1. Definition and characteristics of indigenous peoples in light of U.N. documents and practice

1.1. Introduction

By most accounts, the number of indigenous peoples in the world today number between 250 to 300 million, or upwards to 600 million if the distinct peoples of Africa are included. Taking these figures into consideration, indigenous peoples comprise between 5% - 10% of the world’s population and can be found on every continent.

Common threats concerning the plight of indigenous peoples include: environmental degradation, deforestation, tourism, weapons testing, militarization, cultural breakdown, colonization, invasion, mining projects, and a host of others ills. Although for many years victimized, indigenous peoples are increasingly raising their voices to draw attention to their situation on a national and international level.

A significant United Nations (U.N.) action towards examining the plight of indigenous peoples occurred in May 1982 with the formation of the U.N. Working Group on Indigenous Populations (WGIP). The WGIP was formed pursuant to Economic and Social Council (ECOSOC) resolution 1982/34, of May 7, 1982 which authorized the group composed of five members from the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The WGIP’s dual mandate is to: 1) review developments pertaining to the promotion and protection of the human rights of indigenous populations; and 2) develop standards concerning the rights of indigenous populations. The WGIP has met annually since its inception in 1982.

1.2. Definition of Indigenous Peoples

In the United Nations document entitled Study of the problem of Discrimination against Indigenous Populations, the U.N. appointed Special Rapporteur Mr. José R. Martinez Cobo reviewed a wide range of definitions in hopes of drafting a unified definition of indigenous peoples.

The following provisional definition seeks to incorporate both subjective and objective aspects of definitions reviewed. More importantly, Martinez suggests that any universally accepted definition of indigenous peoples must recognize the right of indigenous peoples to define what and who is indigenous. Thus, the study preliminarily defined indigenous peoples as follows:

379. Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on
their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence with their own cultural patterns, social institutions and legal systems.4

The key provisions of this definition include: long standing or historical connection with a particular land area; a shared group consciousness of being distinct from the surrounding population; a shared culture, language, ethnicity and social patterns; and a desire to remain immemorially separate and distinct from the surrounding population. Examples of indigenous peoples include: Aboriginals of Australia, Tibet, West Papua, Kalahui Hawai‘i, Native American tribes of ‘nations’ (i.e. - Cherokee, Cree, Lakota, Mohawk, Navajo, etc.), Cordillera, Crimean Tartars, Maasai, Mapuche, Miskito, Saami and Yanomami.

1.3. **Defining minority populations**

Many legal and political science scholars view the term ‘minority’ as serving as an umbrella to capture a wide variety of distinct population groups. In this regard, indigenous peoples might be considered one important population group of concern under this heading. As it has been pointed out, “[t]he U.N. has followed a different institutional track to elaborate norms [for minority versus indigenous populations], including norms involving autonomy schemes”.5

Although U.N. attention towards protecting the interest of indigenous peoples is relatively recent, attempts at safeguarding the rights of minority populations date back to the predecessor of the U.N., namely, the League of Nations. The League’s concern for protection of minorities stems in large measures from the conclusion of World War I and the need to protect the various minority populations residing in different parts of Central and Eastern Europe. Today, the U.N. continues to express its concern for the protection of minorities, whether they be “… ethnic, religious, linguistic, or national origin in character”.6

Primary U.N. concern for the rights of minorities is expressed in Article 27 of the International Covenant on Civil and Political Rights (ICCPR).7 The ICCPR specifically protects the rights of minorities in regards to their culture, religion and language.8 Article 27 also qualifies minority rights as being individual rights which are collectively exercised. Similar to the activities of the WGIP and the Martinez study, no definition of ‘minority’ has been formally adopted by the U.N. However, in a U.N. study on the rights of minorities, Special Rapporteur F. Capotorti offers the following working definition:

[A] group numerically smaller than the rest of the population of the State to which it belongs and possessing cultural, physical or historical characteristics, a religion or a language different from those of the rest of the population.9

