

# INDIGENOUS "SOVEREIGNTY" AND INTERNATIONAL LAW: REVISED STRATEGIES FOR PURSUING "SELF-DETERMINATION"

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Many writers . . . are specialists in human rights, rather than general international law, and specialists in indigenous peoples rather than human rights. Some . . . of these super-specialists suffer from super tunnel vision. It does not seem to occur to them that their subject of special interest belongs to a much wider world of normative development and, what is more, a world in which the concepts lying to hand have more fluency and political acceptability.

-Ian Brownlie<sup>1</sup>

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<sup>1</sup> Ian Brownlie, *Treaties and Indigenous Peoples* (Oxford: Clarendon Press, 1992), 63.

## I. INTRODUCTION

The indigenous community greeted the United Nations' decision to officially proclaim 1993 as the "International Year of the World's Indigenous Peoples" rather warily. A mere twelve years had passed since the United Nations had created the Working Group on Indigenous Populations to formally address global indigenous issues. Over a much broader historical time span, many indigenous movements around the world have gained little more than symbolic international action in response to their quests for cultural, social, economic, and political autonomy. However, UN recognition reflects the increased globalization of indigenous rights movements.<sup>2</sup>

The 1993 celebration of the indigenous population, just one year after the quincentennial of Columbus' arrival in the Western Hemisphere, provides an ideal backdrop against which to examine past efforts by colonial powers to subjugate indigenous populations and current strategies used by indigenous groups to combat these existing relationships. Within this framework, one can examine the future prospects for indigenous rights in the international community.

This paper seeks to expound upon Brownlie's above quotation in order to demonstrate that some "super-specialists" regarding indigenous and human rights groups have used misguided strategies. Such specialists often manifest a lack of precision in their use of the international human rights lexicon, particularly in their attempts to further the "right of self-determination" and enhance the degree of "sovereignty" of indigenous populations. Not only are other concepts available which these specialists can use to further their agendas, but strategies are possible which would not threaten the territorial integrity or political sovereignty of a majority of states in the international system.

Essentially, the struggle between indigenous groups and state actors in the international system does not revolve around the extension of the right of self-determination to these groups as traditionally conceived

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<sup>2</sup> The birth of the international indigenous movement is probably tied to the indigenous activism of the 1960s and early 1970s. In the United States, indigenous peoples were mobilizing on a national scale to stage several key events, most notable being Wounded Knee II, in 1974, and the Trail of Broken Treaties march on Washington, D.C. in 1975. These events had a diffusionary effect by heightening the awareness of indigenous populations throughout the globe that they shared a common plight in the face of the modernization process. The result was the establishment of several nongovernmental organizations (NGOs) with consultive status to the United Nations, such as the International Indian Treaty Council in 1974, which originated out of the American Indian Movement (AIM), and the creation of the World Council of Indigenous Peoples in 1975. Franke Wilmer, *The Indigenous Voice in World Politics*, (Newbury Park, California: Sage, 1993), 18-19, 136-38.

under international law.<sup>3</sup> As Douglas Sanders and others acknowledge,<sup>4</sup> most of these groups seek not to secede from the territories of the states in which they reside, but rather to wield greater control over matters such as natural resources, environmental preservation of their homelands, education, use of language, and bureaucratic administration (call it autonomy for present purposes) in order to ensure their group's cultural preservation and integrity.<sup>5</sup> Self-determination, as presently understood under international law, is not a prerequisite for cultural preservation. The existing body of human rights law is sufficient to ensure that all indigenous groups in the international system have recourse under international norms which, if respected, will ensure their cultural survival.<sup>6</sup> It is to these currently existing human rights treaties and documents that indigenous groups should appeal.<sup>7</sup>

The erosion of state sovereignty in the international system has long been apparent.<sup>8</sup> Within the international system one sees an emerging norm: all states must adhere to a minimum international community standard regarding treatment of their own populations, including their indigenous populations.<sup>9</sup> But demanding respect for this minimum standard is quite

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<sup>3</sup> The most commonly held definition of the right of self-determination implies that "any self-differentiating people, simply because it is a people, has the right, should it so desire, to rule itself." Walker Connor, *Ethnonationalism: The Quest for Understanding*, (Princeton, N.J.: Princeton University Press 1994), 38.

<sup>4</sup> Douglas Sanders, "The UN Working Group on Indigenous Populations," *Human Rights Quarterly* 11 (1989): 429; see also Raidza Torres, "The Rights of Indigenous Populations," *Yale Journal of International Law* 16 (1991): 142; Rodolfo Stavenhagen, "Challenging the Nation-State in Latin America," *Journal of International Affairs* 45 (1992): 436.

<sup>5</sup> It must be noted here that indigenous populations place a particular primacy on their ties to their ecosystem/environment, and that they place an emphasis on the fact that their cultural survival is directly linked to their intimate connections to their territorial homelands.

<sup>6</sup> S. James Anaya, "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims," *Human Rights Quarterly* 13 (1991): 403-11.

<sup>7</sup> See S. James Anaya, "Indigenous Rights Norms in Contemporary International Law," *Arizona Journal of International and Comparative Law* 1 (1991): 15-24. Some of the most salient examples include: the Universal Declaration of Human Rights (1948); the Anti-Genocide Convention (1948); the International Convention Eliminating all Forms of Racial Discrimination (1965); the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights, especially Article 27 (1966); and the UNESCO Declaration on the Principles of International Cultural Cooperation (1966). For a more comprehensive listing of the relevant documents and their texts see James Crawford, *The Rights of Peoples* (New York: Oxford University Press 1988).

<sup>8</sup> Stanley Hoffman, *Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics*, (Syracuse, New York: Syracuse University Press, 1981).

<sup>9</sup> As an anecdotal illustration of this we point simply to the reaction (or lack thereof) of the world community to the US state-sponsored massacre at Wounded Knee in 1890, and

different from proposing and pursuing strategies that ultimately challenge the political sovereignty and territorial integrity of nearly every state in the international system. In pursuing such a course of action, indigenous groups and their leaders should expect not only intractability on the part of host states, but outright hostility. As Brownlie presciently notes, there are concepts with more "fluency and political acceptability" which will achieve the same desired ends of cultural preservation.

