

2. RECONSTRUCTING SELF-DETERMINATION: A RELATIONAL APPROACH

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1. INTRODUCTION

Negotiations on international normative instruments relating to indigenous peoples have repeatedly become ensnared in the question: Does the international law of self-determination apply to indigenous peoples? Although there are glimmerings of future change, the political debate has revolved around the binary issue of the complete applicability or inapplicability of the existing international law concept of self-determination. Representatives of indigenous peoples in international negotiations have insisted, as a large group of them put it in a 1993 *demarche* to the UN Working Group on Indigenous Populations, that 'the right of self-determination is the heart and soul of the declaration. We will not consent to any language which limits or curtails the right of self-determination'.² These representatives of indigenous peoples proposed that the UN draft Declaration on the Rights of Indigenous Peoples incorporate a version of common Article 1(1) of the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR), modified by

¹ This chapter draws, with permission, from the author's much larger paper, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law', to be published in Philip Alston (ed.), *Peoples' Rights* (Oxford: Oxford University Press, forthcoming), an article written in memory of Andrew Gray (1955-1999). A version was presented at the Annual Meeting of the American Society of International Law in April 2000. The support of the Filomen D'Agostino and Max E. Greenberg Research Fund is gratefully acknowledged.

² Quoted in S. Pritchard, 'Working Group on Indigenous Populations: Mandate, Standard-Setting Activities and Future Perspectives', in S. Pritchard (ed.), *Indigenous Peoples, the United Nations and Human Rights* (London: Zed Books, 1998), pp. 40-62, at pp. 45-46.

changing the opening word from 'All' to 'Indigenous', so as to state expressly that the right of self-determination belonged to indigenous peoples. The five members of the Working Group adopted this indigenous proposal verbatim in Article 3 of the draft: '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 development'. Representatives of many UN Member States met this with categorical opposition, asserting that these groups are not 'peoples', and have no international law right of self-determination. For some state governments, self-determination is a principle upholding independent states, and any application of it to groups within states would undermine the state.

2. INDIGENOUS PEOPLES AND THE TRADITIONAL INTERNATIONAL LAW OF SELF-DETERMINATION

Self-determination has long been a conceptual morass in international law, partly because internationally agreed texts have not fully formulated its meaning or some aspects of its implementation, partly because it both reinforces and conflicts with other important principles and specific rules, and partly because the details of the international law practice of self-determination do not fully correspond to some of the established textual formulations.³ Analysis of practice since 1945 along traditional international law lines suggests the standard view that self-determination accords to the people of certain territorially-defined units the right to determine the political future of the territory. The categories of units to which this right applies have not been precisely delineated, but in addition to states, at least five such categories are supported in the practice of states and inter-state institutions.⁴ These are:

³ Some of the problems are surveyed in C. Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff, 1993).

⁴ Many are discussed in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Supreme Court of Canada). For more substantial treatment see J. Crawford, 'The Right of Self-Determination in International Law: Its Development and Future', in P. Alston, *op. cit.* (note 1).

- Mandated territories, trust territories, and territories treated as non-self-governing under Chapter XI of the UN Charter;
- Distinct political-geographical entities subject to *carence de souveraineté* (gross failure of the duties of the state);
- Other territories in which the principle of self-determination is applied by the parties;
- Highest-level constituent units of a federal state where that state has dissolved;
- Formerly independent entities reasserting their independence with at least the tacit consent of the established state, where their incorporation into that state was illegal or of dubious legality.

A somewhat distinct body of practice confers upon such units, and especially on peoples of independent states as represented by their governments, certain economic rights relating especially to natural resources, and certain protections in relation to title to territory and the use of force.⁵ While claims by indigenous peoples may in some cases fall within these five categories, for the most part acceptance of claims by indigenous peoples to self-determination would involve some rethinking of the ambit of traditional international law represented in this summary. Elements of existing interpretations of self-determination, together with increasingly coherent bodies of emerging national and international practice, and the growing support among state governments for initiatives in relation to internal self-determination generally and especially in relation to indigenous peoples, suggest that the case of indigenous peoples may be one in which innovative normative formulations can be agreed if indigenous peoples are willing to support them. These formulations will almost certainly not be exhaustive of the issues, probably not be highly precise, will not be met with universal compliance any more than most human rights norms are, and as with other normative formulations about self-determination, may well be somewhat incoherent. At a minimum, they must not be disastrously dangerous, and within the limits of existing imprecision and incoherence they should be consistent with existing formulations relating to self-determination,