Under this definition, minority protection may extend to such diverse groups as Basques in Spain; Kurds in Iraq and Turkey; Greek Minority in Albania; Hungarian Minority in Romania; and possibly African Americans in the United States.
Another U.N. Special Rapporteur, Jules Deschênes, offers a similar definition to that suggested by Capotorti. However, Deschênes makes explicit two important characteristics of minority populations: 1) “... a group of citizens of a state”; and 2) “... whose aim is to achieve equality with the majority in fact and in law”. These differences illuminate a general goal on the part of minorities to either assimilate into the dominant population with adequate safeguards to protect their unique characteristics and mores, or to gain equal standing within a nation-state structure, if not a separate state. A predominant indigenous view is to maintain, preserve or regain their separate and distinct attributes and existence in mutually exclusive communities. Indigenous peoples seldom consider themselves as voluntarily being members of any state and generally wish to continue their own indigenous structures rather than aspire to statehood. Indigenous peoples “have reacted vigorously to any suggestion that they are simply a special case of ‘minorities’”. Noted indigenous rights expert Gudmundur Alfredsson summarizes the primary distinction between indigenous and minority as follows:

The crucial factor in the definition of indigenous peoples is their original inhabitation of the land on which, unlike the minorities, they have lived from time immemorial.

While both indigenous peoples and minorities are most commonly found to be a numerical minority in the territories or nation-states where they are located, minority populations are not necessarily indigenous. This is particularly true for the many minority groups dislocated as a result of the two World Wars and African Americans residing in the United States. Distinctions between minority and indigenous populations take on greater significance when discussing the issue of self-determination. General international law makes the distinction of specifying that “peoples” such as indigenous peoples possess the right to self-determination while the same cannot be said for minorities. We will examine this notion in Section III.

As previously mentioned, no formal definitions of minority or indigenous peoples exists within the United Nations. The lack has not hindered the U.N. or the WGIP from moving ahead in promulgating declarations, conventions and treaties for the protection of indigenous peoples. A summary of several of these documents is listed below.

2. U.N. documents providing protection for Indigenous Peoples and minorities

Various U.N. documents such as the Universal Declaration of Human Rights; the International Covenant on Economic, Social, and Cultural Rights (ICESCR); and the International Covenant on Civil and Political Rights (ICCPR) espouse rights to be enjoyed by all. However, over the years these general pronouncements have appeared insufficient in ensuring universal protection of human rights. Several attempts have been made to draw special attention to the plight of indigenous and minority populations within States.
2.1. U.N. Draft Declaration on the Rights of Indigenous Peoples

The Working Group on Indigenous Populations initially devoted the bulk of its efforts toward the standard setting aspects of their mandate. This has led the WGIP to adopt at its Eleventh Session - 1993, the U.N. Draft Declaration on the Rights of Indigenous Peoples. The document attempts to set out a series of individual and collective rights possessed by indigenous peoples, reinforcing, in part, the overarching notion that indigenous peoples share equally in all rights of peoples mentioned in the Universal Declaration of Human Rights. Specific articles delineate rights possessed by indigenous peoples in the important areas of self-determination and the resolution of disputes with the respective states where located. These latter provisions are of special interest to the overall inquiry of this paper.

Article 31, in specifying the rights inherent in the notion of self-determination states:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means of financing these autonomous functions.

In terms of resolving disputes with States, Article 36 suggests that indigenous peoples should have recourse to “... competent international bodies agreed to by all parties concerned”, while Article 39 further elaborates this point by stating:

Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

In August 1994, the WGIP forwarded the draft declaration to its parent body, viz., the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which in turn, adopted the draft and submitted it to the Commission on Human Rights. The Commission formed an open-ended inter-sessional working group which initially convened during the fall, 1995. As stated, their mandate is to elaborate on a draft declaration, considering the draft submitted by the Sub-Commission.

2.2. U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

On 18 December 1992, the United Nations General Assembly adopted Resolution 47/135 entitled Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The document sets out standards and expectations by the U.N. for the treatment of minorities in the various States. The relevant provisions include an obligation for States to “... protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories ...”, and a duty to ensure that minority group members
exercise their “... fundamental freedoms without any discrimination and in full equality before the law.”. 24 Absent from the declaration is any explicit reference concerning the settlement of disputes between minorities and the relevant State, or any reference to a right to self-determination, both mentioned in the Draft Declaration on the Rights on Indigenous Peoples.

