RICHARD STONE

SELF-DETERMINATION:
POLITICAL 'PRINCIPLE' TO LEGAL 'RIGHT'

LLM RESEARCH PAPER

PUBLIC LAW (LAWS 505)

LAW FACULTY

VICTORIA UNIVERSITY OF WELLINGTON

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Abstract

In the face of tremendous adversity, indigenous peoples have long sought to flourish as distinct communities on their ancestral lands, and they have endeavoured to roll back inequities lingering as the result of historical patterns of colonisation.

The author submits that historically indigenous peoples, not qualifying as States, could not participate in the shaping of international law. On that basis, indigenous peoples could not look to international law to affirm the rights that had once been deemed to inhere in them by divine or natural law. States, on the other hand, both shaped the rules of international law and enjoyed rights under it largely independent of international law considerations. States could create doctrine to affirm and perfect their claims over indigenous territories as a matter of international law, and treat the indigenous inhabitants according to domestic policies, shielded from uninvited outside scrutiny by international law itself.

The author argues that the right to self-determination is a group right. It is the legal right to freely determine political status, economic, social and cultural development. The right has been declared in a number of international legal instruments, and accepted as a component of customary international law. However, the author also argues that legal right does not exist in a coherent legal framework. Rather, the right is applied to a variety of circumstances involving delicate balancing of interests.

In terms of structure, the author has chosen not to divide this paper into discrete sections. The purpose of this paper is to identify the traditional aspects of the principle of self-determination, demonstrate the principle's evolution into a right recognised at international law, and its applicability to indigenous peoples. The author identifies the conflict between eurocentric and indigenous foundations of the right to self-determination, and its evolution in the international arena. The author argues that placing overt emphasis on the nature of international law as 'law' ignores the historical reformulation of the concept of self-determination that has occurred with an evolution in jurisprudential and political discourse.

With increased intensity over the last several years, the international community has maintained indigenous peoples as special subjects of concern and sought co-operation to secure their rights and well-being. That is, international law has evolved to incorporate entities other than States as players in the international legal regime. States have duties at international law in relation to indigenous peoples. The primary duty is the duty of States to secure enjoyment of human rights and to provide remedies where the rights are violated. The duty to secure enjoyment of human rights is heightened in the context of indigenous peoples and extends beyond States to the

international community at large. In addition, the duty is implicit in customary international law".

The duty exists as contemporary recognition of centuries of eurocentrically based systemic oppression. The duty does not necessitate assimilation or integration. The duty requires the implementation of contemporary treaty and customary norms grounded in the principle of self-determination.

I. INTRODUCTION

does this need demonstration?

The author contends that the right to self-determination is a group right. It is the right to freely determine political status, economic, social and cultural development. The right has been declared in a number of international legal instruments, and accepted as a component of customary international law. However, the right does not exist in a coherent legal framework. Rather, the right is applied to a variety of circumstances involving delicate balancing of interests.

A. Purpose

The purpose of this paper is to identify the traditional aspects of the principle of self-determination, and demonstrate the principle's evolution into a right recognised at international law, and its applicability to indigenous peoples.

B. Introducing the Evolution

For a period in history, international law was concerned only with the rights and duties of independent sovereign States. In that sense, international law disregarded the face of humanity beyond the sovereign. However, under the modern rubric of human rights international law is increasingly concerned with upholding rights deemed to inhere in human beings individually as well as collectively. Extending from core values of human freedom and equality, expressly associated with peoples instead of States, and affirmed in a number of international human rights instruments, the principle of self-determination arises within international law's human rights framework. It benefits all human beings as human beings, rather than sovereign entities. Therefore, like all human rights norms, self-determination is universal in scope and must be assumed to benefit all segments of society.

States over whether an individual or collective right? Just another collective right?

True evolution here. Refer to Bowrie & other sources.

C. A Working Concept

This paper identifies the conflict between eurocentric and indigenous foundations of the right to self-determination, and its evolution in the international arena. On one hand self-determination evolved from a political principle to its current status as a human right recognised by international law. For example:[1]

> [t]he concept of self-determination is virtually as old as the concept of Statehood itself. Since its inception self-determination has undergone dramatic alterations in many aspects, from a concept initially conservatively applied to issues such as decolonisation, to a justification for the break-up of multi-ethnic States.

On the other hand, however, the right to self-determination may have existed since time immemorial. Nevertheless, Cassesse[2] argues that there is now sufficient consensus on the concept of self-determination of peoples. That is:[3]

> Self-determination can either be external or internal. External self determination embodies the ability of a people to freely choose independence or union with other States. Internal self-determination usually means that a people in a sovereign State can elect and keep the government of its choice or that an ethnic, racial, religious or other minority within a sovereign State has the right not to be oppressed by central government.

The concept of self-determination has evolved to encompass a broad range of ideas and goals. Self-determination entails the devolution of political and economic power to indigenous peoples. In those terms control over decision making processes relative to political, social, economic and cultural status and development moves from States to indigenous groups. The author contends that placing overt emphasis on the nature of international law as 'law' ignores the historical reformulation of the concept of self-determination that has occurred with an evolution in jurisprudential and political discourse.

D. Central Premise

It is the central premise of this paper that international law has developed beyond utilisation as an instrument of colonialism to encompass the demands of indigenous peoples. In the face of

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[1] M Batistich "The Right to Self-Determination and International Law" [1995] AULR 1013.
[2] A Cassese *Self-Determination of Peoples - A Legal Reappraisal* (CUP, Cambridge, 1996).
[3] Above n 2, 137.

tremendous adversity, indigenous peoples have long sought to flourish as distinct communities on their ancestral lands, and they have endeavoured to roll back inequities lingering as the result of historical patterns of colonisation.

II. HISTORY

> What we now call international law can be traced to the natural law philosophies of Renaissance European theorists, which were in some measure, although not entirely, sympathetic to indigenous peoples' existence as self-determining communities in the face of imperial onslaught. International law, however, shed its naturalist frame as it changed into a state-centred system, strongly grounded in the Western world view; it developed to facilitate colonial patterns promoted by European States and their offspring, to the detriment of indigenous peoples.[4]

The author contends that Higgins's comments suggest the eurocentric political concept of self-determination did not have its genesis as a political idea put forth by Woodrow Wilson in response to international divisiveness subsequent to the First World War. Instead, the principle of self-determination developed in the eighteenth and nineteenth centuries as a corollary to national group demands for independence and autonomy. The author also submits that the principle's applicability was limited to nations within the territories of defeated empires, and had little to do with the interests of peoples "unless [demands] were consistent with the geopolitical and strategic interests of the Great Powers".[5] Self determination was not recognised as a rule of international law because international law did not recognise national group expressions of separatist wishes as rights.

doc. proposition.

Show this
Not enough to
"submit" it.

A. Political Principle

In an advisory opinion the International Committee of Jurists favoured the supremacy of domestic legal systems and Parliamentary Sovereignty: For example:[6]

> Positive international law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some

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[4] SJ Anaya *Indigenous Peoples in International Law* (OUP, New York, 1996).
[5] H Hannum *Autonomy, Sovereignty and Self-Determination* (UPP, Philadelphia, 1990) 28.
[6] *Report By the International Committee of Jurists* (1920) 3 Journal of League of Nations 5.

Very poor knowledge of literature
Why didn't he see me? Williams
Status of Indians.

other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted.