This paper argues that calls for self-determination, for an absolute right to self-identification, and for sovereignty only exacerbate tensions between indigenous groups and states. We examine the debate surrounding what constitutes an indigenous group, and we survey the various ways in which aboriginal groups were subjugated as well as the colonial treaty-making process which gives rise to present indigenous claims of sovereignty. Subsequently, we analyze indigenous perceptions of sovereignty and their incompatibility with sovereignty as conceived under contemporary international law, and finally, we offer revised strategies for indigenous groups to employ in their attempts to maintain cultural integrity.

## II. DEFINING THE TERM "INDIGENOUS GROUP"

The terminology of the indigenous rights movement is fraught with conceptual ambiguity, stemming largely from the dialectical differences between the presently conceived and accepted definitions of these concepts (self-determination, "peoples," and "indigenous" groups) under state dominated international law, and the new definitions that the indigenous movement is constantly seeking to implement to their own advantage.

The term indigenous is used to describe more than 5,000 groups in the international system with an estimated population of 300 million.<sup>10</sup> In the past, these indigenous populations have received many different designations: aborigines, Indians, natives, minorities, first people, and the "Fourth World." The "indigenous" designation is most widely used among the native populations themselves, by intergovernmental organizations (IGOs) such as the United Nations, as well as by many nongovernmental organizations (NGOs). States in the international community, however, have not accepted the term as readily.

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the more recent, privately initiated, 1993 massacre of the Yanomami in the forests of the Brazilian Amazon.

<sup>10</sup> Nancy Seufert-Barr, "Seeking a New Partnership," *United Nations Chronicles* (June 1993): 40. Of course, definitional considerations arise when identifying indigenous populations around the world. Given the several, competing conceptions of what it means to be indigenous, anthropologists differ as to the actual global indigenous population sizes, with estimates ranging from 230-300 million.

The United Nations did not officially recognize indigenous groups until it formed the UN Working Group on Indigenous Populations (hereinafter Working Group) in 1982.<sup>11</sup> The Working Group established a lengthy definition of the term indigenous, an abridged version being: ". . . descendants of the original inhabitants of conquered territories possessing a minority culture and recognizing themselves as such."<sup>12</sup> While the International Labor Organization (ILO) and other juridical researchers have their own definitions of indigenous, the Working Group definition is the most widely used.<sup>13</sup>

There are four basic problems with the existing UN working definition of indigenous populations. First, indigenous persons are not always the minority population in the host state. For instance, indigenous populations constitute a majority of the population in Greenland, where the Inuit make up approximately 90 percent of the population. The Quechua and other indigenous groups in Bolivia account for 60 percent (4.9 million) of the total population. Mayan groups in Guatemala comprise approximately 60 percent (5.4 million people) of the population, while the Malays in East Malaysia constitute 50 percent of the total population (approximately 500,000 people).<sup>14</sup> Clearly, a minority culture status does not apply in these and several other cases around the globe.

A second problem with the above-mentioned definition arises when identifying the descendants of the "original inhabitants." Descendants undergo transformation and change in cultural identity over time, such as

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<sup>11</sup> Sanders, *supra* note 4, at 407. The Economic and Social Council authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to establish the Working Group on Indigenous Populations in May 1982. The Working Group is composed of five persons, drawn from the membership of the Sub-Commission and representing five regions officially recognized by the United Nations (Africa, Asia, Eastern Europe, Latin America, and "Western Europe and Others"). The group meets annually and reviews current developments affecting the rights of indigenous populations. As the most open body in the UN system, the Working Group rules of procedure allow any indigenous person or representative to speak as well as states, intergovernmental agencies, and nongovernmental organizations. The basic mandate of the group is to draft standards, such as the current revision of the "Draft Universal Declaration on Indigenous Rights." Eventually, this draft is to be reviewed for consideration by the General Assembly.

<sup>12</sup> Gilbert Charles, "Hobson's Choice for Indigenous Peoples," *World Press Review* (Sept. 1992): 26.

<sup>13</sup> In 1982 the World Bank also developed guidelines to identify indigenous populations which might be affected or displaced by World Bank funded development projects. The World Bank's definition is similar to the UN Working Group's definition, but it also adds the criteria that they be "non-monetized or only partially monetized, largely or entirely dependent on the national economic system," "non-literate: not possessing a written language," and having an "economic base more tightly dependent on their specific environment." Wilmer, *supra* note 2, 181.

<sup>14</sup> Wilmer, *supra* note 2, 136-38; Seufert-Barr, *supra* note 10, 40-42.

with Mestizo populations. How then does one identify an indigenous descendant: self-identity, blood quantum or cultural practice?

Third, not all territories occupied by indigenous populations were conquered militarily by colonials. Treaty-making, for instance, often took the place of outright conquest in North America between the colonial powers (Great Britain, Holland, France) and the indigenous populations of Canada and the US.

Lastly, the present working (though unofficial) definition used by the Working Group is so broadly conceived that almost any stateless group in the international system can be interpreted to be a member of an "indigenous" population.<sup>15</sup> Under this definition, any non-state nation,<sup>16</sup> regardless of geographic locale (even in the heart of Europe), could fit under the term "indigenous population." What allows this phrase to be so inclusive is the use of the terms "non-dominant or colonial condition."<sup>17</sup> Under the existing working definition one could easily identify Basques, Kurds, Abkazians, Bretons, Chechens, Tibetans, Timorese, Puerto Ricans, Northern Irish, Welsh, Tamils, Madan Arabs, or Palestinians as indigenous people.

In common practice, the Working Group grants people the freedom to identify themselves as indigenous. Since the existing definition of

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<sup>15</sup> That definition is the following:

Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them, and, by conquest, settlement or other means reduced them to a non-dominant or colonial condition; who today live more in conformity with the particular social, economic and cultural customs and traditions that with the institutions of the country of which they now form part, under a State structure which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant.

Proceedings from the 1st Meeting of the UN Working Group on Indigenous Rights U.N. Doc. E/CN.r/Sub.2/1982 L.566.

