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THE DRAFT UNIVERSAL DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: COMPATIBILITY WITH ASPECTS OF INTERNATIONAL HUMAN RIGHTS LAW

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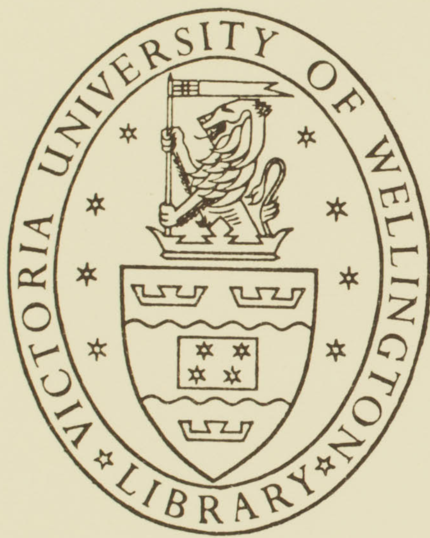
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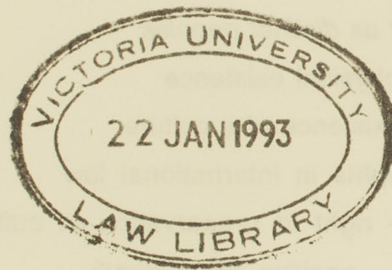
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In this paper, the writer examines the compatibility of the draft Universal Declaration on the Rights of Indigenous Peoples with aspects of international human rights law. Two main issues are the focus of this paper. First, whether the rights in the draft Declaration are precedented in international human rights law and practice. Secondly, whether the land rights and autonomy rights in the draft Declaration which purport to confer a differentiated status on indigenous peoples are 'discriminatory' within the meaning of that concept under international law.

The draft Declaration presents a new perspective on issues of indigenous rights and go further than existing provisions in other United Nations instruments. For example, the right to protection of environment and the right to compensation for encroachment on indigenous peoples' property rights are stated for the first time in an international instrument. However, an examination of existing international human rights law and practice reveals that such rights are not unprecedented.

With respect to the second issue, the writer concludes that special land rights and autonomy rights accorded to indigenous peoples do not conflict with the notion of 'equality' in international law but in fact enhances it. It is argued that such rights are merely responses to the special circumstances of a group of people disadvantaged in the past. In essence, they are 'new rights for old wrongs'. Such special rights are consistent with the practice of 'equality' in international law.

The text of this paper (excluding contents page, footnotes, bibliography and annexes) comprises approximately 15,300 words.

INTRODUCTION

The rights of indigenous peoples[1] have been the focus of much concern and debate in the United Nations in the last few years. 1992 has been proclaimed by the United Nations (UN) as the International Year of Indigenous Peoples. A draft Declaration on the Rights of Indigenous Peoples[2] is before the U.N. General Assembly and is to be adopted in 1992. The draft Declaration is considered by many to be a controversial piece of instrument due to the nature of the rights enumerated in it. The draft Declaration is premised on autonomy and self-determination for indigenous peoples and the recognition of indigenous peoples as distinct groups in society deserving special rights with respect to their lands and protection of their culture. These are notions which many States are not comfortable with.[3] States' acceptance is naturally crucial to the success of the draft Declaration. There are two major concerns voiced by States over the provisions in the draft Declaration. First, that the principles and rights in the draft Declaration are unprecedented in international law and secondly, such rights confer onto indigenous peoples a differentiated status which conflicts with the notion of equality central to international human rights law.

This paper aims to dispel some of the controversy over the draft Declaration by addressing the two concerns mentioned above. The literature on the draft Declaration largely address the moral claims of indigenous groups.[4] While such moral claims are important nevertheless the provisions in the draft Declaration need to be consistent

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[1] The term 'indigenous' will be defined in the later part of the paper.The terms 'indigenous' and 'natives' will be used interchangeably.

[2] Hereafter referred to as the draft Declaration. The latest text of the draft can be found in U.N.Doc.E/CN.4/Sub.2/1991/40 pg 29. A copy of the draft Declaration is appended to this paper.

[3] Some comments from representatives of states have rejected the basic principle of recognising indigenous peoples as a distinct segment of society. For example, the Venezuelan representive stated:

> "One fails to see how a State could create a variety of regimes, different for each particular person or group, when the aim of every community organised as a State is precisely to ensure that all persons will be on an equal footing before the law", 41 U.N.ESCOR.CN.4 (Agenda Item 13, addendum part 1) at 17.

[4] Some examples of such writings are R Williams "Redefining The Terms of Indigenous Peoples' Survival In The World" (1990) Duke L.J. 660; EA Pearce "Self-determination of Native Americans: Utility of Domestic and International Law" (1991) 22 Col. Hum. Rt. L.R.361. There is a lack of literature analysing the specific provisions of the draft Declaration in light of current international human rights law and practice. See however, L Stomski "The Development of Minimum Standards for the Protection and Promotion of Rights for Indigenous Peoples" (1991) Vol VXI No.2 Am. Ind. L.R. 575 for brief descriptions of some provisions of the draft Declaration and comments made by States identifying the disputed areas and exploring the disputed provisions.

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with existing international human rights law and practice.[5] The writer seeks to prove that the rights enumerated in the draft Declaration are not unprecedented in international human rights law and practice. Stripped of all the emotive and political responses to the draft Declaration, a close examination of its principles and rights reveal that such fears and concerns are unnecessary.

Part one of the paper sets out the definition of terms and provides a background on the effects of colonisation on indigenous peoples of the world. A brief history of the development of indigenous rights in international law will also be provided.

The second part of this paper looks at the principles and rights contained in the draft Declaration and their position in current international law and practice. It is proposed to limit the discussion to the context of the United Nations. In examining international law and practice, all its sources will be relevant - ie UN resolutions, declarations and conventions as well as practice of States.

Part III looks at the question of whether indigenous peoples' claims to differentiated status via land rights and autonomy rights can be reconciled with the powerful norm of non-discrimination and equality central to international human rights law.

I BACKGROUND

A *Definition of Terms*

The definition of 'indigenous' is not contained in the draft Declaration itself.[6] Defining the concept of 'indigenous' has long been the subject of debate and discussion among jurists, academics, international organisations and the indigenous peoples themselves.[7] However, this paper adopts the generally accepted definition within the

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[5] Guidelines for the setting of international standards in the field of human rights require that existing international law principles be adhered to when drafting an international instrument, UN Resolution 41/120 of 4 Dec 1986.

[6] This exclusion has been debated during discussions on the draft Declaration. States are divided over this issue. Japan, for example, feels that a subjective interpretation would lead to confusion whereas Norway agrees that the term 'indigenous peoples' need not be defined in the draft Declaration itself, E/CN.4/Sub.2/1989/Add.1 (1989) p 2-4. [Hereinafter States' Comments].

[7] For examples of such discussions, see R Barsh "Indigenous Peoples: Emerging Objects Of International Law" (1986) 80 Am. J.Int. L. 369; Special Study on Racial Discrimination UN Doc. E/CN.4/Sub 2/307/Rev.1.; UN Doc E/CN/.4/Sub 2/1984/20.

UN system and one particularly developed for the application of the draft Declaration:[8]

> [T]hose 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 existences as peoples, in accordance with their own cultural patterns, social institutions and legal systems.
>
> On an individual basis, an indigenous person is one who belong to these indigenous populations through self-identification as indigenous and is recognised and accepted by those populations as one of its members.

Most States seem satisfied that adequate limits are drawn by this definition and that there is a need to be flexible to allow for the different realities of indigenous groups worldwide to be reflected.[9] Indigenous people are broadly understood as the descendants of the original inhabitants of a territory overcome by conquest.[10] Some examples are the native peoples of North America, the aborigines of Australia, the Maoris of New Zealand and the Indians of South America.[11]

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[8] This definition is presented in the Study of the Problem of Discrimination Against Indigenous Populations submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities U.N.Doc.E/CN.4/Sub.2/1986/7 and Add. 1-4 [hereinafter the Cobo Report].

[9] See discussion in UN Doc E/CN.4/Sub 2/1984/20 pg 18.

[10] This categorisation is not unproblematic. How far back does one go to determine the time of 'colonisation'? A good example is the case of Malaysia. The Malays settled there subsequent to the tribal peoples but prior to British colonisation. Are the Malays then indigenous? There is evidence in the literature of a 'blue water' syndrome in defining pre-colonisation indigenous peoples. However, it seems clear that Asian hill tribes and Arab and African nomadic tribes should be included in a common sence understanding of the term 'indigenous'.

[11] At present, there are an estimated 200 million indigenous peoples worldwide, totalling 4 per cent of the global population, *Report on Human Rights And The Environment* E/Cn.4/Sub. 2/1991/8 at 8. See also J Burger *Report From the Frontier: The State of the World's Indigenous Peoples* (Zed Books Ltd., London, 1987) p11 giving the same estimate with a breakdown of their distribution. To give some idea of such distribution, there are about 2.5 million native peoples in North America, between 25 and 30 million indigenous peoples in Central South America, 60,000 Sami (Lapps) in the Scandinavian countries, 240,000 Maoris in New Zealand, 250,000 aborigines in Australia. Majority of the world's indigenous peoples live in Asia: about 6.5 million in the Philippines, 11 million in Burma, 500,000 in Thailand, 67 million in China. Indigenous peoples are generally a demographic minority with some exceptions like Greenland (the indigenous population accounts for 90% of the total) and Guatemala and Bolivia (the indigenous populations make up more than half the total population).

B *Effects of Colonisation*

Despite variations in the specific political and historical circumstances surrounding non-dominant native populations, nearly all indigenous groups share a common set of problems.[12] In a broad sense, the history of indigenous peoples is a history of colonialism. The problems faced by indigenous groups today largely result from the nature of the relationship between the colonisers and conquered indigenous populations.

A distinctive feature of indigenous peoples is said to be their intimate relationship with their lands and water.[13] Most indigenous peoples' culture and identity is based upon this relationship with the lands they occupy which are considered integral parts of their total being.[14]

The colonisers often took land away from the natives in order to benefit from local resources and to establish effective political power over the territory.[15] Furthermore, as the colonial powers began to consolidate power, they found it expedient to impose their way of life on native groups whose traditions they often considered primitive and inferior. Racial discrimination against indigenous peoples are said to be outcomes of a long historical process of "conquest, penetration and marginalization".[16] The discrimination is of a dual nature - on one hand, gradual destruction of the material and spiritual conditions for the maintenance of their way of life, and on the other hand, attitudes and behaviour of exclusive or negative

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[12] R Torres "The Rights of Indigenous Populations: The Emerging International Norm" (1991) 16 Yale J. Int'l L. 127, 133. The writer argues that nearly all indigenous groups share a common set of problems and illustrates this by case studies of four representative indigenous groups in Canada, Nicaragua, Guatemala and Scandinavia. For a comprehensive study, see also Burger, above n 11.

[13] References to the special relationship between indigenous peoples and their environment is present in most of the literature on indigenous peoples. Some examples are W M Shutkin "International Human Rights Law and the Earth: The Protection of Indigenous Peoples and The Environment" (1991) 31 Va. Int. L J. 479; R Kappashesit & M Kippenstein "Aboriginal Group Rights and Environmental Protection" (1991) 36 McGill L. J. 925.

[14] Above n 13.

[15] For a more detailed account of the 'colonisation' of indigenous peoples, see R Williams "Redefining The Terms Of Indigenous Peoples' Survival In The World" (1990) Duke L. J.660, 668.

[16] See *Report on the U.N.Seminar on Effects of Racism and Racial Discrimination on the Social and the Economic Relations between Indigenous Peoples and States*, E/CN.4/1989/22 at 12.

distinction when indigenous peoples seek to participate in the dominant society. Realisation of indigenous rights is hampered by certain precepts which perpetuate colonialism, like arguments for acquisition of territory based upon discovery, conquest, *terra nullius* and trusteeship.

An example is the treatment of Native Indians in the United States of America.Chief Justice Marshall of the U.S. Supreme Court propounded the most influential formulation of the European colonial era-derived discovery doctrine in international law. According to Marshall's 1823 opinion for an unanimous court in *Johnson* v *Mcintosh* [17],the discovery of territory occupied by Indian tribes in the New World gave the discovering European nation "an exclusive right to extinguish the Indian title of occupancy, either by title or sovereign rights in the territories they occupied". This doctrine was adopted by Spain, Great Britain and all major European colonising nations as the law of 'civilised' nations in their dealings with indigenous peoples whose territories they invaded.[18]

As a result of the treatment of indigenous peoples by the new settlers, indigenous groups often constitute the most backward and deprived group in many States. In Canada, suicide and unemployment rates in Indian tribes are six to eight times the national average.[19] In the U.S., 25 per cent of Native American babies born suffer from foetal alcohol abuse syndrome, yet the U.S. Indian Health Services does little or nothing to provide effective prenatal education or care for pregnant Indian women.[20] The average per capita income of Indians is half that of the population as a whole.[21] In Australia,the proportion of aborigines in prison is up to sixteen times that of the total population, giving them the dubious distinction of being the most imprisoned race on earth.[22]

Why the sudden emergence of indigenous rights in international law during the past decade? Like many oppressed peoples who have appealed to the emerging discourse of international human rights in recent years, indigenous people recognise that international human rights law and norms have come to assume a more authoritative and even constraining role on State actions. The next part of the paper

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[17] 21 U.S.(8 Wheat.) 543 (1823).
[18] Williams, above n 15 at 666.
[19] Above n 15 at 681.
[20] Above n 16 at 3.
[21] See Burger, above n 11, 100
[22] Above n 11, 102.

will provide a brief overview of the development of indigenous rights in post World War II international law.[23]

C Evolution of Indigenous Rights in International Law

1 Recognition of indigenous concerns

The United Nations General Assembly first acknowledged the unique problems facing indigenous peoples as early as 1949, where the General Assembly called for the establishment of a sub-commission to study the conditions of indigenous Americans. The study however, was terminated because of opposition from the United States government, which felt that the study would invade its sovereignty.[24] Much of the early work with respect to indigenous peoples' rights was done by the International Labour Organisation (ILO).

2 The role played by the International Labour Organisation (ILO)

Since its inception, ILO has shown interest in the problems of indigenous populations. Several early conventions dealt with such problems.They include conventions No. 29 (1930), on Forced Labour; No.50 (1936), on Recruitment of Indigenous Workers; No. 64 (1939) on Contracts of Employment (Indigenous Workers) and No.65 (1939) on Penal Sanctions (Indigenous Workers).[25] However, all these early conventions dealt exclusively with labour and labour-related concerns.