The International Committee of Jurists referred to the political consequences of self-determination in the context of the sovereignty debate raging between parties to the Treaty of Versailles 1919.[7] In doing so the Committee ignored the internal aspects of self-determination where "self-rule implies meaningful participation in the processes of government".[8]

The concept of self-determination was strictly a political principle, operating in a young international legal system at a time when the notion of imperialism was seen as rational. States became the main players in the international legal regime. The formal and informal agreements between States, and State action stemming from those agreements, gave rise to both formal[9] and less formal international law.[10]

B. Underlying Difficulties

The underlying difficulties with the principle of self-determination persisted beyond 1919. Those difficulties centred on the content of the principle, and its applicability. Formulations of the principle of self-determination embodied notions of subjectivity and objectivity. Subjectivity and objectivity were often confusingly intertwined. For example, Higgins asserts:[11]

> The designating of States as 'subjects' within the international legal system in turn led to an embracing, especially by the leading jurists of the positivist school of international law, of the position that under a legal system there exist only 'objects' and 'subjects'. This starting point has received a widespread and uncritical acceptance and has necessarily dictated the framework of any examination. We have all been held captive by a doctrine that stipulates that all international law is to be divided into 'subjects' - that is, those elements bearing, without the need for municipal intervention, rights and responsibilities; and 'objects' - that is, the rest. Certain authors have contended vigorously that only States are the subjects of international law. And to the positivist there is no permissive rule of international law that allows individuals to be the bearers of rights and duties. They must, therefore, be *objects*: that is to say, they are like 'boundaries' or 'rivers' or 'territory' or any of the other chapter headings found in the traditional textbooks.

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[7] Above n 6, 6.
[8] A Cassese *United Nations Law: Fundamental Rights* (Sijthoff & Noordhoff, AADR, 1979) 137, 165.
[9] The Treaty and legislation aspects of international law.
[10] The custom and opinio juris sense.
[11] R Higgins *International Law and How We Use It* (Clarendon Press, Oxford, 1994) 47.

Underpinning those notions was the perpetuation of international law's applicability to States, rather than international law extending to include as participants those entities who did not meet the broad criteria for Statehood.[12] Despite its political significance, consequent upon the establishment of the United Nations regime in 1945, the principle was not immediately recognised as a fundamental right. Groups seeking to utilise the principle of self-determination were required to be distinctive entities embodying objectively determinable common characteristics. Those characteristics included language, history, ethnicity or religion. However, the objective application of strict terms of reference failed to recognise contemporaneous membership of a multiplicity of groups. In addition, objectively determinable common characteristics were eurocentrically defined. On those grounds, subjective and objective divisions as the basis for a determination of membership of groups entitled to self-determination posed problems for the formulation of a succinct concept.

C. Participation

The author submits that indigenous peoples, not qualifying as States, could not participate in the shaping of international law. On that basis, indigenous peoples could not look to international law to affirm the rights that had once been deemed to inhere in them by divine or natural law. States, on the other hand, both shaped the rules of international law and enjoyed rights under it largely independent of international law considerations. States could create doctrine to affirm and perfect their claims over indigenous territories as a matter of international law, and treat the indigenous inhabitants according to domestic policies, shielded from uninvited outside scrutiny by international law itself.

D. The United Nations

It is arguable whether the creation of the United Nations in 1945[13] impacted upon the nature of the principle of self-determination to the extent that it was eurocentrically recognised as a right at international law. It is less contentious that the United Nations as an institution has

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[12] Article 1, Montevideo Convention 1933. The 'State' as an entity at international law *should* possess as its characteristics the following qualification - a) a permanent population; b) a defined territory; c) government and d) capacity to enter into relations with other States. The concept of Statehood is not immutable. (my emphasis).

acted as a catalyst for the evolution of international legal rights, both in terms of the nature of the concept of self-determination and recognition of groups pursuing their right to self-determination. In addition, the United Nations, its organs, sub-organs, committees, sub-committees and working groups, has provided a forum for participation and recognition of entities other than States, under the cloak of which the political principle of self-determination has evolved into the international legal right to self-determination.

III. JURISPRUDENCE

Like all systems of law, international law is the product of historical as well as modern elements. International law especially is rooted in jurisprudential strains originating in classical Western legal thought, although today it is increasingly influenced by non-western actors and perspectives. The subject of indigenous peoples is not new to this genre of law but has figured with varying degrees of prominence in the legal discourse and practice related to international law's evolution over centuries.

A. Ignoring the Obvious

International 'law' has been, and continues to be, the subject of jurisprudential analysis by enlightened scholars.[14] The validity of international 'law'[15] as true 'law'[16] has been analysed to prove either its existence or non-existence, and the invalidity or validity of arguments based on its negation or assertion. This paper will avoid that task. Not because academic analysis of that kind is unimportant, but because that analysis invariably leads one into an infinite regress, doing little to advance the debate. To assert the invalidity of an international legal instrument or international law works as a means to ignore the reality that indigenous peoples play important roles in international and political affairs, based on the significant evolution that the concept of self-determination has undergone.

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[13] Subsequent to World War 2, under the United Nations Charter 1945.

[14] See H Lauterpacht *The Function of Law in the International Community* (Garland, London, 1974); A d'Amato *International Law: Process and Prospect* (TPI, New York, 1987). Some scholarship is impenetrable. See for example M Koskeniemmi *From Apology to Eutopia* (OUP, London, 1989).

[15] In terms of custom, treaties, international instruments and opinio juris.

[16] Embodying that elusive concept 'bindingness'.

Obviously, international law as a concept cannot be totally ignored in the context of an international law paper, nor can one ignore the rights asserted consequent upon the existence of the international legal regime. On that basis, the author adopts a Higginsian[17] approach to the nature of international law and the international legal system based on 'functionality'.

B. Jurisprudential Conflicts

Higgins[18] argues that international law has traditionally been defined by those to whom it is said to apply. Classically, international law applies to States as subjects.[19] Objects[20] of international law are entities requiring provision of rights by the subjects of international law. The criteria for Statehood is generally circumscribed by the Montevideo Convention 1933.[21] However, the "classic definition of [international law] as law binding on [s]tates has been expanded to include also international organisations".[22] Yet, to the positivist "there is no permissive rule of international law that allows individuals to be bearers of rights and duties".[23]

Nevertheless, if one accepts that international law is more than a body of rules to be applied, and encompasses flexible norms responsive to the needs of a variety of entities involved in decision-making processes, entities at international law include international organisations and individuals. In that sense individuals are more than mere objects at international law. Higgins argues that it is not particularly helpful either intellectually or operationally, to rely on the subject-object dichotomy that runs through so much of the writings. It is more helpful, and closer to perceived reality, to return to the view of international law as a particular decision-making process. Within that process (which is a dynamic and not a static one) there are a variety of participants, making claims across state lines, with the object of maximising various values.

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[17] Above n 11. Dame Roslyn Higgins is a renowned scholar of international law. Her recent work develops the 'functionality' approach to the international legal regime, providing answers to the often seemingly insurmountable objections to the existence of international laws' status as 'law'.

[18] Above n 11, 48.

[19] 'Subjects' of international law are those entities bearing rights, and having responsibilities at international law.

[20] 'Objects' of international law are those entities requiring the municipal provision of rights.

[21] Above n 12.

[22] Above n 11, 48.

[23] Above n 11, 49.

For example:[24]

> If peoples entitled to self determination are the entire peoples of a [S]tate, then it becomes unnecessary to answer the difficult question of whether a particular minority group...are peoples for purposes of self determination under Article 1 of the [International Covenant on Civil and Political Rights 1966].

Higgins[25] recognises the fundamental jurisprudential conflicts at variance in this complex area. Underpinning the ubiquitous naturalist/positivist debate are the difficulties surrounding international law's recognition as law. Arguments for the existence of a right to self-determination based on international law are weak when one cannot argue that the rules formulated by a range of means within the international sphere actually constitute 'law', in the sense that the international rules relied upon have some binding quality.