2.3. International Labour Organization (ILO) Convention No. 169

Another U.N. Specialized agency that has devoted significant attention to the plight of indigenous peoples is the International Labour Organization (ILO). At its 76th session in June, 1989, the General Conference of the ILO adopted the Convention concerning Indigenous and Tribal Peoples in Independent Countries, also known as Convention No. 169. The Convention is unique insofar as it is one of the few treaties in existence which specifically address indigenous peoples. The Convention sets out to define the population group covered by the Convention in much the same terms as the aforementioned documents. 25

The Convention assigns the respective governments with the responsibility for “…developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity”. 26 The rights of indigenous peoples and disputes arising there from shall be protected and enforced through the respective national legal systems. 27

A unique aspect of this and all other conventions adopted by the ILO is their enforcement apparatus. Member states are required to submit annual reports on measures they are undertaking to implement each convention. 28 Any member state may file a complaint alleging another state with failure to comply with convention provisions. The complaint may be referred to a ILO convened commission of inquiry for investigation and recommendation. Either of the parties may refer the findings of the commission to the International Court of Justice (ICJ) as specified in Article 29(2) of the ILO Constitution. 29 The ICJ has the option to affirm, alter, or reverse the Commission findings. 30 In the event of non-compliance by a state party, the ILO General Conference is given final authority to propose steps to ensure compliance with the commission or ICJ rulings. 31

3. Whether Indigenous Peoples possess a right to self-determination?

A unifying concept that embodies the aspirations of many indigenous peoples and minority groups is their desire to achieve some form of self-determination. However, the precise meaning of this term and exactly who possesses their right is the subject of continuing debate. A noted legal scholar, Ian Brownlie, defines self-determination as “…the right of cohesive national groups (‘peoples’) to choose for themselves a form of political organization and their relation to other groups. The choice may be independence as a state, association with other groups in a federal state, or autonomy or assimilation in a unitary (non-federal) state”. 32 The right to self-determination has been stated in several important U.N. documents. These include: the Charter of the United Nations; 33 the Declaration on the Granting of Independence to Colonial Countries and Peoples; 34 the two international covenants on human rights - the Covenant on Civil and Political Rights, 35 and Economic, Social and Cultural Rights; 36
Definition of Aggression\(^3^7\); and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.\(^3^8\) This latter document under the heading: “The principle of equal rights and self-determination of peoples” asserts the following:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development.

Similarly, the two covenants on human rights provide in their common article 1: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

The documents cited above reflect the evolution of the concept and the opinion of jurists that self-determination has progressed from being originally thought of as “... an ill-defined concept of policy and morality” to today whereby the “... [U.N.] and Western jurists now generally admit that self-determination is a legal principle”.\(^3^9\)

Further, while successive U.N. documents have asserted a right to self-determination, controversy continues to surround who possesses such a right. This is due, in part, to the fact that several of these same documents reiterate the often cited preeminent international norm of the ‘territorial integrity’ of states.\(^4^0\)

In commenting on the responsibility of states to assist groups in the achievement of self-determination, legal theorist Louis Henkin and colleagues have heightened the import of this right and the corresponding responsibility on states by suggesting that:

In principle, the failure of a responsible state to meet its obligation to support self-determination would be an international wrong giving rise to responsibility on the international level. The delict in question may also be of an *erga omnes* character, that is a violation of a legal duty owed to the international community.\(^4^1\)

Disputes concerning who possesses the right to self-determination are often broken down around three prevailing views. First, those who argue along a strict interpretation of the sovereign equality of states and territorial integrity suggest that these principles can only remain preeminent if states are the object of the right to self-determination.\(^4^2\)

A second view restricts the right of self-determination to non-self-governing territories as enunciated in Chapter XI of the U.N. Charter.\(^4^3\) Third, a more liberal interpretation argues that protected groups such as minorities and indigenous peoples must retain an on-going right to self-determination to be exercised if and when states fail to uphold their duty to “... conduct[ing] themselves in compliance with the principle of equal rights and self-determination of peoples ...”.\(^4^4\) While the current prevailing view appears to entail the latter two positions, common wisdom suggests that the trend may be moving towards finding a compromise position to expand the right to self-determination beyond non-self-governing territories, but granting this right in a way that protects the sovereignty and territorial integrity of states.
There also appears to be general agreement in differentiating between peoples versus minorities as to which possess a right to self-determination. Espiell, in his final report to the Sub-Commission makes the point: “It is Peoples as such which are entitled to the right to self-determination. Under contemporary international law minorities do not have this right”. This view was echoed by The Minority Rights Group, a human rights advocacy group based in London. In a January, 1991 report commenting on the then draft Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the report states: ‘peoples’ have the right to self-determination. On the other hand, the law distinguishes between a ‘people’ and a ‘minority’: minorities are not generally accorded any right to self-determination.

