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"The Challenge of Plurinational Citizenship: Reconciling Indigenous Demands for Legal Pluralism with Liberal Citizenship in Mexico's Legal System"

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Introduction

The rise of identity politics from indigenous rights to gay and lesbian rights as a basis for new claims to citizenship rights made possible by new economic, social and cultural conditions has generated a new focus on questions such as what it means to be a citizen, who is and can be considered a citizen, and what are the specific rights and obligations attached to citizenship. These calls for legal, political and social recognition have spawned citizenship studies in areas of immigration, gender studies and ecology and have prompted scholars to reassess standard theories of citizenship especially the traditional liberal theory of citizenship upon which modern democracies rest. For thinking about and making sense of these new demands for "recognition and citizenship"[1] tradition liberal notions of citizenship have been found wanting. The theoretical vacuum left by modern liberalism's inability to adequately respond to the articulation of identity claims as citizenship claims has generated innovative approaches to standard theories of citizenship. Liberal, republican and communitarian theories have been reexamined and in some ways reconfigured in light of this phenomenon. They have also informed various studies of citizenship from ecological citizenship to multicultural citizenship. For example, the liberal citizenship regime in Mexico is being challenged by its indigenous peoples who historically have been denied full citizenship. Their demands for legal, political and social recognition of the multicultural nature of Mexico has been framed in terms of citizenship rights. Since a liberal perspective on citizenship cannot capture the current dynamics in Mexico, one needs to take a multicultural view of this struggle over the form and scope of citizenship- specifically one that focuses on the legal struggles. Multicultural citizenship tends to stress the social and political processes of citizenship. I argue that we should not lose sight of the relevance of legal battles

[1] Isin, Engin. "Citizenship Studies: An Introduction" In *Handbook of Citizenship Studies*, edited by Engin F. Isin and Bryan S. Turner. London: Sage Publications, 2002, 2.

over citizenship particularly since this has been the chosen battleground for indigenous activists. Yet, there are ideological as well as political forces deeply embedded in the foundations of the Mexican state that are working against a radical rethinking and restructuring of citizenship. In order to make this argument, I will first outline the current struggle over citizenship. Next, I briefly trace the historical construction of citizenship in Mexico to point out the ideological foundations of Mexican citizenship. Then, I will discuss both liberal and radical approaches to multicultural citizenship and why liberal multicultural citizenship has offers more leverage than radical multicultural citizenship in conceptualizing the dynamics of multicultural citizenship and in providing tangible suggestions for accommodating the multiethnic nature of Mexico. Lastly, I will posit why, in the context of Mexico, currently the most important domain for study and reform is the Mexican legal system. I will then briefly sketch out some of the reforms necessary to fully and justly respond to indigenous demands for differentiated citizenship as well as lay out some of the obstacles to ideological and institutional changes to Mexico's legal system.

Demands for Multicultural Citizenship

Changing economic social and cultural conditions in Mexico such as the implementation of political and economic liberalism and the growth of transnational social movement networks over the past several decades have both prompted and enabled the contestation of the terms and practices of Mexican citizenship by Mexico's indigenous peoples. These changes, from the reorganization of the peasant organizations in the 1970s to the debt crisis in the 1980s and the peso crisis of 1992 to the subsequent adoptions of neoliberal macroeconomic policies unraveled the corporatist arrangements that had sustained Mexico's post revolutionary governments. These corporatist arrangements had served the state for over seventy years by maintaining stability and

reducing pressure on the government. But as the legitimacy of the authoritarian regime was undermined by its inability to maintain its clientelistic networks through the selective distribution of benefits to its corporate sectors (military, peasant and popular) the Mexican revolutionary regime effectively ended. A consequence of the dismantling of the revolutionary project was that Mexico's indigenous peoples lost their access to political institutions and accordingly, their access to participation, representation and resources also declined. Although the benefits of acquiescence to the government in exchange for government subsidies and group representation and participation in government were hardly satisfactory, they did offer some protection against the brutality of liberal economic policies. Without the minimal protections from the compromised form of citizenship, people who had been effectively excluded from enjoying the benefits of full citizenship in particular indigenous communities began asserting the reconfiguration of Mexico's citizenship regime. Ironically, Mexico's corporatist structures unwittingly provided autonomous spaces protected rural indigenous communities from state control. The neoliberal policies of the 1990s that promoted individualized relationships challenged the indigenous autonomy corporatism unknowingly fostered. So when neoliberalism failed to deliver the promised citizenship rights, indigenous peoples were politically galvanized and ethnic cleavages were politicized.[2]

The rise of ethnic identity as a source of community identity and political mobilization in the struggle to (re)envision indigenous peoples' citizenship came to the fore on the eve of the ratification of NAFTA on January 1st, 1992 with the Ejército Zapatista de Liberación Nacional (EZLN) uprising in Chiapas. The EZLN uprising is Chiapas brought national and international attention to indigenous demands for autonomy, recognition of collective rights and the right to

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[2]Deborah J Yashar. "Contesting Citizenship: Indigenous Movements and Democracy in Latin America," *Comparative Politics* 31, no. 1 (Oct 1998) 23-42, 31.

self-determination. These demands articulated a rejection of the "indigenista"[3] policies that had historically guided the Mexican state's relationship with its indigenous peoples. Calling into question the indigenista policies geared towards the assimilation and enculturation of the indigenous people into the dominant mestizo society, the EZLN set forth a number of rights claims: the right to an indigenous language, to educate children in the language and to have official business conducted in that language, the right to use customary judicial processes and punishments for offenses that occur within the community, the right to govern and select political leadership according to local customs and the right to territorial integrity and control including control over local resources."[4] In essence, Mexico's indigenous called for recognition as peoples who have unique customs, political institutions and traditions that currently are not taken into account by the larger mestizo social, political and economic structures. This recognition means the construction of "indigenous national autonomies"[5] within the Mexican nation-state. This entails differentiated citizenship with boundaries that guarantee equal rights and representation at the national level and recognize corporate indigenous authority structures in indigenous territory.

The Mexican government's response to the political mobilization by indigenous peoples was the recognition of the multicultural nature of Mexico, but not its political and legal diversity.[6] For instance, the 1992 constitutional reform defined the Mexican nation as having a "pluricultural" composition. This is the first time the government has officially acknowledged the various ethnic groups in Mexico. It also guaranteed the protection and promotion of

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[3] Generally speaking "indigenista" policies celebrated the indigenous cultural past while, at the same time, geared to "modernize" the indigenous population and, thereby, erasing the present indigenous identity.
[4] Willem Assies. Ramírez Sevilla and Marâ del Carmen Ventura Paiño, "Autonomy Rights and the Politics of Constitutional Reform in Mexico, *Latin American and Caribbean Ethnic Studies* 1 no. 1 (April 2006): 37-62, 43.
[5] Claudio Lomnitz. *Deep Mexico, Silent Mexico*. Minneapolis: Reagents of the University of Minnesota, 2001, 49.
[6] The presence and use of traditional judicial processes by indigenous peoples within their communities.

indigenous cultural and social organizations. Yet, what was conspicuous in its absence was any recognition of Indigenous political and legal rights. In addition, the fact that the reform was located in Article 4 of the constitution, which deals with individual rights, signals that the Mexican government does not favor interpreting indigenous rights as collective rights.

Another sign that the Mexican government may have been serious about recognizing indigenous claims for political, legal and cultural autonomy was the ratification in 1991 of the ILO treaty 169 which mandated the recognition of the pluriethnic national composition without much debate or opposition. Yet, in 1992, a reform of the Agrarian Reform Law of the 1917 Constitution (Article 27) was passed making it possible for individual shareholders in communal land to sell their land and engage in commercial ventures going beyond the community, which in effect directly attacks the ability of indigenous peoples to maintain communal lands and in the process maintain their communities. Perhaps most discouraging for the future of indigenous autonomy was the actual changes that came out of the San Andres Peace Accords between the federal government and the EZLN. President Zedillo refused to implement San Andres Accords in which the government agreed to EZLN demands that indigenous communities be allowed to establish their own local governments, to use indigenous languages in education and to have indigenous representation in the legislative bodies. Moreover, when the federal government did pass an indigenous rights law in 2001, it reduced scope of indigenous autonomy set out in the 1996 peace accords with the EZLN and drawn up by the consultative peace commission, Comisión de Concorda y Pacifición (COCOPA), arguing that they conflicted with the property rights guaranteed by the constitution. The indigenous rights law was also extremely weak on issues of autonomy, collective landownership, control of natural resources, access to media in

native languages, customary law and the legal recognition of "peoples."[7] To date, there have not been substantive moves on the part of the government to seriously engage with indigenous demands for autonomy.

The Historical Development of Mexican Citizenship

The exclusionary nature of Mexican citizenship has been grounded in part in the liberal thrust of its constitutional regimes and its ethnically homogenized concept of nationality. Consequently, since independence Mexico's indigenous peoples have been systematically excluded from the protection and benefits of Mexican citizenship. The first federal constitution (1824) paved the way for this exclusion by leaving the decision of who would be considered a citizen up to states and thus up to the regional elites of each to decide who was to be considered a citizenship. Delegating the power to determine who would be granted citizenship to the regional elites "left the door open for mechanisms of exclusion."[8] Also, despite an opposing republican movement to broaden the basis of citizenship by eradicating criteria for exclusion such as lineage and race, laws such the legal code of 1836 reaffirmed certain restrictions on citizenship for minors, domestic servants, criminals, illiterates[9]. After the initial period of state building and consolidation during which citizenship was linked to the forging of a national identity, concerns for stability and progress overrode the occupation over creating a broadly based nationality. So although the first truly liberal constitution of 1857 set out very inclusive citizenship criteria-all Mexican males over eighteen qualified- it was largely ignored because the main concern of the ruling elite, both liberal and conservative, was the consolidation of state power (at the expense of

[7] The expression "peoples" as opposed to population conveys a community that shares past, present and future.
[8] Claudio Lomnitz. *Deep Mexico, Silent Mexico*. Minneapolis: Reagents of the University of Minnesota, 2001, 58.
[9] Many indigenous peoples were illiterate in Spanish and thus were excluded from politics.

broadening citizenship rights). The debates over liberal citizenship resurfaced once regime stability had been achieved under the Diaz regime (1876-1910); these debates fueled by "existing divisions among elites and by the pressures of popular groups."[10] All groups and individuals were made juridically equal by erasing group distinctions through individual citizenship in the interest of equality and mexicanidad an attempt was made to erase all previously existing distinction within the population. The liberalists' objective was to increase equality in society by "legally erasing differences"[11] between individuals and distinctions between class and ethnicity through undifferentiated citizenship and equality before the law. However, the reality was that sharp ethnic and class discrimination and inequality remained. Moreover, as critics and reformers of liberalism point out, the practice of liberalism falls quite short of its goal of eradicating difference. Under this liberal citizenship regime, indigenous peoples were not seen as full citizens, but rather "protocitizens" who needed to "conform to the ideal of citizenship that the constitution granted them….through state protection, miscegenation or education."[12] Instead of freedom and equality that liberalism promised, the indigenous were effectively excluded from national politics through property and literacy qualifications on franchise, paternalistic policies and disregard for indigenous peoples without any respect to indigenous cultures and language.

In addition to Mexican liberalism, the paradigm of the nation-state that underlies the Mexican state functions as an obstacle to the Mexican state's resistance to supplanting its current citizenship regime with a multicultural citizenship regime. Liberal nationalists in the nineteenth and twentieth century sought to create a nation-state through culture, while cultural nationalism was also seen as a way to promote liberal goals. The interconnectedness of liberalism and

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[10] Claudio Lomnitz. *Deep Mexico, Silent Mexico*. Minneapolis: Reagents of the University of Minnesota, 2001, 74.
[11] Rachel Sieder. Introduction to *Multiculturalism in Latin America*. Edited by Rachel Sieder. New York: Palgrave Macmillan, 2002, 11.
[12] Ibid 66.

nationalism is most evident in the post-revolutionary era. The revolution of 1910 expanded citizenship rights from individual rights and no social rights to a wide range of civil, political and social rights and in the process "enshrined a full concept of Mexican citizenship."[13] One of the urgent goals was national unification; therefore, the state had to wrench control of the masses from the catholic church-a competing power structure that threatened to undermine the authority of the new revolutionary regime by reaching out to the popular masses. However, the state reached out to the masses[14] not as individual citizens, but through corporate groups and sectors. Coupled with this effort to consolidate and legitimate the revolutionary regime, the state initiated nationalist discourses[15] to promote a unified ethnic national identity- one that distinctly was mestizo- in an attempt to unify a heterogeneous population. The goal was "to assimilate and integrate various racial, ethnic, political and economic sectors of society into a single pueblo.[16] Accordingly, these nationalist discourses contained a new forged "civic myth"…"to explain why [Mexicans] form a people…[and] how [the Mexican] political community originated, who is eligible for membership, who is not and why and what the community's values and aims are."[17] While the current indigenous people were rendered invisible through the state's homogenizing effort, ironically the revolutionary government used a glorified idea of the pre-Columbian Mesoamerican history and culture to provide the mythical founding of the Mexican peoples. This glorification of Mexico's pre-Columbian past did not, however, translate into substantive and equal citizenship rights for Mexico's indigenous people. Instead, the policy towards of

[13] Joe Foweraker. "Measuring Citizenship in Mexico" In Rebuilding the State: Mexico After Salinas. edited by Mónica Serrano and Victor Bulmer-Thomas. The Institute of Latin American Studies: University of London, 1996, 79.
[14] Under which indigenous peoples were subsumed as peasants along with nonindigenous peasants as opposed to indigenous peoples.
[15] "Discursive strategies that attempt to define elements that constitute a nation by delineating a nation's unique cultural, economic, political or demographic characteristics in order to foster national unity through its portrayal of the traits of a community to which citizens believe they belong" (Chorba 2007, 8).
[16] Carrie C Chorba. *Mexico, From Mestizo to Multicultural*. Nashville: Vanderbilt University Press, 2007, 8.
[17] Rogers Smith . *Civic Ideals*. New Haven: Yale University Press, 1997, 33.

indigenous peoples was to force them to integrate into the metizo nation that had been constructed by the revolutionary regime. The goal of the revolutionary state was to create a nation by destroying and ignoring previous distinctions within the population.[18] Thus, the indigenous peoples right to their own political, cultural and social structures, were abridged in the effort to construct a mestizo nation. The 1917 constitution reflects this nation building process by not recognizing the variety of ethnic, linguistic or cultural identities of its Mexican citizens. Citizenship lost its urgency and was, consequently, relegated to a long-term goal that would be fulfilled after complete modernization and as soon as the state was consolidated. It can be said that the main approach of the Mexican state towards its indigenous population officially in the service of both liberalism and nationalism has been assimilation alternating, at times, with unofficially eradication. The policies of assimilation have actively sought to deny cultural and political expression and refused to recognize these cultural differences to fit into its hegemonic vision of the Mexican nation. With recent constitutional recognition of indigenous people; however, the state has moved from a policy of assimilation to a policy of integration, which limits but does not deny rights of cultural expression.