C. Operation

Domestic legal regimes are hierarchical, and a 'Parliament' in the domestic sense does not exist in the international forum. In that sense, an international hierarchy comparable to domestic legal systems is non-existent without a sovereign Parliament. The international arena operates on a horizontal plane, each participant in that arena being equal.[26] The fundamental opposition to the status of self-determination as a legal right hinges on the conflict between perceptions of international and domestic law.[27] Domestic rules constitute 'law' when proffered by domestic Parliaments, so self-determination cannot be a legal right if not so conferred.[28]

D. Predispositions

It is clear that perceptions about the nature and sources of law predispose one to the adoption of certain lines of argument about rights consequent upon the existence or non-existence of

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[24] Above n 11, 126.
[25] Above n 11.
[26] 'Equality' exists as an ideal, rather than a reality.
[27] The natural law v positivist debate.
[28] Domestic recognition of international law through custom or ratification can equate to conferral.

that law. For example, Cassese[29] and Koskeniemmi[30] are boxed into frameworks based on their deconstructive ideals. Deconstructive analyses of international law focus on a lack of international law's binding quality, in attempts at invalidating its existence as 'true law'. Deconstructive analyses mitigate against the existence of the legal right to self-determination because international law lacks a binding character. On that basis, Cassese and Koskeniemmi question the legal status of concepts based on presumably non-existent legal foundations. Such an objection assumes that the jurisprudential quality of the domestic legal system and the laws it creates exceeds that of the international legal system. In fact, that is the basis for the divergence between positivist and alternative conceptions of the legal right to self-determination at its core. That is, there are ways to view the legal paradigm other than with positivist eyes. To assume the falsity of systems because law's binding character is conceptualised in a way different to the positivist notion locks one into a mindset devoid of the richness and vigour developing in international law.

On that basis, Anaya[31] argues that a belief in the naturalist ideal, the existence of fundamental human rights in existence by virtue of human existence, renders illusory the positivist notion that rights are created when they are proffered by Parliament in the domestic legal regime. The author favours Anaya's argument because positivism is too restrictive in international law discourse. That is, deconstructive positivist analyses ignore reality.

Where positivists are prepared to accept the existence of the international legal system then States are the players in that system. Naturally, such an argument meets opposition by those who adhere to the belief that, at international law, there exist players other than, and in addition to States.

E. Evolution in a System of Normative Conduct

Higgins[32] asserts that, unlike domestic legal systems, international 'law' is not purely about rules. It is a normative system, the basis for Higgins's argument being that all organised groups and structures require a system of normative conduct in order to operate effectively:[33]

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[29] Above n 2, 170.
[30] M Koskeniemmi *From Apology to Eutopia* (OUP, London, 1989). See also M Koskeniemmi "The Politics of International Law" (1990) 1 EJIL 4.
[31] Above n 2, 178.
[32] Above n 11.
[33] Above n 11, 1.

> [t]hat is to say, conduct which is regarded by each actor, and by the group as a whole, as being obligatory, and for which violation carries a price. Normative systems make possible that degree of order if society is to maximise the common good. The role of law is to provide an operational system for securing values that we all desire - security, freedom, the provision of sufficient material goods. It is not, as commonly supposed, about resolving disputes. In these essentials international law is no different from domestic law. [However] consent and sovereignty are constraining factors against which the prescribing, invoking, and applying of international law norms must operate.

Faced with the normative international legal system positivists may object to Higgins's assertion on the grounds that international 'laws' actually constitute rules meant to be impartially applied, but which are frequently ignored because of the absence of centralised sanctions.[34] However, to Higgins rules are merely accumulated past decisions because if international law was just 'rules' it would indeed be unable to contribute to, and cope with, a changing political world: [35]

> To rely merely on accumulated past decisions (rules) when the context in which they were articulated has changed - and indeed when their content is often unclear - is to ensure that international law will not be able to contribute to today's [issues and problems] and, further, that it will be disobeyed for that reason. International law is a normative choice-making process.

The author contends that international law, like domestic law, is continually evolving and as recognised by the United Nations involves as players entities such as indigenous 'peoples'.[36] International law is also undergoing a process of revolution, because at it's inception international law was created by States for States. However, the author also contends that an international legal evolution to encompass recognition, implicit or explicit, of customary law is not new to the basis of international law itself. Custom in the form of the practises of States has long been viewed as a source of international law. On that basis, the author submits that the legal revolution gets its freshness from a renewed focus on opinio juris as a form of international law, and the most persuasive opinio juris asserts that fundamental rights exist by virtue of one's existence as a human being.[37] That is, one's rights are inherent to being human, and the right to self-determination is one of those rights. On that basis, the right to self-determination constitutes an international law.

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[34] Above n 2, 174.

[35] Above n 11, 3. See generally H Lauterpacht *The Function of Law in the International Community* (Garland, London, 1974).

[36] And to a lesser extent 'minorities'. The 'minority' rights regime is generally circumscribed by the United Nations Charter 1945, the International Covenant on Civil and Political Rights 1966, and a multiplicity of domestic rights legislation. 'Minority' issues, except where applicable to the notions of 'indigenous' or 'peoples' are outside the scope of this paper.

F. International by Necessity

Entities purporting to exist as equivalents to States within the domestic legal sphere pose threats to the territorial integrity of the particular State, and in the case of indigenous 'peoples' the threat is primarily to the State's internal territorial integrity. The author submits that, when viewed from an international law perspective, it is simplistic to assume the consequence of the existence of indigenous 'peoples' within the States territory to necessarily be internal division.

Nevertheless, domestic legal systems which are adherent to the positivist ideal perpetuate the supremacy of Parliament. That is, all other entities within the State's territory operate as subservient to the domestic Parliament. In that sense there is little room for evolution encompassing indigenous 'peoples' as players in domestic legal spheres. However, the author supports keeping the focus of indigenous legal rights within the international legal regime. Doing so allows the legal right to self-determination to be analysed in terms of its rights centred content.

IV. EMERGENCE OF THE LEGAL RIGHT

The Charter of the United Nations placed positive duties on States "to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".[38] Szego described the principle as 'lex imperfecta' since "[it] did not rise to the level of international law at the time the United Nations Charter was drafted".[39]

Article 1(2) of the Charter of the United Nations states:

> The Purposes of the United Nations [include]..
> 2. To develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, and to take appropriate measures to strengthen universal peace.

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[37] Above n 4, 60.

[38] Article 1, United Nations Charter 1945. The United Nations Charter referred to the principle of self-determination twice, both times in the context of developing friendly relations among nations, and in conjunction with the notion of equal rights of peoples. See also Articles 1(2) and 55.

[39] H Szego *New States and International Law* (Akademiai Kiado, Budapest, 1970) 62, 65.

Article 55 of the Charter of the United Nations states:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote -
>
> a. higher standards of living, full employment, and conditions of economic and social progress and development;
> b. solutions of international economic, social, health, and related problems; and international cultural and international co-operation; and
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The United Nations adopted the Universal Declaration on Human Rights in 1948. It contained a preambular reference to the development of friendly relations between nations, and outlined the human rights and fundamental freedoms to which all individuals are entitled. However, the Universal Declaration on Human Rights 1948 failed to mention the principle of self-determination.

A. Evolution from Political to Legal, and Domestic to International

The principle of self-determination evolved into a right recognised by international law with the adoption of the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples ("Resolution 1514").[40] Resolution 1514 applied to colonial countries and the peoples therein. Preambular paragraph two declared that "peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[41]

Despite Resolution 1514 exemplifying a change in the principle's focus from political expediency to legal rights definitional ambiguity persisted. The notion of 'peoples' was the foundation upon which the principle rested, though 'peoples' were not defined. On that basis Hannum[42] argued that the precise ambit of the applicability of the principle of self-determination was unclear. Hannun questioned whether the concept of 'peoples' ought to be read in its general sense since it was not clear from preambular paragraph two whether

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[40] United Nations General Assembly Resolution 1514 (XV), (1960) 15 UN Doc A/4684.
[41] Above n 40. See preambular paragraph two.
[42] Above n 39, 35.

peoples had to exist within colonial territories before the principle of self-determination could apply to them.[43]

On the other hand, it has been argued that Resolution 1514 applied solely to peoples under colonial rule, and continues to do so.[44] However, Higgins has argued that the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations nullified the existence of the right outside the context of de-colonialisation.[45]

Resolution 1514 was premised on the need for international and domestic stability, peace and respect for human rights. Its preamble States in part:[46]

> The Declaration relates the normative development in the field of human rights to the rights of national groups, and, in particular the right of self-determination. The Declaration, in conjunction with the United Nations Charter, supports the view that self-determination is now a legal principle, and, although its precise ramifications are not yet determined, the principle has great significance as a root of particular legal developments.