⁵ See generally I. Brownlie, *Principles of Public International Law*, 5th edition (Oxford: Oxford University Press, 1998), pp. 167 and 599-602.

human rights, and other fundamental principles. If progress toward agreement on useful innovative formulations is to be made, it is suggested that a fundamental reorientation is called for that leaves aside the binary conceptual debate and moves closer to emerging practice. This reorientation involves shifting—not for the purpose of exhaustive statement but merely for the purpose of reaching agreement on partial formulations—from an end-state approach to a relational approach to self-determination.

In the formative period of the international indigenous movement, the major referent in shaping the movement's articulation of self-determination as a legal concept was the law established for decolonization of extra-European colonies of European states, and to a lesser extent the international law applied to special situations such as minority rule under apartheid in South Africa. The practice of decolonization did much to transform what had been in effect a political principle of self-determination into a legal right, with correlative duties for states exercising control over such units of self-determination, and more attenuated duties arising for other states as the *erga omnes* character of the right came to be recognized.⁶ Arguments for the extension of the decolonization justification of the right of self-determination to indigenous peoples presuppose, and recognize, their colonized status. These arguments appeal to the logic of decolonization and urge that its unfinished business be addressed. Some of the early rhetoric of the international indigenous peoples movement referred to the 'Fourth World', and sought support from newly decolonized states of the 'Third World'.⁷ This approach has been reinforced by appeal to the principle of equality, which is explicitly associated with self-determination in the UN Charter principle of 'equal rights and self-determination of peoples'. If 'all peoples' have the legal right to self-determination, as the 1966 Covenants stipulate, it is strongly argued that it is unjustifiable discrimination to treat indigenous peoples

⁶ *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p. 90, para. 29; Article 1(3) of the CCPR and the CESCR.

⁷ D. Sanders, *The Formation of the World Council of Indigenous Peoples* (Copenhagen: IWGIA, 1977).

differently from other 'peoples'.⁸ This logic leads to the view that independence should be one of the options for an indigenous people exercising self-determination, even if it is an option rarely chosen in practice.

This argument from decolonization has been reinforced by practice suggesting that self-determination in the strong form as a right to establish a separate state may be an extraordinary remedy in distinct territories suffering massive human rights violations orchestrated by governing authorities based elsewhere in the state—such an argument may explain acceptance of the secession of Bangladesh from Pakistan. Internationally-backed autonomy within the state may be an alternative remedy in such situations, much discussed in the case of Kosovo. But the far-reaching argument that self-determination in this strong form of statehood or almost complete autonomy is essential as a general precondition for human rights does not establish which groups or territories are the units of self-determination for purposes of human rights enhancement; nor does it overcome legitimate concerns about the threats to human rights and to human security posed by repeated fragmentation and irredentism.⁹ The remedial human rights justification for self-determination, while persuasive in some cases, is most unlikely to become normal rather than exceptional unless the sovereignty and legitimacy of states declines precipitously.¹⁰

3. END-STATE V. RELATIONAL APPROACHES TO SELF-DETERMINATION

The right to self-determination in the context of European decolonization was conceptualized primarily as an instrument for ending the colonial

⁸ E-I. A. Daes, 'Equality of Indigenous Peoples under the Auspices of the United Nations Draft Declaration on the Rights of Indigenous Peoples', *St. Thomas Law Review*, Vol. 7 (1995), pp. 493-519.

⁹ D. Horowitz, 'Self-Determination: Politics, Philosophy, and Law', in I. Shapiro and W. Kymlicka (eds.), *Ethnicity and Group Rights* (New York: New York University Press, 1997), pp. 421-463.