Therefore, on the critical right to self-determination, only ‘peoples’ such as indigenous peoples, may conceivably be categorized as possessing a right to self-determination. Population groups encompassed in the more universal language of “All peoples ”, including minorities, must rely on the more general provisions of Article 1(2) of the U.N. Charter, common article 1 of the two human rights Covenants, and Article 27 of the ICCPR guaranteeing equal rights. Finally, in effectuating self-determination, a continuum of possibilities exists. Every group that possesses this right should be able to choose from a range of possibilities spanning from forming their own nation-state to the less controversial option of some measure of local autonomy. Events over the coming years will determine whether for many groups of indigenous peoples, a type of “internal self-determination” will prove sufficient to meet their legitimate needs and aspirations.

4. U.N. Human Rights mechanisms for the resolution of disputes between State parties versus Indigenous peoples

Few avenues currently exist for indigenous peoples as a group to advance a claim alleging a violation of their human rights. For example, as mentioned earlier in this paper, part of the mandate of the WGIP is to “review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations ...”. However, in practice, the WGIP has established strict rules of procedures limiting the degree to which indigenous peoples may advance information alleging violations of their human rights by named States. The usual rationale for this occurrence is that other U.N. bodies have been charged with this responsibility and are competent to hear such complaints. These other bodies include for example the Commission on Human Rights, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and the Human Rights Committee. A brief review of the competence of each of these and other potential forums follows:

Commission on Human Rights and Sub-Commission on Prevention of Discrimination and Protection of Minorities: The Commission on Human Rights was established by the ECOSOC in 1946 as the principal U.N. organ to address human rights concerns. The Commission is currently composed of fifty-three representatives from Member States charged with the responsibility of conducting
studies, preparing recommendations, and drafting international instruments for the furtherance of human rights. Of particular concern is the Commission’s task of receiving communications and investigating allegations of human rights abuses. In addition to contacting the state accused of a violation, the Commission may “… invite any national liberation movement recognized by, or in accordance with, resolutions of the General Assembly to participate in its deliberations on any matter of particular concern to that movement”.

The Sub-Commission on Prevention of Discrimination and Protection of Minorities was established by the Commission in 1947. Similar to the mandate of the Commission, the Sub-Commission is charged with conducting studies and making recommendations “… concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, religious and linguistic minorities”. The Sub-Commission is composed of twenty-six individuals elected by the Commission who serve in their personal capacity.

4.1. ECOSOC Resolution 728 F

ECOSOC Resolution 728 F adopted in 1959 consolidated the U.N. procedures for receipt and handling human rights complaints. The resolution provides for the Secretary General to prepare and distribute to the Commission on Human Rights and the Sub-Commission a non-confidential and confidential listing of communications received by the Secretariat, along with a brief description of the substance of each, pertaining to “… principles involved in the promotion of universal respect for, and observance of, human rights ...”. Although initially the scope of this activity was limited by a clause in the resolution stating that the Commission has “… no power to take any action in regard to any complaints concerning human rights …”, the Commission requested and was granted authority to make recommendations concerning specific violations brought before the Commission. This new authority was encompassed in ECOSOC Resolution 1235 and 1503, adopted in 1967 and 1970 respectively.