<sup>16</sup> Milton J. Esman, "Ethnic Pluralism and International Relations," *Canadian Review of Studies in Nationalism* 27 (1990): 88. Esman identifies non-state nations as being ethnic groups which do not have a patron state of their own. They are peoples which identify with a territory which is usually subsumed within a larger state (or contiguous states) controlled or dominated by another ethnic group.

<sup>17</sup> Inclusiveness occurs because the international system is rife with ethnic groups which are "non-dominant" within the states in which they reside, and "colonial condition" does not specify with which type of "colonialism" one is dealing, colonialism in the "western" sense or as more precisely conceived by Hechter as colonialism being both "internal" and "external" in nature. Michael Hechter, *Internal Colonialism: The Celtic Fringe in British National Development, 1536-1966* (Berkeley: University of California Press, 1975), 30-34.

indigenous is so broadly conceived, any non-state nation may choose to identify itself as indigenous and receive the benefits of such an identity. Such a subjective approach lends itself to dispute by failing to clearly establish guidelines that differentiate indigenous from non-indigenous groups. Similarly, the "Draft Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities" (hereinafter Draft Declaration) emphasizes self-identification rather than establishing a formal definition.<sup>18</sup> The blurred distinction between "indigenous" and "minority" under international law further complicates prospects for the UN General Assembly's eventual adoption of the "Draft Universal Declaration on the Rights of Indigenous Peoples."

### III. THE NOTION OF SELF-IDENTIFICATION

#### A. *General Problems of Terminology*

Some indigenous groups argue that not only do all "peoples" have the right to self-determination, but that they also have the exclusive right to proclaim or identify themselves as "indigenous peoples." They insist that the right to self-determination is an "inherent and inalienable right . . . which existed independently from recognition from [g]overnments and international organizations."<sup>19</sup> These groups argue further that it is "not for [g]overnments to determine who constituted a nation or a people, since peoples were entitled to decide for themselves."<sup>20</sup>

Adamant insistence by indigenous groups on the right of self-identification is understandable, particularly given their historical experience in relation to dominant population groups. While there are 547 federally recognized tribes in the United States, for instance, there have been numerous groups denied official tribal status by the Federal government.<sup>21</sup> Until just recently the government of Turkey insisted that there was no such thing as a Kurdish identity group within its borders, insisting on referring to Kurdish people as "mountain Turks" or "people from the mountains." The government of Greece refuses to acknowledge that Macedonian, Albanian, or Turkish identity groups reside within its borders; in Mexico there is resistance on the part of that government to acknowledge separate indigenous identity groups by imposition of the

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<sup>18</sup> This document was formally adopted by the UN General Assembly in 1992. Protection of Minorities U.N. Doc. E/CN.4/Sub.2/1992/37.

<sup>19</sup> Proceedings from the 11th Meeting of the UN Working Group on Indigenous Rights, at 18, U.N. Doc. E/CN.4/Sub.2/1992/33 (1992).

<sup>20</sup> *Id.*, 19. Reiteration of this point is made plain in "Operative paragraph 6" of the proposed charter "Indigenous peoples have the collective and individual right to maintain and develop their distinct ethnic and cultural characteristics and identities, including the right to self-identification." *Id.*, 47.

<sup>21</sup> The plight of the Lumbee of North Carolina, the Edisto of South Carolina, the Mattaponi of Virginia, and the Gabrielenos of California are just a few examples.

"mestizo myth" which states that all Mexicans derive roots from indigenous populations, and that "Indianness" is only a matter of degree. Finally, the Australian province of Tasmania has denied (until just recently) to itself and the world the existence of surviving Tasmanian aboriginals.<sup>22</sup>

These examples of states denying identity seem to support the "self-identification" argument. However, taken to its logical conclusion, the self-identification principle is the Pandora's box which states, in practice, ardently resist opening. For example, in Tasmania, nascent Tasmanian nationalism appears to be emerging, based upon the barely surviving elements of the original aboriginal people. This group has for years struggled against the Tasmanian government's denial of their existence as an aboriginal community, the government arguing that the entire aboriginal population was wiped out (taking a macabre pride in the efficiency of their forbearers' genocide). A small isolated population did survive (not on the mainland),<sup>23</sup> and today is exerting its right to self-identification. What is curious is that not only are semi-assimilated aboriginals increasingly stepping forward and identifying themselves as survivors of the aboriginal Tasmanian culture, but some argue that individuals of exclusively European stock are beginning to identify themselves as ancestrally related to the aboriginals, as well.<sup>24</sup> Governments like Australia may begin to ask (given the dynamic nature of nationalism and national identity formation), if in the future they will have to contend with a Tasmanian separatist movement demanding to exercise its right of self-determination. Furthermore, if the right to self-identification is absolute, can this right be asserted by minority religious groups who choose to identify themselves as "indigenous peoples?" Can these groups avail themselves of all of the rights that any international declaration will provide? Do the Jewish claims to Judea have validity? Do they have the right to identify themselves as the indigenous population of Palestine? Or is the group which they displaced, with centuries of continuous and intimate ties to the land, the true "indigenous

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<sup>22</sup> Illustrative of this fact was the privately released film, "The Last Tasmanian," (Tom Haydon, 1978) supposedly documenting the nineteenth century deaths of the few remaining Tasmanians.

<sup>23</sup> Lyndall Ryan, *The Aboriginal Tasmanians*, (London: University of Queensland Press 1981), 222. Ryan notes that in 1847 a group of fifty aboriginal women and whalers survived on some small islands in the eastern Bass Strait. Today they constitute the only surviving link to the main island's original inhabitants.

<sup>24</sup> *Id.*, 253. Ryan reports that there was a four-fold increase (from 671 to 2,942) in the number of people who openly asserted their aboriginal identity in the Tasmanian censuses between 1971 and 1976. This has led some to question whether or not this is a case in which there was the widespread "voluntary concealment" of aboriginal identity, or as others assert, the spread of the myth among the progeny of those who committed the genocide of the aboriginals that they are ancestrally related to the islands original inhabitants.

population?" Why has the Bahai community sent an observer to participate in the Working Group on Indigenous Peoples?<sup>25</sup>

Clearly, the lack of any objective definition of indigenous peoples on the part of the working group is partly the result of demand of the right to self-identification, because not every group which might consider itself indigenous would find itself falling within the parameters of any generally accepted definition.<sup>26</sup> Acceptance of objective criteria<sup>27</sup> could feasibly exclude some groups, which would automatically deny them the right of self-identification. Most of the standard working definitions of indigenous peoples would, for example, exclude the Jews of Israel or the Bahai of Iran, and thereby deny them the right to self-identification.