Liberal and Radical Multicultural Citizenship

Mexico's indigenous peoples' challenge to the idea of a homogenized mestizo nation has forced the state to legally recognize the multicultural nature of Mexico. Mexico's indigenous peoples have "constructed a vision of multiculturalism as a tool for self-empowerment as well as for social and political reform."[19] In their perspective, the recognition of the multicultural nature of Mexico does not simply mean an acceptance of privately practiced cultural customs and

[18] Moisés Franco Mendoza. "The Debate Concerning Indigenous Rights in Mexico." In *The Challenge of Diversity*, edited by Willem Assies, Gemma va de Haar and André J. Hoekema. Amsterdam: Thela Thesis, 1998, 59.
[19] Guillermo De La Peña. "A New Mexican Nationalism?" *Nations and Nationalism* 12 no. 2 (2006): 279-302, 281.

traditions, rather it demands the practice of new forms of governance specifically participation and representation. Studies of indigenous peoples multicultural demands often derive from two basic theoretical orientations on multicultural citizenship- radical and ““reformist”” liberal both of which emphasizes the social and political enactments of citizenship over its legal manifestations. Additionally, they reject the traditional liberal citizenship’s tenant of state ‘neutrality’ with respect to ethnocultural differences meaning the state should be indifferent to enthocultural identities of their citizens and to the ability of enthocultural groups to reproduce themselves over time.[20] They argue that, in reality, liberal institutions are neither impartial nor neutral to cultural differences. Rather the state reproduces and reflects the dominant culture through the designation of an official language and holidays and the practice of standards methods of dispute resolution. Therefore, although citizenship is supposedly undifferentiated, membership in a specific cultural group does in fact determine the opportunities to be represented in political institutions and to participate in political deliberations. In other words, citizenship as a political resource is unevenly distributed among members of any political community, and cultural difference plays an important role in this unfair distribution.[21] These critiques of the way that liberal citizenship is played out often center on liberal citizenship’s language of universal citizenship rights that demands undifferentiated citizenship- that everyone can be a citizen and citizenship means the same for each individual. As critics of liberal citizenship point out, although universal citizenship seems to be egalitarian, it actually degrades the quality and substance of citizenship for minority groups as it encourages the process of homogenization. The insistence that members of minority groups will be protected by universal individual rights ignores the reality that groups and therefore individuals within those groups

[20] Will Kymlicka. *Politics in the Vernacular*. Oxford: Oxford University Press. 2001, 16.
[21] Matteo Gianni. “Taking Multiculturalism Seriously: Political Claims of Differentiated Citizenship.” In *Citizenship After Liberalism*, edited by Karen Slawner and Mark E. Denham. New York: Peter Lang, 1998, 35-36

(because of their membership in the group) are systematically denied individual rights enjoyed by the majority group. Conversely, in a society that recognizes group-differentiated rights certain groups in society will have special rights and exceptions determined by their status in society. Members of these groups are "incorporated into the political community not only as individuals, but also through the group, and their rights depend, in party, on their group membership."[22]

In an effort to close the gap between liberal citizenship's theoretical promise and its practice, liberal theorists such as Kymlicka augment liberal theory to take into consideration group- citizenship rights. He defends the liberal focus on individual rights arguing that "individual rights can be and typically are used to sustain a wide variety of social relationships and, furthermore, liberal principles of justice are consistent with…certain forms of special status for national minorities."[23] Nevertheless, the lacuna in liberal theory, he argues, is that it does not recognize that an individual's cultural group can function to protect her universal individual. Consequently, access to one's societal culture is essential for that individual's freedom because of the deep bond that between people and their own culture. Therefore, in a multinational country, where there are component indigenous nations,[24] these nations must be granted autonomy to ensure their full and free development, which serves the interests of their people by securing their individual rights in the larger polity. This demands, Kymlicka argues, a new liberal theory of minority rights, one that will "…replace the idea of an ethnoculturally neutral state with a new…nation-state model of a liberal democratic state.[25] This model will include both individual universal rights and certain group-differentiated rights for indigenous groups.[26]

[22] Will Kymlicka. *Multicultural Citizenship*. Oxford: Claredon Press, 1995, 174.
[23] Ibid 171
[24] "Nation" a historical community more or less institutionally complete occupying a given territory or homeland sharing a distinct language or culture.
[25] Will Kymlicka. *Politics in the Vernacular*. Oxford: Oxford University Press. 2001, 19.
[26] Ibid 6

Radical multicultural theorists of citizenship[27] are not content with merely augmenting liberal citizenship, they argue that the idea of universal citizenship reinforces the dominance of one social group over oppressed groups because the idea of universality covers up the fact that universal citizenship is really just a particular citizenship for the dominant group from which oppressed social groups are excluded. In its stead, these theorists call for special representation rights specifically reserved for oppressed groups such as women, blacks, Asian American working-class people, poor people etc. The wide range of potential and actual oppressed groups has been a target of criticism of radical multicultural citizenship for its vagueness, which may impede implementation.[28] On the other hand, Kymlicka's nation-state model differentiates between different types of minorities[29] recognizing that their significant differences in the makeup and relationship to the state and other social groups result in different claims and thus, demand different accommodations. So unlike, radical multicultural theories who often do not distinguish between indigenous groups (whom Kymlicka contends have legitimate claims to autonomy) from immigrants (whom he argues do not), radical multicultural theories are not sufficiently suited to theorizing about the multicultural demands of Mexico's indigenous groups.

The Requirements of Liberal Multicultural Citizenship for Mexico's Legal System

Adopting liberal multicultural form of citizenship that calls for differentiated rights for indigenous peoples would require seismic changes in the legal foundations of the Mexican state. Multicultural citizenship emphasizes that the recognition of Mexico's multicultural nature should not only be legal process, but also a political and social process "through which individuals and

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[27] (Young 1989, Gianni 1998)
[28] (Barry 2001, Joppke 2002, Glazer 1997)
[29] Kymlicka specifically distinguishes indigenous groups from immigrant groups.

social groups engage in claiming, expanding or losing rights."[30] Yet, at its core, citizenship is about rights-enshrined in the legal institutions of the state primarily the constitution. Therefore, while negotiating and contesting the application and distribution of rights and obligations is a social and political process that determines the nature of citizenship, who is a citizen and where citizenship is located, citizenship rights are given legal status by the state.[31]

This emphasis, I argue, on the legal context of citizenship, is appropriate for the Mexican context for two reasons. First, Mexican citizenship is based on the liberal principles of individual rights within the context of an "imagined"[32] ethnically homogenous nation-state. These liberal underpinning are grounded in a legal system that privileges individual over collective right and undifferentiated rights over differentiated rights. Consequently, the normative basis of the legal order along with legal practices and procedures must be substantially modified to fit the pluri-national nature of the Mexican state. Second, as Moisés Franco Mendoza makes the case, Mexico is more a legalistic state as opposed to a rights-based state.[33] As he argues, "the exclusive rule of law in Mexico has taken the place of the enjoyment of rights so that rights have been reduced to law."[34] In other words, rights are conceptualized as being bestowed from above by the legal structure as opposed to being generated from below (within civil society) through social movements. Hence, citizenship rights are inextricably linked with a legalistic framework. So a juridical opening recognizing Mexico's ethnic plurality would be responding to indigenous demands for justice. In other words, establishment of legal pluralism and the recognition of group rights in and of itself would be an act of justice. Additionally, since indigenous peoples

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[30] Isin, Engin. "Citizenship Studies: An Introduction" In *Handbook of Citizenship Studies*, edited by Engin F. Isin and Bryan S. Turner. London: Sage Publications, 2002.
[31] Linda Bosniak. *The Citizen and the Alien*. Princeton, N.J.: Princeton University Press, 2006.
[32] Benedict Anderson. *Imagined Communities*. London: Verso, 1983.
[33] Moisés Franco Mendoza. "The Debate Concerning Indigenous Rights in Mexico." In *The Challenge of Diversity*, edited by Willem Assies, Gemma va de Haar and André J. Hoekema. Amsterdam: Thela Thesis, 1998, 60.
[34] Ibid

citizenship claims have centered around political rights as opposed to social or civil rights, much of the contestation and negotiations over citizenship will most likely center around legal issues.

What are some of the necessary alterations to the Mexican legal system to justly address indigenous claims to autonomy? Foremost, the rule of law in Mexico needs to be strengthened by reducing the level of patronage and clientelism that impedes the uniform and consistent application of law. Furthermore, the state's institutional legal structures need to be transformed and strengthened by imbuing the judiciary with more discretion and freedom from the executive branch. Also, in order to better to serve in the interest of justice, indigenous peoples and the poor must be given better and fairer access to the judicial system. The most radical but essential transformation would be the acceptance of a separate indigenous legal system that would not be subordinate to overarching state legal system, which in time would require recognition of indigenous customary law. The Mexican state, especially in rural areas where there is little federal or state presence, has tolerated the incorporation of indigenous communities' legal practices, but only as a form of alternative dispute resolution. In essence, the state has, only in a de facto sense, recognized the practice of indigenous legal norms and practices at the community/village level with the understanding the state legal system is the final arbitrator of legal issues and disputes and its judgments always take precedence over the judgments of indigenous authorities. This inconsistent de facto recognition does not translate into a guarantee that indigenous peoples' will be able to independently determine and control their own mechanisms of justice that are based on their traditions, norms and customs. For that reason, in order to ensure that the indigenous peoples do not continue to be denied access to justice that is in keeping with their cultural needs, the state must fully recognize indigenous peoples' rights to their authorities, legal norms and practice. However, this process will be fraught with questions

concerning the relationship between majority and minority rights as well as the tension between collective and individual rights. ILO convention 169 specifies that customary law should be respected when it does not conflict with universal human rights. Kymlicka attempts to reconcile these potentially conflicting rights by making an external/internal protections distinction. He proposes that collective rights that limit the liberty of its members in the name of group solidarity or cultural purity violate individual rights, while collective rights understood as protecting the group from restrictions set by the larger society are not incompatible with individual rights. Thus, the legal system of the larger society should not interfere with the legal system of the indigenous groups unless it unduly violates the individual rights of its members. It The inherent tension between universal individual rights and differentiated collective rights that Kymlicka attempts to reconcile theoretically can be explored concretely through a study of how the parallel legal structures (liberal and indigenous) in Mexico have evolved in tension with one another over time. Such an empirical study may help inform the processes and identify the impediments to establishing legal pluralism in Mexico as well as help evaluate Kymlicka's liberal multicultural theory.

Not only do implementation issues beset efforts to legally institutionalize indigenous autonomy, but there exists a few other substantial impediments to the legal recognition of indigenous autonomy of which I will discuss one. One major impediment is the nationalist vision of a homogenous ethnic citizenry. This nationalism is embedded into the Mexican culture. Consequently, any attempt to introduce policies or even rhetoric that call into question this vision is in some quarters still vehemently opposed. This offers a partial explanation for the intractability of many Mexican politicians to entertaining the idea of legally and in particular constitutionally recognizing and accommodating the plurinational composition of their country.

What drives this obduracy is the fear that recognizing differences would lead to disunity and distrust that is cultivated when people did not feel that they share a common background, history and ethnicity. This lack of cohesion would then fatally undermine the state. Brian Barry argues that such concerns should not be dismissed as reactionary. He argues that "citizenship should be a forum where people transcend their differences and are concerned with the common good."[35] Thus, minority groups retreating from the larger society fragments the civic sphere through distrust and lack of cooperation impeding democratic deliberation necessary for the health of democracies. shared citizenship or civic identity. Yet, on the other hand, refusing demands for self-government rights will simply aggravate alienation among national minorities.

Over the past few decades, indigenous peoples in Latin America have sought to revise their respective country's citizenship regimes to recognize their indigenous collective identities. Such recognition entails granting indigenous peoples the autonomy to practice their own cultural beliefs, respecting the authority of their religious and political leaders and institutions, and honoring their territorial claims. Critics of liberal citizenship theory, argue that liberal citizenship is incapable of justly addressing these identity claims through universal, individual citizenship. "Reformist" liberal theorists such as Will Kymlicka attempt to retool traditional liberal citizenship theory to oblige multicultural demands. The tension between reconciling universal individual rights and collective rights is being played out on the ground as governments try to both accommodate and contain pressures to construct differentiated citizenship regimes. In Mexico specifically, there are ideological and political obstacles to establishing a multicultural citizenship regime. The linchpin in this battle is Mexico's legal system since it is where

[35] Brian Barry. *Culture and Equality*. Cambridge, MA: Harvard University Press, 2001, 119.

citizenship rights are enshrined and as well as the fact that this is the institution most affected by indigenous calls for legal autonomy. Much can learned about the feasibility of liberal multicultural theory by the exploring in a concrete manner the playing out of the tensions over individual and collective rights as indigenous peoples and the Mexican state struggle over the degree and scope of legal pluralism and indigenous autonomy.