¹⁰ B. Kingsbury, 'Sovereignty and Inequality', *European Journal of International Law*, Vol. 9 (1998), pp. 599-625.

relationship, by conferring freedom. The future relations between colonizer and colonized were then to be determined by free agreement, but the right to self-determination was concerned with the preconditions for such choice, not with the relationship itself. Many problems were accentuated by the rapidity and artificiality of the transformation of legal relations from colonial hierarchy to the supposed equality and freedom of relations among sovereign states; often the theory of these legal relations was grossly disconnected from economic, political and social relations as they existed in practice. The duties of the colonial state correlative to the right of the people of the colonized unit to self-determination were mainly procedural, encompassing rather modest preparations of the territory for possible independence, the negotiated establishment of an environment and framework for a legitimate act of self-determination, the proper conduct of a referendum, and the orderly transfer of power. The focus was on realization of an end-state: usually independence, but occasionally some other political arrangement.

Most of the groups participating in the international indigenous peoples movement, however, expect to continue in an enduring relationship with the state(s) in which they presently live. This is also the expectation of leaders of the states involved. The claims of Cree in Quebec illustrate this dynamic. They have not sought independence from Canada, concentrating instead on their evolving relations with the federal and provincial governments, to which Canadian courts have increasingly contributed. But if Quebec secedes based on its existing boundaries, thus changing the nature of these relations, they insist on exercising their right of self-determination to determine their future, which might well involve their continuing in Canada.¹¹ Thus the claim to self-determination in the

¹¹ Grand Council of the Crees, *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec* (Nemaska, Quebec: Grand Council of the Crees (of Quebec), 1995). The Supreme Court of Canada paid disconcertingly little specific attention to issues raised by aboriginal peoples in *Reference re Secession of Quebec*, *loc. cit.* (note 4), for reasons it gives at para. 169. The Court may well imply, but does not make absolutely explicit, that aboriginal peoples should have a distinct place in negotiations were Quebec to seek independence. In a forthcoming work, Catherine Beagan Flood argues that a constitutional convention on participation by aboriginal peoples in certain types of negotiations has emerged in Canadian constitutional practice.

sense of a choice among internationally-sovereign entities is considered in practice by Cree leaders as relational and remedial, triggered by outside action disrupting existing relationships. In practice, assertion by the international indigenous movement of a strong form of the right of 'all peoples' to self-determination may prove double-edged for Cree in Quebec who oppose Quebec independence, as such an argument is equally well-adapted to assertions of self-determination in the name of some 'people' defined by a separatist movement able to secure a majority in Quebec.

The international indigenous movement has been reluctant in international negotiations to move away from the end-state model including possible independence, in order to maintain solidarity with groups unwilling to accept any relationship with an existing state. A representative statement of such a position is that of Mick Dodson, a central figure in the Australian Aboriginal and Torres Strait Islander Commission and Chair of the UN Voluntary Fund for Indigenous Populations: 'Finally, even where a state meets the obligations required under the Declaration [on Friendly Relations¹²], there will be some indigenous peoples whose right to self-determination will never be satisfied until they have a free and independent state of their own. And it would be a violation of those peoples' right of self-determination for anyone else to say that this is not an acceptable way for them to exercise that right'.¹³ Similarly, a conference of 'representatives of indigenous

¹² Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV), 24 October 1970.

¹³ M. Dodson, 'Towards the Exercise of Indigenous Rights: Policy, Power and Self-Determination', *Race & Class*, Vol. 35, No. 4 (1994), pp. 65-76, at p. 74. Elsewhere he notes that when indigenous peoples started trying to persuade the UN Working Group on Indigenous Populations to recognize the right to self-determination: 'The members of the Working Group thought that we were crazy. The Chairperson made it clear that there was no way that the Working Group could support recognition of such a politically contentious right. An examination of the drafts from one year to the next reveals that our perspectives were gradually accepted'. A significant group of state governments have moved in the same direction over the years, suggesting that unswerving adherence to the basic position has been a successful strategy for indigenous negotiators so far. M. Dodson, 'Comment', in S. Pritchard (ed.), *op. cit.*

peoples of Asia' at Baguio declared in 1999 'that although autonomy and self-government may be a way through which many indigenous peoples wish to exercise their right of self-determination . . . these are not the only ways by which indigenous peoples may exercise this right . . . they have the right to establish their own government and determine its relations to other political communities'.¹⁴ While the international indigenous movement may well adhere to this theoretical position, it is not viable as an express formulation for a UN Declaration on the Rights of Indigenous Peoples to be adopted by states, nor does it embody the current preoccupations of most internationally active indigenous peoples. By contrast, a relational approach to self-determination captures many of the aspirations embodied in the UN draft Declaration produced by the UN Working Group on Indigenous Populations.¹⁵ Such an approach might be pursued in a UN declaration without foreclosing remedial questions that may arise in extraordinary cases.