The rights of indigenous peoples received attention again in 1957. The issue arose in the context of labour discrimination in Latin America. The ILO adopted Convention 107[26] complemented by non-binding Recommendation No.104.[27] Unlike the earlier ILO conventions, Convention 107 dealt with a multitude of issues such as land rights and education. Convention 107 hoped to ensure indigenous peoples' participation in and benefit from development by sharing decision-making power. However, this was taken no further than 'collaboration' with indigenous peoples'

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23 For a comprehensive overview of the development and changes in approach to aboriginal rights over the last century, see R Barsh "Indigenous North Americans and Contemporary International Law" (1983) 62 Oregon L. R. 73.

24 See Barsh above n 7, 370.

25 International Labour Organisation, International Labour Conventions and Recommendations 1919 - 1981 at 837 - 856.

26 The International Labour Organisation Convention No 107 Concerning The Protection And Integration of Indigenous and Other Tribal And Semi-Tribal Populations in Independent Countries, June 2 1957, above n 25 at 858 [hereinafter Convention 107].

27 Recommendation 104 Concerning Tribal and Indigenous Populations, above n 25 at 865.

leaders.[28] On crucial issues of land rights, Convention 107 did little to restrict State power. Although indigenous groups' ownership over the lands they traditionally occupied was recognised but so too was the State's power to resettle communities in the interest of economic development.[29] Convention 107 contained a specific endorsement of the principle of assimilation.[30] The assimilationist approach and paternalistic tone of provisions have contributed to the almost universal rejection of Convention 107 by indigenous organisations.[31] However, several States did ratify Convention 107.[32]

In 1989, the ILO revised Convention 107 through the adoption of Convention 169.[33] This new Convention abandons the promotion of assimilation in favour of the right of indigenous peoples to exist as distinct peoples in the societies in which they live. Para 5 of the Preamble stresses the need to adopt "new international standards ... with the view to removing the assimilationist orientation of the earlier standards". The main difference between Convention 169 and the draft Declaration concerns the extent of the rights granted, particularly that of the rights to enforce claims and the corresponding prospects for ratification.[34] In terms of the substance of rights, the most significant difference between the provisions of Convention 169 and that of the draft Declaration is the absence of any specific reference to the right to self-determination in Convention 169.[35] The reason behind this difference is

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28 See especially Articles 5, 7(2) and 13(1) of Convention 107.

29 Article 12 of Convention 107 provides that the populations concerned should not be removed without their free consent from their habitual territories but goes on to provide a number of exceptions enabling removals to be imposed for economic development projects and national security reasons, see International Labour Office *Partial Revision of the Indigenous and Tribal Populations Convention 1957 (No 107) Report VI(1)* International Labour Conference, 75th Session, Geneva, 1988 at 113.

30 The preamble. Assimilation is based on ideas of the superiority of the dominant culture, aiming to produce a homogeneous society by getting groups to discard their culture in favour of the dominant culture.

31 Above n 29 at 18.

32 By 1987, Convention 107 had been ratified by 26 countries; 14 Latin American countries, 4 in Asia, 6 in Afrika and the Middle East and 2 in Europe, above n 29.

33 The Indigenous and Tribal Peoples Convention 1989. Text in ILO Record of Proceedings International Labour Conference, 76th Session, Geneva, 1989, p xvi [hereinafter Convention 169]. As at 1 Jan 1991, Convention 169 has only been ratified by 2 States, namely Mexico and Norway.

34 7 U.N. ESCOR.CN.4 (Agenda items 4 & 5, addendum part 2) at 3.

35 A more detailed comparison between the provisions of Convention 169 and those of the draft Declaration is beyond the scope of this paper. However, references may be made to certain provisions of Convention 169 to assist in the interpretation of ambiguous provisions contained in the draft Declaration. The provisions of Convention 169 and their obligations have been well canvassed in A J Stewart The Indigenous and Tribal Peoples Convention 1989: Its History and Destiny in the New Zealand Context (unpublished LLM Thesis, Public Law, VUW, 1991).

that the ILO was considered not an appropriate forum for the vindication of such a right.[36] In fact, some States felt that Convention 169 itself was outside the ILO's mandate.[37] This could well be the reason for the U.N. Human Rights Committee taking over from the ILO the task of setting standards of indigenous rights. The other reason could be the dissatisfaction of indigenous groups with Convention 169 in terms of substance and procedure in its drafting. As mentioned above, Convention 169 does not include in its provisions the right to self-determination. There was also a lack of participation from indigenous groups in the drafting of Convention 169. The strict tripartite nature of the ILO was responsible for the exclusion of indigenous groups from most discussions. Indigenous representatives claimed to have been relegated to an indirect and demeaning level of participation during the entire revision process.[38] Our own New Zealand government did not engage in any consultation with the Maori people throughout the whole revision process.[39]

3 Towards the draft Declaration

In 1971, the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities (the Sub-Commission) appointed Jose R. Martinez Cobo as Special Rapporteur to study the problem of discrimination against indigenous populations. As a result of the ensuing report, a Working Group on Indigenous Populations (the Working Group) was formed to gather data and serve as a forum for complaints of discrimination against indigenous peoples. By 1984, the Sub Commission directed the Working Group to focus its attention on the setting of minimum standards to be guaranteed to all indigenous peoples. These minimum standards form the draft Declaration.

The draft Declaration is considered by advocates of indigenous rights to represent the rise of a new perspective on issues surrounding the rights of indigenous peoples. Previously, the main problem was perceived to be

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36 During one of the discussions on articles of Convention 169, it was made clear that the right of indigenous groups to self-determination is only within the framework of national States and that any implications regarding self-determination in international law were outside theILO's area of competence, see statement by the representative of the Secretary-General, International Labour Conference, Provisional Record, 76th session, 1989, No.25, 25 June 1989 at 25/2.

37 For example, see New Zealand government's statement that Convention 169 should only deal with labour-related matters, above n 29 Report VI(2) at 6.

38 Record of Proceedings International Labour Conference, 76th Session, Geneva, 1989 (ILO, Geneva, 1990) Provisional Record No.31, 12.

39 For a detailed discussion on New Zealand's participation in the revision process see Stewart, above n 35.

discrimination and lack of economic equality with the dominant population.[40] More recently, the international human rights community has become more sympathetic toward the perspective of indigenous peoples' advocates who contend that the problem is not just discrimination but also "*forced assimilation* and *forced equality,* which lead to the derogation of traditional indigenous culture".[41] The draft Declaration emphasises the right of a people to determine its own culture, tradition and status within the dominant society.

The success of the draft Declaration ultimately depend upon the acceptance of States and also the indigenous communities. Voices of dissatisfaction have already been heard from the States. This paper addresses one of the primary concerns voiced by the States - the consistency of the rights and freedoms enumerated in the draft Declaration with aspects of international human rights law.[42] Two issues arise: first, are all the rights contained in the draft Declaration precedented in current international human rights law?[43] Secondly, do the rights in the draft Declaration confer a differentiated status to indigenous peoples and thus derogate from the principle of equality central to human rights law?[44]
The former issue will be addressed first.

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[40]For example, ILO Convention 107 encouraged States to remove obstacles to the complete integration of indigenous communities (Article 2); the Committee on the Elimination of Racial Discrimination was preoccupied with questions of whether indigenous peoples were accorded treatment equal to that of the majority in areas of health, education, employment, and land ownership.

[41] EA Pearce "Self-determination of Native Americans: Utility of Domestic And International Law" (1991) 22 Columbia Human Rights Law Review 361, 382.

[42] This requirement is contained in the guidelines for the setting of international standards in the field of human rights, UN Resolution 41/120, 4 Dec 1986.

[43] Several States have raised this concern for example the representative from Japan stated that the draft Declaration introduces new rights and concepts which have no precedent in international UN instruments. Australia commented that it is not clear from the draft Declaration whether it could be read consistently with the major UN human rights instruments, see States' Comments, above n 6 at 2.

[44] Examples of such concerns are statements from the representatives of Canada ("some of the draft principles go beyond the objective of ensuring indigenous peoples the full enjoyment of fundamental human rights on an equal basis with other nationals..."), Venezuela ("the draft ...seeks to create a special situation that would place [indigenous peoples] in a privileged situation with respect to the rest of the community of the country in which they live"), see States' Comments, above n 5 pgs 5 and 11 respectively.

II Consistency of Rights In The Draft Declaration With Existing International Standards

The draft Declaration contains thirty clauses and is divided into seven parts. Part I and VII contain the general policies. Part II, III and IV contain rights which for purposes of the present discussion will be broadly categorised into[45]:

A.The right to exist as distinct peoples

B.Land/territorial rights and

C.Autonomy rights

The various rights in the draft Declaration are not strictly divisible into neat divisions. Some fuzziness in the categories and some interrelationships among them are inevitable. However, such categorisation as above is necessary for purposes of the present discussion.

A *The Right to Exist as Distinct Peoples*

The rights which fall under this category will be further divided into two categories - the right to physical existence and the right to cultural existence.

1. The right to physical existence

Paragraph 4 of the draft Declaration states that indigenous peoples have the "collective right to exist in peace and security as distinct peoples and to be protected against genocide, as well as the individual right to life, physical and mental integrity, liberty and security of person".

The right to live or to exist in peace and security is inarguably the most basic of all fundamental human rights. It is the necessary prerequisite for other rights. Paragraph 4 enumerates the right of indigenous peoples to exist as *individuals* as

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[45] Due to practical constraints, this paper is not able to examine all the provisions in the draft Declaration. Excluded provisions are:
i. paragraphs 2 and 3 - provisions of general policy affirming the rights of indigenous peoples to full enjoyment of all fundamental rights and freedoms recognised in the UN Charter and all other international human rights instruments free from discrimination of any kind based on their indigenous identity.
ii. Paragraph 18 concerning the protection of indigenous peoples' cultural property. UN has prepared a working paper on cultural property (E/CN.4/Sub 2/1991/34) which has been much discussed in Geneva.
iii.paragraph 27 concerning the right of indigenous peoples to claim that States honour treaties and other agreements concluded with indigenous peoples. A study is currently being undertaken by the Working Group to determine the scope and content of this clause.
iv.paragraph 28 - right to access to and prompt decisions by mutually acceptable and fair procedures for resolving conflicts.

well as *groups*. The right of individuals to exist in peace and security is set forth in Article 3 of the Universal Declaration of Human Rights[46] - "everyone has the right to life, liberty and security of person".

Existence is a notion which has a special sense for a group. In the case of an individual, she either exists or she does not; non-existence is individual death. In the case of a group or collective, physical death of individuals does not necessarily destroy the existence of the group, although it may impair its health. The right of a human group to exist is protected in international human rights law by the prohibition of genocide. Genocide is the denial of the right to exist of entire human groups.[47] The prevention of genocide is translated into binding legal obligation by the adoption of the Convention on the Prevention of the Crime of Genocide, 1948.[48] The destruction of groups through the extermination of their members thus violating the fundamental right of a group to exist is regarded as criminal in international law.[49] What, then is the status of the principle of prohibition against genocide? Does the prohibition of genocide bind all States or does it only bind States which have ratified the Genocide Convention? A principle of international law is said to bind all States if it has achieved the status of *jus cogens* - a principle of international law that is so widely accepted and practised by the international community of States that it is considered to be binding on all States.[50] Generally, commentators are in agreement that the prohibition against genocide has achieved the status of *jus cogens.*

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[46] G.A.Res.217A(III), 3(1) U.N.GAOR Resolutions 71, UN Doc. A/810 (1948) [Hereinafter the Universal Declaration].

[47] This definition of genocide is taken from the Resolution on the Crime of Genocide, Resolution 96(I) YBUN 1946-47, 255 adopted 11 Dec 1946. The acts which constitute genocide is set out in Article 1 of the Genocide Convention (below n 48) which prohibits any of the following acts "committed with the intent to destroy in whole or in part the listed groups:

a. Killing members of the group.

b. Causing serious bodily or mental harm to members of the group.

c. Deliberately inflicting on members of the group conditions of life calculated to bring about its physical destruction in whole or in part.

d. Imposing measures intended to prevent births within the group.

e. Forceably transferring children of the group to another group.

[48] Entered into force 12 January 1951,78 UNTS 277 (hereinafter the Genocide Convention). Obligations on State Parties involve the enactment of necessary legislation to give effect to the Convention and to provide effective penalties for those guilty of genocide (Article V).

[49] L Kuper *The Prevention of Genocide* (Yale University Press, Cambridge, 1985).18

[50] The doctrine of jus cogens is reflected in Articles 53 and 64 of the Vienna Convention on the Law of Treaties, 1969 (in force 24 Jan 1980, UN Doc A/Conf.39/27): "... a preemptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogations are permitted and which can be modified only by a subsequent norm of general international law having the same character".

Thornberry[51] comes to this conclusion by looking at the relationship between genocide and the customary law of crimes against humanity. Other support for his conclusion came from his analysis of practice of States and comments made by various international law agencies.[52]

Which groups are protected by the Genocide Convention? The protected groups are regarded as sharing certain features. The descriptions commonly employed in debates on the text were 'distinct', 'permanent', 'sharing a common origin or having characteristic features in common - membership is not optional but inevitable and members can be identified by objective criteria.[53] Thus, groups are stable communities identifiable through the possession of distinct characteristics. Ethnic and racial groups are clearly groups protected by the Genocide Convention. Although indigenous peoples were not directly referred to in the discussion on the text of the Genocide Convention, it is submitted that indigenous peoples, possessing distinct characteristics in terms of their origin, history and way of life clearly fall within the definition of 'group' under the Genocide Convention.

Therefore, the right to physical existence of indigenous peoples both as individuals and as groups are well settled rules of international human rights law. However, the right to existence of a culture is not quite so uncontroversial.

2.The right to existence of a culture

Paragraphs 5 to 13 of the draft Declaration deal with the rights of indigenous peoples to maintain and develop their distinct ethnic and cultural characteristics. Below is a summary of the essence of each clause;

Paragraph 5 - collective and individual right to maintain and develop their distinct ethnic and cultural characteristics and identities.

Paragraph 6 - collective and individual right to be protected against cultural genocide, including the prevention of and redress for:

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[51] Thornberry, P *International Law and The Rights of Minorities* (Clarendon Press, Oxford, London, 1991) at 86. See also generally, Kuper above n 49.