4.2. ECOSOC Resolution 1235

ECOSOC Resolution 1235 authorizes the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities “… to examine information relevant to gross violations of human rights and fundamental freedoms ...”. The resolution also directs the Commission to detect situations which reveal “… a consistent pattern of violations of human rights”. Under a recurring agenda item, both the Commission and Sub-Commission at their annual meetings serve as forums for debate between governments and nongovernmental organizations (NGOs) concerning general allegations of human rights violations. As a result of these public debates, the Commission and Sub-Commission may elect to adopt resolutions expressing their concern for the human rights situation in a given country, or appoint special rapporteurs, envoys, experts, or special representatives to monitor the human rights situation in particular countries. The reports are shared with the governments in question and the U.N. General Assembly, through the ECOSOC.

The Commission has no power to enforce its findings or recommendations. This had lead many human rights advocates to suggest that the 1235 procedure is most
effective in situations where prompt international public attention and monitoring are required.

4.3. ECOSOC Resolution 1503

In contrast to the public 1235 procedure, the Commission also adopted the private 1503 procedure detailed in ECOSOC Resolution 1503. The 1503 procedure allows Commission Members to refer directly to the substance of complaints or communications received under resolution 728 F. The procedure established includes a three stage process whereby a complaint would first be reviewed by a working group of the Sub-Commission, next the full Sub-Commission, and finally the Commission. The working group “considers all communications, including replies of Governments thereon, received by the Secretary General under Council resolution 728 F ... with a view to bringing to the attention of the Sub-Commission those communications, together with replies of Governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms ...”.

Communications that are ultimately referred to the Commission are examined to determine whether: a) to conduct a thorough study by the Commission followed by a report of recommendations to ECOSOC; or b) to launch an investigation by an ad-hoc committee “with the express consent of the State concerned ...” and to “strive for friendly solutions before, during and even after the investigation ...”. Matters being dealt with under other U.N. human rights instruments may not be reviewed simultaneously here. All activities of the ad hoc committee, Sub-Commission and Commission are to remain confidential.

4.4. Human Rights Committee and Optional Protocol

The Human Rights Committee was created by Article 28 of the International Covenant on Civil and Political Rights (ICCPR) to monitor implementation of the Covenant by State parties. The 18 Committee members are elected by states and serve in their personal capacity. Article 40 of the Covenant obligates states to submit reports every two years outlining steps they are undertaking in furtherance of the Covenants’ requirements. The review process is closed and confidential, with the Committee being empowered to reach decisions on the merits of the case. The state party and the complainant are informed of the Committee’s decision. The entire procedure can take between two to three years.

Another potential important feature is encompassed in Article 41 which establishes an interstate complaint procedure whereby states may submit complaints or “communications” alleging violations by other state parties. This procedure can only be effectuated when both parties have previously recognized the competence of the Committee to consider such communications. If such a complaint is received, the parties in question are given an opportunity to resolve the matter themselves through written communications. If both states are not satisfied with this outcome, the Human Rights Committee may provide “good offices” in hopes of facilitating a friendly settlement of the dispute. Although apparently never utilized, Article 42 allows for the appointment of an ad hoc conciliation commission to assist in the resolution when the parties so consent.
The **Optional Protocol to the International Covenant on Civil and Political Rights** contains a special provision which allows individuals to submit complaints alleging violations to the Covenant by State parties. The individual must be able to prove that all domestic remedies have been exhausted. The responding State is obligated to respond with “written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State”. The Committee forwards its final “views” to the State and the individual, and may make them public. Again, complaints may only be brought against a State that is a party to the ICCPR and the Optional Protocol.

4.5. *Rulings and Advisory Opinions by the International Court of Justice (ICJ)*

The International Court of Justice (ICJ) serves as the “principal judicial organ of the United Nations”. Article 34(1) of the Statute of the ICJ states that “[o]nly states may be parties in cases before the Court”. This provision specifically refers to contentious cases. Further, Article 96(1)(2) of the U.N. Charter authorizes the Court to give advisory opinions to the General Assembly, Security Council, organs and specialized agencies of the U.N. on questions within their respective areas of competence. As such, the Court has exercised minimum direct influence in cases concerning the plight of indigenous peoples.

However, a few noteworthy exceptions warrant mention. In the Western Sahara Case, the Court considered a request from the General Assembly concerning the decolonization of the Western Sahara. The Court concluded that the right to self-determination for non-self-governing territories had become a norm of international law.