Self-determination is about the relation between state and community. As an international programme it has complex modern origins: in efforts by nationalists to establish states for their nations, in efforts by state elites to establish a mass sense of belonging to overcome the artificiality of the modern rationalist-legal industrialized state, and in hybrid efforts to end foreign domination and create state and nation all at once.¹⁶ It can be state-threatening or state-reinforcing, liberating or chauvinist, democratic or demagogic. In its legal operation it has since 1920 generally buttressed the states system, even when potentially a

(note 2), pp. 62-64, at p. 64. On the conduct of the negotiations in the first four annual sessions of the inter-sessional working group of the Commission on Human Rights, see the thoughtful accounts by Andrew Gray in the IWGIA Yearbook. For example, A. Gray, 'The UN Declaration on the Rights of Indigenous Peoples Is Still Intact', *The Indigenous World 1998-99* (Copenhagen: IWGIA, 1999), pp. 355-371.

¹⁴ Baguio Declaration, adopted at Baguio City, Philippines, 18-21 April 1999, mimeo.

¹⁵ UN doc. E/CN.4/Sub.2/1993/29, Annex I. See also UN doc. E/CN.4/1995/2; E/CN.4/Sub.2/1994/56, pp. 105-115; and 34 I.L.M. 541 (1995).

¹⁶ For a review see, e.g., M. Koskeniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', *International and Comparative Law Quarterly*, Vol. 43 (1994), pp. 241-269.

threat, as with the lift it provided to the minorities programme in the 1920s and 1930s,¹⁷ and its expression in the law of mandates, trusts, and decolonization. In many states in which groups active in the international indigenous peoples movement live, maintenance of the state at present involves efforts by the state to enhance its legitimacy, engaging with forms of community that run deeper than rational-legal associations, and in some cases accommodation of pluralism and multiple identities. There is thus for the time being a convergence between indigenous peoples and state decision-makers, with sufficient overlap to make conceivable the adoption of some set of international principles, at least in the form of a UN declaration. Reconstruction of the concept of self-determination is needed to take advantage of this convergence. The end-state independence-oriented focus, established during European decolonization and still relevant in some situations, has diverted attention from the development of legal principles concerning enduring relations between indigenous peoples and states.¹⁸

4. A RELATIONAL APPROACH IN THE UN DRAFT DECLARATION

The 1993 UN draft Declaration proposed by the Working Group on Indigenous Populations incorporates numerous ideas relevant to such reconstruction, but the only element explicitly connected with self-determination is the strong preference for autonomy expressed in Article 31:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management,

¹⁷ N. Berman, "'But the Alternative is Despair': European Nationalism and the Modernist Renewal of International Law", *Harvard Law Review*, Vol. 106 (1993), pp. 1792-1903.

¹⁸ F. Kirgis, 'The Degrees of Self-Determination in the United Nations Era', *American Journal of International Law*, Vol. 88 (1994), pp. 304-310.

environment and entry by non-members, as well as ways and means for financing these autonomous functions.

The meaning of 'autonomy' and 'self-government' is not further specified, but the political connotation is one of freedom, subject to restrictions as to matters not specifically included in the powers of the autonomous entity. In practice the most conspicuous exclusions from autonomy relate to foreign affairs and military security, but Article 31 is more hesitant even than this, not providing specifically for autonomy in matters such as policing, taxation, or judicial proceedings. Article 31 does not expressly connect autonomy with a land base, leaving open the possibility of autonomy that is defined by personal affinity rather than territorial area.