The predicament is compounded by both the imprecise nature of world history regarding the origins of groups, and by a common tendency among nations to suspend rationality (as is illustrated in the Tasmanian case) when analyzing the origins of those nations. As Walker Connor notes, it is possible to define a nation or people not as a group of people who share a common origin, but rather as a group of people who believe that they share a common origin, and believe that they are ancestrally related.<sup>28</sup> Responding to this highly sensitive issue, many multinational states regard the principle of self-identification as akin to dousing an inferno with gasoline.

Probably the most essential criterion for defining a group as indigenous, and one for which there is seemingly the most consensus, is that the group be antecedent to all other subsequent arrivals. Unfortunately, the historical record is not always clear, particularly in the Eastern Hemisphere, as to which groups were the first in arriving. Couple this fact with non-rationality and myth creation doctrines centered around the concept of "nationhood," and it becomes clear why states such as China and India refuse to even recognize the concept of "indigenous,"<sup>29</sup> let alone allow these groups to engage in self-identification.

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<sup>25</sup> An inquiry was made to the Bahai's UN representative, but that office chose not to respond.

<sup>26</sup> One of Burger's six criteria as to what constitutes an "indigenous group" is one which "consist[s] of individuals who subjectively consider themselves to be indigenous, and are accepted by the group as such." Julian Burger, *Report from the Frontier: The State of the World's Indigenous Peoples*, (Atlantic Highlands, New Jersey: Zed Books, 1987), 9.

<sup>27</sup> One example of an objective criterion which could be incorporated by indigenous groups is: a group which has a contemporary and historical affinity to a territorial homeland which pre-dates colonial contact. Notice that this does not specify "Western" colonial contact. Eschewing this distinction allows for the inclusion of such groups as the Nagas of India and the Tibetans of China.

<sup>28</sup> Connor, *supra* note 3, 93.

<sup>29</sup> Brownlie, *supra* note 1, 61.

*B. Problems Raised by the UN Draft Declaration*

Every policy must define its target. The indigenous population is the target group of the UN Draft Declaration. Wholesale adoption of the current policy of self-identification lends itself to possible fallacious claims of indigenous identity within the international community. Despite the arguments in favor of a cultural relativist approach--foundational to the self-identification philosophy--the nature of this document is universal. Creating a universal document presupposes that one can identify specific indigenous populations throughout the world and establish standards and practices typifying these groups. While few definitions of indigenous groups are complete, one can develop several indicators for "indigenesness." There is no formula for establishing the existence of an indigenous group; however, the existing working definition must be reconceptualized to include minimal working standards for identification prior to passage of the draft declaration.

We do not prescribe this task lightly. Any undertaking attempting to differentiate indigenous populations from ethnic, linguistic or religious minorities is extremely difficult. However, one must attempt to allay the fears of the states which attend Working Group meetings and ultimately vote on the passage of the Draft Declaration in the General Assembly.

Interest in the Draft Declaration is growing within the international community, especially among member states. In 1988, thirty-three states participated in the annual meeting of the Working Group. By 1992, forty-two states participated, many of which had no traditionally-conceived indigenous populations within their borders.

A number of states with traditionally-conceived indigenous populations sent observers to the Working Group.<sup>30</sup> Representatives were also sent by states whose "non-state nations" could be construed as indigenous peoples under a broad definition.<sup>31</sup> The participation of these states in the Working Group demonstrates the level of concern over the revision of the Draft Declaration. Indigenous and state-based concerns about issues of self-identification need to be addressed and deliberated more fully. This ongoing deliberative process must better define the targets of the Draft Declaration before many other indigenous issues (such as intellectual property, funerary remains, and economic development) can be furthered.

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<sup>30</sup> For example, those countries participating in the 1992 session included Australia, Bolivia, Brazil, Canada, Chile, Colombia, El Salvador, Honduras, Mexico, New Zealand, Nicaragua, Panama, Peru, and Venezuela.

<sup>31</sup> Included here are the countries of Bangladesh (Chakmas), Cyprus (Greeks), France (Basques, Bretons, Catalonians, Corsicans), Greece (Macedonians), India (Mizo, Nagas), Indonesia (Dyaks, Papuans, Timorese), Italy (Sardinians), Japan (Bugunin), Myanmar (Karen, Kachin, Mon, Shan), Nigeria (Ibo), Senegal (Diola, Serer, Wolof), Syria (Kurds), Thailand (Karen), Turkey (Kurds), and Vietnam (Cham, Montagnards).

## IV. THE RIGHT OF SELF-DETERMINATION AND STATE PRACTICE

One can place aboriginal populations into three categories in terms of the extension or withholding of the right to self-determination under international law and state practice. The first type is those groups (primarily from Africa and Asia) that were subjugated under a Western imperial power, and went through a process of colonization. These groups (or amalgams of groups)<sup>32</sup> asserted and were extended the right of self-determination under the decolonization process, many only after bloody wars of "national liberation." The extension of this right however proceeded to absurd lengths, whereupon self-determination was granted based upon one criterion and one alone: if a group had been subjugated under a "Western" form of colonialism. The result of this *carte blanche* extension of the right of self-determination was the creation of those problematic and questionable international entities known as "micro states."<sup>33</sup>

The second type of aboriginal peoples may be found in the Eastern Hemisphere and consist of what have also been referred to as "non-state nations." Non-state nations can be considered the more broadly conceived "indigenous" groups, if the requisite of subjugation to Western imperialism is dropped as a criterion. As Hurst Hannum has pointed out, the more powerful states within this hemisphere, such as China, the former USSR, and India, have steadfastly refused to recognize the presence of any indigenous groups within their territories because they equate "indigenoussness and [Western] colonization."<sup>34</sup>

The third population group has been referred to as "indigenous populations" which are found in settler-colonial societies, and are chiefly comprised of "native" groups found primarily in the Western Hemisphere (although with some exceptions such as Australia, New Zealand, Israel, and South Africa). In the process of decolonization the right of self-determination was extended or forcibly exercised (through "wars of independence") by the "settlers" from the colonizing group, while the indigenous population remained subjugated, excluded, and marginalized. These are "indigenous groups" as they are more traditionally conceived.<sup>35</sup>

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<sup>32</sup> It would be more precise to state that the right of self-determination was extended to the colonial territorial unit rather than the often various "peoples" within it.