More recently, the Court heard a case involving Portugal versus Australia pertaining to Australia’s exploitation of the continental shelf of East Timor. Although the Court held that it could not rule on the substance of the case presented, it did make a strong statement affirming the right of peoples in non-self-governing territories to self-determination. In the Court’s decision, it reaffirmed the view that “[t]he right of peoples to self-determination, as it has evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable”. The Court further states:

For the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination. Moreover, the General Assembly, which reserves to itself the right to determine the territories which have to be regarded as non-self-governing for the purposes of the application of Chapter XI of the Charter, has treated East Timor as such a territory.

These opinions may shed light on the efficacy of utilizing the political forum of the General Assembly and state initiated action as springboards to voice issues concerning indigenous peoples. Ultimately, they may be referred to the Court.

4.6. *U.N. General Assembly and Security Council*
As alluded to above, resolutions and declarations promulgated by the General Assembly and Security Council may be perceived by the Court as “... having legal effect and as enriching the corpus juris gentium”. Legal scholar Christopher O. Quaye points out that recourse to resolving disputes through the various political organs of the U.N. alleviates many of the procedural restrictions concerning jurisdiction inherent with the Court. As stated, “... neither the requirement for statehood nor that for consent is a sine qua non for the assumption of jurisdiction in any of them”.

Continuing, Quaye states:

Among the provisions that elucidate these procedural advantages are titles 10 to 14 of the U.N. Charter, according to which the General Assembly is authorized to discuss and resolve any case arising under the Charter, ... and Chapter VI of the Charter, which empowers the Security Council to investigate any situation that is likely to cause international friction, dispute, or threats to the peace. The simple inference is that, at least in theory, any case at all involving liberation movements - whether intrastate or not - can be resolved by any of the political organs.

The extent that indigenous peoples are able to get concerned states as sympathetic allies to champion their cause through the U.N. political organs remains to be seen. Any state willing to take on such a role must be prepared to confront the alleged violating state. As might be imagined, the responding state will not take lightly this type of accusation and will undoubtedly view it as a threat to their territorial integrity and sovereign equality. Indigenous peoples should embark upon the arduous task of securing state support through the U.N. political organs in conjunction with galvanizing international public opinion and utilizing the U.N. human rights apparatus.

5. Analysis and Application

We now return to our basic que, viz.

Can indigenous peoples (as a distinct population group) bring a claim alleging a violation of human rights in general, and particularly the right to self-determination, through the United Nations apparatus for the protection of human rights, specifically the Commission on Human Rights or its Sub-Commission under ECOSOC Resolution 1235, 1503 or the Human Rights Committee under the Optional Protocol?

5.1. In terms of ECOSOC Resolution 1235, indigenous peoples as a distinct group may be able to claim a violation of their human rights during the public debate process. Resolution 1235 is, for example, geared toward situations which pertain to gross violations of human rights and fundamental freedoms, and situations which reveal a consistent pattern of violations. As such, allegations of violations pertaining to groups, such as the former policy of apartheid in South Africa, are of principal concern here. Sub-Commission and Commission members may feel compelled as a result of these public debates to either pass resolutions expressing concern for the particular human rights situation or appoint special rapporteurs under a country orientated approach or thematic approach. The country or thematic rapporteurs
investigate the authenticity of complaints and serve as a focal point for continued international public attention on the violating state.

5.2. In terms of **ECOSOC Resolution 1235**, an **individual** who may or may not be indigenous might conceivably claim a violation of a general nature regarding his or her human rights. The key determinant is whether the individual complaint contributes in establishing a pattern of gross violations of human rights and fundamental freedoms, and situations which reveal a consistent pattern of violations. Resolution 1235 does not provide for the review of specific communications received under 728 F by the Commission or Sub-Commission. As such, allegations of violations pertaining to an individual will normally only be appropriate if the state in question is already on the agenda of either the Sub-Commission or Commission and the complaint assists in establishing a pattern of gross violations. The 1235 public procedure is most useful in mobilizing public scrutiny in hopes the immediate international attention will curtail the violations.

It is important to caution that a complaint filed under the 1235 procedure which also has been filed under 1503 runs the risk of stiff objection from the government in question as to a violation of the confidentiality requirements of 1503.