The kinds of autonomy regimes which indigenous peoples operate or aspire to vary enormously, influenced in part by the geographical and demographic setting.¹⁹ Almost all such regimes presuppose extensive relations between the autonomous institutions and other government institutions of the state, and between indigenous people and other people within or outside the autonomous area. Relations between autonomous entities (and their institutions) and the state (and its institutions) require a complex governance framework, often embodied in a formal agreement or in constitutional or legislative provisions which, although formally unilateral, may over time be understood as requiring the consent of all affected groups before amendment.²⁰ Establishing the terms of such relationships, and the legal elements structuring the dynamics of their continued evolution, has become a specialized field of practice in crafting

¹⁹ For one study of the practicalities of self-determination, far from although connected with the politics pursued in negotiations in Geneva, see A. Gray, *Indigenous Rights and Development: Self-Determination in an Amazonian Community* (Providence, Oxford: Berghahn Books, 1997).

²⁰ See Section 35 of the Canadian Constitution Act 1982. Even provisions such as the allocation of power on Indian issues to the federal government in Section 91(24) of the British North America Act 1867 could not easily be amended without support from First Nations in Canada.

solutions in many strife-torn polities.²¹ More systematic analysis of rapidly evolving autonomy arrangements involving indigenous peoples and other groups may provide part of a structure of norms to give substance to an emerging legal understanding of autonomy.²² It is clear, however, that in the overwhelming majority of cases autonomy is not simply freedom—it is a relationship. Indeed, most of the aspirations of most groups in the indigenous peoples' movement involve definition of relationships with states. The relational dimension of self-determination embodies these aspirations. Giving meaning to this element of self-determination thus requires that a central focus be on the terms and dynamics of these relational aspects.

The UN draft Declaration identifies, and makes provision concerning, many further crucial issues in such relationships, but does not expressly connect these to self-determination in the way advocated here. The dynamic of the UN process has been rather the opposite, treating self-determination as an end-state issue, and separating the debate on self-determination from the structuring of relationships. The draft Declaration provides much of the material from which the concept of self-determination may be reconstructed in relational terms, but does not always develop the relational aspects sufficiently. The draft envisages that indigenous groups may determine their own memberships and the structures of their own institutions (Articles 32 and 33), while indigenous individuals have rights to obtain citizenship of the states in which they live. Recourse for an individual aggrieved by a membership decision of the group is not specified—decisions are required as to the enduring responsibilities and powers of states of the sort where the exclusion of an individual seems to raise human rights concerns. Indigenous institutions and juridical practices may be maintained and promoted, subject to internationally recognized human rights standards (Article 33), but the

²¹ See Y. Ghai, *Ethnicity, Democracy and Human Rights* (Oxford: Oxford University Press, forthcoming).

²² H. Hannum, *Autonomy, Sovereignty and Self-Determination* (Philadelphia: University of Pennsylvania Press, 1996); M. Suksi (ed.), *Autonomy: Applications and Implications* (The Hague: Kluwer, 1998); R. Lapidot, *Autonomy: Flexible Solutions to Ethnic Conflicts* (Washington: United States Institute of Peace Press, 1997); R. Moody (ed.), *The Indigenous Voice: Vision and Realities* (London: Zed Books, 1988).

relation of these institutions and practices to state institutions, particularly the judicial system, is not explicitly addressed. The draft would require states to include the rights recognized in the Declaration in national legislation 'in such a manner that indigenous peoples can avail themselves of such rights in practice', but the role of state institutions, especially courts and administrative agencies, is not systematically addressed.

The capacities and powers of states are alluded to throughout the draft. States are required, for instance, to 'take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples' (Article 28), a formulation that deliberately did not provide for indigenous consent to receipt of such materials. Indigenous peoples have the right to effective measures by states to prevent any interference with, alienation of or encroachment upon their rights to 'own, develop, control and use the lands and territories ... which they have traditionally owned or otherwise occupied or used' (Article 26). This may entail some state responsibility to prevent alienation of land even where an indigenous person wishes to sell, albeit perhaps only in exceptional circumstances where the group's own political and legal structures are in disarray or where the conduct of the state (for example in wrongly individualizing communal title) has precipitated the situation. Even with qualifications, such state involvement raises complex problems, often restricting the ability of indigenous groups to raise capital by mortgage or to make their own development decisions, and in some cases preventing indigenous individuals from taking the same reasonable decisions. Further engagement between the state and indigenous people is indicated in provisions that indigenous peoples are entitled to benefit from state education (Article 15) and health care (Article 24) where they wish, from the full rights accorded by international labour law and national labour legislation (Article 18), and from financial and technical assistance (Article 38), and they have the right to special measures to improve their economic and social conditions (Article 22) and reflection of indigenous cultural diversity in state-owned media (Article 17).