[52] An example is a commentary by the International Law Commission that a treaty contemplating the commission of acts such as trading in slaves, piracy or genocide are illustrations of arrangements contrary to "obvious and best settled rules of jus cogens", cited in Thornberry, above n 51 at 87.

[53] Kuper, above n 49 at 10.

a) any act which has the aim or effect of depriving them of their integrity as distinct societies or their cultural identities
b) any form of forced assimilation or integration
c) dispossession of their lands, territories or resources
d) imposition of other cultures or ways of life
e) any propaganda directed against them

Paragraph 7 - right to revive and practise their cultural identity and traditions, including the rights to maintain and develop their cultures (such as archeological and historical sights, artifacts, etc).

Paragraph 8 - the right to manifest, practise and teach their own spiritual and religious traditions, customs and ceremonies.

Paragraph 9 - the right to revive, use, develop and transmit to future generations their own languages, writing systems and literature.States shall take measures to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary, through the provision of interpretation or by other effective means.

Paragraph 10 - right to access to education in their own languages.

Paragraph 11 - right to have the dignity of their cultures, histories, traditions and aspirations reflected in all forms of education and public information.

Paragraph 12 - right to use and access to mass media in their own languages

Paragraph 13 - right to adequate financial and technical assistance (from States and through international cooperation) to pursue their own economic, social and cultural development

The draft Declaration's greatest significance from the perspective of indigenous peoples' rights and status under international law is said to be "the legitimation and affirmation of the value of protecting indigenous peoples' way of life and cultures *per se*."[54] In a sense, the whole draft is concerned with one theme - that of preserving indigenous peoples and their cultures. All the other rights in the draft Declaration such as the right to tribal autonomy or self-determination and territorial rights can

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[54] Above n15 at 687.

be seen as necessary for the preservation of indigenous cultures. Conversely, the right to preserve culture can be seen as implicit in the right of peoples to self-determination. In this regard, the line of distinction drawn in this paper between the various category of rights is somewhat blurred. Nevertheless, such categorisation is necessary for the present analysis

Paragraphs 5 to 13 recognise the collective rights of indigenous peoples to **maintain** and **develop** their ethnic and cultural characteristics and distinct identities through their own traditions, religions, languages and educational systems. The need for indigenous peoples to be protected against cultural genocide or ethnocide is also recognised. Ethnocide is defined in paragraph 7 as including "any act which has the aim or effect of depriving indigenous peoples of their ethnic characteristics or cultural identity [or] or any form of forced assimilation or integration, [such as the] imposition of foreign life styles." The Draft is thus responding directly to the principal concern of indigenous peoples - genocide and ethnocide-at-law which have been in many cases the consistent features of indigenous policies adopted by settler State regimes [55]

The provisions of the Draft is couched in strong language. The imposition of 'other' cultures and ways of life constitutes cultural genocide. Cultural genocide also includes any act which has the **aim or effect** of depriving indigenous peoples of their cultural or ethnic characteristics.

It can be seen that two important 'themes' emerge from paragraphs 5 to 13. First, indigenous peoples as groups have the right to preserve and develop their cultures and thus be protected against cultural genocide. Secondly, States are to take the necessary measures including providing resources to enable the preservation and development of indigenous cultures. Particular emphasis is put on the development of language and education. Paragraph 10 requires States to provide resources to enable indigenous peoples to establish and control their own educational systems and institutions. Paragraph 9 calls for State measures to ensure that indigenous peoples are able to use their own language in political, legal and administrative proceedings. Paragraph 9 is one of the more controversial provisions in the draft Declaration. Some governments, concerned over what the implication of such a provision would mean for the administration of governmental functions, have rejected the language

[55] Above n15 at 688.

provision.[56] Are the two 'themes' mentioned above supported by precedents in existing international human rights law?

a.Cultural Rights in International Law

In broad anthropological sense, all of our human rights might be deemed cultural for they rest on our culture and make reference to culturally defined entities such as courts, prison, the press, etc. Cultural rights per se are rarely a matter of intense political controversy and thus usually are not given the consideration of more controversial rights.[57] Cultural rights refer to a community's way of life except those aspects regulated by other classes of human rights.[58] In many ways then, cultural rights is a residual category.

There are a number of provisions dealing with cultural rights in the Universal Bill of Rights.[59] Article 27 of the Universal Declaration on Human Rights recognises "the right to freely participate in the cultural life of the community". However, this provision only recognises the right of an *individual* to participate in the cultural life of her community. It does not profess to be a tool for minority groups to preserve their cultural identity.[60] A similar provision is found in the International Covenant on Economic, Social and Cultural Rights.[61]

The idea of a collective right of a particular group to preserve its culture have only begun to appear in the last few decades. This delay is largely due to the nature of international human rights law and the attitude of the UN towards minority issues. The UN initially ignored minority issues. The UN Charter contains no provisions specifically addressing the issue of minority rights. Instead, the drafters assumed

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[56] For example, the representative from Canada commented that there are over 50 aboriginal languages in Canada, many of which have no written form, see States' Comments above n 6 p20.

[57] "Cultural Rights and the Right to Cultural Identity" in Berting,J et al (eds) *Human Rights In A Pluralist World* (Meckler, Westport, London, 1990).

[58] Above n 57 at 62. Contemporary legal instruments do not define "culture' as such but list 'cultural rights' which include language, education and religious practices.

[59] The Universal Bill of Rights comprise of The Universal Declaration of Human Rights, The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, texts found in Henkin, L(ed) *The International Bill Of Rights* (Columbia University Press, New York, 1981) appendix.

[60] Y Distein "Collective Human Rights of Peoples and Minorities" (1976) 25 Int. & Comp. L. Q.102, 104.

[61] Adopted Dec 16, 1966, 999 UNTS. 3 [Hereinafter the Economic, Social and Cultural Covenant].The relevant Article is Article 15 which recognises the right of everyone to take part in cultural life and the duty of State parties to take those steps necessary for the conservation, development and diffusion of science and culture.

that minorities would be satisfied if their individual rights particularly those of equality and non-discrimination were respected.[62] The general attitude is that minorities should be *assimilated* into the majority culture. Thus ethnic and cultural differences should be eliminated rather than emphasised. However, as will be seen later, subsequent developments within the UN and the international community have moved away from this assimilationist and egalitarian trend.

In 1960, UNESCO adopted the Convention Against Discrimination in Education[63] which generally recognised the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and the use and teaching of their own language. More significant, however, is Article 27 of the International Covenant on Civil and Political Rights[64] adopted in 1966. Article 27 is considered the only expression of the right to cultural identity which could possibly be used as a device for the preservation of minority culture[65] and "the first internationally accepted rule for the protection of minorities".[66] Article 27 states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their religion, or to use their own language.

The content and scope of Article 27 is however, rather vague. Thus far, the Human Rights Committee has been unable to agree on the formulation of a general comment with respect to article 27 although general comments have been issued with respect to the other articles in the Civil and Political Rights Convenant. Can Article 27 be reconciled with the cultural protection provisions in the draft Declaration?

i. Does Article 27 recognise the right of a minority group to preserve its culture or does it merely recognise the right of an individual to practise his own culture and way of life?

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[62] H Hannum "Contemporary Developments in the International Protection of the Rights of Minorities" (1991) Notre Dame L. R 1431, 1434.

[63] Adopted 14 Dec 1960, 429 U.N.T.S. 93.

[64] Adopted Dec 16 1966, 999 U.N.T.S. 171 [Hereinafter the Civil and Political Rights Covenant].

[65] Thornberry, above n 51 at 145.

[66] Caportorti *Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/Rev.1 (1979), p1 [Hereinafter the Caportorti Report].

There is a conceptual distinction between the two alternatives above. The recognition of an individual's right to retain his cultural identity does not grant the group to which the individual belong the right to **preserve** the group's cultural identity.[67] For example, the right of an individual to speak her own language is itself ineffective to preserve the language. The right to preserve the language come into effect only in the context of the minority group which is free to collectively maintain separate schools or other cultural institutions. The draft Declaration enumerates both the individual and the collective right of indigenous peoples to preserve and develop their distinct cultural identity. However, Article 27 of the Civil and Political Rights Convention is not clear as to which right it confers.

Article 27 is cast in individualistic terms - "Persons belonging to ethnic, religious and linguistic minorities shall not be denied...". This seem to suggest an intention to deal only with individual rights to cultural identity, thus excluding direct protection of the minority as a group. This interpretation is supported by commentators Tomuschat and Ermacoma[68] largely due to the preference for the above phrase as opposed to "Ethnic, religious and linguistic minorities shall not be denied.." which was used in the original draft of Article 27. "[I]n community with other members of their group" after "shall not be denied" was included to recognise group identity in some form.[69] Author Thornberry's view is that the right in Article 27 is a hybrid between individual and collective rights because of the 'community' requirement. Hybrid rights are said to be rights which benefit individuals but require collective exercise. [70] The other reason supporting the narrow interpretation of Article 27 is the fact that minorities were not considered at that time to be subjects of international law. Moreover, 'persons belonging to minorities' could be easier identified than minorities.[71]

The writer's view is that Article 27 is indicative of the right of a **group** to **preserve** its own cultural identity. The right of an individual to a cultural identity is already protected by other provisions in the Civil and Political Rights Covenant.

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[67] This is also related to the distinction made by some between individual rights and collective rights. A detailed discussion of such a distinction is outside the scope of this paper. For discussions on collective rights and the protection of minorities, see generally N Lerner *Groups Rights and Discrimination In International Law* (Martinus Nijhoff Publishers, Dordrecht, 1987); Tarnopolsky "Ways of Ensuring The Protection Of Minorities" (1986) 27 Les Cahiers de Droit 159.

[68] See Caportorti Report above n 61 p 274.

[69] Above n 68.

[70] Thornberry, above n 51 at 173.

[71] Thornberry, above n 51 at 149.

Articles 18 and 19 protect the right of everyone to freedom of thought, conscience, religion and expression. Moreover, there are provisions in the Universal Declaration as well as the Social and Cultural Rights Covenant enumerating the right of an individual to participate in the cultural life of the community.[72] Article 27 of the Civil and Political Rights Covenant would be superfluous if interpreted to merely grant the right to a cultural identity to an individual.

Also, the concept of a 'hybrid' right is not particularly helpful. Thornberry could have concluded that Article 27 conferred both the right of an individual to her own cultural identity **and** the right of a minority to preserve its culture. The other alternative is that Article 27 contained either one of the above rights. Bearing in mind the distinction between those two kinds of right mentioned above, a hybrid between them does not seem to be conceptually sound. According to Thornberry, a hybrid right would benefit individuals but require collective exercise. All human rights whether individual or collective, positive or negative, benefit the individual ultimately. The hybrid right defined by Thornberry seem to be in effect the popular conception of a collective right.[73]

The conclusion that Article 27 enumerates the right of a minority group to preserve its cultural identity is also consistent with other international instruments adopted by the UN. One such instrument is the UNESCO Declaration on Race and Racial Prejudice.[74] Although not a binding treaty like the Civil and Political Rights Covenant and not as widely accepted as the latter, nonetheless, this UNESCO Declaration received wide support.[75] The UNESCO Declaration expressly proclaims, for the first time in an international instrument, the right of groups to be different[76] and to maintain their cultural identity.[77] Also proclaimed is the right of

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[72] Article 27 of both the Universal Declaration and the Economic, Social and Cultural Covenant.

[73] The writer refers to the "popular conception of a collective right" because there are more than one recognised way of conceptualising a "collective right". The first is to say that collective rights are merely individual rights conferred on an individual by virtue of his membership of a group. The stronger formulation of a group right and the more popular one, is that the group is the necessary bearer of group rights although group rights ultimately benefit the individuals in the group. For a fuller discussion, see J Donnelly *Universal Human Rights In Theory And Practice* (Cornell University Press, 1989) 143.

[74] Adopted 27 Nov 1978. For its text, see N Lerner "New Concepts in the UNESCO Declaration on Race and Racial Prejudice" in (1981) 3 Human Rights Quarterly 48 [Hereinafter the UNESCO Declaration].

[75] It was adopted unanimously and by acclamation and passed simultaneously with a resolution for implementation, above n 74 at 55.

[76] Article 1(2).

[77] Article 1(3).

groups to full development which implies equal access to the means of personal and collective advancement and the need for respect for the values of civilisations and cultures.[78]

The next question to consider is: is the State obliged to take positive measures to ensure the preservation of a minority culture?

ii. Does Article 27 impose a positive duty on States to preserve minority culture?

While most people would not oppose the notion of groups' rights to preserve their cultural identity, the suggestion that they are entitled to positive measures by the State to that end (for example the provision of financial resources) is more contentious.

The literal interpretation of Article 27 seems to suggest that States are not required to enter into any commitment to actively protect minority culture but are only under a duty of toleration or non-interference. Article 27 uses the words 'shall not be denied the right' as opposed to 'shall have the right' or 'has the right' used in other articles. This can be contrasted with provisions of the draft Declaration for example paragraph 10 which obligates States to provide resources to enable indigenous peoples to establish their own educational institutions. The drafting record of Article 27 reveals that suggestions and amendments more demanding of State action to support minorities were rejected.[79] It was widely assumed that Article 27 would not place States under the obligation, for example, to provide special schools for persons belonging to linguistic minorities. The majority of the literature on this subject, particularly the older writings support the narrow interpretation of Article 27 for the reasons stated above.[80]

Another possible reason behind the support for a narrow interpretation which is not alluded to in the literature is the conventional categorisation of human rights into 'positive' and 'negative' rights. Civil and political rights (so called "first generation rights") purportedly are rights pertaining to individual liberty. They are individual and *negative* rights, merely requiring non interference from the State. Economic, social and cultural rights purportedly emanate from the more essential civil and political rights and include rights associated with the welfare State such as the right

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78 Article 3.

79 MJ Bossuyt *Guide To The "Travaux Preparatoires" of the International Covenant on Civil and Political Rights* (Matinus Nijhoff Publishers, Dordrecht, 1987) p 493.