<sup>33</sup> The extension of the "right of self-determination" to groups or "nations" like these stretches the concept well past its capacity, and lends credence to those groups in the international system like the Tamils (population 60 million) and the Kurds (20 million) who argue that if a "country" like Nauru (with a population of 8,000) has the "right to self-determination," surely it must be extended to a cohesive group of tens of millions.

<sup>34</sup> Hurst Hannum, "New Developments in Indigenous Rights," *Virginia Journal of International Law* 28 (1988): 664.

<sup>35</sup> Roxanne Dunbar Ortiz, *Indians of the Americas: Human Rights and Self-determination*, (New York, New York: Praeger, 1984), 54.

The extension of the right of self-determination to the latter two groups has been vociferously resisted by the existing members of the modern state system. As Anaya notes, the source of this resistance is a "concern that an acknowledged 'right to self-determination' for indigenous groups may imply an effective right of secession."<sup>36</sup>

The UN Charter explicitly states that all "peoples"<sup>37</sup> are accorded the right of self-determination. Increasingly, groups of the second and third categories are seeking greater autonomy within their host states, but not necessarily self-determination as it is understood under international law.

A recent strategy on the part of some indigenous groups to gain greater autonomy from the states in which they reside has been to utilize the treaty-making process as a means of asserting "prior" sovereignty.<sup>38</sup> They argue that this process was an explicit recognition of their sovereign rights and standing as international sovereign entities. However, the vast majority of indigenous groups were not extended participation in the treaty-making process. We now turn to an examination of the various means through which states subjugated indigenous groups, and the validity of consequent claims to sovereignty from the perspective of contemporary international law.

#### V. VARYING PATTERNS OF INDIGENOUS SUBJUGATION

A brief review of colonial treatment of indigenous populations from the 16th to 18th centuries will reveal many of the historical patterns of indigenous subjugation. The most common form of subjugation and resultant marginalization of indigenous groups worldwide has been through military conquest or outright genocide. In North America, colonial powers such as England, France, Sweden, Holland, Spain, and Portugal utilized treaties to legitimize their territorial claims and expand their spheres of influence in the "new world."<sup>39</sup> We contend that the

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<sup>36</sup> Anaya, *supra* note 6, 34.

<sup>37</sup> Here again, the semantic divide arises between states and indigenous groups over the phraseology of "peoples." Indigenous groups insist on the use of the term "indigenous peoples," while states are adamant on the use of the phrase "indigenous populations." The reasoning of states here is obvious. Using indigenous "peoples" would be a tacit acknowledgement of their right to self-determination. This debate between states and indigenous groups was evident at the 1992 Earth Summit in Rio. Wilmer, *supra* note 2, 203-04.

<sup>38</sup> Ironically, some indigenous groups who were not subjugated via the treaty process have sought "to derive advantage from the lack of any treaties to argue that they have never conceded sovereignty." Garth Nettheim, "Peoples and Populations: Indigenous Peoples and the Rights of Peoples," in *The Rights of Peoples*, James Crawford ed., (Oxford [England]: Clarendon Press, 1988), 118.

<sup>39</sup> For a more detailed account of the colonial patterns of contact in the "new world" see Howard Peckham & Charles Gibson, *Attitudes of the Colonial Powers Toward the American-Indian*, (Salt Lake City: University of Utah Press, 1969); Wilcomb E. Washburn, *History of Indian-White Relations*, Volume 4 (Smithsonian Institution 1988);

treaty-making process was used by the imperial powers as a less direct form of incremental subjugation and colonization. The effects of this method of subjugation were nonetheless just as devastating as direct military conquest. Within a century of the European colonizing intrusion into the Western Hemisphere, a population of approximately one hundred million aboriginals had dwindled down to ten million.<sup>40</sup>

At the time of contact, there were basically four legitimate claims to territory under international law: papal order, discovery, conquest, and land cession. Colonizing powers often resorted to treaty-making because the law deemed land cession the most legitimate means of appropriation, yet it accounted for only a small percentage of the overall land acquisitions in the Americas. The "doctrine of discovery" was a key provision accepted in international law that enabled European states to justify their conquest of the Americas. As Vine Deloria notes, "the theory meant that the discoverer of unoccupied lands in the rest of the world gained a right to the land titles as against the claims of other European nations."<sup>41</sup>

Spanish explorers immediately applied the Aristotelian doctrine of natural slavery to indigenous populations.<sup>42</sup> Neither the Spanish nor the Portuguese entered into systematic treaty-making policy with indigenous populations of the Americas. Both colonial powers relied heavily on Papal Bulls for land claims and justifications of forcible religious conversion.

#### VI. THE VALIDITY OF PAST INDIGENOUS TREATY CLAIMS UNDER INTERNATIONAL LAW

As the nature of the relationship between the imperial powers and the autochthonous populations changed, these treaties devolved from documents of accommodation to documents of domination. Many of the

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Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest*, (New York: Oxford University Press 1990); Study on Treaties, Agreements, and other Constructive Arrangements between States and Indigenous Populations U.N. Doc. E/CN.4/Sub.2/1992/32.

<sup>40</sup> Dunbar Ortiz, *supra* note 35, 1.

<sup>41</sup> Vine Deloria, Jr., *Behind the Trail of Broken Treaties; an Indian Declaration of Independence*, (New York: Dell Publishing Company, 1974), 86.

<sup>42</sup> Las Casas and Sepulveda clashed over the application of the Aristotelian notion of slavery, prompting the Great Debate at Valladolid, 1550-1551. Sepulveda believed that wars against Indians were just and even constituted a necessary preliminary to their Christianization while Las Casas argued vehemently against such a rationale, asserting that unjust conquests must stop. While the debate ended in a stalemate, it did produce the Law of Burgos, ultimately failing to stop the outright Spanish conquest of the Americas. For a more extensive account of this debate see Lewis Hanke, *Aristotle and the American Indians*, (London: Hollis & Carter, 1959), 27.

initial treaties dealt with issues of trade or military alliance, but as colonization progressed and settlement of Indian homelands began on a massive scale these treaties increasingly focused on the issue of land cession.