The broad philosophy of the draft is that indigenous peoples have the right to maintain and strengthen their distinct characteristics and legal systems while retaining the right to participate fully in the life of the state

(Article 4; also Articles 8, 12-14, 19-21, 23 etc.). The provisions concerning indigenous spiritual and material relationships to, and ownership, control and restitution of, land, territories and waters, together with provisions on environment, development, and indigenous responsibilities to future generations (Articles 25-28) provide a foundation for a land and territorial base within the state. The draft would constrain state military activities and development projects in indigenous areas except with the consent of the people concerned (Articles 28 and 30)—although specific formulations such as these will be debated, negotiation on such issues is part of relational autonomy as already widely practised. The draft is lacking in provisions on duties of indigenous peoples, and in provisions addressing conflicting rights and interests of others, including non-members and dissenting members—these and other relational questions are of immense practical importance, but do not appear to be excluded or prejudged by the draft as written.

5. A RELATIONAL APPROACH TO SELF-DETERMINATION IN INTERNATIONAL LAW

After long hesitation about the application of the provisions on self-determination in Article 1 of the CCPR to indigenous groups within independent states, the UN Human Rights Committee has begun in dialogues with States Parties under the reporting procedure to express views under the self-determination rubric on the substantive terms of relationships between states and indigenous peoples. It has emphasized in particular the provisions of Article 1(2), which stipulates that all peoples may freely dispose of their natural wealth and resources, and must not be deprived of their own means of subsistence. It has criticized the Canadian government practice of insisting on the inclusion in contemporary claims settlement agreements of a provision extinguishing inherent aboriginal rights, confining aboriginal rights instead to those specified in the agreement.²³ The Committee recommended that this

²³ This policy was criticized by the Royal Commission on Aboriginal Peoples (Canada) in its 1994 report, drawing in turn on a study by Mary-Ellen Turpel and Paul Joffe.

practice 'be abandoned as incompatible with article 1 of the Covenant', an important indication that the Committee believes the Article 1 provisions on self-determination are applicable to indigenous peoples in Canada.²⁴ The Committee further recommended on the basis of Article 1 that the government implement the report of the Royal Commission on Aboriginal Peoples on the need for greater allocation of land and resources to ensure institutions of aboriginal self-government do not fail.²⁵ Earlier the Committee on Economic, Social and Cultural Rights had made similar substantive recommendations to the Government of Canada, without basing itself explicitly on self-determination and the terms of Article 1 of the CESCR.²⁶

As Article 1 is common to both Covenants, the logic of gradual convergence in interpretation is compelling, and is likely to prevail over differences in institutional dynamics. The intervention of such bodies in the dynamics of state-indigenous relations under Article 1 may be well-judged in relation to Canada, where the federal government accepts the general principle of indigenous self-determination and where the political and policy system has already developed and calibrated possible initiatives. The international bodies, although they have scant ability to formulate such detailed policies themselves, are able in such a case to boost one part of a national process. The challenge for these bodies is whether to try to apply such interpretations of self-determination for indigenous peoples to states where the government and the political system are not prepared to accept any such notion, or in situations where

²⁴ For argument that harsher elements of the policy of extinguishment pursued by the Australian Government infringe international law, see S. Pritchard, 'Native Title from the Perspective of International Standards', *Australian Year Book of International Law*, Vol. 18 (1997), pp. 127-173. The Native Title Amendment Act has been critically considered also by the UN Committee on the Elimination of Racial Discrimination. The New Zealand government's policy of seeking to make contemporary settlements of Maori claims 'full and final' has been criticized by Maori leaders and several scholars, including Annie Mikaere and Russell Karu.