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The Penn Program on

Democracy, Citizenship, and Constitutionalism

Graduate Workshop

**"Indigenous Peoples' Courts:
Egalitarian Juridical Pluralism, Self-Determination, and the UN Declaration on the Rights of Indigenous Peoples."**

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Thursday, January 17th
College Hall 209
University of Pennsylvania

http://www.sas.upenn.edu/dcc/

TABLE OF CONTENTS

INTRODUCTION 2
I. INTERNATIONAL LAW, SELF-DETERMINATION, AND MINORITY RIGHTS 10
A. *Overview of International Human Rights* 11
B. *Self-Determination and Minority Rights in International Law* 13
1. The Roots of Self-Determination and Minority Rights 14
2. The Modern Standard: External v. Internal Self-determination 17
II. INTERPRETING INDIGENOUS PEOPLES' RIGHTS UNDER THE DRIP 24
A. *The Fall and Rise of Indigenous Peoples' Rights under International Law* 24
B. *A Method for Interpreting the Rights Conferred in the DRIP* 29
1. A Trinity of Rights 30
2. Fleshing Out Article 3 32
III. EGALITARIAN JURIDICAL PLURALISM: A TEST CASE 35
A. *Egalitarian Juridical Pluralism in Context* 36
B. *Is Egalitarian Juridical Pluralism an "Appropriate" Exercise of Article 34?* 38
C. *Indigenous Courts, EJP, and the Objections Registered by the Opposing States* 41
CONCLUSION 43

INTRODUCTION

On September 13, 2007 the United Nations General Assembly ("GA") overwhelmingly adopted the United Nations Declaration on the Rights of Indigenous Peoples, ("DRIP") which recognized, *inter alia*, the right of such peoples to "self-determination" (Article 3), "autonomy or self government" (Article 4) and "the right to promote, develop and maintain . . . in the cases where they exist, *juridical systems* or customs, in accordance with international human rights standards" (Article 34).[1] The Declaration is arguably the single most important development in the history of international law relating to indigenous peoples.[2] On its date of passage in the GA, Ban Ki-moon, Secretary General of the UN, called it "a triumph for indigenous peoples around the world" and noted that it "marks a historic moment when UN Member States and indigenous peoples have reconciled with their painful histories and are resolved to move forward together on the path of human rights, justice and development for all."[3]

Like the 1948 Universal Declaration of Human Rights[4] ("UDHR") and other GA declarations addressing specific human rights concerns or demographics,[5] the DRIP is generally considered an aspirational document that broadly declares a set of rights and places all declaring

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[1] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res 61/295, arts. 3, 4, 34, U.N. GAOR, 61st sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (2007) (hereinafter "DRIP") (emphasis added).
[2] This assertion holds even given the non-binding or "soft law" character of the Declaration and the parallel existence of binding multilateral treaties that deal, in greater or smaller measure, with indigenous peoples. For example, WLO Convention 169—a binding treaty—protects rights for indigenous peoples, but recognizes only very limited rights with regard to indigenous laws and customs.
[3] Secretary General, Office of the Spokesperson, "Statement attributable to the Spokesperson for the Secretary-General on the adoption of the Declaration on the Rights of Indigenous Peoples," Sept. 13, 2007, *available at* http://www.un.org/apps/sg/sgstats.asp?nid=2733 (last visited Nov. 20, 2007).
[4] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd sess., 67th plen. mtg., U.N. Doc. A/810(III) (1948).
[5] *See, e.g.*, Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th sess., 841st plen. mtg., U.N. Doc A/RES/1386(XIV) (1959) (hereinafter "DRC"); Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904, U.N. GAOR, 18th sess., 1261st plen. mtg., U.N. Doc. A/RES/1904(XVIII) (1963) (hereinafter "DERD"); Declaration on the Elimination of Discrimination against Women, G.A. Res. 2263, U.N. GAOR, 22nd sess., 1597th plen. mtg., U.N. Doc. A/RES/2263(XXII) (1967) (hereinafter "DEDW").

States[6] under a moral obligation to ensure implementation and enforcement of those rights.[7] And, like past human rights declarations, the DRIP lays a foundation for the creation of future binding international law, primarily expressed through multilateral treaties based on the DRIP's principles, and secondarily through the development of customary international law.[8] That said, the DRIP is not in and of itself legally binding on States, and violations of the rights declared therein are not necessarily judicially enforceable against States in international courts.[9]

Because of the DRIP's presumptively non-binding character, its enforcement is largely, if not exclusively, dependant upon its voluntary acceptance and implementation by UN Member States. In this sense, the overwhelming international support for the DRIP—involving 144

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[6] Because this paper discusses both "States" in the international sense (i.e. nation-states, as traditionally understood) and "states" in the domestic sense (i.e. political subdivisions within a nation-state), I have adopted the following convention for sake of clarity: "State(s)" is capitalized when referring to nation-states, and lower case when referring to domestic states.

[7] This is the standard view of such declarations taken by international lawyers and scholars. *See* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, VOL. I, 972 (Rudolf Bernhardt ed. 1992) (noting that, while "not treaties" the UN declarations are, at least, "enunciat[ions of] important principles").

[8] Customary international law ("CIL") develops where enough States act in a certain way (state practice) with the sense that they are legally obligated to do so (*opinio juris*) to create customary law binding on all States. The DRIP could advance the development of CIL related to indigenous peoples' rights if states have implemented—or begin to implement—its principles with *opinio juris.*

[9] *See* Bernhardt, *supra* note 7 at 972 ("The prevailing opinion is that [UN declarations] do not as such have binding force, since the [GA] does not have the power to make decisions of this kind binding. Such declarations can, however, be wholly or in part an expression of existing rules or principles of international law. Moreover, as evidence of emerging new convictions and as a reflection of the practice of States adopting these declarations, they can influence the development of new norms of international law, either as general principles of law or as rules of customary international law."). While the prevailing view of such declarations is indeed that they are not legally binding per se, it is worth noting that New Zealand, one of the four States to oppose the DRIP, thought otherwise: "This Declaration is explained by its supporters as being an aspirational document, intended to inspire rather than to have legal effect. New Zealand does not, however, accept that a State can responsibly take such a stance towards a document that purports to declare the contents of the rights of indigenous people. We take the statements in the Declaration very seriously. For that reason we have felt compelled to take the position that we do." Explanation of Vote by New Zealand, Permanent Representative H.E. Ms. Rosemary Banks, to the U.N. General Assembly, at ¶ 12 (Sept. 13, 2007), *available at* http://www.nzembassy.com/info.cfm?CFID=6958589&CFTOKEN=33159055&c=51&l=124&s=to&p=63315 (last visited Nov. 23, 2007) (hereinafter "N.Z. Explanation"). The apparent view of New Zealand would seem to accord with an argument advanced by some that state practice no longer essential to the formation of CIL and that *opinio juris*, as expressed in non-binding declarations, is enough to crystallize "instant" binding customary law. *See* Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 513, 532 (J. Macdonald & Douglas M. Johnston eds., 1983) (advancing the theory of "instant" customary law based on *opinion juris* without State practice).

States[10]—suggests that it may be used, in the words of Mr. Ki-moon, "to urgently advance the work of integrating the rights of indigenous peoples into international human rights and development agendas . . . so as to ensure that the vision behind the Declaration becomes a reality."[11]

However, unlike some other UN human rights declarations, though not—ironically—unlike the watershed UDHR, the DRIP did not enjoy "universal" support.[12] Four States voted against it: Australia, Canada, New Zealand, and the United States.[13] While Canada's long-standing support for the DRIP only recently waned after the rise a new government in 2006,[14]

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[10] The total vote count was 144 States for, 11 abstaining, and 4 against. Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa, and Ukraine abstained. Australia, Canada, New Zealand, and the United States opposed the DRIP.

[11] Secretary General, *supra* note 3.

[12] Here, I use "universal" to mean favorable votes by all parties eligible to vote (i.e. Member States) or adoption without vote (signaling full support of Member States). Thus, the Declaration of the Rights of Child, the Declaration on the Elimination of Racial Discrimination, and the Declaration on the Elimination of Discrimination against Women all enjoyed universal support in the sense that they passed unanimously. *See* 1959 Y.B.U.N 192 (1960) (noting unanimous adoption of the DRC by the GA); 1963 Y.B.U.N. 330 (1965) (noting unanimous adoption of the DERD); 1967 Y.B.U.N. 514 (1969) (noting unanimous adoption of the DEDW). Likewise, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief ("Religious Intolerance Declaration") and the Declaration on Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities ("Minority Rights Declaration") were adopted without vote and hence universally supported. *See* 1981 Y.B.U.N. 879 (1985) (noting adoption without vote of the Religious Intolerance Declaration); 1992 Y.B. U.N. 722 (noting adoption without vote of the Minority Rights Declaration).

However, the Universal Declaration of Human Rights did not enjoy universal support where eight states, including the former Soviet Union and South Africa, abstained. *See* Verbatim Record of the Hundred and Eighty-third Plenary Meeting, Paris, 10 December 1948 *available at* http://www.un.org/Depts/dhl/landmark/amajor.htm (last visited Nov. 20, 2007) (noting 48 States voting for the UDHR with 8 abstaining: Byelorussian Soviet Socialist Republic, Czechoslovakia, Poland, Saudi Arabia, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, and Yugoslavia). In addition, the Declaration on the Granting of Independence for Colonial Countries and Peoples ("Colonial Peoples' Declaration") was not universally supported where 9 States abstained. *See* Colonial Peoples' Declaration, G.A. Res. 1514(XV), GAOR, 15th sess., 947th plen. mtg., U.N. Doc. A/RES/1514(XV) (1960) *available at* http://daccess-ods.un.org/TMP/1568189.html (last visited Nov. 30, 2007) (noting 89 States voting for with 9 States abstaining: Australia, Belgium, Dominican Republic, France, Portugal, Spain, South Africa, United Kingdom, and the United States). Despite their lack of "universal" support, the UDHR is nevertheless considered *the* foundational document in the modern human rights system, and colonialism per se has become indefensible foreign policy and a violation of the right to "external" self-determination. *See* Part.I.B.2 (discussing external self-determination).

[13] The total vote count was 144 States for, 11 abstaining, and 4 against. Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa, and Ukraine abstained. Australia, Canada, New Zealand, and the United States opposed the DRIP. DRIP, *supra* note 1.

[14] *See* Statement by Ambassador John McNee, Permanent Representative of Canada to the United Nations, to the 61st Session of the General Assembly on the Declaration on the Rights of Indigenous Peoples, at ¶¶ 2-3 (Sept. 13, 2007), *available at* http://geo.international.gc.ca/canada_un/new_york/statements/unga-

the opposition of Australia, New Zealand, and the United States to the approved text has been more consistent.[15] In addition, Canada's stated reasons for opposing the Declaration appear to be somewhat distinct from those expressed by the latter three.[16] Noting "significant concerns with respect to the wording of the [adopted] text," Canada's Ambassador to the UN, John McNee, focused on three specific areas when speaking to the GA on September 13, 2007: (1) "the provisions on lands, territories and resources;" (2) "free, prior and informed consent when used as a veto;" and (3) "dissatisfaction with the process."[17]

By contrast, in a joint statement made back on October 16, 2006 after adoption of the draft DRIP by the Human Rights Council, Australia, New Zealand, and the United States focused on a more fundamental concern with DRIP: Self-determination.[18] These States called the draft DRIP text "confusing, unworkable, contradictory and deeply flawed" and asserted that

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en.asp?id=10373&content_type=2 (last visited Nov. 19, 2007) ("Canada has long been a proponent of a strong and effective text that would promote and protect the human rights [of indigenous persons] and recognize the collective rights of indigenous peoples around the world. We have sought for many years . . . an aspirational document which would advance indigenous rights and promote harmonious arrangements between indigenous peoples and the States in which they live. However, the text that was presented at the Human Rights Council in June 2006 . . . did not address some of our concerns. This is why we voted against it.") (hereinafter "Canadian Explanation"). On January 23, 2006, the Conservative Party of Canada won a plurality of seats in parliament, creating the proportionally smallest minority government since Confederation in 1867. *See* Elections Canada, "Official Voting Results / Résultats officiels du scrutin," http://www.elections.ca/scripts/OVR2006/default.html (last visited Nov. 19, 2007).

[15] *See infra* note 18 and accompanying text.

[16] *Compare* Canadian Explanation, *supra* note 13, *with* Press Release, United States Mission to the United Nations, Explanation of Vote by Robert Hagen, U.S. Advisor, on the DRIP, to the UN General Assembly with Annex: Observations of the United States with respect to the DRIP (Sept. 13, 2007) *available at* http://www.usunnewyork.usmission.gov/press_releases/20070913_204.html (last visited Nov. 24, 2007) (hereinafter "U.S. Explanation"), *and* Explanation of Vote by the Hon. Robert Hill, Ambassador and Permanent Representative of Australia to the United Nations, on the DRIP, to the UN General Assembly (Sept. 13, 2007), *available at* http://www.australiaun.org/unny/GA%5f070913.html (last visited Nov. 24, 2007) (hereinafter "Australian Explanation"). Note, however, that New Zealand's ultimate, though not its preliminary, reasons for voting against the DRIP are more like those of Canada than those of Australia and the United States. *See infra* notes 21-23 and accompanying text.

[17] Canadian Explanation, *supra* note 13. In addition to the above three concerns, Mr. McNee also mentioned without elaboration concerns about "self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of indigenous peoples, member States and third parties." *Id.*

[18] *See* Statement by H.E. Ambassador Rosemary Banks, on Behalf of Australia, New Zealand and the United States, on Item 64 (a) The Declaration on the Rights of the Indigenous Peoples, in the Third Committee of the 61st UN General Assembly (October 16, 2006), *available at* http://www.usunnewyork.usmission.gov/press_releases/20061016_294.html (last visited Nov. 23, 2007) (hereinafter "Joint Statement").

the right of self-determination, declared in Article 3, "could be misrepresented as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity, territorial integrity and the stability of existing UN Member States."[19] Other concerns raised in the joint statement seem to take root from this one central worry about unilateral "self-determination" potentially leading to secession.[20]

The final version of the DRIP adopted by the GA contains a provision, Article 46(1), that specifically forecloses the possibility of such a broad misrepresentation of the conferred "self-determination" right: "Nothing in this Declaration may be . . . construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[21] Given Article 46(1) and the general disfavor with which international law looks on the recognition of newly formed States, any worry about the DRIP being used in an even marginally effective way to invoke "secession" rights seems extreme at best. However, other rights implied by "self-determination"—short of secession and not otherwise threatening the territorial integrity or political unity of States—are arguably still unilaterally conferred on indigenous peoples.