Of the over 400 treaties signed between the US government and indigenous populations in the United States, seventy-six treaties called for removal and 230 dealt with land cessions.<sup>43</sup> Many of the treaties signed between indigenous populations and the US federal government during the removal era were negotiated and concluded fraudulently, without a designated tribal representative present or under duress.<sup>44</sup> Due to uncontrolled westward expansion in the 1830s, the US government began to negotiate treaties of removal for many of the tribes in the east (including the Five Civilized tribes of the Iroquois). Also, in direct refutation of earlier treaties, the US government extended the application of state laws to the concerned indigenous populations. As Deloria concedes, the treaty-making process devolved from a mutual agreement between two powers to "the rubber-stamp land conveyances that opened the West."<sup>45</sup> In the United States, the goal of the treaty-making process became questionable over time as treaties increasingly dealt with real estate transactions rather than tribal autonomy. Cohen also acknowledges that the United States "often abrogated treaty provisions."<sup>46</sup> There have been international aspects to tribal treaties, ranging from clauses for passport issuance for travel onto Indian land, boundary separation, and extradition, to the ability to make war. However, Cohen notes that these treaty provisions are counterbalanced by the federal establishment of

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<sup>43</sup> Dorothy V. Jones, *License for Empire*, (Chicago: University of Chicago Press, 1982), 188-196.

<sup>44</sup> One such example is the 1795 Treaty of Greenville. In this case, the defeated tribes (Wyandots, Delawares, Shawnees) of the conflict with General Wayne were coerced into signing a provisional treaty stipulating an enormous land cession. This treaty is said to symbolize the beginning of the slow, gradual process of dispossession of aboriginal lands during the westward expansion of settlers.

<sup>45</sup> Deloria, *supra* note 41, 108.

<sup>46</sup> Felix Cohen, *Handbook of Federal Indian Law*, (Albuquerque: University of New Mexico Press, 1942), 36. For example, the case of *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), established the notion of Congressional "plenary power over the tribal relations of the Indians." In effect, an act of Congress could then supersede a prior treaty provision, further negating the strength of treaties under international law. Congressional acts leading to direct treaty violations include: the Dawes Act of 1887, which divided tribal lands into severalties; the Indian Citizenship Act of 1924; and the outright termination of the Federal/Indian trust relationship during the 1950s in a flagrant attempt to assimilate Indians into US society.

plenary power over tribes, exclusive trade relations,<sup>47</sup> and wholesale abrogation of previous treaties.<sup>48</sup>

Similarly, treaties signed in Canada and New Zealand suffered from similar lack of enforceability under international law. Maori-British relations were formally established in 1840 under the Treaty of Waitangi, entered into by over five hundred Maori chiefs and the representatives of Queen Victoria. This treaty, however, was never formally ratified, and never fully honored.<sup>49</sup> For the many indigenous populations of Canada (Inuit, Crees, Metis, and others), eleven treaties were signed between 1871 and 1921. These treaties effectively displaced indigenous groups from their land to reserves, in a fashion akin to the US reservation system. Over time it became apparent that these treaties had been negotiated primarily as a means of "extinguishing" indigenous groups' title to the land.<sup>50</sup> While indigenous groups hold "special status" under Canadian law, the government has done little to uphold the previous treaty provisions. Thus, the treaty-making process can be viewed as a more benign form of subjugation, but a method of incremental subjugation, nonetheless.

#### VII. RECOGNITION OF SOVEREIGNTY: THE DYNAMIC BETWEEN NATURAL AND POSITIVE LAW

Numerous scholars and advocates of indigenous rights have maintained that the treaties which evolved between colonial powers and indigenous groups demonstrate the imperial powers' recognition of Indian sovereignty, or what has been referred to elsewhere as "prior sovereignty."<sup>51</sup> "Prior sovereignty" refers to the argument that antecedent to the invasion of the North American continent by the European powers, Indian communities exercised sovereignty over themselves and that, at least in the initial stages of contact, this sovereignty was formally recognized by the colonial powers via the treaty-making process.

Scholars and activists have pointed to the works of the seminal scholars writing in the field of international law at the time of contact to make the argument that these treaties were viewed as having the force of law

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<sup>47</sup> See U.S. Constitution, Article I, §8 ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

<sup>48</sup> For a more detailed account of this process see Donald E. Worcester, *Forked Tongues and Broken Treaties*, (Caldwell, Idaho: Caxton Printers, 1975); Oren Lyons, *Exiled in the Land of the Free: Democracy, Indian Nations & the U.S. Constitution*, (Santa Fe, New Mexico: Clear Light Publishers, 1992).

<sup>49</sup> Burger, *supra* note 26, 192-95.

<sup>50</sup> Wilmer, *supra* note 2, 15.

<sup>51</sup> Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples," *Stanford Law Review* 45 (1993): 1333-1335.

among the community of nations.<sup>52</sup> What is often overlooked by those who invoke the writings of Vattel, Grotius, and Vitoria to argue that international law has long viewed aboriginal societies as being "distinct political entities with territorial rights,"<sup>53</sup> is that much of the body of early international law was infused with the influence of natural law and its prescriptive nature on how states ideally should behave towards these newly contacted indigenous communities. It was not until the nineteenth century that the full force of the positivist school of international law came to be felt. Positivist law is descriptive in nature and is concerned with describing how states actually behave in the international arena. Positivism argues that it is only through examining the actions of states in the international community that one can begin to discern what international law actually is. So it is with the positivist revolution that one begins to see a preoccupation with not only how states should behave in the international arena, but on how they actually do behave. Falk notes this dialectic between the rights of indigenous groups under natural law on the one hand, and the rights (or complete lack thereof) accorded these groups in the historical record:

The jurisprudential starting-point of the rights of peoples is a direct assault upon positivist and neo-positivist views of international law as dependent upon State practice and acknowledgement. In this regard, the rights of peoples can be associated with pre-positivist conceptions of natural law which at the very birth of international law were invoked by Vitoria and others on behalf of Indians being cruelly victimized by Spanish conquistadores.<sup>54</sup>

Throughout the 19th and 20th centuries states practiced the widespread abrogation of the rights of indigenous groups that were enumerated in the treaty-making process. Most contemporary legal scholars view this fact as reflective of the lack of political sovereignty and international standing of indigenous groups under international law.<sup>55</sup>

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<sup>52</sup> See, e.g., Kirke Kickingbird, *Indian Sovereignty*, (Washington: The Institute, 1977).

