expectations, a misleading and misplaced use of the right incapable of providing shelter required in all situations.

Indigenous peoples in the past endured State-sponsored genocidal acts, the ultimate of all international crimes. Modern States still find it an uphill daunting task to establish that their past practices have totally been eradicated. A state that commits genocide against its own peoples cannot claim, as a matter of right, the allegiance and loyalty of the targeted peoples. It was therefore neither possible nor desirable for the Working Group to ignore the compelling plight of such peoples. In a bid to afford protection and remedy to such peoples, the Working Group found no other alternative but to formulate indigenous self-determination quite consistently with the contents of the right under international law,[57] without expressly ruling out altogether secession as a permissible mode of exercising indigenous self-determination. Any such preclusion would have been tantamount to watering down the meaning and relevance of indigenous self-determination - a posture not found in any UN instruments proclaiming equal rights and self-determination of peoples. The implication of such a circumscribed indigenous self-determination could have been that "all peoples" do not have equal right to self-determination which would run counter to the prescription of self-determination cherished in the UN Charter regime.

Whilst all indigenous peoples are entitled to self-determination, they must bear foremost in mind that the nature of secessionist alternative is not automatic but consequential, the scope of which is extremely narrow under

[57] Self-determination in the post colonial era "includes a right to independent statehood", C Tomuschat, "Self-Determination in a Post-Colonial World" in Tomuschat (ed), n 8 at 11; also UN doc. E/CN.4/sub.2/404, Rev 1, 1981 titled: *The Right to Self-Determination* by A Cristescu, at 47.

the 1970 Declaration on Friendly Relations. If measured in terms of historical forces of the present state-oriented paradigm with its dogmatic bias towards the rights and interests of state, secession may juridically be classified as a revolutionary act which acquires recognition and legitimacy only if it succeeds. Viewed from these perspectives, the 1970 Declaration on Friendly Relations is a significant step forward in creating an international normative regime for the orderly governance of secession under certain limited and legitimate circumstances.

Self-determination enshrined in the UN Charter regime is not an irrefutable right of peoples. It cannot be understood to possess an absolute effect in itself devoid of other prescriptions of the UN Charter regime. Similarly indigenous self-determination embodied in the Draft Declaration must be placed in its legal and political contexts as supplied by the UN Charter and other relevant UN instruments including the 1970 Declaration on Friendly Relations. Indigenous peoples must seek to realise their right within the existing limits of the UN Charter regime in a manner consistent with, not in isolation of, other rights including the territorial integrity of state. Should indigenous peoples purport to assert and exercise their right beyond the limit of the UN Charter regime and their means extend up to secession under all circumstances, any such action may be dubbed as a revolutionary, rather than a self-determination, act. And the normative rule of international law governing such a situation may well be the might determining the right and nothing succeeds like success, counting up costs to peace, security and order.

Prospects for the UN Endorsement of Indigenous Self-Determination

The Draft Declaration embodying indigenous self-determination has already been approved, without any change, by the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission) in its resolution 1994/45 of 26 August 1994. The adopted draft titled: "United Nations declaration on the rights of indigenous peoples" was submitted to the UN Commission on Human Rights (Commission) at its 51st session in January-March 1995 for consideration and adoption. The Commission in its resolution 1995/32 of 3 March 1995 set up an open-ended inter-governmental Working Group with the sole purpose of elaborating the draft. Pursuant to the General Assembly resolution 49/214

of 23 December 1994 which encouraged the Commission to consider the draft in consultation with the indigenous peoples, the Commission agreed to include the participation of indigenous peoples' representatives from organisations having no status with the ECOSOC. This inclusion was in addition to the indigenous representatives from organisations in consultative status with the ECOSOC.