80 For more details of the commentators' views, see Thornberry above n 51 at 178.

to work. They are deemed collective and *positive* rights. Thus, the right in Article 27, being a civil and political right, is deemed to be a negative right. However, the categorisation of first generation (negative) and second generation (positive) rights are only theoretical models of rights and in the author's opinion does not definitively describe the content of treaties. The rights of peoples to self determination is generally regarded as a collective right but is included in the Civil and Political Rights Covenant.[81]

However, there is also support for a positive interpretation. There are commentators who support a purposive reading[82] of Article 27 - that the right in Article 27 will be inoperative without active intervention from the States as adequate cultural development requires considerable human and financial resources, and minorities will rarely possess them.[83] The writer agrees with this interpretation. Subsequent State practice also suggests a positive interpretation.[84] State Reports on the implementation of Article 27 disclose that the majority of State Parties to the Civil and Political Rights Covenant consider Article 27 as imposing an obligation on the States to take the necessary measures to assist in the preservation and development of minority cultures. Words used in State Reports - 'encourage', 'promote' and 'enhance' imply undertakings by the States to act in a positive manner.[85] Further support for the broad interpretation of Article 27 comes from Cholewinski[86] who suggests that the practice of the Human Rights Committee dictate that State Parties are under a positive duty to assist ethnic minorities in the preservation and development of their culture, language and religion. In particular,

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[81] This point is also alluded to by Thornberry, above n 51 at 181. It is interesting to note that the right of all peoples to self-determination is in Article 1 of **both** the Civil and Political Covenant and the Economic, Social and Cultural Covenant.

[82] Rules of international law concerning interpretation of treaties are laid down in the Vienna Convention on the Law of Treaties (in force 27 Jan 1940 UN Doc. A/Conf.39/27). Article 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[83] This is the view of Caportorti, the Special Rappoteur on Minorities, see Caportorti Report, Add.2, para 132.

[84] Subsequent State practice can be used as means of interpreting ambiguous provisions of international instruments. Article 32 of the Vienna Convention on the Law of Treaties states: "If the meaning of a provision is ambiguous, recourse could be made to supplementary means of interpretation including the preparation work of the treaty and other circumstances of its conclusion."

[85] For example, State Reports from Sweden, Germany,New Zealand and the Soviet Union reveal support and encouragement for the promotion and development of minority culture. For details see UN Doc CCPR/C/101 Add.6 at 102, para 342 (1980).

[86] R Cholewinski "State Duty Towards Ethnic Minorities: Positive or Negative?" (1988) 16 Human Rights Quarterly 344. The author's theory is based on meeting records of the Human Rights Committee up to and including the 30th session held in summer 1987.

questions from members of the Human Rights Committee when considering State Reports suggest that a positive State duty can be supported especially with respect to the specific area of minority language.

The question of State funding has been considered in the context of Article 27. A number of State reports considered the provision of financial assistance to ethnic minorities to be in conformity with Article 27. For instance, the Yugoslavian report stated that the implementation of Article 27 cannot be achieved without "substantial national financial means".[87]. In a number of countries of Western Europe and a number of the provinces of Canada, public financial support for the establishment of separate schools for minorities is the norm.[88]

The position of indigenous peoples has also been considered in the context of Article 27. During the Human Rights Committee's discussion of the draft general comment on Article 27, it was observed that "Article 27 afforded the kind of protection for the rights of certain indigenous populations which were heavily dependent on traditional resources such as land rights".[89] A vast amount of attention was devoted to the problem of indigenous peoples.[90] At that time Convention 107 was in force. The practice of the Human Rights Committee reveals a compromise between the integrationist approach of Convention 107 and the preservation of distinct cultural and linguistic characteristics of certain groups - it was said that the integration of indigenous peoples into the mainstream of national life was not to take place without special efforts on the part of the State to help these groups retain their culture, language and religion.[91]

The above discussion demonstrates that the right of a minority group such as indigenous peoples to preserve and develop their culture and their entitlement to assistance from the State for such aims is not a novel concept in current international human rights law. Subsequent State practice leading to a positive interpretation of Article 27 suggest the existence of such rights. Although Article 27

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[87] UN Doc CCPRIC/1/Add.23 at sec 30 (1978).

[88] Above n 86 p 350.

[89] This observation was made by Committee member Opsahl, quoted in Cholewinski, above n 86 at 348.

[90] Swepston "Latin American Approaches to the Indian Problem" (March-April 1978) 117 Int. Labour Review 181.

[91] This compromise was succinctly stated in a comment from Sir Vincent Evans, a member of the Human Rights Committee that "the problem of indigenous peoples is partly one of the preservation of cultural identity and partly one of integration into society as a whole", quoted in Cholewinski, above n 86 at 351.

is not a source of legal obligations for States that have not yet ratified the Covenant,there is ample authority among jurists to suggest that Article 27 is considered a general principle of international law, due to wide acceptance of its principles by States in the international community.[92] Paragraphs 5 to 13 of the draft Declaration are thus merely affirming the rights of indigenous peoples as a minority to practise their own way of life, to preserve and develop their culture with assistance from the State although the draft goes further than current conventional law by specifying measures to be taken by States to that effect.

B. *Territorial or Land Rights*

1. Land rights in the draft Declaration

Paragraphs 14 to 17 of the draft Declaration enumerate rights of indigenous peoples in relation to land. Below is a summary of the relevant clauses:

Paragraph 14 - right to maintain indigenous peoples' distinct and profound relationship with their lands, territories and resources which include the total environment of the land, waters, air and sea, which they have traditionally occupied or used.

Paragraph 15 - collective and individual right to own, control and use the lands and territories they have traditionally occupied or otherwise used. This includes full recognition of their own laws and custom, land tenure systems and institutions for the management of resources The State should take effective measures to prevent any encroachment upon these rights.

Paragraph 16 - right to **restitution** or just and fair **compensation** for lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent. Unless freely agreed upon by the peoples concerned, compensation shall preferably take the form of lands and territories of quality, quantity and legal status at least equal to those which were lost.

Paragraph 17 - the right to protection of their environment and productivity of their lands and territories and the right to adequate assistance including international cooperation to this end.

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[92] For a detailed discussion of Article 27 as a general principle of international law see Thornberry, above n 51 at 219.

Some of the most difficult issues the international community has to deal with relates to the land rights of indigenous peoples. While the needs and moral claims of these peoples are clear, the machinery to give effect to such claims is less apparent. The draft Declaration gives international legal recognition to the special relationship of indigenous peoples to their lands, territories and resources. The land rights in clauses 14 to 17 involve several aspects:

i. Ownership, control and use of land and resources.

ii Restitution and compensation for loss of or damage to indigenous peoples' lands and territories.

iii.Protection of their environment and productivity of their lands.

Each of these aspects will now be examined in more detail in the context of rights and principles relating to property in international law.

i. the collective and individual right to own, control and use lands and territories indigenous peoples have traditionally occupied (paragraph 15).

The wording of this provision is problematic. Paragraph 15 can be contrasted with a corresponding provision in Convention 107 which uses the phrase 'lands which they traditionally occupy'. This difference in language can give rise to far reaching consequences. As the representative from Australia pointed out, in the case of Australia, the lands which indigenous peoples have traditionally occupied constitute the whole continent of Australia![93] The discussion on this provision does not reveal if that is the kind of effect contemplated by the drafters. It is submitted that the drafters would not have intended such a result. If the interpretation of paragraph 15 forwarded by Australia is correct, it would mean that ratifying States would be engaged in massive exercises of dispossessing current owners' of their land and revesting indigenous peoples with the ownership of those lands. Such a result is inconceivable. However, the literal language of paragraph 15 does lead to such an interpretation and there needs to be a redrafting of that provision.

A point to note is that paragraph 15 defines lands, territories and resources as including the total environment of the land, waters, air and sea, which have been traditionally occupied or otherwise used by indigenous peoples. The draft Declaration seeks to differentiate indigenous people from other individuals or groups of individuals by granting special protection to their lands, territories and resources.

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[93] States' Comments, above n 6 at 23.

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Free and informed consent from indigenous peoples is necessary before the State undertakes any plan of action which could encroach or interfere with indigenous groups' land rights. Some States oppose the proposal of granting indigenous peoples special protection with respect to their lands and resources over and above those recognised for the majority population.[94] Can such special protections for indigenous peoples be reconciled with existing principles of international law?

a. Property rights in international law

Adopting the narrow reading of paragraph 15 which the writer submits is necessarily the correct one, paragraph 15 can be seen as affirmation of the basic human right to own property. Article 17 of the Universal Declaration states:

(1) Everyone has the right to own property alone as well as in association with others.
(2) No one shall be arbitrarily deprived of his property.

A similar guarantee appears in the 1966 International Convention on the Elimination of All Forms of Racial Discrimination.[95] Article 5 of this Convention recognises the civil right to "own property alone as well as in association with others without a contrary discrimination based on race, colour, nationality or ethnic origin". A right of ownership grant full proprietary status and includes the right to control and use of the property. While international law clearly recognises individual and collective rights to property, the extent of this right is not clear. Article 17 of the Universal Declaration dealing with the right to property has not been developed into firm legal obligations.

Under the doctrine of discovery still persisting in many Western States such as the USA and Canada, the European settlers are deemed to have acquired exclusive rights and control over territories they discovered even if the lands were already occupied by indigenous peoples[96] for example the Brazilian Constitution provides that the lands occupied by forest dwelling aborigines are part of the "patrimony of

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[94] For example, Venezuela rejected the land rights provisions which are said to conflict with Venezuela's constitutional guarantee to all citizens of the right of ownership to land subject to State taxes and other restrictions which the State deems necessary for the benefit of its citizens, States' Comments, above n 6 at 25.

[95] Approved by Res. 1904 (XVIII) of the GA, 20 November 1963, adopted 21 Dec 1965, text in 18 GAOR Suppl. No. 15 (A/5515) at 35-37 [hereinafter the Racial Discrimination Convention].

[96] Above n 15 at 690.

the union" i.e. the property of the federal government.[97] Such constitutional provisions and doctrines ensure State power over land and resources traditionally owned by indigenous peoples.

Some regional instruments recognise that the right of property may on some occasions be subordinate to the interest of society.[98] However, the condition of "interest of society" has not been defined. This establishes a grey area between arbitrary deprivation and valid expropriation on grounds of social policy. In practice, most of the Constitutions of the world recognise the social function of property - well expressed in the application of the 'public purpose' doctrine.[99] Although the 'public purpose' doctrine is found in most municipal legal systems, international law does not have any definition of this doctrine except perhaps in a negative sense. Negative sense here means absence of public purpose perhaps where the measure is retaliatory or discriminatory.[100] The definition of the content and scope of the doctrine is largely defined by the State. The provision in the Venezuelan Constitution serves as an illustration - the right of ownership to land is subject to restrictions which the "*State deems necessary for the benefit of its citizens.*"[101]

The treatment of land and resources by the State is closely linked to the principle of 'permanent State sovereignty over natural resources', recognised as a fundamental principle of contemporary international law.[102] In the context of the UN, this principle has been formulated, developed and reiterated in a number of resolutions of the general assembly, the most important of which is the Charter of Economic Rights and Duties of States.[103] Under this principle, the State can

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[97] Article 4(IV) of the Constitution of the Federal Republic of Brazil cited in M Pallemaerts "Development, Conservation and Indigenous Rights In Brazil" (1986) Vol 8 No. 3 Human Rights Quarterly 374, 379.

[98] McHugh *The Maori Magna Carta* (Oxford University Press, Oxford, 1991) 209 citing Article 21 of the OAS American Convention of Human Rights.

[99] Various terms may be used to denote the same purpose - 'public utility', 'public necessity', 'public use', 'common good', 'general interest', 'public benefit'. These terms are difficult to interpret in the context of international law, S Jain *Nationalisation Of Foreign Property* (Deep & Deep Publications, India, 1983) 103.

[100] Above n 99 at 109.

[101] As quoted in Van Dyke "Cultural Rights Of Peoples" (1986) Vol 8 No. 3 Human Rights Quarterly 374, 376.

[102] Various commentators have further suggested that the principle of sovereignty over natural resources have reached the status of *jus cogens*, see K Hossain & SR Chowdhury (eds) *Permanent Sovereignty Over Natural Resources In International Law* (St. Martin's Press, New York, 1984).

[103] Extending from resolution 523(VI) of 12 Jan 1952 and 626(VII) of 21 Dec 1952 through resolution 1803 (XVII) of 14 Dec 1962 to resolution 2185 (XXI) of 25 Nov 1966 to

expropriate property as a matter of sovereign right, subject only to the public purpose requirement and perhaps the payment of compensation.[104]

State practice and international jurisprudence has reaffirmed this sovereign power of the State to expropriate property rights, irrespective of the owners' nationality.[105] Although this principle is primarily concerned with the right of a State to expropriate or nationalise foreign-owned resources in its territory[106], it has also been extensively invoked by States in support of positions and actions taken by them in a wide range of situations, including the destruction of renewable natural resources on the territories of indigenous peoples.[107] One of many possible examples is the situation in Brazil where State development projects have caused considerable destruction of renewable natural resources on territories of native peoples in the Amazon region.[108]

Can the special protection granted to indigenous peoples in the draft Declaration with respect to their rights of ownership, control and use of their lands and territories be reconciled with the principle of permanent State sovereignty over land and resources? It is submitted that such a reconciliation is possible. There are two grounds for such an argument. The first ground uses legal provisions regarding human rights protection, particularly the right to physical and cultural survival of indigenous peoples. The second ground is based on the fact that there is an emerging norm of special protection of indigenous territorial rights evidenced by State practice.

The first argument emphasises the security of land tenure as prerequisite for the continuance of indigenous peoples' traditional lifestyle and their development, ie the basis of their survival as a distinct cultural unit. This argument is not a new one. The Cobo report for example, stressed that lands form part of indigenous peoples' very existence and special land rights are necessary to ensure their physical and

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resolution 3281 (XXIX) of 12 Dec 1984, by which the Charter of Economic Rights and Duties of States was adopted. [Hereinafter the Charter of Economic Rights].

104 Article 2 of the Charter of Economic Rights. The question of payment of compensation is dealt with in the later part of this paper, see below Part II(B)(ii).

105 Above n 88.

106 The principle originates from efforts to address situations where powerful developed States exploit natural resources of the developing countries and eroding sovereignty of those States over their natural resources.

107 M Pallemaerts "Development, Conservation and Indigenous Rights In Brazil" (1986) Vol 8 No. 3 Human Rights Quarterly 374, 375.

108 Above n 107.

cultural survival. Commentators have also utilised this line of argument.[109] However, the writings have not sought to reconcile the argument for special land rights for indigenous peoples with the principle of State sovereignty over land and resources which is a principle of international law widely adhered to by States. The expropriation of property for public purposes is not considered arbitrary and not an infringement of the human right to own property because collective good is seen as overriding the private right to own property.