The author contends that Higgins's assertions were based on the adoption of the United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States[47] ("Resolution 2625"). That is, the principle of self-determination came to apply to peoples existing in non-colonial situations. In fact, Resolution 2625 represented the first time in history that the conditions and parameters of self-determination were extended to encompass peoples in the general sense. However, Resolution 2625 discouraged the dismemberment of States, placing emphasis instead on the concept of internal self-determination:[48]

Nevertheless, in the context of post-1945 de-colonialism, it soon became evident that the primary, and often sole definition of peoples was that of non-European inhabitants of former colonies. Apart from the fact of colonisation itself, little regard was had for the ethnicity, language, religion, or other objective characteristics of colonised peoples. Territory, rather than 'nationhood' determined the extent of people's rights..

Why stop here ?
ILO etc.

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[43] Above n 5.
[44] Above n 5.
[45] Above n 40. See preambular paragraph two.
[46] Above n 40.
[47] General Assembly Resolution 2625 (1970) 25 UN Doc A/5217.
[48] Above n 5. Hallum interchanges the terms de-colonialism, de-colonisation and anti-colonialism. For the purposes of this paper the terms do not differ. See also T Kirgis "The Degrees of Self-Determination in the United Nations Era" (1988) AJIL 304.

B. Status : Jus Cogens or Lex Imperfecta

By applying a eurocentric framework to an indigenous idea Brownlie has argued that the 'right' to self-determination constitutes a peremptory norm of international law:[49]

> Affirmed in the United Nations Charter and other major international instruments, self-determination is widely acknowledged to be a principle of customary international law and even *jus cogens*, a peremptory norm. Mention of self-determination within contemporary political discourse has at times raised the spectre of destabilisation and even violent turmoil. And indeed, as many have observed, self-determination rhetoric has been invoked in the world of late in association with extremist political posturing and ethnic chauvinism.

The author supports Brownlie's argument, and contends that a number of States have resisted express usage of the term 'self-determination' in articulating indigenous people's rights. Putting rhetorical extremism to one side, the concept underlying the term 'self-determination' entails a certain nexus of widely shared values. Those values include unity and communality. Those values and related decision-making processes can be seen as stabilising forces in the international system, and as foundational to international law's contemporary treatment of indigenous peoples.

A 'peremptory' norm is not open to denial or challenge. Peremptory norms are often known as *jus cogens*, rules or principles of international law that are so fundamental they bind all States without exception. Peremptory norms amount to *jus cogens* if they are recognised as such by the international community as a whole, and States cannot create regional customary international law that contradicts *jus cogens* rules.[50] On the other hand it has been asserted that the principle of self-determination is "unworthy of the appellation of a rule of law".[51] For example:[52]

> The 'right of self-determination'...has never been recognised as a genuine positive right of 'peoples' of universal and impartial application, and it never will, nor can it be so recognised in the future. It would indeed in its general implementation prove a constant source of disruption and subversion, and the international legal order of established States will never be prepared to acknowledge with sincerity its universal existence as a matter of law or right. 'Peoples' may fight for it and win or lose; they may succeed in persuading their own State to grant it by peaceful agreement, or fail, completely or in part, to do so. But it is one of those realities of international life which do not lend themselves to rigid regulation by law, that is, by a mandatory rule, impartially applying and applied to all identical cases and susceptible of a juristic definition. And for the sake of the law itself it is better that

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[49] I Brownlie *Principles of Public International Law* (3ed, Clarendon Press, Oxford, 1979) 75.
[50] EA Martin (ed) *Concise Oxford Dictionary of Law* (2ed, OUP, London, 1992) 224.
[51] JHW Verzijil *International Law in Historical Perspective* (Sijthoff & Noordhoff, Leiden, 1968).
[52] Above n 51, 1.

> it should remain so, for, worse than leaving the issue at the mercy of the unceasing political game would be to create a rule of law which would from the outset be inevitably infected by an ineradicable taint of international hypocrisy, and therefore unworthy of the appellation rule of law...It is inherently impossible for it [self-determination] to form a universal basis of concrete rights and obligations under international law and accordingly it invariably presents itself in practice as a scarcely veiled instance of measuring two measures.

On the other hand, Espiell also believes that the right to self-determination is *jus cogens*. Today no one can challenge the fact that, in light of contemporary international realities, the principle of self-determination necessarily possesses the character of *jus cogens.*[53]

C. The Need for Coherence

Unlike Brownlie[54] Espiell conceptualises a limited form of the right to self-determination on the grounds that the United Nations has established the right of self-determination as a right of peoples under colonial and alien domination.[55] Espiell argues that the right to self-determination does not apply to peoples already organised in the form of a State, which are not under colonial and alien domination. That is:[56]

> Resolution 1514 (XV) and other United Nations instruments condemn any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country. If, however, beneath the guise of ostensible national unity, colonial and alien domination does in fact exist, whatever legal formula may be used in an attempt to conceal it, the right of the subject people concerned cannot be disregarded without international law being violated.

The author contends that a coherent framework based on human rights law needs to be developed that facilitates resolution of competing claims relative to the right of self-determination. The rules expounded in this framework must be able to be applied to a variety of circumstances without creating an increased threat to international peace and security while respecting the rights and interests of all members of the international community.

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[53] HG Espiell *Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination*, Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights (UN Doc E/CN.4/Sub.2/390, 1977) para 63, 17.

[54] Above n 49.

[55] HG Espiell "Self-Determination and Jus Cogens" in A Cassesse (ed) *United Nations Law / Fundamental Rights* (Sijthoff & Noordhoff, AADR, 1979) 167.

[56] Above n 55, 167.

United Nations Resolutions 1514 and 2625 were unanimously adopted. A range of other United Nations resolutions reiterate the 'right' of peoples to self-determination.[57] In addition, the majority of members of the United Nations became parties to both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights 1966 at its inception.[58] "It would seem difficult to question [the principle of self-determination's] status as a right at international law".[59]

V. SOVEREIGNTY

In the late nineteenth and early twentieth centuries, the expansion of colonialism greatly increased the number and diversity of indigenous populations under colonial rule.

A. Traditional or Functional

> Sovereignty, as both an idea and institution, lies at the heart of the modern and therefore Western experience of space and time. It is integral to the structure of Western thought with its stress on dichotomies and polarities and to a geographical discourse in which territory is sharply demarcated and exclusively controlled.[60]

Cassese[61] represents a facet of international legal scholarship averse to the functional approach to international law posited by Higgins.[62] Cassese purports to assess the extent to which the principle of self-determination has impacted upon existing international legal norms, and in doing so adopts a jurisprudentially restrictive stance. Cassese does not argue that the right to self-determination is applicable to indigenous peoples. Instead, Cassese limits the focus of the right to instances of decolonisation. In that regard Cassese is locked into consideration of pertinent issues relative to colonial experiences. However, Cassese does not dispute indigenous 'peoples' status as peoples, though considers that where an indigenous

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[57] For example General Assembly Resolutions 2535 (XXIVB) (1970); 2144 (XXV) (1970); 3236 (XXIX) (1974).