The newly created Working Group of the Commission held meetings for ten working days in 1995.[58] The Working Group generally considered nearly every aspect of the draft, including its scope of application. The right of indigenous peoples to self-control and the need for indigenous consent in determining political relations with the national authority were the central themes of the discussions. Apparently there was a bipartisan support for indigenous self-determination. But signs were there for the revival of the past difference of opinions between the government representatives and the indigenous representatives on the extent of exercise of the right. The former have cautiously been worried about the inclusion of indigenous self-determination with all options open for the exercise of right. Apprehending the potential detrimental effect of the right on the territorial integrity and political unity of states, they support only the internal realisation of the right in the form of autonomy, self-government and self-management within the existing State structure - short of outright secession. The indigenous group purports to favour the right to be recognised in its entirety with all permissible modes of exercise, including secession. The government representatives in the past attempted in vain to formally qualify indigenous self-determination. The Working Group that drafted the Declaration was composed of members who served in their individual capacity. The new Working Group of the Commission is composed of government representatives. Whether this difference will generate any impact on the recommendation of the new Working Group is yet to be seen.

Australia however on its part has consistently been supportive of the Draft Declaration in general. It has been a prosper and strong supporter of indigenous self-determination to be implemented effectively within the domestic sphere of a State.[59] The former Labour Government displayed

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[58] (1995) 34 *ILM* 535-43; JR Crook, "The Fifty-First Session of the UN Commission on Human Rights" (1996) 90 *Am JIL* 126.

[59] To this effect, Australia made a written submission to the UN Working Group, see n 36.

reasonable enthusiasm and political will in devising domestic strategies for the phase by phase implementation of aboriginal self-determination within Australia. The attitude of the incumbent Howard Government towards the Draft Declaration may not be substantially different, except that its political commitment may not be as intense as its predecessor offered. But the indigenous cause has already travelled a long distance from the distant mist of colonialism to the global setting of wider human rights movements in the 1990s. The indigenous issue has already outgrown the domestic jurisdiction of states and become a legitimate international concern. In this climate, it would be exceedingly difficult for the present government to adopt a radically different posture on the Draft Declaration.

In order for it to be finally adopted by the UN, the Draft Declaration will be debated and reviewed by the ECOSOC and the General Assembly. These UN organs, unlike the two Working Groups, are not open to participation by indigenous peoples. These are exclusively dominated by state representatives with ultimate decision-making power. The inclusion in the Draft Declaration of a provision on full-fledged indigenous self-determination with all options open for the exercise of the right may be less receptive to states. Their representatives at the UN organs may prefer to draft a provision that would provide them maximum freedom and ambiguity, rendering indigenous self-determination subservient to territorial integrity under all circumstances at any cost. Such a possibility may not be gainsaid in view of the fact that it would be extremely difficult for the UN bodies to decide the matter in a manner inimical to their power base - the member states.

Nonetheless, there are certain strong mitigating factors militating in favour of indigenous self-determination worked out by the Working Group in the Draft Declaration. There has been a mounting worldwide trend towards support for indigenous self-determination. The realisation of this right is regarded as a precondition for the restoration of native rights and fundamental freedoms which have steadily and violently been eroded ever since the time of first contact. The drive of indigenous peoples for equal rights and self-determination and concomitant widespread international sympathy for its implementation is as powerful a mobilising force in the 1990s as it was during the process of decolonisation. Indigenous peoples quest for self-determination is rapidly substituting for the fictional notion of discovery and *terra nullius* that has already been stripped of its legal validity.

The indigenous perception of self-determination involves the needs, aspirations, values and goals of their political, economic, social and cultural community. The fundamental objective is to resuscitate their values and dignity, to regain control over their present and future destiny through self-participation in the process of state they live in, to restore sovereignty over their territorial base and to introduce a social order determined by themselves.[60] The western societies, which once considered indigenous peoples as savages in a state of nature, have begun to understand and appreciate the distinct identity of indigenous values, expectations, their social and human organisation. States with indigenous components in their territories have now come to surmise that coercive assimilationist or indiscriminate integrationist policies are bound to be counterproductive. These governments are now grappling with the challenges of reconciliation towards a true healing of relationships.[61] This process of accommodation of indigenous rights and interests in any national system would not necessarily justify buttressing the existing national order. It may inflict a destabilising impact on the status quo. But such a disruption to the status quo seems constructive in that it would help transform the present unjust order into a more desirable and equitable one.