In the case of indigenous peoples, the distinctive nature of their relationship with their lands would mean that any interference or encroachment upon their land rights is not only in breach of their property rights but also in breach of a more fundamental right - that of their very existence. In some cases, the complex interrelationship between the land, indigenous peoples' culture and religion means that encroachment on their lands may constitute cultural genocide. The emergence of international human rights law constrains State action in order to ensure respect for the human rights of its people. However, in some cases the 'common good' overrides as is seen in the application of the principle of State sovereignty over land and resources. In balancing the right to own and control one's property against the benefits of development for the community, the latter prevails. In such balancing exercises one naturally needs to take into account what right is being infringed, the degree of infringement and the benefit gained by the infringement. Infringements of indigenous peoples' land rights are not merely violations of their property rights in the conventional sense but also constitute infringements to their basic right to a cultural identity. In some extreme cases, physical genocide can also occur.[110]

Seen in this light, the 'public purpose' doctrine used by States to justify interference with indigenous peoples' lands and resources would only be valid in extreme cases where the benefit significantly outweighs the undesirability of

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[109] See note on recent case of *Lyng* v *Northwest Indian Cemetery Protective Association* where the author argued that the US Supreme Court decision in that case constitutes cultural genocide, thus violating a fundamental human right of the Native Americans. The court in *Lyng* upheld the US Forest Service's authority to build a logging road through land held sacred to three Native American tribes even though the court conceded that building the logging road would effectively destroy the tribes ability to practice their religion, Cline "Pursuing Native American Rights In International Law Venues: A Jus Cogens Strategy After *Lyng* v *Northwest Indian Cemetery Protection Association*" (1991) Hastings L.J. 591.

[110] Such a result could be attributed to the change in environment, loss of traditional subsistence activities and diseases consequent to a change of diet caused by the removal of indigenous peoples from their habitual territories. For accounts of such cases, see Report- *Indigenous Peoples and Slavery in the UN* Human Rights Internet, Canada, 1991, p 12-13.

infringement. Therefore, indigenous peoples' lands and resources are given protection over and above that recognised for the rest of the national population. At the same time the State retains sovereignty over land and resources in its territory.

An alternative argument (and one which would be favoured by indigenous peoples) is to suggest that indigenous peoples' sovereignty over their territories be recognised. The question of indigenous land rights in most cases cannot be severed from arguments of indigenous groups that they have sovereignty over their lands and resources.[111] It is not proposed here to examine in depth issues of the conflicts between indigenous peoples' sovereignty and State sovereignty. However, it is helpful to look briefly at the position in international law.

International human rights law meant a move away from older concepts of State sovereignty. Today, States' sovereignty is subject to external limitation. This seems a trite point to raise at this stage but it is nevertheless essential, as assertions of State sovereignty in order to justify causes of action by the State in respect of indigenous peoples are too often raised. International law, unlike standard Anglo-Commonwealth Constitutional theory, has always conceded the possibility of a division of sovereignty.[112] In practice, there has been numerous instances in international practice both of division of sovereignty and of distribution of the component of sovereignty. For instance, sovereignty is often shared jointly by two or more Powers as in case of a condominium, while States may by a Treaty restrict their right to transfer territory. Leases or pledges of a territory are frequently made by one State to another, a recent example being the lease of Hong Kong by China to Great Britain for 99 years. Federalism is itself a form of division of sovereignty. International law does not seem to restrict the manner in which the sovereignty as to a particular territory can be bestowed on, or withdrawn from any State.[113] Thus, arguably the recognition of indigenous peoples' sovereignty over their lands and resources granting them special protection over those lands would not prejudice the concept of State sovereignty.

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[111] The issue of indigenous peoples' sovereignty over the territories they traditionally occupied are particularly significant in jurisdictions such as the US, Canada and New Zealand where the indigenous populations often raise arguments of sovereignty in relation to recognition of their rights.

[112] J G Starke *Introduction To International Law* (10ed, Butterworths, London, 1989) 158.

[113] Starke, above n 112 at 158.

Special constitutional protection for land rights for a certain segment of a national population is not something new. A number of States have traditionally practised this and an equal number of States are contemplating this practice. The America Samoa Constitution regulates the acquisition of land to protect a given group - it provides that the government of America Samoa shall have the policy of protecting persons of Samoan ancestry against alienation of their lands; communal land in America Samoa is inalienable and land individually owned by Samoans can only be sold to Samoans.[114] The Fijian Constitution reserves 83% of the land to indigenous Fijians (who constitute 50% of the Fijian population).[115] Torres[116] identifies an emerging international norm of State recognition of indigenous peoples' territorial claims. USA and Canada, for example has established reservations for Indians in designated areas, while Nicaragua has recognised the Miskitos' right to remain along Nicaragua's Atlantic Coast.

ii. Right to compensation for loss of or damage to land and resources

Besides free consent, the draft Declaration requires 'just and fair compensation' from the State for any action or course of conduct resulting in environmental degradation of indigenous peoples' territories. Paragraph 16 states the right of indigenous peoples to restitution or, where this is not possible, to just and fair compensation for lands and territories lost or damaged without their free consent. Such compensation shall preferably take the form of lands and territories of quality, quantity and legal status at least equal to those which were lost. States such as Australia and USA reject the notion of compensation as a property right.[117]

The right to compensation for the dispossessed owner of land and resources has only been addressed in relation to nationalisation by a State of foreign-owned property in its territory. UN resolutions on the new economic order insist that the appropriate compensation should be paid by the expropriating State, the most significant resolution being the 1974 Charter on Economic Rights and Duties of States. [118] Such compensation should be governed by all the relevant laws and regulations of that State in light of all the circumstances. The question of compensation for dispossessed owners who are nationals of the expropriating State is

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[114] Article 1(3) of the America Samoan Constitution cited in Van Dyke "Cultural Rights of Peoples" (1986) Human Rights Quarterly vol 2 No. 2 p15.

[115] Above n 114.

[116] Above n 12.

[117] See UN Doc E/CN.4/Sub.2/AC.4/1989/2/ Add.1 (1989) at 7.

[118] Above n 103, the relevant article being Article 2(2c).

still an open question in international law. Although this issue has not been expressly addressed in any UN instruments, there has been some reference to it in regional instruments. The right to property under the OAS American Convention grants a right to compensation to everyone deprived of his property.[119] The European Convention on Human Rights, however, does not expressly secure such a right but merely refers to principles of international law, which begs the question of whether nationals of the expropriating State are entitled to compensation.

Practices among States indicate that generally nationals of the expropriating State are entitled to compensation for the dispossession of their property.[120] Where there is no relevant conventions covering a particular issue, the general principles of law recognised by civilised nations may be considered a source of international law.[121] There is therefore room to argue that the payment of compensation if found to be widely practiced by States may constitute a principle of international law. However, there is no discernible common standard with regards to the amount or type of compensation. The draft Declaration states that restitution, or where this is not possible, just and fair compensation should be granted to indigenous peoples for loss of or damage to their lands without their free consent. Taking into account the historical circumstances under which indigenous peoples have been deprived of their lands and their need of land bases to ensure their very existence as a people, the standards with regards to compensation in paragraph 16 of the draft Declaration can not be deemed unreasonable. Restitution of lands or the replacement with lands of equal quality should be preferred.

iii. Right of indigenous peoples to protection of their environment

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[119] P McHugh *The Maori Magna Carta* (Oxford University Press, Oxford, 1991) 209 citing Article 21 of the Organization of American States (OAS) American Convention Of Human Rights.

[120] Although the standard applied with respect to compensation for expropriation of foreign-owned property and property owned by nationals might differ, K Hossain & SR Chowdhury (eds) *Permanent Sovereignty Over Natural Resources* (St. Martin's Press, New York, 1984) p10.

[121] Article 38(1) of the Statute of the International Court of Justice is widely recognise as the most authoritative statement as to the source of international law, Starke, above n 112, p59. It provides that the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting States
b) international custom, as evidence of general practice acceptable as law
c) the general principles of law recognised by civilised nations
d) judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means.

Environmental law is fast becoming one of the most important area in international law. A question often asked is: is there a right to the environment? It has not been defined from a substantive point of view. The main problem is said to pertain to legal classification: is there a separate right to environment? Or do we only claim it through other rights whose realisation would be affected by an environment unfavourable to their implementation?[122] However, whether viewed as a right on its own or claimed through other human rights, the right to protection of the environment is recognised in international law. [123] It is considered a procedural right , implying that certain procedures exist and are at the beneficiaries' disposal so that effective recourse may be had to a competent jurisdiction.[124] The right to protection of one's environment has not been expressly enumerated in any UN instruments although it has been referred to in a number of regional instruments[125] and a large number of States' Constitutions.[126] Thus, the draft Declaration is a pioneer in this respect.

The existence of international law is much weaker in the area of territorial or land rights compared to other categories of rights. Article 17 of the Universal Declaration dealing with the right to property has not been developed into firm legal obligations. The draft Declaration recognises special rights and protection for indigenous peoples' lands and environment unprecedented in any international human rights instruments. The territorial and land rights in the draft Declaration confer special protection to indigenous peoples' territories and natural resources. Such special protection seem to conflict with the sovereign rights of the State over land and resources in its territory. Territory is static in international law where the sovereignty of the State is protected. Indigenous people, in claiming the territorial rights of which they have been deprived in the past, encounter this barrier of State sovereignty - how can they forward their claims without threatening the sovereign State? The draft Declaration has avoided the sensitive political and legal issues raised

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122 *Report on Human Rights and the Environment*, UN Doc E/CN.4/Sub.2/1991/8 at 15.

123 Above n 122. See also W M Shutkin "Human Rights Law And The Earth: The Protection Of Indigenous Peoples and the Environment" (1991) 31 Va. J. Int. L. 479. The author analyses the application of human rights law to indigenous communities and the environment and concludes that indigenous peoples are necessarily accorded special protection in respect of their environment.

124 Above n 122 at 2.

125 An example is Article 24 of the Afrikan Charter on Human and Peoples' Rights: "All peoples shall have the right to a general satisfactory environment favourable to their development".

126 Such States include Algeria, Brazil, China, Guyana, Ecuador, Chile, Haiti, Republic of Korea, Thailand, Mozambique, and the Netherlands, see above n 122 at 5-6.

by traditional State assertions of sovereignty and national control over indigenous lands and natural resources located in indigenous territories. It is outside the scope of this paper to examine all such issues. The present discussion however, is concerned with forwarding territorial claims of indigenous peoples through the discourse of human rights - thus using legal provisions regarding human rights protection, with the emphasis on cultural survival. It is submitted, for the above reasons, that special protection of indigenous peoples' territorial rights can be reconciled with the sovereign rights of the State and other relevant principles of international law.

C *Self Determination and Autonomy Rights*

Paragraph 18 to 23 contain rights which will be termed as 'autonomy rights'. These autonomy rights are linked to the broader concept of the right to self-determination which is expressed in the general policy section of the draft Declaration. Article 1 states:

> Indigenous people have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the State in which they live, in a spirit of co-existence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.

The right to self-determination is the one of the most controversial rights in international human rights law, particularly in the context of minority groups. It has been the subject of much debate and as one commentator puts it, "is in a state of conceptual disorder as far as indigenous peoples are concerned".[127] In the draft Declaration, the right to self determination is substantiated by 'autonomy rights' in paragraphs 18 to 26:

paragraph 18 - the right to maintain and develop within their areas of lands and other territories their traditional economic structures, institutions and ways of life, the right to their traditional means of subsistence, the deprival of which entitles them to just and fair compensation.

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[127] J T Paxman "Minority Indigenous Populations And Their Claims for Self-Determination" (1989) 21 Case Western Reserve J. Int. L. 185, 186.

paragraph 19 - the right to special State measures for the improvement of their social and economic conditions, that reflect their own priorities.

paragraph 20 - the right to determine, plan and implement all health, housing and other social and economic programs effecting them, as far as possible through their own institutions.

Paragraph 21 - the right to participate on an equal footing with all other citizens in the political, economic, social and cultural life of the State.

Paragraph 22 - the right to participate fully at the State level in decision-making about and implementation of all matters effecting them, through representatives chosen by themselves.

paragraph 23 - the collective right to autonomy in matters relating to their own internal and local affairs, including education, mass media, culture, religion, health, housing, social welfare, land and resources management, etc.

paragraph 24 - the right to decide upon the structures of their autonomous institutions which should be recognised by the State through the legal systems and political institutions.

paragraph 26 - the right to determine the responsibilities of individuals to their own community, consistent with universally recognised human rights and fundamental freedoms.

The provisions above describe the rights and measures necessary for the self-determination of indigenous peoples. Paragraphs 18 to 20 provides for the right of indigenous peoples to preserve their own economic systems and administer all social and economic programs affecting their communities. Paragraphs 21 and 22 recognise that indigenous peoples have the equal rights of all citizens, including the right to participate in the State legislative process and the implementation of all national and international matters affecting them. Paragraphs 22 to 25 establish indigenous peoples right to develop autonomous institutions and to "determine the responsibilities of individuals to their own community."[128]

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[128] Paragraphs 23,24 and 25.

What is the right to self -determination and how does it relate to indigenous peoples? The content of this right is two-fold. First, there is the right to choose one's own form of government and to determine the social, economic and cultural policies of the State.[129] This implies the right of every member of the community to choose, in full freedom the authorities that will implement the genuine will of the people and thus incorporates other rights such as the right to vote, freedom of opinion, and expression, etc. This aspect of the right to self determination is incorporated in the draft Declaration in paragraphs 18 to 26 - these provisions state the right of indigenous peoples to participate fully at the State level in decision making and implementation of all matters affecting them (paragraphs 21 and 22)as well as grant indigenous peoples a certain amount of autonomy in pursuit of their economic, social and cultural goals.

The second aspect of the right to self-determination is the more controversial aspect - a people may freely decide on their international status whether to form a new State (ie to secede) or to associate themselves with an existing State. However, the right to self-determination in the draft Declaration seems to **exclude** the right to full independence or secession. The second sentence of Paragraph 1 provides that by virtue of the right to self determination, indigenous peoples "freely determine their relationship with the States in which they live, *in a spirit of co-existence with other citizens".*

The right to self-determination in the draft therefore pertains to forms of self government and autonomy within the framework of the State. This interpretation is also supported by the drafting record and perceived intention of the drafters.[130] What forms of self government does the draft declaration provide for? Does it go the full extent (short of secession) - where indigenous peoples would establish their own governments, design their own political systems, and enforce their own laws? Both indigenous advocates and representatives of States have referred to this lack of clarity.[131] While political autonomy would not necessarily mean that an indigenous

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[129] This right is clearly expressed in the second sentence, paragraph one of the Civil and Political Rights Covenant: "by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.", A Cassese "The Rights of Peoples to Self-determination" in L Henkin (ed) *The International Bill Of Rights* (Columbia University Press, 1981) 96.