[58] The International Covenant on Economic, Social and Cultural Rights 1966 was adopted by the United Nations General Assembly on 16 December 1966, and entered into force on 3 January 1976. The International Covenant on Civil and Political Rights 1966 was adopted by the United Nations General Assembly on 16 December 1966, and entered into force on 23 March 1976.

[59] Above n 11, 45.

[60] FH Hinsley *Sovereignty* (CUP, New York, 1986) 11.

[61] Above n 2.

[62] Above n 11.

peoples were under colonial domination but are no longer, indigenous peoples cannot assert the right to self-determination.[63]

Cassese argues that "the principle and rules [about] self-determination have extended their influence and sway to a traditional part of international law ~ that governing modes of acquisition, transfer and loss of legal title over territory".[64] However, the evolutionary right to self-determination has not invalidated traditional legal bases of title:[65]

> However, a legal process, starting with the League of Nations mandate system, followed by the United Nations trusteeship system and compounded by the gradual emergence of legal rules on self-determination, has led to the emergence of a set of legal obligations for those countries still enjoying sovereignty over colonial territories.

Prima facie, Cassese's argument appears liberal because Cassesse advocates the realisation of the right to self-determination within the framework surrounding United Nations Resolution 1514. However, with respect Cassese advocates restrictive legalism in ignorance of the reality that indigenous peoples play important roles in their domestic political and legal systems, and the international political and legal system. The author contends that international obligations make it incumbent on former colonial States to enable the people of their former colonial territories to freely choose whether to opt for independent Statehood, or association or integration within an existing State.

Cassesse's argument is grounded in the continued reliance on non-binding resolutions at international law[66], and on arguments against the nature and validity of international law.[67] At best, such arguments allow critical legal scholars to restrict the evolution of the right to self-determination within barriers apposite to its rights based nature. In doing so the functional approach is denied in favour of the perpetuation of domestic Parliamentary sovereignty and Statehood at international law. At their worst, deconstructive analyses allow scholars like Cassese to dismiss the validity, existence and evolution of the right to self-determination, without advancing the debate.[68]

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[63] Above n 2, 184.
[64] Above n 2, 185.
[65] Above n 2, 186.
[66] General Assembly Resolution 1514 (XV) is an example.
[67] An approach contrary to the functional approach advocated by both Higgins and Anaya. See above n 11 and above n 4.
[68] Cassese is not alone. In recent times Koskeniemmi has argued the deconstructive analysis. See above n 30.

On one hand Cassese adopts Higgins's jurisprudence when Higgins commented on the stance of the United Nations General Assembly to the principle of self-determination as it existed in the 1950s and 1960s. Higgins stated:[69]

> For the moment it suffices to note that, notwithstanding the cautious way in which self-determination is referred to in the [United Nations] Charter, there began in the 1950s to be a moral stand taken on the issue by the General Assembly. At first, several of the colonial powers resisted the idea that there was a legal right of self-determination. It was, in their view, merely a political aspiration. But gradually their resistance to the idea of a legal right became more muted. They accepted broader interpretations of their duties...especially in terms of the provision of information to the United Nations on political progress. The development of the concept of self-determination was historically bound up with decolonisation - with the growing agreement that it was obligatory to bring forward dependent peoples to independence if they so chose.

On the other hand, Cassese[70] takes Higgins's arguments out of context, and uses that jurisprudence selectively. Cassese fails to recognise that Higgins went on to argue:[71]

> It came further to be accepted that the right of self-determination was applicable not only to peoples under colonial rule, but also to peoples subject to foreign or alien domination. This was spelled out in the United Nations Declaration on Friendly Relations of 1970, which has been widely invoked on this point...The Declaration speaks of self-determination being available in situations of colonialism, and the 'subjection of peoples to alien subjugation, domination and exploitation'.

VI. THE CONTENT OF THE RIGHT

Anaya argues that the concept of self-determination derives from philosophical affirmation of the human drive to translate aspiration into reality, coupled with postulates of inherent human quality.[72] In doing so Anaya concedes the right to self-determination's illusory character. That is, "perhaps no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all peoples to self-determination...yet the meaning and content of that right remains vague and imprecise".[73]

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[69] Above n 11, 112.
[70] Above n 2, 187.
[71] Above n 11, 115.
[72] Above n 2, 75.
[73] Above n 39, 27.

A. Recognition

The right to self-determination is ambiguous. On the one hand the content of the right to self-determination seems to be generally accepted. However, what this actually means is not clear. Many declarations and conventions have recognised the right to self-determination. Nevertheless, to a large extent recognition has been confined to the right for those under colonial control to be free of such control within the context of their own States or territories. From a eurocentric perspective territories have traditionally been defined by colonial borders and State practice.

The author contends that it is remarkable how a concept widely recognised as being central to the achievement of profound change remains so ephemeral and difficult to define. The concept of self-determination draws from a number of areas of international law. It is an amalgamation of numerous principles. Included in its ambit are the notions of territorial acquisition, territorial integrity, recognition and Statehood. Batistich[74] argues that the extent to which those principles are applied delineates the boundaries of the right to self-determination. That is:[75]

> The resistance toward acknowledging self-determination as implying rights for literally all peoples is founded on the misconception that self-determination in its fullest sense means a right to independent Statehood, even if the right is not to be exercised right away or is to be exercised to achieve some alternative status. This misconception is often reinforced by reference to decolonisation, which has involved the transformation of colonial territories into new States.

B. Peoples

Although self-determination presumptively benefits all human beings, its linkage with the term peoples in international instruments indicates the collective or group characteristic of the principle. Self-determination is concerned with human beings, not simply as individuals with autonomous will but more as social creatures engaged in the constitution and functioning of communities. In its plain meaning the term peoples undoubtedly embraces the multitude of indigenous groups the world over.

Authoritative definitions of 'peoples' do not exist. At international law the term implies the right to self-determination. International legal instruments make distinctions between

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[74] Above n 1, 1016.
[75] Above n 4, 80.

'peoples' and 'minorities'[76] within a State. Those instruments do not make the distinction clearly. "There is nothing within the confines of the self-determination formula to give guidance on the definition and concretisation of the self".[77]

Historically, groups seeking to utilise the principle of self-determination were required to be distinctive entities embodying objectively determinable common characteristics. Those characteristics included language, history, ethnicity or religion. However, the objective application of strict terms of reference failed to recognise contemporaneous membership of a multiplicity of groups.[78]

It is not difficult to conceptualise indigenous groups falling within the broad 'peoples' concept.[79] The author contends that legalistic limitations on the right to self-determination are merely perpetuations of eurocentric concepts to fundamental human rights, in attempts to artificially delineate the boundaries of those rights. The only way indigenous rights are currently recognised is through the utilisation of procedures under a eurocentric construct such as the United Nations, and despite legal formulations of the right political expediency outweighs international law.

Indigenous peoples consider the right to self-determination a natural right, in existence by virtue of being human. The right to self-determination does not need to be delineated in international legal instruments. In that sense, a 'right' need not exist in eurocentric terms for that right to exist. The author submits that when international and domestic legal systems have favoured eurocentric objective criteria as measurements of the existence or non-existence of indigenous peoples and their right to self-determination those systems have been incorrect. Nevertheless, despite rhetoric to the contrary, various United Nations member States perpetuate historically paternalistic attitudes towards indigenous populations.[80]

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[76] For example Article 27 of the International Covenant on Civil and Political Rights 1966 refers specifically to the rights of minorities. However, minorities do not have the right to self-determination. Instead, minorities have rights to retention of cultural identity.

[77] R McCorquodale "Self-Determination: A Human Rights Approach" (1994) 43 IntCompLQ 857, 866.

[78] In addition to failing to recognise that peoples can change over time, or created to achieve certain political or social ends.