<sup>53</sup> Howard R. Berman, "Are Indigenous Groups Entitled to International Juridical Personality," *Proceedings of the 79th Meeting of the American Society of International Law*, 190.

<sup>54</sup> Richard Falk, "The Rights of Peoples (In Particular Indigenous Peoples)," in *The Rights of Peoples*, James Crawford ed., (Oxford [England]: Clarendon Press, 1988), 19.

<sup>55</sup> See, e.g., Gerhard von Glahn, *Law of Nations*, (London: Collier Macmillan, 1986), 80. Von Glahn notes that though there was some initial recognition on the part of a few writers on the international persona of Indian tribes, "States on the other hand, usually denied such status to tribes, and agreements made with them were subsequently (and often unfairly) denied the character of binding treaties, regardless of the nomenclature applied to the original agreement at the time of its conclusion. Tribes, therefore, do not constitute members of the community of nations."

Never mentioned by those making the argument that these treaties are instruments of international law and the vessels for the explicit recognition by the imperial powers of Indian sovereignty is the concept of *pacta sunt servanda*. *Pacta sunt servanda* is the primary concept underlying all treaty law. Under *pacta sunt servanda* all states, when entering international agreements, are obligated to adhere to the terms of the treaty and acknowledge that "a treaty in force is binding upon the parties and must be performed by them in good faith."<sup>56</sup>

A sincere adherence to *pacta sunt servanda* is necessary for states to act effectively at the international level via the treaty-making process. Those states which wantonly and continually violate the terms of treaty agreements run the risk of international condemnation and pariah status. At the time of the violations of most of the rights acceded to the "uncivilized" indigenous populations around the globe, there was no international hue and cry regarding their violation. Other members of the international community were not reluctant to enter into international treaty agreements with violating states because of their non-performance of treaty obligations regarding indigenous groups. Indeed, only recently has the international community questioned states' treatment of their indigenous populations. Irregardless of treaty provisions, such treatment was previously considered to be exclusively a matter of domestic concern falling under the principle of non-intervention. The lack of response on the part of the international community to the abrogation of these treaties should speak volumes as to the status of indigenous populations within the community of "civilized" nations at that time.

#### VIII. THE FAILURE OF TREATY-BASED APPROACHES

The fact that *pacta sunt servanda* was not adhered to by the colonial powers in their dealings with indigenous groups does much to undermine the central premise of the strategy advocating the "trail of broken treaties" as a means of reclaiming "prior sovereignty." This conclusion is bound to agitate many scholars and activists within the indigenous community. The inadequacy of a treaty-based approach, however, speaks to the need for representatives of the global indigenous community to revamp their strategies in their quest to achieve "self-determination" or, more precisely, to retain cultural integrity.

Referring to prior treaties made at the time of contact as a means of reclaiming "sovereignty" is an ill-begotten strategy which has been rejected elsewhere. Anaya argues that a more fruitful strategy in terms of achieving cultural integrity would be to invoke current human rights treaties within international law.<sup>57</sup> He argues that there are three main

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<sup>56</sup> Ian Brownlie, *Principles of Public International Law*, (Oxford [England]: Clarendon Press, 1990), 616.

<sup>57</sup> Anaya, *supra* note 6, 404.

reasons for dropping the treaty-based strategy: the intertemporality of international law, the lack of recognition of their international status, and what he calls the "stability through pragmatism over instability" (which would result if the right of self-determination as presently defined under international law were to be extended to each indigenous group).<sup>58</sup>

Under the concept of intertemporal law one "judges historical events according to the law in effect at the time of their occurrence."<sup>59</sup> Unfortunately, during the eras of contact, the concepts of discovery and right to acquisition of territory via conquest were accepted norms under international law. There was also a complete lack of official recognition of the sovereign status of the Indian nations by the international community (although the argument may be made that the treaty-making process is implicitly a form of tacit recognition). Finally, given that there are presently over 5,000 identified peoples in the international system, contained within roughly 160 discrete territorial units, the wholesale extension of the right of self-determination (as found in current international practice) and the resultant fragmentation would lead to disastrous consequences.<sup>60</sup>

Consistent with Anaya's suggestions, another reason for not utilizing the treaty strategy is that many groups were not a part of the treaty-making process, and not all of them were extended the same types of rights.<sup>61</sup> Moreover, neither the Portuguese nor Spanish as colonial powers normally interacted with indigenous populations via the treaty-making process.<sup>62</sup> Thus there are numerous indigenous groups (particularly within the Southern hemisphere) which have no access to abrogated treaties at all. A more universal approach, and one which is accessible to all indigenous populations, is found in existing human rights laws to which most states of the international community are currently party.<sup>63</sup>

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<sup>58</sup> *Id.*, 406.

<sup>59</sup> *Id.*, 405.

<sup>60</sup> Rodolfo Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights*, (Tokyo, Japan: United Nations University Press, 1990), 5.

<sup>61</sup> Macklem, *supra* note 51, 1332.

<sup>62</sup> There are a few exceptions to this in North America. The Spanish entered into a treaty agreement with the Cherokee and another with the Choctaw and Chickasaw.