[130] This point is emphasised by Mrs. Erica Daes, Special Rappoteur for the Working Group and the person responsible for the drafting of the draft Declaration, see E Daes "Native Peoples Rights" (1986) 27 Les Cahiers de Droit 123.

[131] For example, New Zealander Moana Jackson pointed out that Article 1 of the draft Declaration is "not specific enough about the political dimensions of self-determination", see Report of the Working Group on its ninth session E/CN.4/Sub.2/1991/40 at 9.

population could never be subject to laws of the majoritarian State, it would mean that indigenous groups would have primary jurisdiction and control over indigenous affairs. A literal reading of the relevant provisions raises some doubt. For instance, does 'institutions' include political institutions or merely indigenous community organisations? Paragraph 25 which provides for the right of indigenous groups to "determine the responsibilities of individuals to their own community" further adds to the confusion. Paragraph 23 provides an extensive but not exhaustive list of areas in which indigenous groups are to have autonomy. Such areas include education, mass media, social welfare, culture, land and resources administration, internal taxation, etc.- indicating a wide scope of autonomy being contemplated. However, Paragraph 1 in alluding to the right of indigenous peoples to "freely pursue their economic, social, cultural and spiritual development", excluded political development from the list. This omission arguably indicates the intention to exclude full political autonomy.

The provisions concerning autonomy are the subject of some attention from States. Concerns include the vagueness of the term 'autonomy', objection to its implication of segregation, the impossibility of implementing such a right within the State's constitutional framework and how the right to autonomy is to co-exist with the laws of the State.[132] The obvious disapproval of governments to the establishment of the right to collective autonomy could endanger the success of the section on self-determination, especially considering that indigenous groups may be unwilling to settle for anything less. Such objections to a significant extent reflect the literature on this topic. Such literature, although supportive of the collective right to self-determination for indigenous people, suggest that indigenous self-determination as a fundamental human right represents the most significant change to present conceptions of international human rights law.[133] The following discussion examines this issue - what is the present conception of international law with respect to self determination and autonomy for minority groups?

1.The right of peoples to self-determination in international law

The principle of self-determination made its first appearance in the UN Charter. Articles 1(2) and 5 of the Charter refer to the principle of equal rights and self determination of peoples. The principle of self-determination was first thought of as simply a statement of desirable goals but subsequent State practice and advocacy by

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[132] See States' Comments, above n 6 at 30-31.
[133] Above n 15 at 691.

3rd World and Communist countries ensured its status as a legal principle.[134] The advisory opinion of the International Court of Justice in the Western Sahara case of 1975 affirmed the right of self determination as a rule of general international law.[135] A series of GA Resolutions over the past 47 years have reiterated the principle of self determination.[136] The right is also recognised in both the Civil and Political Rights Covenant and the Economic, Social and Cultural Rights Covenant. Articles 1 of both Covenants state that "all peoples have the right to self-determination". There is also ample authority to suggest that the general principle of self-determination has become *jus cogens.*[137] However, the extent of such self determination, is unclear. The term 'peoples' has not been conclusively defined and neither is it clear what limits are there upon the exercise of self determination when it directly conflicts with the territorial integrity of a state.

The accepted interpretation of the principle of self determination of peoples in the practice of UN is that it is only applicable to peoples inhabiting overseas colonies.[138] Thus this right is not universally applicable to indigenous peoples who are not - at least in the conventional sense - colonised.[139] Concern for the territorial integrity and strong reluctance to break up recognised territories fuel the opposition to granting full self-determination to peoples situated within already sovereign territories.[140]

A further problem is that the international legal community has not agreed upon the definition of 'peoples'. Nonetheless, 'peoples', the subject of the right to self-

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[134] McHugh, above n 119 p 234.

[135] ICJ Report 1975, 12 at 31-33.

[136] For example (1952) GA Res 637, UN DOC A/2361 (Declaration of the Right of Peoples and Nations to Self-Determination); (1960) GA Res 1514, UN Doc A/C323 (Declaration on the Granting of Independence to Colonial Countries and Peoples); (1970) GA Res 2625, UN Doc A/88082.

[137] Cassese, above n 129 at 111.

[138] This occurs in spite of an increasing amount of literature suggesting that the scope of the principle of self-determination should be broadened to include minority groups within a sovereign State, including indigenous peoples. See for example, H Hannum "Self-determination, Minorities, Human Rights" (1989) Int. & Comp. L.Q. 874.

[139] The 'Blue Water Thesis' and 'Racial Pigmentation Test' favoured by UN restrict the right of self-determination to territories geographically separated from the dominant society by an ocean. This interpretation excludes indigenous peoples, whose populations are generally confined within the borders of existing nations. However, there are rival theories, see "Self-determination of Native Americans: Utility of Domestic and International Law" (1991) 22 Col.Hum. Rt.L.R. 361, 397.

[140] GA Resolution 1514(XV), UN Doc A/C323 (Declaration on the Granting of Independence To Colonial Countries and Peoples) provides that "any attempt aimed at the partial and total disruption of the national unity and territorial integrity of a country is incompatible with the purpose and the principles of the UN Charter".

determination is deemed to **exclude** minorities within a State, thus also excluding indigenous groups (as they are, until recently treated as minorities in international law).[141] Therefore, the exclusion of the right to full self-determination in the draft Declaration is in accordance with existing conceptions of international law.[142] The draft Declaration expressly refers to indigenous populations as 'peoples' and enumerates their right to self-determination. This might be taken by some as an indication that indigenous peoples are finally accorded the status of 'peoples' in international law. Convention 169 also uses the description of 'peoples' for indigenous groups but contains an express proviso that the term does not carry connotations that relates to it in international law.[143] On the surface, the draft Declaration seem to have advanced the 'peoples' debate with respect to indigenous peoples with this express recognition of them as 'peoples' entitled to the right to self-determination. However, there is a catch. Only the right to autonomy is granted. The draft Declaration has thus closed the door to secessionist claims by indigenous minorities.

As revealed in the above discussion, the provisions on autonomy rights are still a matter of some contention among States. The discussion will now proceed to look at the concept of 'autonomy' in international law.

2. Autonomy and self-government in international law

Autonomy is not a term of art or a concept which has a generally accepted definition in international law.[144] It is a relative term which describes the extent or degree of independence of a particular entity, rather than defining a particular level of independence which can be designated as reaching the status of "autonomy". Autonomy and its related principle of self government have been subjects since 1945

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[141] An arguable exception is the African Charter of Humans and Peoples' Rights 1981 which is said to be unique in its focus on peoples' rights. The definition of 'peoples' in the Charter includes minority groups within a sovereign State. See R N Kiwanuka "The Meaning Of Peoples in the Banjul Charter" (1988) 82 Am. J. Int. Law 80.

[142] Article 1 of the draft Declaration has also expressed that indigenous peoples have the right to self-determination in accordance with international law. This of course begs the question of what their right to self-determination is under present conceptions of international law.

[143] Article 1(3) of Convention 169 states that "[t]he 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".

[144] H Hannum & R Lillich "Autonomy in International Law - The General Concept" in Y Dinstein *Models Of Autonomy* (Faculty of Law, Tel Aviv University, 1981) 248.

of developing political jurisprudence within the context of the UN. What is the position in international law with regards to autonomy of a minority group within a State? Author Dinstein[145] undertook case studies of non sovereign entities and found many States offering a wide range of varying degrees of autonomy to minority groups within its territory. Author Cholewinski[146] too concludes that the most prominent and widespread type of political arrangement for a minority group to enable the preservation of its culture is the grant of a measure of autonomy. Autonomy for religious groups is a good example. All States arguably permit a significant degree of autonomy for religious groups in its territory. Rules of the Catholic Church for example is not subject to intervention from the State even if the rules sanction discrimination between the sexes. The US Supreme Court has recognised that the Old Order Amish of Wisconsin members are free to disobey the law requiring school attendance until a child's sixteenth birthday.[147] The religious millets established within the Ottoman Empire were independent within the realm of religious practice, the law regulating the civil status of its members and also enjoy a degree of administrative autonomy in the collection of taxes and responsibility for the general behaviour of the community could be delegated from the Ottoman rulers to the various millets.[148] The Aland Islands and the linguistic communities in Belgium are concerned more strictly with questions of language, education, and culture. Both those communities are granted home rule in those specific areas of concern, ie use of language and control over education.[149]

With respect to ethnic or indigenous groups , similar recognition is granted in many States. For example, in the Eritrea constitution, all Eritrean nationals are guarantied "the right to respect for their custom and their own legislation governing personal status and legal capacity, the law of the family and the law of succession.[150] The rights to autonomy in the above examples are exercised on a personal rather than on a territorial basis (except for the Belgium linguistic communities). The writer put forward these examples instead of the better known

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[145] Above n 144 at 215.

[146] Above n 86 at 5.

[147] The Court accepted the argument that obedience to the law will "ultimately result in the destruction of the Old Amish church community" and that the right to preserve the community overrode both the interest of the State in educating citizens and the interest of the child in secondary education, *Wisconsin* v *Yoder,* 406 U.S. 205 (1972), at 212.

[148] Above n 144 at 246.

[149] Aland Autonomous Law, Articles 35, 37, 38, 39 cited in Dinstein, above n 144 at 24.

[150] Eritrea Constitution Article 36 cited in Dinstein, above n 144 at 247. In addition, customary property rights, including on State owned land are not to be impaired in a discriminatory manner, and ethnic languages are permitted to be used in dealing with governmental authorities, as well as for religious and educational purposes.

ones of say, Indian self government in USA and Canada to counter any argument that the right to autonomy or self government cannot possibly be granted to indigenous peoples who are without their own territorial base. Full political autonomy for indigenous minorities is admittedly difficult to implement. However, arguably this issue does not arise as the draft Declaration does not seem to accord such a right.

In conclusion, the right to autonomy for minority groups within a State is not expressly recognised in conventional law (notwithstanding arguments by some commentators that rights of minorities to preserve their cultural identities necessarily implies a degree of autonomy for minority groups).[151] However, the arguments put forward suggest that the most prominent and widespread type of political arrangement for ethnic, religious and linguistic groups is the grant of a measure of autonomy either on a territorial or a personal basis. The autonomy rights in the draft Declaration therefore do not represent any significant challenge to present conceptions of international law.

Part II of this paper has looked at the categories of rights contained in the draft Declaration and precedents for those rights in international human rights law. The cultural protection rights in the draft Declaration can be reconciled with the minority protection provision in Article 27 of the Civil and Political Rights Covenant. Although the land rights and autonomy rights go further than any provisions in existing international human rights instruments, the writer has attempted to show that they are by no means novel concepts in international law. A significant number of States in the international community accords such land and autonomy rights to their indigenous inhabitants.

The rights in the draft Declaration, particularly the land rights and autonomy rights confer a differentiated status on indigenous peoples in relation to the non indigenous population of the State. A prevalent objection to the rights in the draft Declaration relates to the very nature of international human rights law - that such 'special' rights conferred on indigenous peoples conflict with the notion of 'equality' central to human rights law. The following discussion examines this issue.

III Do 'Special Rights' for Indigenous Peoples Conflict With The Notion of 'Equality' In International Human Rights Law?

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[151] See for example, Hannum above n 138.

A. *Reaction of States*

Various State have voiced their concern that the separation and singling out of indigenous peoples (a racial/ ethnic group) for a unique set of rights would be in contravention of international human rights law in general and specifically the Racial Discrimination Convention. Canada, for example, is concerned that some of the principles in the draft Declaration (for example, the right to autonomy) seem to create new classes of rights over and above fundamental human rights.[152] Our own New Zealand government stated that it would not support the principle in paragraph 25 (the right to determine the responsibilities of individuals to their own community) if it sanctions legal pluralism -the reason being that existing human rights standards enshrined a guarantee of equality before the law for all citizens.[153] The following discussion examines such claims by analysing the concepts of equality and non-discrimination in international law.

B *The Principle of Equality and Non-Discrimination in International Law*

An address at the opening of the World Conference to Combat Racism and Racial Discrimination aptly summarises the principle of equality and non discrimination in the international law of human rights:[154]

> Of all human rights, the right to equality is one of the most important. It is linked to the concepts of liberty and justice, and is manifested through the observance of two fundamental and complementary principles of international law. The first of these principles, that "all human beings are born equal and free in dignity and rights," appears in the 1948 Universal Declaration of Human Rights; the second, the principle of non discrimination, has been solemnly affirmed in Article 1 of the Charter of the United Nations. It is upon these two principles that all the instruments on human rights adopted since 1945 are based.... The prohibition of discrimination has become a norm of positive law ... . To establish... and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or

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152 States' comments, above n 6 p2. See also the comment of the Australian representative at p4.

153 Ministry of External Relation and Trade *Declaration on The Rights of Indigenous Peoples - consultation with the Tangata Whenua* (Wellington, 1990) p26.

154 Address by the Head of the Federal Political Department of Switzerland on August 14, 1978, Report of the World Conference to Combat Racism and Racial Discrimination , UN Doc A/CONF.92/40 Annex 1C (1979).

ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.

Equality is a notion subject to different philosophical interpretations. However, international human rights law attach to it a concrete meaning - that of non-discrimination.[155] The rule of non-discrimination is the negative restatement of the principle of equality. The principles of equality and non discrimination are enshrined in all major human rights instruments and is widely acknowledged as forming part of international customary law - some have argued that they are preemptory norms binding on all States as superior law.[156]

The texts of UN human rights instruments give no guidance as to what test should be used to differentiate between acceptable distinctions and discrimination. The drafting record of the Universal Bill of Rights indicate that the concept of equality was not given a consistent meaning.[157] It was understood at that time that the principle of equality does not exclude differences based on merit or social value but does not permit distinctions on grounds which have no relevance to merit or social value such as colour, race and sex.[158] On this strict interpretation, there is no room to accord special rights to indigenous peoples over and above what is enjoyed by the non indigenous population. However, as later discussions reveal, subsequent practice by the UN and the international community reflects the relativity of the equality principle.