²⁵ Concluding observations on the fourth periodic report of Canada, UN doc. CCPR/C/79/Add.105, 7 April 1999, para. 8.

²⁶ Concluding observations on the third periodic report of Canada, UN doc. E/C.12/1/Add.31, 4 December 1998, para. 18.

there is no carefully crafted and politically legitimate policy document upon which the international body may seize.

The number of state governments accepting principles for relationships with indigenous peoples that incorporate elements of self-determination has gradually increased. Reasonably representative of current positions of Canada, New Zealand, Denmark and other governments is a 1995 statement by the then Australian (Labour) Government, that self-determination is 'an evolving right which includes equal rights, the continuing right of peoples to decide how they should be governed, the right of people as individuals to participate in the political process (particularly by way of periodic free and fair elections) and the right of distinct peoples within a state to make decisions on and administer their own affairs'.²⁷ The Government of Guatemala, formally committed to implementing provisions on land rights, local self-government and national participation in the 1995 Mexico City Agreement on Identity and Rights of Indigenous Peoples, has taken the position internationally that self-determination of indigenous peoples is possible without threatening national unity.²⁸ A basis for comparable international positions is provided by the 1991 Colombian Constitution, which in tandem with a series of Constitutional Court decisions envisages significant indigenous autonomy as well as rights in relation to land, resources, consultation, representation, language, and education,²⁹ and by the Philippines Indigenous Peoples Rights Act of 1997 which expressly endorses indigenous self-governance and self-determination within the state. These legal policies often conflict with other government policies, and may fall far short in implementation and in their real effects, but their normative stance has some genuine support, and reflects a broader if uneven trend.

²⁷ UN doc. E/CN.4/1995/WG.15/2/Add.2, para. 8.

²⁸ Statement at Commission on Human Rights inter-sessional working group on the draft Declaration, 1998. For the text of the agreement, see 36 J.L.M. 285 (1997).

²⁹ For a short summary, see S. Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis', *Harvard Human Rights Journal*, Vol. 12 (1999), pp. 57-128, at pp. 80-81.

This trend may be necessary to the future success of the state³⁰ as well as the vitality of indigenous peoples.

A relational approach to self-determination entails some crossing of boundaries that have been drawn in national and international political debate between the self-determination programme and the human rights programme. This boundary-crossing legal strategy has many adherents, and is juridically reinforced by the inclusion of self-determination as the first right in the 1966 Covenants. Some thus justify self-determination on human rights grounds, as a necessary precondition and means to the realization of other human rights.³¹ In this view, self-determination in finely nuanced forms is an embodiment of the underlying objectives of human rights—general rights to political participation, for example, or specific rights for the members of religious and linguistic communities collectively to make decisions concerning religious and language matters. This view, while plausible, is far removed from the most common ways in which the idea of 'self-determination' is presently used in international practice, although the tide may be moving in this direction. Others look behind the formal rules of self-determination and human rights to find a justification that unites both programmes, such as the realization of freedom and equality through rights accorded to human individuals or collectivities.³² In this analysis the law of self-determination is the law of remedies for serious deficiencies of freedom and equality, just as the law of human rights is.

Internationalist writing in western countries increasingly assumes conditions of unquestionable peace, participation, and respect constructed through dialogue—what some have described as the advent of

³⁰ See A. Milward, *The European Rescue of the Nation-State* (London: Routledge, 1992); A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca: Cornell University Press, 1998).

³¹ H. Gros Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions* (New York: United Nations, 1980), para. 59; and R. McCorquodale, 'Self-Determination: A Human Rights Approach', *International and Comparative Law Quarterly*, Vol. 43 (1994), pp. 857–885.