<sup>63</sup> Macklem has argued against the pursuit of this "universalist" approach because it is subject to "indeterminacy" within the framework of universal norms as found under international law. He does this by implicitly juxtaposing the constant tension between the concepts of individual versus collective rights and their seeming irreconcilable resolution, in terms of which should have primacy, or, which is the "more universal." *Id.* at 1338-40. He fails to recognize that the struggle between these rights constantly unfolds within any political arena, and that if one is acceding to the fact that groups within a particular society have the right of "cultural preservation," one is going to have to acknowledge the primacy of collective over individual rights in at least some circumstances. It is also common for the rights of groups (as well as individuals) to be explicitly laid forth in the

Our argument is that Indian claims to sovereignty via the treaty-making process are out of sync with current trends among indigenous groups in the international system. Such an approach is out of sync because it is a strategy which is exclusive in nature, while the current international trend is towards universalism. The indigenous movement is becoming increasingly more global. Due to the unprecedented level of modern communication, indigenous populations around the world are uniting and acting in a concerted fashion. A treaty-based approach is legally questionable and ultimately has limited applicability--it addresses the situation of a small minority of the world's indigenous populations, and could only exacerbate an already nearly intractable state-centric system.

#### IX. CONCLUSION: TERMINOLOGICAL CONFUSION OVER THE NOTION OF SOVEREIGNTY

Traditionally, sovereignty and self-determination have been inexorably linked as characteristics of states under international law. The UN Charter specifically grants the right of self-determination to all "peoples." Somewhere within the context of this debate lies the aboriginals' call for greater self-determination as a reaction to longstanding western colonialism. The issues are clear: what is meant by self-determination of indigenous groups, and what are the international connotations?

Scholars advocating indigenous sovereignty often contend that sovereignty can be conceptualized in two distinct and exclusive forms: internal and external. Internal control of one's community is deemed sovereignty, yet several scholars seemingly dismiss the principle of external control as a valid indicator of indigenous sovereignty.

The concepts of both internal and external sovereignty have been subject to several, competing interpretations.<sup>64</sup> Despite the raging controversy, several indigenous groups have adopted "sovereignty" as part of their lexicon in an ongoing quest for increased autonomy and cultural preservation. In response to this, Boldt and Long contend that use of the

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constitutions of a number of countries. Hannum, *supra* note 34, at 655-57. This tension between individual versus collective rights is not one that can be as easily dismissed as Macklem feels free to do. See, e.g., Gillian Triggs, "The Rights of "Peoples" and Individual Rights: Conflict or Harmony?," in *The Rights of Peoples*, James Crawford ed., (Oxford [England]: Clarendon Press, 1988), 141-157; Jay A. Sigler, *Minority Rights* (Westport, Connecticut: Greenwood Press, 1983), 175-201.

<sup>64</sup> Lack of unity over external conceptions of sovereignty can be illustrated by the recurring debate over the First World's focus on respect for civil rights and liberties and the Third World's call for the right of "development."

concept of sovereignty by indigenous groups only further legitimizes Western-European power structures of authority and decision-making.<sup>65</sup>

"Indigenous sovereignty" can take on multiple meanings ranging from "cultural integrity" to "internal management." Vine Deloria asserts that the "conflict over Indian sovereignty today originates in part because of the misconception held by the non-Indians with respect to social institutions and nationality."<sup>66</sup> Deloria's remark illustrates the contention of many indigenous scholars that sovereignty can mean more than those principles traditionally conceived under international law.

While such a misconception does exist to a degree, an expanded use of the term sovereignty only seems to heighten misunderstanding in discussions of indigenous sovereignty. Traditionally treated as a legal concept, sovereignty is stretched under Deloria's conceptualization to "consist more of continued cultural integrity than of political powers and to the degree that a nation loses its sense of cultural identity, to that degree it suffers a loss of sovereignty."<sup>67</sup>

By Deloria's terms, sovereignty becomes the set of cultural differences and standards resting on the development of a distinct community. However, this expanded use of the term serves to dilute the meaning of sovereignty in international law. What Deloria has labeled sovereignty is best understood as the right to preserve "cultural integrity." Invocations of self-determination and sovereignty cloud the issue of indigenous rights when it is unclear whether the term reflects the traditional international law interpretation, the notion of cultural integrity or another competing definition. The lack of clarity regarding the term's application can have the unintended effect of preventing solutions. If the language used in the draft declaration and other subsequent legal documents is to be universal, then there must be terminological precision.

While Deloria concludes that limiting the meaning of sovereignty to a narrow version of political or legal power precludes the resolution of indigenous rights, it appears that the conceptual expansion of the term may have even more detrimental effects. As the recent debate among the observers at the 1992 Working Group on Indigenous Populations

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<sup>65</sup> Menno Boldt & J. Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms," in *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, Menno Boldt & J. Anthony Long eds., (Buffalo: University of Toronto Press, 1985), 165-179.

<sup>66</sup> Vine Deloria, "Self-determination and the Concept of Sovereignty," in *Economic Developments in American Indian Reservations*, Roxanne Dunbar-Ortiz & Larry Emerson eds., (Albuquerque: Institute for Native American Development, University of New Mexico, 1970), 26.

<sup>67</sup> *Id.*

meeting reflects, great confusion exists over the competing uses of sovereignty by both indigenous populations and member states.

Stretching the concept of sovereignty to denote cultural integrity adds further confusion to the ongoing debate. Not all indigenous populations want self-determination as understood under international law.<sup>68</sup> For many indigenous groups, expanded autonomy is preferable to sovereign statehood. The Working Group tends to share chairperson Erica-Irene A. Daes' view that indigenous populations do not have a right of secession.<sup>69</sup> Rather, Daes believes that indigenous communities have the right to self-management within the structure of the existing host state. This great schism in defining sovereignty only further contributes to the terminological discord in the area of indigenous rights.

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<sup>68</sup> Hannum, *supra* note 34, 671-72.

<sup>69</sup> Sanders, *supra* note 4, 428, describing the work of the UN Working Group. The original source was listed as: Daes, "Native Peoples Rights," *Cahiers De Droit* 27 (1986): 123. In the tenth session of the UN Working Group (1992), Chairperson Mrs. Erica-Irene Daes reaffirmed her earlier contentions that the principle of self-determination as discussed within the Working Group as reflected within the Draft Declaration, "was used in its internal character, that is short of any implications which might encourage the formation of independent States." Proceedings from the 11th Meeting of the UN Working Group on Indigenous Rights, at 17, U.N. Doc. E/CN.4/Sub.2/1992/33. See also Erica-Irene A. Daes, "Some Considerations on the Rights of Indigenous Peoples to Self-Determination," *Transnational Law & Contemporary Problems* 3 (1993): 1.