Perhaps due to the inclusion of Article 46(1) in the final version of the DRIP, New Zealand did not invoke "self-determination" concerns in explaining its continued opposition to the Declaration on September 13. Rather, it stated that it "fully supports the principles and aspirations of the [DRIP]" and, noting the incompatibility of four specific provisions in the text

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[19] *Id.* at ¶¶ 4-5.
[20] Note that the joint statement also addressed concerns similar to those raised by Canada—specifically regarding provisions dealing with land and resources—as well as concerns about some provisions being "potentially discriminatory" and concerns about the lack of a definition of "indigenous peoples" in the text. *See id.* at ¶¶ 6-10. Nevertheless, the overall focus of the statement was clearly on worries about the consequences of conferring a "self-determination" right on indigenous peoples. Indeed, the concern about leaving "indigenous peoples" undefined was explicitly rooted in the overarching self-determination worry: "The lack of definition . . . means that separatist or minority groups, with traditional connections to the territory where they live . . . could seek to exploit this declaration to claim the right to self-determination . . . ." *Id.* at ¶ 10.
[21] DRIP, *supra* note 1, art. 46(1).

with its constitution and laws,[22] justified its "no" vote as required given its view, contrary to that of most States, including the United States, that the DRIP is more than an aspirational document and has, in itself, binding "legal effect."[23] As such, it seemed to believe that it would be legally bound under international law to guarantee rights (e.g. land rights and informed consent rights) that it found incompatible with its domestic law.[24]

Unlike New Zealand and despite the addition of Article 46(1), Australia and the United States continued to invoke opposition to the Article 3 "self-determination" right in explaining their votes against the DRIP. Noting that it has "long expressed its dissatisfaction with the references to self-determination in the Declaration," Australia proceeded to define self-determination as limited to two scenarios, both, in its view, inapposite to indigenous peoples: (1) "de-colonisation and the break-up of states into smaller states with clearly defined population groups;" and (2) "[situations] where a particular group with a defined territory is disenfranchised and is denied political or civil rights."[25] Australia further asserted that "[i]t is not a right which attaches to an undefined subgroup of a population seeking to obtain political independence."[26] Seemingly ignoring the presence and function of Article 46(1), though mimicking its language, Australia concluded its discussion of self-determination by stating that it "does not support a concept that could be construed as encouraging action that would impair, even in part, the territorial and political integrity of a state with a system of democratic representative government."[27]

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[22] New Zealand specifically remained opposed to "Article 26 on lands and resources, Article 28 on redress, and Articles 19 and 32 on a right of veto over the State." N.Z. Declaration, *supra* note 9, at ¶ 6. In addition, it mentioned in passing an opposition to Article 31 relating to intellectual property rights. *Id.* at ¶ 10.
[23] *Id.* at ¶ 12.
[24] *See supra* note 9 and accompanying text.
[25] Australian Explanation, *supra* note 16, at ¶ 2.
[26] *Id.*
[27] *Id.*

For its part, the United States' analysis of Article 3 "self-determination" in opposing the DRIP was more subtle, though apparently just as central to its thinking. In continuing to call the DRIP "confusing" and "flawed," the United States noted that the right to "self-determination" is addressed in common Article 1 of the International Covenant on Civil and Political Rights[28] and the International Covenant on Economic, Social and Cultural Rights[29] where it is "understood by some to include the right to full independence under certain circumstances."[30]

While acknowledging earlier in its explanation that "[u]nder United States domestic law, the United States government recognizes Indian tribes as political entities with *inherent powers of self-government as first peoples*" and that the "federal government has a *government-to-government relationship* with Indian tribes,"[31] the United States asserted that "[u]nder existing common Article 1 legal obligations, indigenous peoples generally are not entitled to independence *nor any right of self-government* within the nation-state."[32]

The United States declared that the mandate of the Working Group on the DRIP—created by the Economic and Social Council ("ECOSOC") in accordance with a GA resolution[33]—was "not . . . to qualify, limit, or expand" the common Article 1 obligations legally binding on States with regard to "self-determination" rights, but rather "to articulate a new concept, i.e., self-

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[28] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (hereinafter "ICCPR").
[29] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (hereinafter "ICESCR").
[30] U.S. Explanation, *supra* note 16, annex at ¶ 4. Note that this characterization of the common Article 1 right to self-determination is somewhat misleading. The understanding that the right carries with it a right to "full independence under certain circumstances" (e.g. classic colonialism) is held by more than "some"—indeed, this understanding is held by the vast majority of international legal scholars and has almost certainly crystallized into a binding customary international norm through state practice with *opinio juris*. *See, e.g.* This "full independence" scenario presumably comports with the first of Australia's two defined scenarios. *See supra* note 25 and accompanying text.
[31] U.S. Explanation, *supra* note 16, at ¶ 4.
[32] *Id.* annex at ¶ 4.
[33] *See* E. Res. 1995/32, U.N. Doc. E/RES/1995/32 (July 25, 1995), *available at* http://www.ohchr.org/english/issues/indigenous/groups/groups-02.htm#mandate (click on "resolution 1995/32") (last visited Nov. 25, 2007).

government within the nation-state."[34] Noting that this "self-government" concept is "not the same concept as the right contained in common Article 1" of the ICCPR and ICESCR, the United States concluded that it was "wholly inappropriate [to] reproduc[e] common Article 1 in Article 3 of the text with no intention that Article 3 mean the same thing as common Article 1, nor that it be considered to explain or modify the scope of existing common Article 1 legal obligations."[35] Because the United States considered the "most significant provisions" of the DRIP, Article 3 foremost among them, "fundamental to interpreting all of the provisions in text [sic]," it concluded that "the text as a whole is rendered *unworkable and unacceptable*."[36]

This comment makes two arguments, one broad and one narrow. Broadly, it argues that U.S. and others' concerns about the "workability" of the DRIP—at least regarding "self-determination"—are misplaced, and that the meaning of "self-determination" is clearly delimited, not merely by Article 46(1), but by the substantive rights conferred in the DRIP. The comment argues that the appropriate way to read "self-determination" in the DRIP involves a two-stage process, moving from the skeletal right conferred in Article 3, to the more substantive Article 4, and then to specific features of the right conferred in subsequent provisions. This

[34] U.S. Explanation, *supra* note 16, annex at ¶ 5.
[35] *Id.* annex at ¶ 4, 6. Note that while it may indeed be, and probably is, the case that the mandate (and power) of the Working Group did not extend to qualifying, limiting, or expanding "self-determination" rights as that term is used in common Article 1 of the ICCPR and ICESCR, this does not mean that the mandate of the Working Group did not include the articulation of aspirational "self-determination" rights as specifically applied to "indigenous peoples." Thus, there would be (1) self-determination as legally binding on State Parties to the ICCPR and/or ICESCR and (2) self-determination in the specific context of indigenous peoples as aspired to by the DRIP. The argument that the mandate of the Working Group included the articulation of "self-determination" rights is conclusively supported by the very wording of the mandate itself. In its Resolution 1995/32, ECOSOC specifically stated that it was creating the Working Group for "the sole purpose of elaborating a draft declaration, *considering the draft* United Nations declaration on the rights of indigenous peoples *annexed to resolution 1994/45* of 26 August 1994 of the Subcommission on Prevention of Discrimination and Protection of Minorities . . . ." E. Res. 1995/32, *supra* note 33, art. 2 (emphasis added). The draft referred to by ECOSOC, the one and only draft the Working Group was required to consider, contained an Article 3—conferring "self-determination" rights—identical to that of the final draft of the DRIP approved by the GA on September 13. *See* Annex to E. Res. 1994/45, U.N. Doc. E/RES/1994/45, art. 3 (Aug. 26, 1994) ("Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").
[36] U.S. Explanation, *supra* note 16, annex at ¶ 15.

broader argument is woven throughout a more narrowly focused argument that examines a single provision in the DRIP—Article 34, conferring rights to "juridical systems"—and its applicability to an emerging concept recognizing increasingly exclusive jurisdiction of indigenous courts that has been called "egalitarian juridical pluralism" by one State that is redesigning its constitution. On this score, the comment argues that "egalitarian juridical pluralism" is an appropriate exercise of the rights guaranteed by Article 34. By examining the applicability of "egalitarian juridical pluralism" to Article 34, this comment seeks to shed light not only on the meaning and workability of Article 34, but also on the content and functionality of the overarching right of "self-determination" conferred in Article 3, "fundamental" as the United States asserted, "to interpreting all of the provisions" in the DRIP.

Part I provides an overview of international law relating specifically to self-determination to provide context for an analysis of the rights conferred by Article 34 in conjunction with Articles 3 and 4. Part II then presents an argument for a two-stage process in reading meaning into "self-determination" in the DRIP. Part III then uses the emerging concept of "egalitarian juridical pluralism" as a test case for fleshing out the rights conferred under the DRIP and then more broadly assesses the workability of "self-determination" under the DRIP paying particular attention to the concerns raised by Australia the United States.

I. International Law, Self-Determination, and Minority Rights

To better understand the meaning of "self-determination" in the DRIP and the significance of the growing movement towards "egalitarian juridical pluralism" in States with large indigenous populations, it is first necessary to review the historical development and

treatment of "self-determination" under international law. This section begins by providing a general overview of international human rights law followed by a review of the concept of "self-determination," paying particular attention to its roots in concern for minority rights, and then discusses the important distinction between "internal" and "external" self-determination.

A. *Overview of International Human Rights*

As mentioned in the introduction, the passage of the Universal Declaration of Human Rights in 1948 was a watershed moment in international law, signaling the beginning of the modern concept "human rights."[37] Before the UDHR—and before the Holocaust, which provided the political impetus to create and pass it[38]—international law was almost entirely State-centered.[39] That is, international law only concerned itself with the actions of States in relation to other States (actions "inter nations").[40] If State A massacred its own citizens plus the citizens of State B, State A had committed an offense against the sovereignty of State B but had committed no act for which the individual victims could, by themselves, hold it accountable. Only if State B chose to take offense at the violation of its sovereignty could State A potentially

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[37] *See* HENRY J. STEINER AND PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS, 138 (2d ed. 2000) ("Despite proposals to the contrary, the [UN] Charter stopped shy of incorporating a bill of rights. . . . [Instead, a commission was set up] including such distinguished founders of the human rights movement as Rene Cassin of France, Charles Malik of the Lebanon, and Eleanor Roosevelt of the United States [to develop] the draft bill of rights . . . . In 1948, the UN Commission adopted a draft Declaration, which in turn was adopted by the General Assembly . . . . During the 28 years between 1948 and 1976 [the year the ICCPR and ICESCR entered into force] the UDHR became so broadly known and frequently invoked [because] it was the only broad-based human rights instrument available."). For more detailed analysis of the drafting history and intent of the UDHR

[38] *See generally* JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT (2000).

[39] *See* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS, 61 (1950) (noting that the "international law of the past [was] concerned mainly with the delimitation of the jurisdiction of States" and that "[i]n traditional international law the individual played an inconspicuous part . . . .").

[40] *See id.*

be held accountable for its actions against B's citizens under international law.[41] The situation for A's own citizens was far worse. Under traditional State-centered international law, State A could do whatever it wanted to with its own citizens—let them eat cake, torture them, or engage in genocide—without breaking international law.[42]

Then, the Holocaust and the UDHR came along, presenting significant challenges to the State-centered concept of international law by introducing the welfare of the individual human being as an object of international concern. The UDHR, like the DRIP, was "only" a declaration, yet it carried with it a force that has fundamentally altered the way the world thinks about international law.[43] It stated a set of basic rights that all individuals have by virtue of being born human, including rights to "life, liberty, and security of person," a series of basic due process rights, and a series of economic rights.[44] All of the rights, with the exception, perhaps, of the right to own property "in association with others" were individual rather than collective rights.[45] Though they were aimed in grand measure at preventing atrocities like the Holocaust, committed against a collective group, the rights themselves were conferred on individuals, not on "peoples" or other groups.[46]

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[41] In such a scenario, B would be exercising "diplomatic protection" on behalf its citizens, and under the traditional system, it would base its claim not on a violation of its citizens human rights, but on a violation of its sovereign dignity. In any case, any satisfaction it got (e.g. an apology, money damages) would belong to it and not to the victims. *See* In re Mavrommatis Palestine Concessions (Jurisdiction), 1924 P.C.I.J. Ser. A., No. 2 (noting that "[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law").

[42] *See* Louis Henkin, *International Law: Politics, Values and Functions*, 216 COLLECTED COURSES OF HAGUE ACADEMY OF INTERNATIONAL LAW 13, at 208 (Vol. IV, 1989) ([F]or hundreds of years international law and the law governing individual life did not come together. . . . What a State did inside its borders in relation to its own nationals remained its own affair, an element of its autonomy, a matter of its 'domestic jurisdiction.'").

[43] *See* Henry Steiner, *Securing Human Rights: The First Half-Century of the Universal Declaration, and Beyond*, HARVARD MAGAZINE, Sept.-Oct. 1998, p. 45 ("[The UDHR] has retained its place of honor in the human rights movement. No other document has so caught the historical moment, achieved the same moral and rhetorical force, or exerted as much influence on the movement as a whole. . . . [It has] forever chang[ed] the discourse of international relations on issues vital to human decency and peace.").

[44] *See* UDHR, *supra* note 4, arts. 3, 5-12, 22-26.

[45] *See id.*, art. 17.

[46] *See* Morsink, *supra* note 38.

The principles in the UDHR formed the basis for the creation of two foundational human rights treaties: the International Covenant on Civil and Political Rights[47] and the International Covenant on Economic, Social and Cultural Rights.[48] These two treaties, the ICCPR and the ICESCR, effectively bifurcated the rights contained in the UDHR, each elaborating and giving legal force to the rights contained within its sphere. Compliance with the rights contained in these treaties is obligatory for State Parties to them. Enforcement, however, is still largely subject to self-monitoring by States and the *realpolitik* of international relations,[49] though one of two optional protocols to the ICCPR broadens the scope of international monitoring and enforcement of human rights violations, including the acceptance of complaints by individual victims.[50] Together with the UDHR, the ICCPR (along with its optional protocols) and the ICESCR are known collectively as the International Bill of Human Rights.[51]

B. *Self-Determination and Minority Rights in International Law*

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[47] ICCPR, *supra* note 28.
[48] ICESCR, *supra* note 29.
[49] *See* Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT'L & COMP. L. 1 (2006) (noting the "significantly limited enforcement capacity" of the international human rights system).
[50] *See* (First) Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976. The Second Optional Protocol to the ICCPR, which the United States has not signed, deals with abolition of the death penalty. *See* (Second) Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 44/128, U.N. Doc. A/44/49 (Dec. 15, 1989).
[51] *See* U.N. Office of the High Commissioner for Human Rights, *Fact Sheet No.2 (Rev.1), The International Bill of Human Rights* (1996), *available at* http://www.unhchr.ch/html/menu6/2/fs2.htm (last visited Nov. 26, 2007) (discussing the definition and impact of the International Bill of Human Rights). Note that in addition to the International Bill of Human Rights, there are a number of important topical human rights treaties, some of which are explored later in the piece as they relate to indigenous peoples' rights. *See e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195 (hereinafter "ICERD"); Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (hereinafter "CEDAW"); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (hereinafter "CAT"); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (hereinafter "CRC"); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/45/49 (1990).

Like the UDHR, the ICCPR and ICESCR generally state a series of individual rights. However, there is one glaring exception in both treaties: common Article 1. It states, in relevant part:

> All *peoples* have the right of *self-determination.* By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[52]

Accruing to "peoples," the right to "self-determination" suggests on its face a collective ("*they* freely determine") rather than an individual character. Though not included in the UDHR, the concept of "self-determination" appears in the 1945 U.N. Charter, where it is used in connection with one of the purposes of the United Nations: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."[53] But, to understand its use in the UN Charter and the International Bill of Human Rights, it is worth briefly tracing the origins of "self-determination" in international law, noting its close relationship with concerns for the rights of ethnic, religious and other minorities.