The inherent evil features of colonialism that compelled the world community and the UN to recognise the right of colonial peoples to self-determination still continue to exist in independent states. The concern of the world community to deal with this old problem in a new context is reflected through the increasing recognition of indigenous rights symbolised by the observance of the International Year of the World's Indigenous Peoples in 1993 and the proposed International Decade of the World's Indigenous Peoples to be commenced later on.[62] This soaring international public opinion is now too formidable to ignore.

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[60] For a discussion on indigenous peoples' view on self-determination, see F Cassidy (ed), *Aboriginal Self-Determination* (1991), D Engelstad and J Bird (eds), *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (1992); Self-Determination, Report of the Martin Ennals Memorial Symposium, Saskatoon, Canada, 3-6 March 1993.

[61] The 1993 Report of the Working Group has recorded a number of steps towards reconciliation, n 2; see n 53.

[62] The World Conference on Human Rights held at Vienna in June 1993 made such a recommendation to the General Assembly. See the 1993 Vienna Declaration and Programme of Action (A/Conf.157/21) Part II. The International Commission on Human Rights in its resolution 1995/32 decided that the UN Declaration on the rights of indigenous peoples be adopted by the General Assembly within this International Decade, see n 58, *ILM* at 536.

Self-determination is no longer regarded as the offspring of the process of decolonisation. Nor is it the solitary manifestation of secession. In this decolonised era, self-determination is widely regarded as a process in itself comprising a wide variety of political and economic arrangements within a state.[63] The opponents of indigenous self-determination can no longer afford to ignore the recent development that:

> The full exercise of self-determination need not result in the outcome predicted by those who would discredit the principle - independent statehood for every single ethnic group. Rather, the full exercise of self-determination can lead to a number of outcomes, ranging from minority-rights protections, to cultural or political autonomy, to independent statehood.[64]

The secessionist option is simply not available in states which internally guarantee equal rights and self-determination of all segments of constituent peoples without discrimination. This internal aspect of self-determination that generates expectation for the enjoyment of the right within existing state structures has minimised the perceived threat to the territorial integrity and political unity of state.

Quite apart from factors referred to which are likely to persuade states, the non-binding nature of the Draft Declaration would perhaps make states more receptive to indigenous self-determination worked out by the Working Party. Had it been presented in the form of a convention or covenant creating binding effects, states might have been very cautious not to bind themselves beyond a bare minimum. A non-binding declaration is, whilst unable to ensure full compliance by states, capable of influencing national policies and legislation pertaining to indigenous peoples. This flexibility enables states to tailor domestic plan to accommodate indigenous rights and interests, thus encouraging states to adopt the Draft Declaration. As more and more states are voluntarily attracted to the Draft Declaration, its provisions become increasingly self-enforcing and difficult to deny. This pragmatic approach of the Working Group purports to serve dual purposes: it makes significant progress towards the protection and promotion of indigenous rights and

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[63] G Nettheim, "Peoples and Populations – Indigenous Peoples and the Rights of Peoples" in J Crawford (ed), *The Rights of Peoples* (1988) at 119; RL Barsh, "Indigenous Peoples and Right to Self-Determination in International Law" in B Hocking (ed), *International Law and Aboriginal Human Rights* (1988) at 71.

[64] MH Halperin and DJ Scheffer, *Self-Determination in the New World Order* (1992) at 46-47.

avoids the alienation of states from the process. At this juncture, this strategy seems to be best suited to foster cooperation between states and indigenous peoples.

The extraordinary dimension of legal, moral, ideological and humanitarian impacts of indigenous plight, and the shared expectations and informed thinking of the world community about restoring long overdue justice to indigenous peoples may drive the indigenous issue even further to the forefront of the UN. The issue has assumed and will continue to assume paramount importance. It has now become an issue which continually solicits the deference of the civilised community, encroaches on its consciousness and often challenges the wisdom in its sense of propriety. It is in this context that the factors referred to are likely to contribute towards dissipating the negative reaction of states to indigenous self-determination. And the prospect for the adoption by the UN of the Draft Declaration with indigenous self-determination as the centre-piece provision is seemingly brighter than ever before.