[79] Article 3 of the Draft Declaration on the Rights of Indigenous Peoples 1993 States: indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

[80] New Zealand is an example. In response to calls for submissions on a revision of the Draft Declaration on the Rights of Indigenous Peoples 1993 the New Zealand Government expressed concern that a notion of 'indigenous' in accordance with reality and not limited by legal technicalities would result in indigenous peoples' secession as a corollary of the right to self determination. On that basis the New Zealand Government sought adoption of a conjunctive definition of the term 'indigenous peoples' that precluded the right to self-determination as a means of protecting against threats to its territorial integrity. See *Mana Tangata: Draft*

C. Contemporary Recognition

In 1982 the Working Group on Indigenous Peoples was established as a result of a proposal by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. Members of the Working Group were provided by State members of the United Nations. In fact, the international legal system's contemporary treatment of indigenous peoples is the result of political and legal activity over the last few decades. That activity has involved, and substantially been driven by, indigenous peoples themselves. Indigenous peoples have ceased to be mere objects of the discussion of their rights and have become real participants in an extensive multilateral dialogue that also has engaged States, non-governmental organisations, and independent experts, a dialogue facilitated by human rights organs of international institutions.

For example, on 12 April 1996 the United Nations Human Rights Commission began formal consideration of the rights of indigenous peoples. Members of the Human Rights Commission expressed support for the establishment of a permanent forum for indigenous peoples within the United Nations system. The Human Rights Commission's views heralded the first indication that the United Nations member States viewed indigenous groups as players in the international legal arena.[81] Nevertheless:[82]

> The historical violations of indigenous peoples' self-determination, together with contemporary inequities against indigenous peoples, still cast a dark shadow on the legitimacy of state authority, regardless of effective control or the law contemporaneous with historical events.

Indigenous communities consider the concept of self-determination essential to an ability to control their own destinies. Formulations of the legal "right" to self-determination range from the expansive to the to the extremely expansive, even though at first those formulations may appear specific. For example, "All indigenous peoples have the right of self-determination. By

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Declaration on the Rights of Indigenous Peoples-Background and Discussion on Key Issues (Wellington, Te Puni Kokiri, 1994).

[81] United Nations Human Rights Commission *Press Release* (12 April 1996, HR/CN/733).

[82] Above n 4, 86.

virtue of this right they may freely determine their political status and freely pursue their economic, social, religious and cultural development".[83] In the extremely expansive vein:[84]

> All indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine their political status, freely pursue their own economic, social, religious and cultural development, and determine their own membership and/or citizenship, without external interference...
>
> No State shall assert any jurisdiction over an indigenous nation of people, or its territory, except in accordance with the freely expressed wishes of the nation or people concerned...
>
> Indigenous nations and peoples may engage in self-defence against State actions in conflict with their right to self-determination.

D. Indigenous

> As empire building and colonial settlement proceeded...those who already inhabited the encroached-upon lands and who were subjected to oppressive forces became known as indigenous, native or aboriginal. Such designations have continued to apply to people by virtue of their place and condition within the life-altering human encounter set in motion by colonialism.[85]

Commonly accepted definitions of 'indigenous' are difficult to delineate. "The United Nations generally refrains from attempting tight definitions, which may limit the flexibility of Governments and peoples in applying relevant instruments to their own national circumstances".[86] Today, the term "indigenous" refers broadly to the living descendants of inhabitants of lands now dominated by others. Indigenous peoples, nations or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest. They are indigenous because their ancestral lands are embedded in the lands in which they live, or would like to live, much more deeply than more powerful sectors of society living in close proximity on the same lands. Furthermore, they are peoples to the extent they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes or nations of their ancestral past.

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[83] Principle 1 of the United Nations Working Group on Indigenous Peoples *Declaration of Principles Adopted at the Fourth General Assembly of the World Council of Indigenous Peoples* (Panama, 1984).

[84] *Draft Declaration of Principles Proposed by the Indian Law Resource Centre, Inuit Circumpolar Conference, Four Directions Council, National Aboriginal and Islander Legal Service, National Indian Youth Council and the International Indian Treaty Council* (1984).

[85] Above n 4, 3.

[86] First Session of the Working Group of the Commission on Human Rights, Geneva 1995. This perspective is echoed by the New Zealand Government in *Mana Tangata.* See above n 84.

E. Redressing the Imbalance

The International Labour Organisation has made significant attempts to address particular issues faced by indigenous peoples. The author contends that discussions of indigenous people's rights at international law are incomplete without a discussion of self-determination, a principle of the highest order within the contemporary international system. Indigenous peoples have repeatedly articulated their demands in terms of self-determination. In turn, the evolution in the concept of self-determination from a political to legal right has fuelled the international movement in favour of those demands.

The International Labour Organisation Convention Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries 1957 ("ILO Convention 107")[87] recognised the right of collective and individual land ownership, indigenous customary laws, and the right to compensation for land taken by governments. However, ILO Convention 107 was couched in assimilationist and integrationist rhetoric typical of the 1940s and 1950s.

The process for the revision of ILO Convention 107 began in 1986.[88] Revision of ILO Convention 107 was sought by an increasing number of Non-Governmental indigenous organisations at the United Nations on the basis that advocacy of integration presupposed the application of national laws to indigenous peoples.

The Convention Concerning Indigenous and Tribal Peoples in Independent Countries[89] ("ILO Convention 169") was adopted by members of the United Nations in 1989. ILO Convention 169 treated the question of self-determination with great caution. Article 1 ILO Convention 169 defined indigenous peoples as:

> a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.
>
> b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the

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[87] International Labour Organisation Convention 107 (1957) 328 UNTS 247.

[88] A meeting of experts preceded the International Labour Organisation Governing Bodies' decision to adopt definitional recommendations put forward by an increasing number of indigenous non-Governmental Organisations at the United Nations. The revisions culminated in the adoption of ILO Convention 169.

[89] International Labour Organisation Convention 169 (1986).

> establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

It is submitted that the reason for caution was that the principle of self-determination was historically synonymous with the realisation of independence from a colonial power. On that basis, article 1(3) of ILO Convention 169 read: "The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law". [90] That qualification meant that 'peoples' could not assert independence, being one of the consequences of the right to self-determination. More specifically, it was considered necessary that use of the term 'peoples' did not presuppose specific rights under international law, even though a 'peoples' exercising their right to self-determination may choose from a range of possible outcomes other than independence.

The United Nations Working Group on Indigenous Populations has become the forum where indigenous peoples, governmental, non-governmental and interested organisations[91] can contribute constructively and systematically to the promotion, realisation and protection of the rights of the world's indigenous peoples.[92] The Thirteenth 1996 Session of the Working Group on Indigenous Peoples saw the Chairperson-Rapporteur consider the concept of 'indigenous' incapable of precise, universally applicable definition. Nevertheless, the Working Group was prepared to take a broad approach, based on the recommendations of the Special Rapporteur commenting on the scope of International Labour Organisation Conventions 107(1957) and 169(1989):[93]

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

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[90] Cassese argues the alternative, in accordance with the thesis that the right to self-determination applied to peoples under colonial oppression. See above n 2.

[91] For example, the Centre for World Indigenous Studies and Fourth World Documentation Project.

[92] At the Thirteenth Session of the Working Group on Indigenous Peoples 1996 (E/CN.4/Sub.2/AC.4/1996/2) the Chairperson-Rapporteur questioned the efficacy of a legalistic definition of the concept of indigenous peoples, pointing out that the Working Group on Indigenous Peoples had been a success despite not having adopted any formal definition 'indigenous peoples'. However, the Chairperson-Rapporteur's view was outweighed by the desirability of a definitional guide for the benefit of indigenous peoples themselves, governments and the United Nations, in particular concerning the implementation of international legal instruments.