The principle of equality and non discrimination must necessarily have a similar meaning irrespective of which human rights instrument one examines. For present purposes, definitions will be taken from the Racial Discrimination Convention. Article 1 defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." Article 1(4) provides

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155 An example of such a provision is Article 2 of the Universal Declaration: "Everyone is entitled to all the rights and freedoms set forth in this without distinction of any kind...". The term 'discrimination' is used in this paper to denote adverse or unacceptable discrimination as opposed to *distinctions* which are acceptable.

156 B G Ramcharan "Equality and Non Discrimination" in Henkin, above n 59 at 249.

157 This is largely due to the fact that over the time span during which the relevant provisions were drafted (1947-1966), membership of the UN and of the various organs were transformed and different coalitions emerged, Ramcharan, above n 156 at 251.

158 Above n 156 at 253.

an exception to the rule of non discrimination with respect to positive action in favour of disadvantaged groups to secure their adequate advancement and to ensure their equal enjoyment of human rights.[159] In fact, such special measures are obligatory by virtue of Article 2(2) which imposes on State Parties the duty to take special measures to ensure the adequate development and protection of certain racial groups to guarantee to them the full and equal enjoyment of human rights and fundamental freedoms.[160] Such special measures are sometimes called affirmative actions. Both Articles 1(4) and 2(2) although have different wording, clearly covers the same question and both insist upon the temporary character of the special measures in their texts.

The rights in the draft Declaration clearly do *not* fall within the conventional definition of affirmative action. The special measures defined in the Racial Discrimination Convention are temporary in character. The Racial Discrimination Convention seems to envisage measures aimed at a specified result or objective within some more or less definite time. Unlike most minorities who seek the elimination of obstacles so as to permit them equal status within the overall society, indigenous people, however, seek *long term* differentiated status. The land rights and autonomy rights in the draft Declaration are long term rights.

The philosophy behind the Racial Discrimination Convention at the time of its drafting is based on the *assimilation* of minority groups into the wider population.[161] Thus, there is room to argue that the singling out of a particular racial/ethnic group such as indigenous peoples for certain rights over and above what is enjoyed by the rest of the population would constitute racial discrimination. The philosophy behind the draft Declaration is *against* the assimilation of indigenous peoples but emphasise their preservation as distinct peoples. Certainly, the writer

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159 Article 1(4): Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination,provided, however, that such special measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

160 Article 2(2) of the Racial Discrimination Convention: "Special concrete measures shall be taken in appropriate circumstances in order to secure adequate development or protection of individuals belonging to certain racial groups with the object of securing the full enjoyment by such individuals of human rights and fundamental freedoms. These measures shall in no circumstances have as a consequence the maintenance of unequal or separate rights for different racial groups".

161 N Lerner The UN Convention On The Elimination Of All Forms of Racial Discrimination (2ed, Sijthoff & Noordhoff, Alphen van den Rijn, 1980) at 34.

concedes that if the draft Declaration existed twenty years ago, its principles would be in contravention of the Racial Discrimination Convention and also principles of equality and non discrimination in human rights law. However, international law and its principles cannot be static. The principles in any international instrument should correspond as closely as possible to existing international norms.[162] Therefore, it is necessary to reconcile the principle of non-discrimination in the Racial Discrimination Convention with current UN practice.

Nevertheless, the question still remains; what in the existing practice and norm of international human rights law constitutes discrimination? Equality cannot be an absolute or universal concept. It involves selections and classifications among objects based on criteria deemed to be relevant. Even the most enlightened government might find it difficult to accept a general non discrimination clause applicable to rights, benefits and laws generally. For example, every State discriminate between citizens and non-citizens with respect to certain rights and benefits, allows distinctions on grounds of age for purposes of voting, etc. The problem for human rights law is how to find a workable test for distinguishing laws which involve proper or acceptable distinctions from those laws which do not. This task is especially difficult in the present discussion because the distinction drawn is based on grounds of race or ethnicity - grounds of discrimination expressly prohibited in international instruments. The following discussion hopes to arrive at a plausible test to differentiate between acceptable distinctions and adverse discrimination. The works of authors in this field as well as the practice of States will be examined.

1 The test for discrimination in international law

Questions of equality and discrimination have been the subject of considerable discussion among writers and academics. A leading academic in this field is McKean[163] whose writing has been quoted by many, including McHugh[164] and the

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[162] This requirement is set forth in General Assembly Resolution 41/120 of 4 December 1986 concerning guidelines for drafting international human rights instruments.

[163] McKean *Equality and Discrimination Under International Law* (Clarendon Press, Oxford, 1983). McKean examines the principles of equality and non-discrimination in international law .The study is based on analyses of non-discrimination provisions of the UN Charter and other treaties on the subject drawn up under UN auspices. Also analysed is the relevant jurisprudence of the International Court of Justice, the European Court of Human Rights, the European Court of Justice and other tribunals along with the work of the US and Indian Supreme Courts.

[164] Above n 119.

Australian Law Reform Commission.[165] In his study on the principle of equality in international law, McKean concludes that equality is a relative principle - different treatment can be given to a particular group of people "*proportionate to concrete individual circumstances*".[166] In order to be legitimate, the different treatment must be reasonable and not arbitrary. Distinctions are reasonable if they pursue a legitimate aim and have an objective justification and a reasonable relation of proportionality exist between the aim sought to be realised and the means employed. McKean goes on to say that the criteria will usually be satisfied if the particular measures can reasonably be interpreted as being in the public interest as a whole and do not arbitrarily single out individuals and groups for indivious treatment.[167]

Author Polyviou in a comparative study of the concept of 'equality before the laws' in the Canadian, the United States and Indian Constitutions, reveals a doctrine of 'reasonable classification' very much similar to McKean's test.[168] It is proposed now to apply McKean's test to the case of indigenous rights contained in the draft Declaration.

McKean's test consist of several components:
i.is the proposed distinction reasonable and not arbitrary?
ii.is the distinction in pursuit of a legitimate aim with an objective justification?
iii.is there proportionality between the aims sought to be realised and the means employed?

i. Reasonable (ie not arbitrary) distinction

The concept of 'reasonableness' although common in legal rhetoric, is a difficult concept to apply. It is perhaps useful to look to constitutional doctrines in domestic Constitutions for guidance in the application of this concept. The jurisprudence of the US Supreme Court is particularly helpful. Much of McKean's analysis focuses on this jurisdiction as decisions of the United States Supreme Court are often cited as supplementary sources of authority by counsels and judges in international

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165 *The Recognition of Aboriginal Customary Law* Australian Law Reform Commission, Parliamentary Papers No 136/1986 Vol 1.

166 McKean, above n 163 at 286-287.

167 McKean, above n 163 at 287.

168 The 'reasonable classification' test in essence provides that the classifications embodied in a statute are reasonable if the legislative response bears a relationship of rationality to the legitimate state purpose, PG Polyviou *The Equal Protection of The Laws* (Duckworth, London, 1980) 650.

tribunals.[169] A distinction is deemed reasonable as long as it is not arbitrary, irrelevant or irrational.[170] Some would argue that distinctions made purely on grounds of one's status be it along race, colour or ethnicity lines is always arbitrary (with the exception of affirmative actions). The granting of special rights to indigenous peoples seem to premise on the fact that they were the first inhabitants of a particular territory - they are to be treated differently from other ethnic minorities which may face similar problems in terms of the dying of their culture and other social and economic problems. However, one needs to look back at the unique historical circumstances under which indigenous people were deprived of their land base and stripped of their traditional institutions and self governing powers by the new settlers. McKean, in his study on the work of the Indian Supreme Court noted that historical reasons is one of the permissible grounds of distinction.[171] In essence, the argument here is that distinction between indigenous and non indigenous peoples in respect of the rights in the draft Declaration is not purely based on colour or race or ethnicity *per se* but runs deeper than that and is based on historical reasons. Thus the distinction cannot be deemed irrelevant or irrational.

ii.legitimate aim with objective justification

Discerning an aim or purpose for distinctions made between different racial groups is not an easy task. The literature provides no guidance for determining the legitimacy of a particular aim except for 'the achievement of positive public good'.[172] It is suggested that the aim of the distinction between indigenous and non-indigenous rights is to compensate indigenous peoples for past losses of their land base and traditional institutions and self governing powers. It is naturally impossible to turn back the clock and return them to their position before their colonisation by the settlers. The draft Declaration merely attempts to ensure as far as possible the enjoyment of some rights of which indigenous peoples were deprived in the past. It is suggested that the objective justification for such an aim is the principle of good faith. In the writer's view, such an aim is not different from the philosophy behind 'special measures' or affirmative actions for racial or ethnic groups permitted under the Racial Discrimination Convention. Both in a sense involve remedies for those groups disadvantaged in the past.

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[169] McKean, above n 163 at 228.

[170] Polyviou, above n 168 at 662.

[171] Above n 163 at 251.

[172] Polyviou, above n 168 at 62.

iii.Proportionality between the aim and the means employed

'The means employed' in the present context is the granting of special rights for indigenous peoples including the measures which are to be taken by the State in relation to those rights. For example, their right to autonomy in the area of education and the State's obligation to provide resources to enable indigenous peoples to establish their own educational institutions. Another instance is effective State measures for the full recognition of indigenous peoples' land tenure systems and institutions. The case law in US demands that racial classification be subjected to the most rigid scrutiny - the means employed must be shown to be "necessary and not merely rationally related to the accomplishment of the permissible state objective wholly independently of the racial discrimination".[173]

In attempting to achieve the aim of compensating indigenous peoples for their land rights and self-governing rights lost in the past, the revesting of those rights in indigenous peoples is the logical and only alternative. In order for them to effectively enjoy such rights, assistance from the State is necessary especially at the outset. Thus, the logical conclusion here is that 'means employed' are not disproportionate to the aim. Rather, they are necessary means to achieve the proposed aim.

For the reasons above, it is submitted that the provision of special land rights and autonomy rights for indigenous peoples satisfy the international test of non-discrimination developed by McKean. At the end of his study, McKean alluded to two types of protective measures applied to a minority group which are acceptable.[174] One is special measures for protection of socially, economically and culturally deprived groups - so long as they are not continued after the need for them has disappeared. These are measures specifically envisaged by the Racial Discrimination Convention. The other type of permissible protective measure is the provision of special rights for minority groups to maintain their own language, culture and religious practices, to establish schools, churches and similar institutions. Such rights are not discriminatory because they merely allow minorities to enjoy rights which are exercised by the rest of the population.[175] It is suggested that the cultural

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[173] Polyviou at 311.
[174] McKean at 288.
[175] McKean at 288.

protection provisions and autonomy rights in the draft Declaration fall into this second category of permissible measures.

It is now proposed to briefly survey some approaches to the guarantee of 'equality' in States' Constitutions. Although the survey, due to practical reasons, will be brief and somewhat superficial, it is necessary for a number of reasons. Developments in domestic constitutional law have a significant impact on the practice in international law. Moreover, the study by McKean was undertaken nearly ten years ago and had a limited scope with respect to developments in domestic constitutional law - the only jurisdictions covered in the study was the United States and India.

2. The practice of 'equality' in domestic constitutions

i.The United States

Much of the material on the US has already been alluded to in the previous discussion. There is an abundance of literature on this topic.[176] The Fourteenth Amendment to the United States Constitution requires that the State not deny to the people 'the equal protection of the laws'. The 'reasonable classification principle ' is cited in all the relevant literature. This principle is very similar to McKean's test and consists of several elements - a legitimate State purpose and a rational relationship between the classification and the purpose.

Indian tribes are recognised to be in a special position. Protective legislation for Indian tribes has its basis in history and is rooted in the unique status of Indians as a separate people with their own political institutions.[177]

ii. Canada

Section 25 of the Canadian Charter of Rights and Freedoms makes it clear that 'equality' is not to be used against any aboriginal rights of the native peoples of

[176] Examples of such literature are J Baer *Equality Under The Constitution* (Cornell University Press, London, 1983), M Perry *The Constitution, The Courts and Human Rights* (Yale University Press, London, 1982).

[177] The Indian tribes occupy a unique position in the US constitutional framework. In the seminal case concerning the status of Indian tribes *Cherokee Nation* v *Georgia* 30 U.S.(5 Pet) 1831, the Supreme Court held that they were "domestic dependent nations" and possess inherent powers of self government.

Canada.[178] However, the definition of 'aboriginal rights' is not clear as yet. Also, the case law is in disarray - there is no discernible rationale or policy behind the court's treatment of legislation which distinguishes between Indians and non-Indians.[179] Judges have intermittently referred to principles such as "valid federal objective' and 'reasonable classification' in the cases.[180]

ii.Australia

There is no express guarantee of the right to equality and non-discrimination in the Australian Constitution. Discussions of these concepts has occurred only in decisions under the The Racial Discrimination Act 1975. The most important case on this issue concerned s19 of the Pitjantjotjara Land Rights Act 1981 (South Australia) which prohibited persons other than a Pitjanjatjara entering tribal land without the permission of the tribe's corporate representative. The court in this case held that the Act was not discriminatory as it is a special measure to protect the aborigines' special relationship with the land.[181]

iv. Other jurisdictions

Courts in other comparable jurisdictions do not use dissimilar arguments in upholding laws which make distinctions between different racial groups.[182] For example, the Cook Islands Court of Appeal's approach is that discrimination only exists where "a law singles out persons for reasons not consonant with a legitimate and apparent legislative purpose".[183]

The New Zealand Bill of Rights, unlike its Canadian counterpart does not provide that equality provisions are to be read subject to aboriginal or Treaty rights. If Maori rights are tested under the Bill of Rights Act 1990, judges may be required to perform the balancing exercise seen in North American jurisdictions.

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178 Article 25 of the Canadian Charter of Rights and Freedoms: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada... "

179 Mc Hugh, above n 119 at 220.

180 See Australian Law Commission Report, above n 165 p 101-107.

181 *Gerhardy* v *Brown* (1985) 57 ALR 472, 517 cited in above n 165 p 113.

182 This was the conclusion of the Australian Law Reform Commission on a survey of jurisdictions such as the Cook Islands, Samoa and Fiji, see above n 165 p 107.

183 Judgement of the court in *Clarke* v *Karika* Unreported, 25 Feb 1983 (Court of Appeal of the Cook Islands, Cooke P., Speight CJ, Keith J) quoted in Australian Law Commission Report, above n 165 p 107.