1. The Roots of Self-Determination and Minority Rights

[52] ICCPR, *supra* note 28, art. 1(1); ICESCR, *supra* note 29, art. 1(1) (emphasis added). In addition to the above-quoted text, Article 1 also states, in paragraph 2: "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." *Id.* art. 1(2). Paragraph 3 creates a binding obligation on States to promote self-determination in colonies and their ilk: "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations." *Id.* art. 1(2).

[53] U.N. Charter, art. 1(2).

The roots of the concept of "self-determination" go back to the American Declaration of Independence (1776) and the French Revolution (1789) which directly challenged the then-prevailing notion that "individuals and peoples, as subjects of the King, were objects to be [used] in accordance with the interests of the monarch."[54] The historical root of "self-determination" is the notion that the government of a State must be accountable to the "people."[55]

During and after the First World War, the concept of "self-determination" exploded onto the international scene,[56] invoked most famously (to western minds at least) by President Woodrow Wilson in connection with his Fourteen Points.[57] Wilson primarily intended "self-determination" as a democratic principle of the right of people to choose their own government,[58] but not to secede from existing States or to decolonize, though he occasionally stated it in broader terms:

> "The fundamental principle of [self-determination] is a principle . . . never acknowledged before . . . that the countries of the world belong to the people who live in them, and that they have a right to determine their own destiny and their own form of government . . . and that no body of statesmen, sitting anywhere . . . has the right to

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[54] ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 11 (1995).
[55] *Id.*
[56] *See id.* at 13 (noting that for President Wilson, self-determination "was the key to lasting peace in Europe" while for V.I. Lenin "it was a means of realizing the dream of worldwide socialism").
[57] For an excellent historical account of the formation of the League of Nations including significant treatment of the use of the concept of "self-determination" see generally Margaret MacMillan, *Paris 1919: Six Months that Changed the World* (2001).
[58] *See id.* at 19-23 (describing Wilson's conception of "self-determination" as containing four "variants": (1) the right of people to choose their "form of government"; (2) a means of "restructuring the states of Europe in accordance with national desires"; (3) a "criterion governing territorial change" (that is, taking the interests of populations into account when States divided up territory); and (4) a factor, but not a decisive one, in settling claims of colonies to independence).

> assign any great people to a sovereignty under which it does not care to live."[59]

Despite rhetorical invocation of broad self-determination rights to secede by some,[60] international law—and States, as its legislators as well as its subjects—initially remained closed to the idea. In 1920, the Council of the League of Nations appointed a Committee of Jurists to decide if the people of the Aaland Islands had a right to secede from Finland and join Sweden.[61] The report issued in the *Aaland Islands* advisory opinion clearly decided: "Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part."[62] *Aaland Islands* went on to state that "[g]enerally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate . . . is, *exclusively*, an attribute of the sovereignty of [the] State."[63] Thus, *Aaland Islands* is generally cited for the proposition that in 1920 the right of self-determination was not guaranteed under positive international law.[64]

However, in addition to rejecting a unilateral right to secede and affirming a strong concept of State sovereignty, *Aaland Islands* did something else: It recognized a fundamental

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[59] Woodrow Wilson, Speech at Billings, Montana (Sept. 11, 1919) *reprinted in* WILSON'S IDEALS, 109 (S. K. Padover ed.) (1942).
[60] This view was expressed most famously by V.I. Lenin. *See supra* note 56 and accompanying text.
[61] For an in-depth historical review of the *Aaland Islands* case, see generally J. Barros, *The Aaland Islands Question: Its Settlement by the League of Nations* (1968).
[62] Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, OFFICIAL JOURNAL OF THE LEAGUE OF NATIONS, Special Supp. No. 3, 5 (Oct. 1920) (hereinafter "Aaland Islands Case").
[63] *Id.* (emphasis added). Note that despite deciding that national groups did not have a right to self-determination that outweighed State sovereignty, the *Aaland Islands* opinion did decide that, because Finland was not a "definitely constituted State" (recently independent from Russia), the League of Nations could appropriately take action on the case without infringing State sovereignty. *Id.* at 14. This resulted in an agreement between Finland and Sweden giving the Aaland Islanders a degree of autonomous local government. *See* OFFICIAL JOURNAL OF THE LEAGUE OF NATIONS, 701-02 (Sept. 1921) (providing the text of the agreement); CASSESE, *supra* note 54, at 33 (discussing the use of the principle of self-determination to grant autonomy to the Aaland Islanders).
[64] CASSESE, *supra* note 54, at 30.

connection between the principle of "self-determination" and the then-emerging principle of "protection of minorities."[65] According to the Commission, "both have a common object – to assure to some national Group the maintenance and free development of its social, ethnical or religious characteristics."[66]

As such, *Aaland Islands* stated, the "principle [of self-determination] must be brought into line with that of the protection of minorities."[67] The Commission noted that "international legal concept[s]" and "the interests of peace" might "dictate" an "extensive grant of liberty to minorities" as a compromise where "geographic, economic and other similar considerations" may preclude the exercise of the "right of self-determination" in its most extreme form—secession or transfer to another State.[68] In the end, the question of independence for the Aaland Islanders' was resolved in just such fashion, though not on the basis of international legal right, in a bilateral agreement between Finland and Sweden: Aaland Islanders were given a significant measure of local autonomy.[69]

2. The Modern Standard: External v. Internal Self-determination

In 1945 at the United Nations Conference on International Organization ("UNCIO") there was debate over the meaning of the term "self-determination" to be included in the UN Charter with arguments advanced by some against inclusion of the term that in some ways

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[65] *See id.*
[66] Aaland Islands Case, *supra* note 62, at 6.
[67] *Id.*
[68] *Id.*
[69] *See* OFFICIAL JOURNAL OF THE LEAGUE OF NATIONS, 701-02 (Sept. 1921).

mirrored the arguments advanced by the United States and Australia in opposition to the DRIP.[70] After hearing arguments that a right of self-determination would encourage secession by national minorities and lead to "international anarchy," the Committee whose task it was to draft Article 1(2) of the Charter—dealing with the purposes of the United Nations—confirmed that "it implied [at most] the right of *self-government* of peoples and not the right of secession."[71] However, while States were clear that "self-determination" as used in Article 1(2) of the UN Charter did not imply minority secession rights or, indeed, the right of colonies to complete independence, they were less clear on what exactly it did mean.[72] In any case, the immediate legal obligations on States with regard to "self-determination" under the Charter were minimal and thus palatable.[73]

During the years after passage of the UN Charter, "self-determination" took on a meaning entirely unexpected (for some): In direct contradiction of the understanding expressed by the UNCIO Committee, many countries, mostly socialist or Third World, began to strongly advocate for a view of self-determination as a right to colonial independence.[74] The focus was on the right to "external" self-determination, or the right to secede and form a new State or join a different State.[75] Western States, including the United States, responded by arguing that the UN Charter clearly contemplated "internal" self-determination: The U.S. delegate to ECOSOC

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[70] For example, the Belgian representative to the UNCIO, H. Rolin, argued that Article 1(2) of the draft UN Charter, dealing with "self-determination," was based on "confusion" and argued that it was "dangerous" and might lead to national minorities invoking it for secessionist purposes. UNCIO, vol. VI, 300.

[71] *Id.* at 296 (emphasis added).

[72] *See* CASSESE, *supra* note 54, at 42 (noting that "States were unable positively to define self-determination").

[73] *See* U.N. Charter, arts. 55, 56 (generally requiring States to take "joint and separate action" to advance the purposes of the UN with regard to economic development, human rights, and other concerns); CASSESE, *supra* note 54, at 43 (noting that the Charter did not impose direct and immediate legal obligations on Member States).

[74] *See id.* at 44. This view of self-determination had been articulated before by V.I. Lenin around the same time President Wilson was articulating his views of the concept. *See* supra note 56 and accompanying text; *see generally* G. B. STARUSHENKO, THE PRINCIPLE OF NATIONAL SELF-DETERMINATION IN SOVIET FOREIGN POLICY (1964).

[75] *See* CASSESE, *supra* note 54, at 46 (discussing the rhetorical battle between States advocating for "external" self-determination and those advocating for "internal" self-determination).

argued that self-determination meant the "promotion of self-government" and was granted universally, not merely to colonial peoples.[76]

In 1966, the ICCPR and ICESCR were opened for signature and included among their conferred rights, as discussed earlier, the collective "right of self-determination" for "all peoples" in their common Article 1.[77] During drafting, Western countries fought the inclusion of the collective right to "self-determination" in both the ICCPR and the ICESCR, arguing that these foundational human rights treaties were focused on individual and not collective rights, while the Soviet Union and many developing countries strongly support inclusion of the right as an anti-colonial principle.[78] The right contained in common Article 1 has been interpreted as containing *both* a right to "internal self-determination" *and* a right to "external self-determination," though historically the focus of the UN Human Rights Committee, charged with monitoring States' compliance with international human rights norms,[79] has been on the latter.[80]

"External self-determination" has always been tied up with the movement for colonial independence. Heavily influenced by the 1960 UN Declaration on Granting Independence to Colonial Countries and Peoples ("Colonial Peoples' Declaration"),[81] which, like the DRIP,

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[76] 27 DEPT. ST. BUL. 269 (1952).
[77] ICCPR, *supra* note 28, art. 1; *see supra* note 52 and accompanying text (reproducing the relevant text of Article 1).
[78] CASSESE, *supra* note 54, at 47; *see generally* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (L. Henkin ed.) (1981).
[79] *See generally* D. MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE (1991).
[80] The emphasis on external self-determination is probably rooted in the international law principle—confirmed in Article 2(7) of the UN Charter—of non-interference in the domestic affairs of States. *See* U.N. Charter, art. 2(7) (explicitly not authorizing the United Nations "to intervene in matters which are essentially within the domestic jurisdiction of any [S]tate"). The Human Rights Committee emphasized this point in a 1984 report where it specifically addressed common Article 1. *See Report of the Human Rights Committee*, U.N. Doc. A/39/40, 143 (1984) ("All States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. . . . [However,] States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination"). *See* CASSESE, *supra* note 54, at 62-65 (noting that "[historically,] the Committee . . . primarily emphasized the *external* dimension of self-determination [and that] contracting States were debarred by the principle of non-interference from inquiring as to whether internal self-determination was being implemented in other States").
[81] Colonial Peoples' Declaration, *supra* note 12.

reproduced common Article 1(1) verbatim in its paragraph 2,[82] the International Court of Justice ("ICJ") authoritatively laid down the rule of external self-determination for colonial peoples in two opinions: the Advisory Opinion on *Namibia*[83] and the Advisory Opinion on *Western Sahara*.[84]

Under the *Namibia* case and the *Western Sahara* cases, the right of colonial peoples to self-determination, as declared in the Colonial Peoples' Declaration, was clearly affirmed.[85] More interesting for our purposes is what these cases and international practice confirm about the scope of the right to "self-determination" as applied to colonies. Despite using identical language to common Article 1(1) of the ICCPR and ICESCR, the right declared in the Colonial Peoples' Declaration concerns *only* "external self-determination" and expires once it has been exercised, either by the choice to form a new State or to associate or integrate with an existing State.[86]

The contours of the Article 1 right to "internal self-determination"—the right to "self-government" rooted in the Wilsonian conception—have been defined with reference to the

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[82] *Id.* art. 2. Note that in both the Colonial Peoples' Declaration and the DRIP, the reproduction of common Article 1 only extends to its first paragraph, which declares the right of self-determination for all peoples. The second paragraph—declaring the right of all peoples to "freely dispose of their natural wealth and resources"—is not included. *Id.*

[83] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Res. 276, Advisory Opinion, 1971 I.C.J. 16 (June 21) (hereinafter "*Namibia*").

[84] Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16).

[85] *See Namibia*, 1971 I.C.J. at 31 (holding that "[t]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them"); *Western Sahara*, 1975 I.C.J. at 32 (declaring that "paragraph 2 [of the Colonial Peoples' Declaration] confirm[s] and emphasize[s] that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned").

[86] *See Namibia*, 1971 I.C.J. at 31 (noting that there is "little doubt that the ultimate objective . . . was the self-determination and *independence* of the peoples concerned"); *Western Sahara*, 1975 I.C.J. at 30-31 (declaring that "[t]he principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in [the Colonial Peoples' Declaration]" and that the Declaration was "a system of decolonization based on the [principle of] self-determination"); CASSESE, *supra* note 54 at 72-73 (noting that the right of self-determination as applied to colonial peoples "only concerns external self-determination, that is, the choice of the international status of the people and the territory where it lives" and that "once a people has exercised its right to external self-determination, the right expires").

specific political rights conferred in other substantive provisions of the ICCPR.[87] In other words, "internal self-determination" has generally meant the right to have the essential political rights conferred in the ICCPR protected as a proxy for the existence of genuine "self-government." In sharp contrast to the right to external self-determination for colonial peoples, the right to internal self-determination is a continuous right.[88] The right can be conceptualized as applying to three demographics within a State: (1) the whole population, (2) racial or religious minorities suffering gross discrimination, and (3) ethnic groups, indigenous peoples and other minorities.[89]

The first scenario—the right of "self-government" for the whole population of a State—has traditionally been underdeveloped in international law due to the strong notion of non-interference with States' domestic affairs.[90] The third scenario will form an essential aspect of our inquiry below, but for now, suffice it to say that is has also been historically looked on with disfavor, generally motivated by a concern about unfettered secession rights.[91] However, the second scenario has been more explicitly developed. In the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance

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[87] For example, the United Kingdom has declared to the GA that internal self-determination "requires that [peoples] be enabled to exercise [the other rights conferred in the ICCPR and ICESR], such as the rights to freedom of thought and expression; the right of peaceful assembly and freedom of association; the right to take part in the conduct of public affairs, either directly or through freely chosen representatives; and the right to vote and be elected at genuine periodic elections." 1984 B.Y.I.L. 432. The United States has declared: "Freedom of choice is indispensable to the exercise of the right of self-determination. For this freedom of choice to be meaningful, there must be corresponding freedom of thought, conscience, expression, movement and association." 1974 U.S. DIGEST 48. *See also* Cassese, *supra* note 54, at 53.

[88] *See* CASSESE, *supra* note 54, at 101 (noting that "the right to internal self-determination is neither destroyed nor diminished by its having already once been invoked and put into effect").

[89] *See id.* at 102.