[93] UN Publication E/CN.4/Sub.2/1986/7/Add.4, para 379. See UN Publication E/CN.4/Sub.2/AC.4/1996/2, 24.

Indigenous peoples resile against ethnocentric attempts at classification according to concepts such as religion, custom, ancestry and language. Instead, indigenous peoples emphasise their right of self-definition, both in terms of individual self-identification and with respect to the communities right to define its members. Some indigenous groups question the efficacy of an unequivocal definition.[94] For example, indigenous peoples participating in the 1996 second and third sessions of the Working Group on Indigenous Peoples[95] stressed the need for definitional flexibility, and for respecting the desire and the right of each indigenous people to define itself. On that basis, the author submits the Working Group on Indigenous Peoples has adopted a flexible approach to determining eligibility to participate in its annual sessions. This is an indication of the evolutionary nature of the concept of self-determination and 'indigenous' in both practical and theoretical terms.

International and domestic legal systems have tended to favour eurocentric objective criteria as measurements of the existence or non-existence of indigenous peoples. Nevertheless, the Working Group on Indigenous Peoples currently treats the concept of 'indigenous' as including:[96]

> a) Priority in time, with respect to the occupation and use of a specific territory;
> b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions;
> c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
> d) An experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.

It is also recognised that such factors cannot constitute an inclusive or comprehensive definition. "Rather they represent factors which may be present, to a greater or lesser degree, in different regions and in different national and local contexts".[97]

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[94] The Aboriginal and Torres Strait Islander Commission in Australia adopts this view. It believes that the scope of certain definitions pertinent to the scope of the right to self-determination should be delineated by the worlds' indigenous peoples themselves.

[95] UN Publication E/CN.4/Sub.2/AC.4/1996/2, 22.

[96] IA Daes/UN Publication *Working Paper on the Concept of Indigenous People* (E/CN.4/Sub.2/AC.4/1996/2, para 69).

[97] Above n 96, para 71.

Article 8 of the United Nations Draft Declaration on the Rights of Indigenous Peoples 1994 reads:

> Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognised as such.

VII. PARTICIPATION

International law does not require or allow for any one particular form of governmental structure for all indigenous peoples. The author contends that the very fact of the diversity of indigenous peoples and their surrounding circumstances belies a singular formula. The underlying objective of self-determination is to allow indigenous peoples to achieve meaningful self-government through political institutions that reflect their specific cultural patterns, and that permit them to be genuinely associated with all decisions affecting them on a continuing basis.

A. Active Participation

Historically, the realm of international law and politics was circumscribed by unilateral, bi-lateral and multi-lateral state actions. Those actions constituted the norms and standards by which the international rule of law was defined and enforced. However, weaknesses in the state system have opened new channels for other political and legal interests to become active participants in international rule-making. Ryser[98] argues that "Fourth World" nations[99] instinctively began to recognise the strengths and weaknesses of the state system. On that basis Fourth World nations began to see the importance of formulating new international customs which entailed broad implications for the affairs of States, increased State recognition of indigenous affairs being the most notable. The Covenant on the Rights of Indigenous Nations is the integrated product of a unification of the World Council of Indigenous Peoples Declaration on the Rights of Indigenous Peoples 1977, the Indigenous Peoples Statement of Principles 1987 and the Draft Declaration on the Rights of Indigenous Peoples as revised by the United Nations Working Group on Indigenous Populations.[100] It represents the extensive efforts of Fourth World nations to formulate conceptions of rights

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[98] RC Ryser "Evolving New International Laws From the Fourth World" (1994) Centre for World Indigenous Studies.

[99] Fourth World nations embody indigenous peoples, ethnic minorities and/or indigenous nations.

[100] UN Publication E/CN.4/Sub.2/AC.4/1993/CRP.4.

beyond those inherent to eurocentric paradigms. On that basis, Article 1 of the Covenant States:[101]

> Nations signatory to this Covenant, exercising their inherent sovereign powers, declare their mutual respect, and aim to promote peaceful co-operation, preserve, protect and guarantee the rights and responsibilities of nations and the inherent rights of individuals, and to promote freedom, justice and international peace.

B. Reformulations

Given the far-reaching transformation of the social and political landscape we have witnessed this century, and especially these past several decades, there is a pressing need to rethink the concept and practice of sovereignty.

"Currently some of the most concrete and problematic threats to sovereignty come from assertions of ethnonationalism and calls for self-determination".[102] International law has traditionally required non-State groups to appear as States prior to gaining recognition as an international legal personality.[103] Exclusion from participation in the international legal system was justified on the basis that entities embodying the characteristics of Statehood[104] were representative of particular populations or territories. In addition, "such claims of exclusion pose a challenge to the stability and integrity of the international legal community".[105]

Indigenous objections are framed on the basis that eurocentric conceptions of representative entities (States) are incapable of representing the interests of groups entitled to exercise the right to self-determination.[106]

VIII. TERRITORIAL INTEGRITY

A. Threat

Some commentators assume the exercise of the right to self-determination to mean independence.[107] By implication, independence entails secession, violating the territorial

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[101] Above n 100.
[102] K Mills "Human Rights and Sovereignty" (1994) YorkCRS 12.
[103] Above n 11.
[104] Above n 12.
[105] Above n 1, 1014.
[106] Above n 4. Anaya argues that such a situation may also be due to cultural or other differences.
[107] Above n 2.

integrity of the whole.[108] Resolution 2625 (XXV)[109] is the basis for a restrictive interpretation of the implications of the exercise of the right to self-determination.

Relying on the phraseology of Resolution 1514 (XV)[110] Higgins, on the other hand, asserts that self-determination was never inextricably tied to independence.[111] "[Peoples] have always had the right to choose the form of their political and economic future. While independence has been the most frequently chosen path, other possibilities have always existed and have sometimes been chosen".[112] Self-determination is no longer limited to the possibility of independence or other post-colonial status. Higgins asserts:[113]

> While self-determination began to be accepted as a legal right in the context of decolonisation, it was never restricted to a choice for independence. A choice by the peoples of a territory to join with another state, or to remain in a constitutional relationship with the former colonial power, was equally acceptable. Usually, of course, the choice has been for independence.

"It is for the people to determine the destiny of the territory and not the territory the destiny of the people".[114] Resolution 1514(2) makes clear that the exercise of the right to self-determination could result in a range of outcomes. Various outcomes consequent upon the exercise of the right to self-determination were contemplated by Article 1 of the International Covenant on Civil and Political Rights 1966 which States:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[115]

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[108] P Thornberry "Self-Determination, Minorities, Human Rights: A Review of International Instruments" (1989) 37 ICLQ 867.

[109] Resolution 2625 (XXV) cautions against violations of territorial integrity to the extent that it shall not be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign or independent States.

[110] General Assembly Resolution 1514 (XV) posited the exercise of self-determination through independence, free association, integration with an independent state, or emergence into any other political status freely determined by the people.

[111] Above n 11, 118. Compare Cassese above n 2, 186.

[112] Above n 11, 118. For example, many indigenous groups world-wide have chosen secession within the territory of a State.

[113] Above n 11, 113. This aspect is reflected in Article 1 of the International Covenant on Civil and Political Rights 1966. Under that Article all peoples may freely determine their political status, and freely pursue their economic, social and cultural development.

[114] *Western Sahara* ICJ (1975) 12, 122 per Dillard J.

[115] This text is repeated in Article 2 of the Draft United Nations Declaration on the Rights of Indigenous Peoples 1994. That Draft goes on to define in greater detail the rights of indigenous peoples.

Higgins argues that the right to self-determination is an ongoing one:[116]

> The Human Rights Committee has consistently told States appearing before it for examination of their periodic reports that the right of self-determination requires that a free choice be afforded to the peoples, on a continuing basis, as to their system of government, in order that they can determine their political, economic, and cultural development.