Some jurisdictions have express qualifications and exceptions in their Constitutions as to the application of the principle of equality and non-discrimination. The 1963 Nigerian Constitution for instance provides that discriminatory laws are forbidden except where such laws "impose restrictions or confer benefits which, having regard to their nature and/or any special circumstances pertaining to the persons to whom they apply, are demonstrably justified in a democratic society".[184]

The brief survey above reveals the relativity of the 'equality' concept in practice. There is notable presence of elements of McKean's test for discrimination - a legitimate aim, reasonable distinction and proportionality of the aim to the measures taken. This further substantiates the validity of McKean's test as the test for discrimination in international law.

The 'knee jerk' reactions of States to rights which seem to confer a differentiated status to indigenous peoples are of course quite understandable. However, a closer look at the concepts and practice of 'equality' in international law reveals that such fears are unfounded. The guarantee of 'equality before the law' does not mean that the law should be the same for everyone. The provision is to secure equality, not identity of treatment. It would not preclude reasonable differentiation between individuals and groups of individuals on grounds that are relevant and material.[185] In practice, there always exist different sets of rules for different persons within a State - the classification may be based on age, profession, religion, etc. Legal pluralism is said to be the routine feature of Western and indeed, Eastern imperialism for centuries.[186] It is the writer's submission that the land and autonomy rights in the draft Declaration which confer a differentiated status to indigenous peoples do not jeopardise the notion of equality in international human rights law but in fact strengthens it. Such 'special rights' are merely responses to the special circumstances of a group of people . Affirmative action is justified in order to attain true equality for minority groups which have been discriminated against in the past. Likewise, the granting of special land rights to indigenous peoples

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184 Quoted in Polyviou, above n 168 p 696 including examples of similar provisions in other Constitutions.

185 This was the explanation given by the Committee during the discussion on Article 26 of the Civil and Political Rights Covenant which guarantees to everyone equality before the law. The explanation was given in response to the objection that the provision of equality before the law might be held to mean that the law should be the same for everyone and that it might preclude the imposition of reasonable legal disabilities upon certain categories of individuals such as minors or persons of unsound minds, see Ramcharan above n 156, 25.

186 Above n 119 p 224.

who in fact have prior claim to such lands, and the right to self-government which was in most cases unjustifiably taken away from them - could not be deemed discriminatory against the non-indigenous population.

CONCLUSION

Although nations containing indigenous peoples had different historical experiences, many of the problems created by colonialism have common roots and common themes. Expropriation of the land and resources of indigenous peoples for the benefit of the dominant colonial society occurs in most cases. Cultural genocide, or what the draft Declaration creatively labels ethnocide, was not uncommon.

The draft Declaration presents a new perspective on issues of indigenous rights and go further than existing provisions in other UN instruments applicable to the situation of indigenous peoples. For example, the right to protection of indigenous peoples' environment and the right to be compensated for any encroachment upon their land rights are enumerated for the first time in an UN international instrument. However, all the rights contained in the draft Declaration are consistent with principles of international human rights law and practice. The land rights and autonomy rights in the draft Declaration arguably confer a differentiated status to indigenous peoples. An issue arises as to whether such rights are consistent with the notion of equality central to human rights law. The writer's view is yes. Equality is not a monolithic concept and should not be looked at as merely equal treatment. It is a goal to be achieved and in achieving this goal, the history and different circumstances of peoples need to be taken into account. With regard to the history of indigenous peoples, such 'special rights' as those enumerated in the draft Declaration are merely new rights to remedy old wrongs in order to accord true equality to these peoples.

Although it is expected that the draft Declaration will be adopted by the UN General Assembly in 1993 in conjunction with the International Year of Indigenous Peoples, the draft has still a long road ahead. After approval of the text by the Working Group, the draft will need to go through the Human Rights Committee and

finally debated in the UN General Assembly. The draft is therefore likely to undergo revision and refinement of terms. However, the core concepts of indigenous peoples' cultural, territorial and autonomy rights must necessarily remain. The draft Declaration, in order to succeed, needs to reflect a good balance between aspirations of indigenous peoples and the legitimate concerns of States. It is hoped that this paper succeeds in addressing some of those concerns.

APPENDIX

A. PREAMBULAR AND OPERATIVE PARAGRAPHS TO THE DRAFT DECLARATION AS SUBMITTED BY THE MEMBERS OF THE WORKING GROUP AT FIRST READING

1st Preambular Paragraph

Affirming that all indigenous peoples are free and equal in dignity and rights in accordance with international standards, while recognizing the right of all individuals and peoples to be different, to consider themselves different, and to be respected as such,

2nd Preambular Paragraph

Considering that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

3rd Preambular Paragraph

Convinced that all doctrines, policies and practices of racial, religious, ethnic or cultural superiority are scientifically false, legally invalid, morally condemnable and socially unjust,

4th Preambular Paragraph

Concerned that indigenous peoples have often been deprived of their human rights and fundamental freedoms, resulting in the dispossession of lands, territories and resources, as well as in poverty and marginalization,

5th Preambular Paragraph

Welcoming the fact that indigenous peoples are organizing themselves in order to bring an end to all forms of discrimination and oppression wherever they occur,

6th Preambular Paragraph

Recognizing the urgent need to promote and respect the rights and characteristics of indigenous peoples which stem from their history, philosophy, cultures, spiritual and other traditions, as well as from their political, economic and social structures, especially their rights to lands, territories and resources,

7th Preambular Paragraph

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from adverse discrimination of any kind,

8th Preambular Paragraph

Endorsing efforts to consolidate and strengthen the societies, cultures and traditions of indigenous peoples, through their control over development affecting them or their lands, territories and resources,

9th Preambular Paragraph

Emphasizing the need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, understanding and friendly relations among all peoples of the world,

10th Preambular Paragraph

Emphasizing the importance of giving special attention to the rights and needs of indigenous women, youth and children,

11th Preambular Paragraph

Recognizing in particular that it is in the best interest of indigenous children for their family and community to retain shared responsibility for the upbringing of the children,

12th Preambular Paragraph

Believing that indigenous peoples have the right freely to determine their relationships with the States in which they live, in a spirit of co-existence with other citizens,

13th Preambular Paragraph

Noting that the International Covenants on Human Rights affirm the fundamental importance of the right to self-determination, as well as the right of all human beings to pursue their material, cultural and spiritual development in conditions of freedom and dignity,

14th Preambular Paragraph

Bearing in mind that nothing in this Declaration may be used as an excuse for denying to any people its right to self-determination,

15th Preambular Paragraph

Calling upon States to comply with and effectively implement all international instruments as they apply to indigenous peoples,

16th Preambular Paragraph

Solemnly proclaims the following Declaration of The Rights of Indigenous Peoples:

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PART I

Operative paragraph 1

Indigenous peoples have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the States in which they live, in a spirit of co-existence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.

Operative paragraph 2

Indigenous peoples have the right to the full and effective enjoyment of all of the human rights and fundamental freedoms which are recognized in the Charter of the United Nations and other international human rights instruments.

Operative paragraph 3

Indigenous peoples have the right to be free and equal to all other human beings and peoples in dignity and rights, and to be free from adverse distinction or discrimination of any kind based on their indigenous identity.

PART II

Operative paragraph 4

Indigenous peoples have the collective right to exist in peace and security as distinct peoples and to be protected against genocide, as well as the individual rights to life, physical and mental integrity, liberty and security of person.

Operative paragraph 5

Indigenous peoples have the collective and individual right to maintain and develop their distinct ethnic and cultural characteristics and identities, including the right to self-identification.

Operative paragraph 6

Indigenous peoples have the collective and individual right to be protected from cultural genocide, including the prevention of and redress for:

(a) any act which has the aim or effect of depriving them of their integrity as distinct societies, or of their cultural or ethnic characteristics or identities;

(b) any form of forced assimilation or integration;

(c) dispossession of their lands, territories or resources;

(d) imposition of other cultures or ways of life; and

(e) any propaganda directed against them.

perative paragraph 7

Indigenous peoples have the right to revive and practise heir cultural identity and traditions, including the right to aintain, develop and protect the past, present and future anifestations of their cultures, such as archaeological and istorical sites and structures, artifacts, designs, ceremonies, echnology and works of art, as well as the right to the estitution of cultural, religious and spiritual property taken rom them without their free and informed consent or in violation f their own laws.

perative paragraph 8

Indigenous peoples have the right to manifest, practise and each their own spiritual and religious traditions, customs and eremonies; the right to maintain, protect, and have access in rivacy to religious and cultural sites; the right to the use and ontrol of ceremonial objects; and the right to the repatriation f human remains.

perative paragraph 9

Indigenous peoples have the right to revive, use, develop, romote and transmit to future generations their own languages, iting systems and literature, and to designate and maintain the iginal names of communities, places and persons. States shall ke measures to ensure that indigenous peoples can understand d be understood in political, legal and administrative oceedings, where necessary, through the provision of terpretation or by other effective means.

erative paragraph 10

Indigenous peoples have the right to all forms of education, cluding access to education in their own languages, and the ght to establish and control their own educational systems and stitutions. Resources shall be provided by the State for these rposes.

erative paragraph 11

Indigenous peoples have the right to have the dignity and versity of their cultures, histories, traditions and pirations reflected in all forms of education and public formation. States shall take effective measures to eliminate ejudices and to foster tolerance, understanding and good lations.

Operative paragraph 12

Indigenous peoples have the right to the use of and access to all forms of mass media in their own languages. States shall take effective measures to this end.

Operative paragraph 13

Indigenous peoples have the right to adequate financial and technical assistance, from States and through international co-operation, to pursue freely their own economic, social and cultural development, and for the enjoyment of the rights contained in this Declaration.

Operative paragraph (to be numbered)

Nothing in this Declaration may be interpreted as implying for any State, group or individual any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or to the Declaration of Principles of International Law on Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.

PART III

Operative paragraph 14

Indigenous peoples have the right to maintain their distinctive and profound relationship with their lands, territories and resources, which include the total environment of the land, waters, air and sea, which they have traditionally occupied or otherwise used.

Operative paragraph 15

Indigenous peoples have the collective and individual right to own, control and use the lands and territories they have traditionally occupied or otherwise used. This includes the right to the full recognition of their own laws and customs, land-tenure systems and institutions for the management of resources, and the right to effective State measures to prevent any interference with or encroachment upon these rights.

Operative paragraph 16

Indigenous peoples have the right to the restitution or, to the extent this is not possible, to just and fair compensation for lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent. Unless otherwise freely agreed upon by the peoples concerned, compensation shall preferably take the form of lands and territories of quality, quantity and legal status at least equal to those which were lost.

Operative paragraph 17

Indigenous peoples have the right to the protection of their environment and productivity of their lands and territories, and the right to adequate assistance including international co-operation to this end. Unless otherwise freely agreed upon by the peoples concerned, military activities and the storage or disposal of hazardous materials shall not take place in their lands and territories.

Operative paragraph 18

Indigenous peoples have the right to special measures for protection, as intellectual property, of their traditional cultural manifestations, such as literature, designs, visual and performing arts, cultigens, medicines and knowledge of the useful properties of fauna and flora.

Operative paragraph (to be numbered)

In no case may any of the indigenous peoples be deprived of their means of subsistence.

B. OPERATIVE PARAGRAPHS AS REVISED BY THE CHAIRPERSON/ RAPPORTEUR PURSUANT TO SUB-COMMISSION RESOLUTION 1990/26

aft operative paragraph 18

PART IV

"The right to maintain and develop within their areas of lands and other rritories their traditional economic structures, institutions and ways of fe, to be secure in the traditional economic structures and ways of life, to secure in the enjoyment of their own traditional means of subsistence, and engage freely in their traditional and other economic activities, including nting, fresh- and salt-water fishing, herding, gathering, lumbering and ltivation, without adverse discrimination. In no case may an indigenous ople be deprived of its means of subsistence. The right to just and fair mpensation if they have been so deprived;"

t operative paragraph 19

"The right to special State measures for the immediate, effective and inuing improvement of their social and economic conditions, with their ent, that reflect their own priorities;"

t operative paragraph 20

"The right to determine, plan and implement all health, housing and other al and economic programmes affecting them, and as far as possible to lop, plan and implement such programmes through their own institutions;"

Draft operative paragraph 21

PART V

"The right to participate on an equal footing with all the other citizens and without adverse discrimination in the political, economic, social and cultural life of the State and to have their specific character duly reflected in the legal system and in political and socio-economic and cultural institutions, including in particular proper regard to and recognition of indigenous laws and customs;"

Draft operative paragraph 22

"The right to participate fully at the State level, through representatives chosen by themselves, in decision-making about and implementation of all national and international matters which may affect their rights, life and destiny;"

"(b) The right of indigenous peoples to be involved, through appropriate procedures, determined in conjunction with them, in devising any laws or administrative measures that may affect them directly, and to obtain their free and informed consent through implementing such measures. States have the duty to guarantee the full exercise of these rights;"

Draft operative paragraph 23

"The collective right to autonomy in matters relating to their own internal and local affairs, including education, information, mass media, culture, religion, health, housing, social welfare, traditional and other economic and management activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions;"

Draft operative paragraph 24

"The right to decide upon the structures of their autonomous institutions, to select the membership of such institutions according to their own procedures, and to determine the membership of the indigenous people concerned for these purposes; States have the duty, where the peoples concerned so desire, to recognize such institutions and their memberships through the legal systems and political institutions of the State;"

Draft operative paragraph 25

"The right to determine the responsibilities of individuals to their own community, consistent with universally recognized human rights and fundamental freedoms;"

Draft operative paragraph 26

"The right to maintain and develop traditional contacts, relations and cooperation, including cultural and social exchanges and trade, with their own kith and kin across State boundaries and the obligation of the State to adopt measures to facilitate such contacts;"

Draft operative paragraph 27

"The right to claim that States honour treaties and other agreements concluded with indigenous peoples, and to submit any disputes that may arise in this matter to competent national or international bodies;"

Draft operative paragraph 28

PART VI

"The individual and collective right to access to and prompt decision by mutually acceptable and fair procedures for resolving conflicts or disputes and any infringement, public or private, between States and indigenous peoples, groups or individuals. These procedures should include, as appropriate, negotiations, mediation, arbitration, national courts and international and regional human rights review and complaints mechanisms;"

raft operative paragraph 29

PART VII

"These rights constitute the minimum standards for the survival and the ll-being of the indigenous peoples of the world;"

raft operative paragraph 30

"Nothing in this Declaration may be interpreted as implying for any tate, group or individual any right to engage in any activity or to perform ny act aimed at the destruction of any of the rights and freedoms set forth erein;"

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