[90] *See supra* note 80 and accompanying text. However, some have scholars have argued that recent practice suggests an emerging customary right to internal self-determination—a right to democracy—for whole populations of States. *See e.g.*, T. Franck, *The Emerging Right to Democratic Governance*, 86 A.J.I.L. 46 (1992); Anne Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

[91] *See generally* LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978).

with the Charter of the UN,[92] the GA set forth a series of governing principles, one of which was entitled "The principle of equal rights and self-determination of peoples." In the title, the strong relationship between minority rights and self-determination—highlighted in the *Aaland Islands* case[93]—is again apparent. The Declaration stated that "the subjection of peoples to . . . exploitation constitutes a violation of the principle"[94] and, while focused primarily on external self-determination, it included a savings clause that looks in some ways like Article 46(1) of the DRIP.[95] It stated:

> Nothing in the [Declaration] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[96]

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[92] G.A. Res. 2625 (XXV), U.N. GAOR 6th Comm., 25th Sess., Supp. No. 28, UN Doc. A/8082 (1970) (hereinafter "Declaration on Friendly Relations").
[93] *See supra* notes 61-69 and accompanying text.
[94] Declaration on Friendly Relations, *supra* note 91, at 124.
[95] For the text of Article 46(1) of the DRIP see supra note 21 and accompanying text.
[96] Declaration on Friendly Relations, *supra* note 91, at 124. Note that the United States initially proposed a different text which would have read: "The existence of a sovereign and independent State possessing a representative Government, effectively functioning as such to *all distinct peoples* within its territory, is presumed to satisfy the principle of equal rights and self-determination as regards these peoples." UN Doc. A/AC.125/L.32, 2 (1966). The U.S. proposal thus would have gone much farther than the adopted text in explicitly recognizing the self-determination rights (as embodied in effectively functioning representative government) of ethnic groups, "distinct peoples," within a State's territory. However, the U.S. proposal was vehemently opposed by many developing countries who argued that it could be used to support secession by ethnic groups. *See e.g.*, U.N. Doc. A/AC.125/SR.68; U.N. Doc. A/AC.125/SR.69; U.N. Doc. A/AC/125/SR.105; U.N. Doc. A/AC/125/SR.107, 88 (Sept. 4, 1969).

This clause is important to the argument here in two ways. First, it has been interpreted as conferring on racial and religious minorities who suffer gross discrimination and are disenfranchised, a right to invoke self-determination for relief. Given extensive State practice, especially with regard to the institutionalized racism of Southern Rhodesia and South Africa,[97] it is widely agreed that the right to internal self-determination exists for such groups as a matter of customary international law.[98] The modes of exercising internal self-determination in this area center on the need to create access to government where it has been denied, and contemplate the granting of extensive autonomy and regional self-government among other solutions.[99]

Second, the savings clause is important in the sense that it suggests a right (albeit as a last resort) to exercise external self-determination in the form of secession by making its prohibition on "dismember[ing] or impair[ing] the territorial integrity or political unity" of States contingent upon States' "compliance with the principle of equal rights and self-determination of peoples . . . without distinction as to race, creed or colour." Where States do not comply with the principle,

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In the course of the drafting process leading up to the adopted savings clause, a compromise proposal was drafted with a proposal by Lebanon that—in addition to including a savings clause—would have read, in relevant part: "States enjoying full sovereignty and independence, and possessed of a government representing the whole of their population, shall be considered to be conducting themselves in conformity with the principle of equal rights and self-determination of peoples as regards that population including the *indigenous population* and without distinction as to race, creed or colour." U.N. Doc. A/AC.125/L.81. Unfortunately, no records are available that conclusively suggest the reasoning behind Lebanon's proposal nor the reason why the Drafting Committee ultimately adopted the language regarding "race, creed or colour" but left out any reference to "indigenous population[s]." Nevertheless, two tentative conclusions can be drawn: (1) the proposal was designed to narrow the broad conference of self-determination rights on individual groups inherent in the U.S. proposal, *see* Cassese, *supra* note 54, at 117; and (2) the singling out of "indigenous population" (in response to the "distinct peoples" language of the U.S. proposal) suggests that indigenous peoples were conceived of as having a right to self-determination that would be fulfilled by representative government.

[97] *See, e.g.*, GA Res. 31/154 A (Dec. 20, 1979); SC Res. 460 (Dec. 21, 1979); S.C. Res. 417 (Oct. 31, 1977); G.A. Res. 41/101 (Dec. 4, 1986).

[98] *See* CASSESE, *supra* note 54, at 120 ("State practice in the UN from the 1970s to the present evidences that the provision granting *internal* self-determination to *racial groups* persecuted by central government has become part of customary international law.").

[99] *Id.* at 124.

all bets are off, at least as far as the plain language of the savings clause is concerned.[100] This is in sharp contrast to Article 46(1) of the DRIP, which makes the protection of "territorial integrity" and "political unity" of States absolute and unconditional.[101]

II. Interpreting Indigenous Peoples' Rights under the DRIP

As explained in the Introduction, the DRIP explicitly recognizes for the first time in international law the right of indigenous peoples to "self-determination" in its Article 3. While the DRIP passed overwhelmingly, objection to this provision and its implications was at the heart of the "no" vote entered by the United States and Australia and the conclusion that the DRIP is "unworkable."[102] This section begins by briefly reviewing the pre-DRIP treatment of indigenous peoples rights' under international law, and then presents method for reading the rights conferred in the DRIP that accords with natural language and takes account of the historical development of the concepts of self-determination and indigenous rights.

A. *The Fall and Rise of Indigenous Peoples' Rights under International Law*

The first treatment of indigenous peoples under international law came, unsurprisingly, at the time of the European conquest of the peoples in the Western Hemisphere during the Sixteenth Century under then-dominant natural law principles. One of widely recognized

[100] Note, however, that, given state practice and extensive *opinio juris*, the existence of customary law supporting even an extremely limited right of discriminated groups to secede is doubtful. *See* Cassese, *supra* note 54, at 122-24 (noting that "States have been adamant in rejecting even the possibility that nations, groups and minorities be granted a right to secede from the territory in which they live"). *But see* BUCHHEIT, *supra* note 91, at 46 (considering possible "grounds" for the "right of separatist self-determination within international law).
[101] DRIP, *supra* note 1, art. 46(1).
[102] *See supra* notes 10-36 and accompanying text.

founders of international law, Francisco Vitoria,[103] published a series of lectures *On the Indians Lately Discovered*, in which he concluded that the indigenous peoples in America had "dominion in both public and private matters" and thus had legal title over their lands, and that discovery alone by the Europeans was insufficient to confer title "any more than if it had been they who had discovered us."[104] In determining that the indigenous peoples had "the use of reason"—a requirement for the possession of rights under natural law—Vitoria noted "method in their affairs" including "polities which are orderly arranged and . . . definite marriage and *magistrates*, overlords, *laws*, and . . . a system of exchange."[105] Nevertheless, Vitoria concluded that indigenous peoples were "unfit to found or administer a lawful State up to the standard required by human and civil claims" because, among other failures, they had "*no proper laws nor magistrates*" and that Europeans might legitimately "undertake the administration of their country . . . so long as this was clearly for their benefit."[106] This theory of administration for the benefit of indigenous peoples developed into the "trusteeship doctrine" of the Nineteenth Century which justified the forced imposition of full jurisdiction over indigenous peoples for purposes of civilizing them.[107]

U.S. domestic jurisprudence, particularly two Supreme Court cases, was highly influential in the development of the trusteeship doctrine. In *Johnson v. M'Intosh*,[108] Chief

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[103] *See generally* JAMES BROWN SCOTT, SPANISH ORIGIN OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS (1934).
[104] FRANCISCO DE VICTORIA, DE INDIS ET DE IVRE BELLI RELECTIONES, 127-28, 139 (J. Bate trans. 1917).
[105] *Id.* at 127 (emphasis added).
[106] *Id.* at 161 (emphasis added). The distinction between those laws which were "proper" and those which were not seems determined by the extent to which social organization mirrored the European system. *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 18 (2004) (noting that "the Indians could be characterized as 'unfit' because they failed to conform to the European forms of civilization with which Vitoria was familiar").
[107] As the U.S. Indian Commissioner Nathaniel G. Taylor wrote in 1868: "[The United States had the] most solemn duty to protect and care for, to elevate and civilize [the Indians] as the guardian of all [of them] under our jurisdiction." Nathaniel G. Taylor, *Shall our Indians be Civilized?*, in ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1868), *reprinted in* DOCUMENTS OF THE UNITED STATES INDIAN POLICY 123, 126 (Francis Paul Prucha ed., 2d ed. 1990).
[108] 21 U.S. (8 Wheat.) 543 (1823).

Justice John Marshall called the Indians "fierce savages, whose occupation was war," noting that "[t]o leave them in possession of their country, was to leave the country a wilderness" and concluded, reasoning in part on justiciability grounds, that U.S. title to Indians lands could be obtained by discovery alone: "However [the rule of title by discovery] may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the county has been settled, [it] certainly cannot be rejected by Courts of Justice."[109] In *Cherokee Nation v. Georgia*,[110] writing for a plurality of the Court, Justice Marshall developed what came to be known as the "domestic dependent nations" doctrine, where tribes had a "relationship to the United States [that] resembles that of a ward to his guardian."[111]

While the civilizing mission of the trusteeship doctrine held sway over international law's attitude toward indigenous peoples for all of the Nineteenth Century and much of the Twentieth, the modern human rights movement has forced a rethinking of indigenous peoples' rights in international law. In addition to developing the relationship between self-determination rights and minority rights in general terms,[112] international law has specifically set forth indigenous rights in two binding treaties.

The first, the International Labor Organization ("ILO") Convention No. 107 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries,[113] was promulgated in 1957 to provide protection of the human rights of

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[109] *Id.* at 590-91. Later, in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Justice Marshall seemed to revise his early views on the "discovery doctrine," holding that it "regulated the right given by discovery among European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man." *Id.* at 554. Thus, in *Worcester*, the Court seemed to recognize the continued possession of inherent natural rights of the tribes to their lands.

[110] 30 U.S. (5 Pet.) 1 (1831).

[111] *Id.* at 16.

[112] *See supra* notes

[113] Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, International Labour Conference, 328 U.N.T.S. 247 (June 26, 1957) (hereinafter "ILO Convention No. 107").

indigenous peoples, and included “special measures . . . for the protection of [indigenous] institutions, persons, property and labour.”[114] However, after being severely criticized as “assimilationist” and “anachronistic,” the ILO convened a “Meeting of Experts” in 1986 to review the continued viability of Convention No. 107.[115] They determined that the “integrationist language of Convention No. 107 is outdated, and that the application of this principle is destructive in the modern world. [Instead,] the policies of pluralism, self-sufficiency, self-management and ethnodevelopment [would] give indigenous populations the best possibilities and means of participating directly in the formulation and implementation of official policies.”[116]

Out of this meeting and subsequent work at the ILO, a new binding treaty, Convention No. 169, was created to replace Convention No. 107.[117] The preamble to Convention No. 169 recognizes the “aspirations of [indigenous] peoples to exercise control over their own institutions . . . within the framework of the States in which they live,” noting that their “laws, values, [and] customs . . . have often been eroded.”[118] Article 1 of the Convention defines “indigenous peoples” while also noting that the use of the term “‘peoples’ shall not be construed as having any implications as regards the rights which may attach to the term under international law.”[119] This was the ILO’s way of saying that, though the Convention’s text is compatible with

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[114] *Id.* art. 3.
[115] *See* ANAYA, *supra* note 106, at 55-58.
[116] *See* Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (1957), Report 6(1), International Labour Conference, 75th Sess. at 100-18 (1988) (reprinting the meeting’s report).
[117] Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 28 I.L.M 1382 (June 27, 1989) (hereinafter “ILO Convention No. 169”).
[118] *Id.*
[119] *Id.* art. 1.

indigenous self-determination, it does not, and cannot, recognize self-determination rights for indigenous peoples.[120]

However, the Convention does provide for "self-management" by indigenous peoples, defined with reference to the preamble's call for "control over their own institutions" and apparently synonymous with "self-government."[121] In particular, Articles 8 and 9 provide significant recognition of indigenous laws, with particular focus on judicial institutions. Article 8 provides that "due regard shall be had to [indigenous] customary laws" when applying national laws and regulations to indigenous peoples and guarantees indigenous peoples' "right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights."[122] It also requires states to establish procedures for resolving jurisdictional and other conflicts that may arise in implementing this right.[123] Article 9 provides that "the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected" subject to compliance with fundamental national and international human rights norms.[124] While the ILO Convention explicitly disavows recognizing the right of self-determination for indigenous peoples, it also unmistakably recognizes and purports to develop

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[120] *See* INTERNATIONAL LABOUR OFFICE, ILO CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES, 1989 (NO. 169): A MANUAL 9 (2003) *available at* http://www.ilo.org/public/english/standards/norm/egalite/itpp/convention/manual.pdf (last visited Dec. 2, 2007) ("The ILO's mandate is social and economic rights. It is outside its competence to interpret the political concept of self-determination. However, Convention No. 169 does not place any limitations on the right to self-determination. It is compatible with any future international instruments which may establish or define such a right.").

[121] *See id.* at 9-10 (noting that an "important aim of Convention No. 169 is to set up the conditions for self-management" and discussing examples of "indigenous self-government" as indicative of "self-management").

[122] *See* ILO Convention No. 169, *supra* note 116, art. 8.

[123] *Id.*

[124] *Id.* art. 9.

"self-government" with special emphasis on judicial institutions.[125] With this in mind, let us turn now back to the DRIP.