³² S. J. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996); and S. J. Anaya, 'Self-Determination as a Collective Human Right under Contemporary International Law', Chapter 1 in this volume.

the post-modern state.³³ In some such writing, the distinctions between the right to self-determination, human rights, minority rights, and indigenous rights virtually disappear. But this view of the world is dangerously optimistic as a basis for global legal norms intended for real and general application. It does not confront, for example, the hard cases where the human rights and self-determination programmes lead in different directions. The logic of self-determination is not simply the orderly negotiation of constitutional issues in a peaceful and affluent society. To illustrate from extreme cases, it is widely thought that the 'free elections' held to vindicate post-communist democratic self-determination in unified Yugoslavia in 1990 encouraged ethno-nationalist campaigning and helped catalyze the ethnicization of politics that precipitated war and fragmentation. If these elections represented the self-determination programme, they did not represent the programme of human rights. Conversely, UN-authorized intervention in Somalia might be defended as protecting basic human rights, but the insertion of external force into complex militarized local politics is scarcely within the standard discourse of self-determination. Less extreme cases involving indigenous peoples arise often.

One of the unresolved dilemmas of basing indigenous claims on self-determination is that in encouraging groups to mobilize as 'nations', some groups or their leaders may take what to outsiders (and to some insiders) appears the path of nationalist excess, oppressing dissenters, mistreating and even creating minorities in order to create a clear majority and reinforce the dominant identity,³⁴ and confronting neighbours. Some persons who are indigenous but have multiple connections may not wish to be forced to opt decisively into one group and out of others; other persons who identify as indigenous, especially in urban areas, may be living outside traditional communities and be left with no group to join. The self-determination programme can have such costs. They can be ameliorated, but not wished away; they must be evaluated

³³ P. Katzenstein, 'Conclusion', in P. Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996), pp. 498–537, at p. 518.

³⁴ This is a theme of D. Gladney (ed.), *Making Majorities* (Palo Alto: Stanford University Press, 1998).

in defining and determining the limits of the self-determination programme. On the other side of any such evaluation, as many members of indigenous groups point out, is the price of not having self-determination, which has been extremely high—state policy, pursued with bureaucratic rationality but little accountability, has often been very expensive for the state and dismal for indigenous people. The logic of self-determination is that 'the people' themselves should make these evaluations, not state governments; but this is not the logic of the human rights programme.

If the use of the human rights programme as a basis for the indigenous self-determination programme confronts difficulties, so too do efforts to integrate these programmes with the evolving programme of minority rights in international law.³⁵ The overlap between the range of claims made by 'indigenous peoples' and 'minorities' can be considerable, and a relational approach is relevant to both. For example, in advocating a view of self-determination as encompassing 'the right of distinct peoples within a state to make decisions on and administer their own affairs', the Australian Government added that this is 'relevant both to indigenous peoples and to national minorities'.³⁶ But the terms of the relationships that evolve will often differ, for reasons that are practical, normative, and in some cases strategic. In some societies, indigenous claims to relational self-determination are legitimate and actionable in a way that comparably extensive claims of minorities might not be, whereas in other societies introducing such a distinction between certain specified groups may be irrelevant or even pernicious. The remarkable evolution of international norm-making to the point where numerous state governments accept some concept of self-determination as a principle broadly applicable to indigenous peoples, has not been remotely paralleled in relation to minorities in general. For many states this is because the category of 'indigenous peoples' is closed-ended, politically

³⁵ Some of the arguments for unification are evaluated, and carefully sidestepped, in A. Spiliopoulou Åkermark, *Justifications of Minority Protection in International Law* (The Hague: Martinus Nijhoff, 1997). See generally P. Thornberry, 'Self-Determination and Indigenous Peoples: Objections and Responses', Chapter 3 in this volume.

³⁶ UN doc. E/CN.4/1995/WG.15/2/Add.2.

accepted, and historically justified, whereas 'minorities' is much wider and free-ranging. This body of practice is strong evidence of the current political vitality of the distinction between these two categories, overlaps and difficulties of definition notwithstanding.³⁷

In the evolving law of self-determination, a normative category of 'indigenous peoples' has come increasingly to occupy a distinctive place. That it has been difficult to reach global agreement on political-legal formulations addressing this issue is not surprising. The suggestion of this chapter is that consideration of self-determination in relational terms may provide a basis for progress toward such an agreement.

³⁷ Some of the problems of defining 'indigenous peoples' as an operational international legal concept are considered in B. Kingsbury, "'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy", *American Journal of International Law*, Vol. 92 (1998), pp. 414-457.

**OPERATIONALIZING
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