However, one of the fundamental difficulties with issues surrounding the evolution of the right to self determination stemmed from the apparent conflict between clauses 6 and 7 of Resolution 1514. The conflict arises because the notion of self-determination embodies threats of disruption to the territorial integrity of States. Threats to territorial integrity, political or otherwise can give rise to armed conflict. The United Nations Charter 1945 sought to circumvent the resort to individual state force by providing mechanisms for asserting legal and political rights. In addition to the UN Charter's ambiguity its articles were formulated as mechanisms to deal with inter-State[117] hostilities. In that regard, Article 2(4) states:

...(4) All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

However, Article 51 provides:

51. Nothing in the present Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

Therefore, a state need not gain the Security Council's permission to act in self defence. At the same time the Security Council can act to protect a member State's territorial integrity where it deems it necessary to do so.

In an attempt at preventing the utilisation of the right to self-determinations threat to territorial integrity resolution 1514(6) States:

> (6) Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

However, resolution 1514(7) effectively forces non-State entities seeking self-determination to choose between it and resolution 1514(6).

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[116] Above n 11, 120.

[117] State against State.

Resolution 1514(7) States:

> (7) All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

Resolution 1514(4) States:

> (4) All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

Resolution 1514(5) States:

> (5) Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

IX. INDEPENDENCE?

Resolution 1514(2) and Article 2 of the Draft United Nations Declaration on the Rights of Indigenous Peoples state:

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

Article 4 of the Draft United Nations Declaration on the Rights of Indigenous People states:

> Indigenous peoples have the right to maintain and strengthen their distinct political, economic. social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 8 of the Draft United Nations Declaration on the Rights of Indigenous People states:

> Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognised as such.

The preamble to Resolution 2625 states:

> The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

Indigenous peoples are estimated to number 300 million people in more than seventy countries. On that basis alone issues relevant to the furtherance of indigenous rights provide a major focus of concern for the international community. That concern stems from the majority of indigenous peoples having been dispossessed by colonial regimes.[118]

A. Contemporary Acknowledgement

Indigenous peoples concerns were on the agenda at the United Nations Conference on Environment and Development 1992.[119] The States present acknowledged the need to recognise indigenous people's values, territories, traditional knowledge and rights. The author submits that such a situation constitutes recognition at international law of indigenous peoples as players in the international legal system. In addition, participating States admitted that indigenous peoples have special relationships with the earth, ecological knowledge and agricultural systems, and play vital roles in promoting sustainable development of natural resources.

The United Nations began actively promoting partnerships between States and the indigenous peoples within the borders of those States in 1993. The United Nations' aim was to promote new partnerships, and encourage global efforts to address problems faced by indigenous peoples in areas such as human rights, environmental development, education and health.

The Covenant on the Rights of Indigenous Nations[120] was initialled in Geneva, Switzerland on 28 July 1994. The Covenant purported to be the first comprehensive international law aimed at addressing the rights and long-term social, economic and political interests of indigenous peoples.

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[118] This concern is recognised in the Fifth Preambular paragraph of the revised United Nations Draft Declaration on the Rights of Indigenous Peoples 1994 The United Nations Commission on Human Rights welcomed the recommendation of the Sub-Commission that the paragraphs of the Draft Declaration agreed upon at its second reading be revised to take into consideration comments of Governments, indigenous people's organisations and other interested parties.

[119] Commonly known as the Earth Summit.

[120] Above n 100.

Article 1 of that Covenant states:

> Nations signatory to this Covenant, exercising their inherent sovereign powers, declare their mutual respect. These Covenants aim to promote peaceful co-operation, and to preserve, protect and guarantee the rights and responsibilities of nations and the inherent rights of individuals, and to promote freedom, justice and international peace.

United Nations General Assembly Resolution 48/163 was passed on 8 December 1994 following a recommendation that the 1994 Year of Indigenous Peoples extend into a decade. Launching the Decade of Indigenous Peoples (1995-2004) the United Nations Secretary General emphasised the need for global co-operation: "I believe that the year [1994] will be the starting point for two partnerships. One between indigenous peoples and States, the other between indigenous peoples and the United Nations". [121] The perpetuation of such partnerships is to be based on equitable principles of mutuality, understanding, consultation and active participation by indigenous peoples in furtherance of indigenous self-determination

X. IMPLEMENTATION

Anaya asserts:[122]

> The principle of self-determination and related human rights precepts undergird more particularised norms concerning indigenous peoples. Newly developing norms contain substantive and remedial prescriptions and, in conjunction with already established human rights standards of general applicability, form the benchmarks for ensuring indigenous peoples of ongoing self-determination.

Anaya[123] and Higgins[124] argue that international law has evolved to incorporate entities other than States as players in the international legal regime. On that basis, and consequent upon the existence of the legal right to self-determination States have duties at international law in relation to indigenous peoples. The primary duty "is the duty of States to secure enjoyment of human rights and to provide remedies where the rights are violated".[125] Anaya asserts that

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[121] United Nations Department of Public Information, DPI/1608/HR, December 1994.
[122] Above n 4, 97.
[123] Above n 11, 129.
[124] Above n 11.
[125] Above n 4, 129.

such a duty is implicit, if not express, in international human rights treaties.[126] In addition, the duty is "similarly implicit in discernible customary human rights law".[127] The duty to secure enjoyment of human rights is heightened in the context of indigenous peoples and extends beyond States to the international community at large. With increased intensity over the last several years, the international community has maintained indigenous peoples as special subjects of concern and sought co-operation to secure their rights and well-being. In particular, the United Nations, the International Labour Organisation, and other international institutions have acknowledged the need for special programs for indigenous peoples at both the state and global levels. In his statement to the United Nations General Assembly at the inauguration of the International Year of the World's Indigenous Peoples, Secretary-General Boutros Boutros-Ghali emphasised that the commitment of the United Nations system to the cause of indigenous people is long-standing. Indigenous peoples are thus subjects of a special duty of care on the part of the international community. The duty exists as contemporary recognition of centuries of eurocentrically based systemic oppression. The duty does not necessitate assimilation or integration. The duty "requires the implementation of contemporary treaty and customary norms grounded in the principle of self-determination".[128]

XIII. CONCLUSION

International law, the body of principles, norms and procedures that today function across national boundaries, remains State centred. However, international law is increasingly pulled at by a discourse directly concerned with individuals and even groups. Notions of State sovereignty remain alive in international law. Those notions are increasingly yielding to a normative trend defined by visions of world peace, stability and human rights. That trend, promoted by modern international institutions and involving non-State and State actors, enhances international law's competency over matters once considered within a State's exclusive domestic domain.

The principle of self-determination and the development of related norms represents significant elements in indigenous people's centuries long quest for survival. International conventional and customary norms today provide legal grounds, however limited, for indigenous peoples to roll back the lingering scourge of colonial patterns and to exist as distinct communities in pursuit of their own destinies under conditions of equality. The

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[126] Above n 4, 130.
[127] Above n 4, 129.
[128] Above n 4, 130.

United Nations Charter 1945 and other widely ratified international legal instruments[129] affirm the principle of self-determination of peoples or include related human rights norms.

Particularly relevant to indigenous peoples is International Labour Convention 169 of 1989, which has already been ratified in a number of countries and received favourable consideration in others. States, moreover, are subject to norms concerning indigenous peoples insofar as those norms are part of general or customary international law. Customary norms are binding upon the constituent units of the world community regardless of any formal act of assent to those norms. It is one thing, however, for international law to incorporate norms concerning indigenous peoples; it is quite another thing for the norms to take effect in the actual lives of people.[130]

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[129] For example see the International Covenant on Civil and Political Rights 1966, International Labour Organisation Convention 157(1957) and International Labour Organisation Convention 169(1989).
[130] Above n 4, 128.

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