B. *A Method for Interpreting the Rights Conferred in the DRIP*

Like most UN resolutions and declarations relating to human rights,[126] the DRIP is divided into a preambular section and an operative section. Though it confers no substantive rights, the preamble is useful in explicitly noting the factors motivating the Declaration.[127] Three central ideas stand out upon reading the preamble: (1) concerns about preservation of culture and the "right of all peoples to be different" (echoing the policies of "pluralism, self-sufficiency, self-management and ethnodevelopment" found in ILO Convention 169);[128] (2) concerns about advancing equal rights and ending discrimination (echoing the historical principle of protecting minorities);[129] and (3) a desire to advance these rights, including the right to self-determination, through a "partnership between indigenous peoples and States."[130]

Turning now to the operative section, the DRIP contains forty-six articles, most of which confer substantive rights on indigenous peoples (positive rights) or place restrictions on State action (negative rights).[131] However, before analyzing the appropriate way to read those

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[125] For a thorough treatment of the letter and spirit of ILO Convention No. 169 see generally Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919-1989)* (2005).
[126] *See, e.g.*, DRC, DERD, and DEDW, *supra* note 5.
[127] The preamble actually contains a series of preambular clauses beginning with present or past participles—such as "Guided by," "Concerned," and "Recognizing"—indicative of motivation. *See* DRIP, *supra* note 1.
[128] *See* DRIP, *supra* note 1, at preamble ¶¶ 2, 3, 6, 10, 22. For the principles developed in ILO Convention No. 169, see *supra* notes 116-22 and accompanying text.
[129] *See id.* at preamble ¶¶ 2, 4, 5, 9, 18, 22. For a review of the historical link between minority rights and self-determination, see *supra* Part I.B.1-2.
[130] *See* DRIP, *supra* note 1, at preamble ¶¶ 15, 18, 19.
[131] For a discussion of the difference between the positive and negative rights in the constitutional setting see David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986) (specifically comparing the German constitutional framework, based largely on positive rights, with the U.S. framework, based largely on negative rights).

substantive rights, it is important to note that there are a series of articles that do not confer rights, but rather serve explicitly interpretive or implementation-oriented functions. Articles 38 and 41 through 46 fall within one or both of these latter two categories.[132] Of these, the most important for interpreting the scope of the right to self-determination is Article 46(1), prohibiting anything in the DRIP from being "construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[133]

As noted in Part I.B.2, this savings clause resembles the savings clause of the Declaration on Friendly Relations with one important distinction: Where the latter makes its prohibition contingent upon States' continued fulfillment of the promised of a non-discriminatory representative government, the prohibition in Article 46(1) is absolute.[134] It essentially says two things: (1) External self-determination (i.e. secession) is unauthorized by the DRIP; and (2) any forms of internal self-determination (e.g. autonomy, self-government, or other special measures) that threaten "territorial integrity or political unity" of States are likewise unauthorized. The substantive rights conferred in the DRIP must be interpreted with this prohibition in mind.

1. A Trinity of Rights

[132] *See id.* arts. 38, 41-46. Article 38, requiring "States in consulation and cooperation with indigenous peoples" to take "appropriate measures . . . to achieve the ends of [the DRIP]," is clearly implementation-oriented (in explaining how—in "cooperation"—States should implement the DRIP) and possibly interpretation-oriented: By calling on States to implement the ends of the DRIP in cooperation with indigenous peoples, Article 38 could conceivably be read to suggest that the rights in the DRIP are not unilaterally conferred on indigenous peoples.
[133] *Id.* art. 46(1).
[134] *Compare id. with* Declaration on Friendly Relations, *supra* note 91, at 124.

Unlike the ICCPR and the ICESCR, the DRIP does not place the right to self-determination in its first article.[135] Rather, Article 1 of the DRIP confirms indigenous peoples' "right to the full enjoyment, as a collective or as individuals, of all human rights" recognized under international law.[136] Nor does self-determination appear in Article 2, which guarantees the "right to be free from any kind of discrimination."[137] Not until Article 3 is the right to self-determination declared. This is not to suggest that the subsequent placement of the self-determination right in any way diminishes its importance or its force, but only to note that the first three articles—distinct from the remaining declared substantive rights—together address the three central ideas of the preamble. Article 1 explicitly recognizes "collective" human rights and advances the "right of all peoples to be different" and "ethnodevelopment" concerns present in the first central idea of the preamble through the recognition of the group rights; Article 2 addresses the discrimination concerns of the preamble's second central idea; and Article 3, when considered in light of the interpretation-oriented elements of Articles 46 and 38, arguably implicitly addresses aspects of the third central idea.[138] The placement of the "self-determination" immediately after two articles directed at protection of minorities also reminds the reader of the historically "common object" of self-determination and minority rights first declared in the *Aaland Islands* case.[139]

This comment argues that Articles 1 through 3 should be read together as a trinity of broad rights focused on the three overarching purposes of the Declaration, whose specifics are

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[135] *Compare* ICCPR, *supra* note 28, *and* ICESCR, *supra* note 29, *with* DRIP, *supra* note 1.
[136] DRIP, *supra* note 1, art. 1.
[137] *Id.* art. 2.
[138] The application of the "partnership" idea to Article 3 is not necessarily evident from its text, nor is it necessarily implied by Article 46 standing alone. If Article 38 is considered an interpretation-oriented provision, *see supra* note 130, then perhaps the spirit of "cooperation" and "partnership" is implied in Article 3 self-determination. However, reading Article 3 by itself suggests a unilaterally conferred right: "Indigenous peoples . . . *freely determine* their political status." *Id.* art. 3 (emphasis added).
[139] *See supra* note 66 and accompanying text.

elaborated and delimited in the remaining substantive provisions of the DRIP. As regards Article 3 self-determination, our focus here, reference to the specific rights subsequently conferred in defining its scope would accord with the way "internal" self-determination has been interpreted in the ICCPR.[140] Given that Article 46(1) conclusively forecloses external self-determination, the Article 3 right is necessarily a right to internal self-determination and interpretation of its specifics according to a method similar to that used in connection with the ICCPR seems quite "workable" at first blush.

2. Fleshing Out Article 3

Using the proposed method, where Article 3 is skeletal by itself and gets fleshed out in subsequent articles, the first and most important single article to address self-determination is Article 4, which provides: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[141] Despite the arguments of some, as a matter of pure logic there is nothing in Article 4 that necessarily limits the right of self-determination to "autonomy or self-government"; rather, these arrangements are presented as examples of the legitimate exercise of internal self-determination.[142] However, in

[140] *See supra* notes 87-88 and accompanying text.
[141] DRIP, *supra* note 1, art. 4.
[142] In explaining its opposition to the DRIP, the United States asserted that Article 4 "limit[s] the scope" of Article 3, but concluded that it nevertheless could not support the DRIP. This assertion is odd for two reasons: (1) If Article 4 did indeed limit the scope of Article 3 to "autonomy or self-government," then the U.S. position that it could support a concept of "self-government" would seem to require it to drop its objections to "self-determination" (because "self-determination" would mean nothing more than "self-government"); (2) the assertion mistakenly seems to rest on the maxim "expressio unius est exclusio alterius" (the express mention of one thing excludes all others. However, that maxim of statutory construction seems inapposite to Article 4, where the language "in exercising their right" suggests a broader availability of options. In any case, "expressio unius" has been heavily criticized by scholars as a logical and practical fallacy, *see* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 282

keeping with the development of the concept of internal self-determination, on the one hand,[143] and indigenous peoples' rights under ILO Convention No. 169, on the other,[144] the right to "autonomy or self-government" is rightly considered at the core of an indigenous right to self-determination.[145] And, when read in conjunction with subsequent rights elaborating the key features "autonomy or self-government,"[146] most of which focus on the right to develop and maintain various indigenous institutions, the right to self-determination takes on a distinct and somewhat elaborate meaning as applied to indigenous peoples. For example, Article 34 provides: "Indigenous peoples have the right to promote, develop and maintain their *institutional structures* and their distinctive customs, spirituality, traditions, *procedures*, practices and, in cases where they exist, *juridical systems* or customs, in accordance with international human rights standards."[147] Thus, while the plain language of Article 4 does not necessarily restrict the scope of the right conferred in Article 3, the totality of specific provisions relating to

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(1985) (arguing that "[t]he canon [is] based on the assumption of legislative omniscience, because it would make sense only if all omissions in legislative drafting were deliberate"), and has been condemned by an unanimous Supreme Court. *See* Herman & MacLean v. Huddleston, 459 U.S. 375, 386 n.23 (1983).

[143] *See supra* Part.I.B.1-2.

[144] *See supra* Part I.C.

[145] In addition to "autonomy or self-government" and the particular rights that go along with it, the exercise of internal self-determination could include, for example, an extensive affirmative action program to increase the representativeness of indigenous populations that have been historically discriminated against. This kind of a program would accord with the application of internal self-determination to racial and religious groups under the Declaration on Friendly Relations. *See supra* note 99 and accompanying text.

[146] The most important provisions fleshing out self-determination include: Article 5 (declaring the "right to maintain and strengthen . . . distinct political, legal, economic, social and cultural institutions); Article 14 (declaring the "right to establish and control their educational systems and institutions"); Article 18 (declaring the "right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions); Article 20 (declaring the "right to maintain and develop their political, economic and social systems or institutions"); Article 26 (declaring the "right to the lands, territories and resources which they have traditionally owned"); Article 32 (declaring the "right to determine and develop priorities and strategies for the development or use of their lands"); Article 33 (declaring the "right to determine their own identity or membership in accordance with their customs and traditions); and Article 34 (declaring the "right to promote, develop and maintain their institutional structures . . . and, in cases where they exist, juridical systems or customs, in accordance with international human rights standards").

[147] DRIP, *supra* note 1, art. 34.

self-determination, especially those relating to indigenous institutions, suggests a limiting (or defining) force.

To recap, then, the Article 3 right of self-determination, a right to internal self-determination, should be interpreted in the same way internal self-determination has been interpreted in the ICCPR: As defined and delimited by the specific rights to which it most closely relates.[148] Under the DRIP, this argues for a two-stage process, moving first from Article 3 to Article 4 for the core of meaning of self-determination ("autonomy or self-government"), and then from Article 4 to the specific provisions of the DRIP elaborating the right of self-government in the form of indigenous institutions. As in the ICCPR, a State's compliance with these specific provisions serves as proxy for its determining its compliance with the overarching self-determination norm.[149] This interpretive method has two principle advantages over a method that attempts to read self-determination as a right broader than the specific provisions that give it life. First, the proposed method makes it much easier for States to evaluate their compliance with the self-determination right. They can, in a sense, use the specific provisions as a kind of checklist; if they have complied with all specific requirements, then they know they have complied with the overall right. Second, the method also benefits indigenous peoples seeking to claim violations of their self-determination rights by giving them specific frames of reference on which to hang claims to rights violations.

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[148] In the case of the ICCPR, the specific rights giving meaning to internal self-determination are those that assure the exercise of "authentic self-government" for the whole population of a State. *See* Cassese, *supra* note 54, at 101. Likewise, in the case of the DRIP, the specific right that give meaning to self-determination are those that assure such self-government for the indigenous peoples within a State. However, because the means of securing self-government for a whole population differ from the means of securing self-government for a sub-national group, *see* Cassese, *supra* note 54, at 102-108 (contrasting internal self-determination as applied to a whole population with internal self-determination as applied to ethnic groups), the particular contours of the right to internal self-determination look different under the ICCPR and the DRIP.

[149] *See supra* notes 87-88 and accompanying text.

However, while this process moves the reader from generality to specifics, in some ways it merely shifts the fundamental inquiry onto the specific provision at issue. The task still remains of applying a particular case or scenario (that is, a proposed or actual exercise of self-determination) to the most relevant specific provision. As with the application of any particular case to a general principle, difficult fact-intensive questions will remain. However, the argument here is that the resolution of the particular case will be easier within the confines of the specific provision. Under such an approach, one that accords with a natural reading of the DRIP in the context of international legal history, the DRIP should be "workable," despite the concerns of the United States and Australia.[150]

To test this thesis, we now examine Article 34, as a specific elaboration of Article 3, and its application to an emerging concept of "egalitarian juridical pluralism" that has appeared in the new draft Constitution of Bolivia.

III. EGALITARIAN JURIDICAL PLURALISM: A TEST CASE

While international law regarding indigenous peoples has slowly developed over the last half century,[151] regional and national indigenous movements have gained significant sway in various parts of the world.[152] Perhaps most notably in current international affairs, Bolivia, where 62% of the population identifies itself as indigenous,[153] elected its first indigenous president in 2005, and is currently rewriting its constitution, in which one of the most important,

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[150] *See supra* notes 20, 36 and accompanying text.
[151] *See supra* Part II.A
[152] *See generally* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995).
[153] National Statistical Institute of Bolivia, 2001 Census, *available at* http://www.ine.gov.bo (last visited December 3, 2007).

and contentious, goals is redress for subjugation of the indigenous majority.[154] In particular, the Bolivian Constitutional Assembly has redesigned the justice system to include not one judiciary—that is, traditional "ordinary justice" based on the civil law—but *two*: In addition to the civil law judiciary, the proposed Bolivian constitution contemplates a "community justice" system, or *indigenous judiciary*, based on indigenous law and custom.[155] On November 24, 2007, the Constitutional Assembly approved on the whole the draft text of the new constitution,[156] though final approval and enactment is still forthcoming.

A. *Egalitarian Juridical Pluralism in Context*

The constitutionalization of an indigenous judiciary is part of a larger movement for greater self-government among the indigenous peoples of Bolivia, a movement that is fundamentally interconnected with the development of democracy in Bolivia's history. After living under conditions of forced labor from the Spanish conquest in the 1500s and through the *latifundio*[157] system of the first 120-plus years of republicanism, a 1952 revolution included agrarian reform that gave some land back to indigenous peasants.[158] However, this reform was

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[154] See *Bolivia Opposition Calls Strike*, BBC NEWS, Nov. 27, 2007, http://news.bbc.co.uk/2/hi/americas/7114506.stm ("The president has made rewriting the constitution a key part of his reform agenda to give the indigenous majority greater political power but the issue has deepened regional and ethnic divisions in the country.").

[155] *See* Constitutional Assembly of Bolivia, Judicial Commission, Report of the Sub-commission for Community Justice, at 8 *available at* http://www.constituyente.bo (last visited Nov. 15, 2007) (hereinafter "Sub-commission Report") (describing the community justice system).

[156] Constitutional Assembly of Bolivia, POLITICAL CONSTITUTION OF THE STATE, approved on the whole, Nov. 24, 2007 (on file with author) (hereinafter "Draft Constitution").

[157] The "latifundio" system involved the expropriation of indigenous lands and the creation of large estates on which the indigenous population served feudal labor for white or mestizo landowners. *See* HERBERT S. KLEIN, A CONCISE HISTORY OF BOLIVIA 209-10 (2003) (noting that "through constant expansion of the [latifundio] system, land distribution had become one of the most unjust in Latin America," with 6 percent of landowners controlling 92 percent of the land, by the time of the 1952 revolution).

[158] *Id.*

not comprehensive,[159] geographically or substantively, leaving huge portions of the country's indigenous population unaffected and leaving the beneficiaries subject to deeply rooted political and economic discrimination.[160]

In 1994, after decades of more or less organized pressure from indigenous peoples and NGOs, the government instituted a number of important constitutional and legislative reforms with respect to indigenous peoples. In addition to broader changes—including the recognition of Bolivia as a "multiethnic" and "pluricultural" state,[161] the decentralization of and inclusion of indigenous peoples in municipal development decisions,[162] and the recognition of collective ownership of some lands[163]—the 1994 constitutional reforms included a limited recognition of indigenous laws and customs as "alternative dispute resolution" mechanisms, so long as those laws and customs were "not contrary to the Constitution and the laws" of the state.[164]

Thus, while the 1994 Constitution recognizes the possibility of functioning indigenous courts applying indigenous law, it grants no significant jurisdictional authority to such courts, whose processes may only be used in the "alternative" (assuming full consent of all parties) and whose decisions may be appealed and overturned by any court of ordinary jurisdiction.[165] This model is mirrored, in large part, in the constitutions of a number of other Latin American States with large indigenous populations.[166]

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[159] In particular, the agrarian reform was focused on the altiplano in the west and left intact the old system in Santa Cruz and other lowlands regions to the east. *See id.* at 215 (noting that Santa Cruz and some other medium-sized hacienda regions were excepted from the reform).
[160] NANCY GREY POSTERO, NOW WE ARE CITIZENS: INDIGENOUS POLITICS IN POSTMULTICULTURAL BOLIVIA 4, (2007).
[161] CONSTITUTION OF BOLIVIA OF 1994, Art. 1.
[162] Law 1551, Popular Participation, April 20, 1994 *available at* http://www2.minedu.gov.bo/pre/ley/ley1551.pdf.
[163] Law 1715, National Service for Agrarian Reform, Oct. 18, 1996 *available at* http://www.inra.gov.bo/portalv2/Uploads/Normas/ley1715.pdf.
[164] CONSTITUTION OF BOLIVIA OF 1994, art. 171.
[165] *Id.*
[166] *See* Elva Terceros C., *Indigenous Law in Positive Legislation*, in INDIGENOUS JURIDICAL SYSTEM, 44-46 (CEJIS ed. 2003) (comparing the existing Bolivian system to the constitutional systems of Peru, Colombia, Venezuela, Ecuador and Paraguay).

By contrast, the new constitution contemplates a system of "egalitarian juridical pluralism" ("EJP") where the indigenous judiciary will be on equal footing with the ordinary civil law judiciary, with exclusive and authoritative jurisdiction granted to the courts of each in there respective territories.[167] Jurisdictional conflicts (as well as alleged violations by indigenous courts of fundamental rights) will be resolved by a Plurinational Constitutional Tribunal—the court of last instance for constitutional questions—composed of both indigenous and civil law judges interpreting fundamental rights "interculturally."[168] Such an extensive grant of judicial autonomy for indigenous peoples is unprecedented anywhere in the world.[169] Taking note of its essential characteristics, "egalitarian juridical pluralism" can be roughly defined in the indigenous context as follows: A system of two exclusive and hierarchically equal judicial organs (one indigenous and one non-indigenous) that together cover the entire jurisdiction of a State with jurisdictional conflicts subject to review only by a court of last instance employing an affirmative action program that mandates the presence of authorities representing each organ.

B. *Is Egalitarian Juridical Pluralism an "Appropriate" Exercise of Article 34?*

Despite their existing handicaps under the 1994 Constitution, there is strong evidence that indigenous laws and courts are heavily utilized and relied on by Bolivian indigenous

[167] *See* Draft Constitution, *supra* note 156, at Title III, "The Judiciary and the Plurinational Constitutional Tribunal" (defining as separate and exclusive jurisdictional authorities the courts of "ordinary justice" and those of "indigenous justice").
[168] *Id.*, *supra* note 156, arts. 206, 212.
[169] To contrast with just one example, tribal courts in the U.S. system are not constitutionally mandated but created under the auspices of Congress's Article 1 powers and are thus akin to administrative courts. Any decisions by U.S. tribal courts can be overturned by a simple Act of Congress. *See* Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L. J. 137, 137 (2004) (noting that "the Supreme Court has stripped tribes of many of the positive aspects of governmental authority [including] key aspects of legislative and adjudicative authority" and noting "Congress's plenary power over Indian tribes").

communities and their members.[170] In describing their preference for taking cases to indigenous court over ordinary courts, indigenous representatives cite several reasons: (1) cultural acceptance—indigenous law is "based on ancestral values"; (2) transparency—it is "public justice in the presence of the people"; (3) accessibility—it is "oral and free of cost, . . . an act of service [by judges]"; (4) efficiency—it is "speedy and free from corruption"; (5) theory of justice—it is "preventative and restorative" as opposed to retributive.[171]

In addition to the above, there is one very important reason why indigenous authorities are asked to resolve disputes by their members. Of Bolivia's 326 municipalities, the ordinary justice system only has courts to cover 130, less than 40%; rural areas, and thus indigenous peoples, are the hardest hit by this dearth of civil law judges.[172] As a result, if indigenous persons want access to justice, indigenous law is often their only realistic option. Because indigenous judges do not accept payment for their services,[173] the fortification and institutionalization of indigenous courts presents a relatively low-cost solution to the problem of inadequate access to justice, and is more broadly understood and embraced by the population served.[174]

However, is a strengthened indigenous judiciary in the form of "egalitarian juridical pluralism" an appropriate exercise of the Article 34 "right to promote, develop and maintain . . . juridical systems" and, therefore, of the Article 3 right to "self-determination"? First, it should

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[170] *See generally* INDIGENOUS JURIDICAL SYSTEM (CEJIS ed. 2003) (studying the practice of indigenous justice in the western Amazon region of the country); Marcelo Fernandez Osco, The Law of the Ayllu: The Practice of Jach'a Justice and Jisk'a Justice in Aymara Communities (2000) (studying the practice of indigenous justice in the eastern altiplano region).

[171] Sub-commission Report, *supra* note 155, at 24.

[172] Constitutional Assembly of Bolivia, Judicial Commission, Diagnosis of Ordinary Justice, at 1, *available at* http://www.constituyente.bo (last visited Nov. 20, 2007).

[173] Sub-commission Report, *supra* note 155, at 24.

[174] *See, e.g.*, Elba Flores, *Chiquitanos (Monte Verde y Lomerio)*, *in* INDIGENOUS JUSTICE SYSTEM 57, 147 (CEJIS ed. 2003) (noting the view of indigenous communities in the Chiquitos region (Santa Cruz department) of Bolivia that "[w]e have always solved our problems internally and according to the customs our grandparents gave us, . . . [I]t is difficult when we have to resort to outside justice because we don't know our rights . . . . [The civil law authorities] abuse and mistreat us.").

be noted that Bolivia is in the process of voluntarily developing its indigenous courts within the framework of a constitutional assembly. No international organization, let alone tribunal, is requiring this process, and because the concept is in its nascent stage, it would be extremely hard to argue that EJP is a binding rule of customary international law.[175] However, its implementation in Bolivia would count as State practice with *opinio juris* for the formation of a future binding customary rule.[176]

It is likewise difficult to argue that EJP as defined in Part III.A is required under Article 34. Article 34 gives the right to develop and maintain "juridical systems," but nowhere does it suggest that such systems must be of an equivalent rank with ordinary State courts. While it is possible to argue that a right to EJP exists under Article 34 when considered in conjunction with the Article 4 "right to autonomy or self-government in matters relating to their internal and local affairs," EJP as defined and elaborated in the draft constitution gives indigenous courts exclusive jurisdiction over all matters arising in their territory. It would be perhaps be a stretch of language to suggest that a dispute between a multi-national corporation accused of dumping oil on indigenous lands and an indigenous people is an "internal or local affair."[177]

However, that Article 34 does not require all the features of EJP does not mean that EJP is an inappropriate exercise of Article 34. Article 43 declares: "The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous

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[175] One could possibly argue, however, that the general Article 34 right to develop juridical systems—though not requiring "egalitarian juridical pluralism" per se—has crystallized as instant customary international law given the opinio juris of 144 States who voted for the DRIP. *See* Bin Cheng, *supra* note 9, at 532.

[176] In developing EJP, the Constitutional Assembly has made specific reference to its existing international legal obligations under ILO Convention No. 169, and while EJP probably isn't required by Convention No. 169, Bolivia's *belief* that it is counts as *opinio juris*. *See* Sub-commission Report, *supra* note 155, at 11 (noting the international law foundation for EJP).

[177] The grant of jurisdiction under the draft Bolivian Constitution is exclusive and territorial, and thus—absent constitutional jurisprudence to the contrary—seems to contemplate according exclusive jurisdiction over such a case to indigenous courts. *See* Draft Constitution, *supra* note 156, at Art. 200 (The indigenous [courts] have competence over all kinds of legal relationships, as well as acts and conditions that violate legally-protected rights and are caused by any person within their territorial sphere. The indigenous courts will definitively decide [the cases they hear, and] their decisions may not be reviewed by the courts of ordinary jurisdiction . . . .").

peoples of the world."[178] Given the process of the constitutional assembly, involving extensive representatives of indigenous peoples,[179] Bolivia appears to be acting in accordance with its Article 38 obligations to take "appropriate measures [in] consultation and cooperation with indigenous peoples . . . to achieve the ends of [the DRIP]," including the development of rights beyond the "minimum standards."[180] In this sense, the Declaration appears to contemplate a kind of "States as laboratories" approach in international law to further the development of indigenous rights.[181] There is nothing inherently inappropriate, and indeed much to be gained, by a State implementing a novel constitutional system that serves as an experiment to be adopted by other States if successful.

C. *Indigenous Courts, EJP, and the Objections Registered by the Opposing States*

The method of interpreting the DRIP proposed herein accords with the historical development of the right and the structure of the Declaration, but, how does it respond to the objections registered by the United States and Australia in voting against the DRIP? First, on the specific question of indigenous courts, Australia stated in its voting explanation: "[We are] concerned that the Declaration places Indigenous customary law in a superior position to national law. Customary law is not 'law' in the sense that modern democracies use the term; it is based on culture and tradition."[182] Given the foregoing analysis of Article 34, this objection can

[178] DRIP, *supra* note 1, art. 43.
[179] *See* Postero, *supra* note 160, at 1 (noting extensive indigenous involvement in the Constitutional Assembly).
[180] DRIP, *supra* note 1, art. 38.
[181] For an explanation of the "[s]tates as laboratories" approach in U.S. domestic law see *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) ("One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that a single courageous State may, if its citizens choose, serve as a laboratory; and try *novel social and economic experiments without risk* to the rest of the country.") (quotation marks omitted) (emphasis added).
[182] Australian Explanation, *supra* note 16, ¶ 10.

be dispatched with relative ease: Article 34 does not require States to accord indigenous customary law and courts even a level of jurisdictional hierarchy *equivalent* to that of national law, let alone *superior*.[183]

Turning to the more central objection to the right of self-determination, it is worth briefly reviewing changes to the stated position of the United States vis-à-vis the DRIP during the last two years. Recall that the U.S. voting explanation on September 13, 2007, declared that it was the mandate of the Working Group to "articulate a new concept, i.e. self-government within the nation state" and not to expand on the right of "self-determination" contained in Article 1 of the ICCPR.[184] As matter of pure fact, it was explicitly within the mandate of the Working Group to use the concept of "self-determination," albeit not to expand the right under Article 1.[185]

In any event, while the September 13 position of the United States embraced "self-government" but rejected "self-determination," the United States took a different tack in a statement made to the UN Permanent Forum on Indigenous Issues on May 17, 2004.[186] Then, it stated: "Over one hundred years ago the United States was in conflict with the Native Peoples of America. In the hundred years since, the United States has adopted various policies—from assimilation to the termination of tribal status to the *current era of self-determination*."[187] In describing the "current era of self-determination," the United States noted that it had a "government-to-government relationship" with tribes and specifically addressed its hopes for the DRIP: "The Declaration should recognize that local authorities should be free to make their own

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[183] *See supra* Part III.B. In addition, the contention, whether true or not, that "customary law is not 'law'" is more than a bit reminiscent of Francisco Vitoria's questionable conclusion that while the Indians had "laws" and "magistrates," they had "no proper laws nor magistrates" and seems little relevant to the question at hand. *See supra* notes 103-07 and accompanying text.
[184] *See supra* notes 34-36 and accompanying text.
[185] *See supra* note 35.
[186] Press Release, Statement on Indigenous Issues Agenda Item on Human Rights, to the Third Session of the Permanent Forum, May 17, 2004, USUN Press Release # 083(04), *available at* http://www.usunnewyork.usmission.gov/press_releases/20040517_083.html (last visited Nov. 8, 2007).
[187] *Id.* at ¶ 1.

decisions on a range of issues from taxation to education to land resources management to membership. These are the *powers of a government*. This is the *essence of a federal system* with which we are quite comfortable."[188] The United States used the term "self-determination" but was clearly referring to one component of that term: Internal self-determination. In a position on indigenous peoples articulated by the U.S. National Security Council in 2001, the Council authorized U.S. representatives to promote "internal self-determination" as the concept to be articulated in the DRIP, and that was the U.S. position during the first half of the decade.[189]

The reasons for the decision to move away from supporting "self-determination" are unclear, but the change in U.S. position illustrates its use of three different terms to describe the right to be conferred in the DRIP: (1) "self-government," (2) "internal self-determination," and (3) "self-determination." While Australia and the United States made much of the distinction between "self-government" and "self-determination" on September 13, 2007, the U.S. statement to the UN on May 17, 2004 seems to use these two concepts interchangeably. And, indeed, under the DRIP, all three terms should be considered virtually synonymous. "Self-determination" under the DRIP means "internal self-determination" when read in conjunction with Article 46, and "self-government," articulated in Article 4, is the core of the "self-determination."[190]

CONCLUSION

[188] *Id.* at ¶ 5.
[189] U.S. National Security Council, Position on Indigenous Peoples, January 18, 2001 *available at* http://www1.umn.edu/humanrts/usdocs/indigenousdoc.html (last visited Nov. 26, 2007).
[190] DRIP, *supra* note 1, arts. 3, 4, and 46.

The objections to the "workability" of the DRIP registered by the United States and Australia on the grounds of concerns about "self-determination" are mistaken, and should be withdrawn. While there may be other legitimate reasons for opposing the DRIP, any opposition should not be based on an avoidable misreading of the concept. The method proposed here accords with both the historical development of "self-determination" and the structural design of the DRIP. It provides a workable framework for both States and Indigenous Peoples as they seek to advance their collective rights, especially in developing and maintaining key institutions of self-government, courts foremost among them. Though individual States, like Bolivia, are free to experiment and develop indigenous courts and other institutions as they see fit, a general agreement, currently impeded only by the opposition of four States, would truly make the drip an effective instrument and "a triumph for indigenous peoples around the world."[191]

[191] Secretary General, *supra* note 3.