5.3. In terms of **ECOSOC Resolution 1503**, an individual who may or may not be indigenous might conceivably claim a violation of a general nature regarding their human rights. The key determinant is whether the individual complaint contributes in “reveal[ing] a consistent pattern of gross and reliably attested violations ...” which in practice generally entails violations of population groups. Further, as Newman and Weissbrodt point out, communications that fail to reveal a pattern as specified above may still stimulate the state in question to take effective action in hopes of forestalling further inquiry.

5.4. In terms of Resolution 1503, indigenous peoples as a distinct **group** may bring a claim alleging violations of their human rights. As previously mentioned, 1503 procedures are those which “reveal a consistent pattern of gross and reliably attested violations”. Examples of the type of gross and reliably attested violations referred to here include political detention, summary or arbitrary killing, disappearance, and torture. Whether other violations, including a denial of the right to self-determination, will constitute “gross” is subject to varying interpretation. Various commentaries have suggested that the right to self-determination is a prerequisite for the enjoyment and protection of other rights. Further, the gross violations listed are often utilized to repel efforts by population groups hoping to achieve self-determination. The various human rights organs will ordinarily not act in a preemptive manner to forestall the initiation of human rights violations. Some violation must have occurred in order to trigger redress. However, sufficient information required to determine precisely how the Commission or Sub-Commission might handle such a claim is not available due to the secrecy surrounding these procedures.

It may prove informative to note a 1503 communication submitted in 1980 by the Six Nations Iroquois Confederacy against the United States. Rather than address the merits of the communication, the Sub-Commission delayed action for a year and ultimately referred the matter without taking any action to the Working Group on Indigenous Populations. While it is impossible to know the rationale behind this
action, we may speculate that among a range of possibilities was confusion as to the ‘jurisdictional overlap’ between the various bodies involved or simply a desire on the part of Sub-Commission members not to take on the U.S.

5.5. In response to whether indigenous peoples may successfully claim a right to **self-determination** through the U.N. organs cited above, the answer is somewhat ambiguous. As stated by Espiell:\(^62\);

> The implementation of the right of peoples to self-determination involves not only the completion of the process of achieving independence or other appropriate legal status by the peoples under colonial and alien domination, but also the recognition of their right to maintain, assure and perfect their full legal, political, economic, social and cultural sovereignty.

Further, Espiell asserts a commonly held view characterizing self-determination as both an individual and collective right. The two principle human rights documents from which the U.N. human rights organs derive their mandate, namely, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights affirm in their common article 1 the right of all “peoples” to self-determination. These views suggest that at least on the procedural stage of review by the human rights organs, a claim based on an individual or group violation may be considered admissible if filed under the corresponding procedure.

As previously stated, it is reasonable to speculate after reviewing the various U.N. human rights documents that the current trend appears to be towards supporting only “[p]eoples under colonial rule to exercise their right to self-determination and emergence into independence”.\(^63\) While indigenous peoples and their allies continue to challenge this more narrow interpretation, the political and legal weight does not currently exist in order for a broader interpretation to prevail. This is not to suggest that the balance cannot, and more importantly, is not, shifting. Many complaints which in fact stem from violations of the right to self-determination may not ordinarily be expressed as a violation of self-determination per se, but rather as significant elements necessary for the full enjoyment of this right. Therefore, a claim alleging a violation will ordinarily detail how that denial is manifest, for example, relating to the denial of some political, economic, social or cultural rights. Over time, these cases may serve as the basis to document a pattern by the Sub-Commission, Commission on Human Rights or the Human Rights Committee of considering cases which have a denial of self-determination at their core.

A more pessimistic view of whether a claim to self-determination might prevail may be gathered from the Human Rights Committee’s decision in the Lovelace Case.\(^64\) Lovelace dealt with a claim stemming from an alleged violation by Canada of claimants’ rights as espoused in Articles 2(1), 3, 23(1) and (4), 26 and 27 of the ICCPR. A major issue of concern here pertained to claimants’ individual right resulting from being born into a protected class (i.e. - Maliseet Indian) and the lack of effective redress to regain that protected status. As previously stated, a claim to self-determination usually involves several essential elements, among them a declaration from a member of a protected class announcing their membership in said class. In interpreting Lovelace’s claim, the Committee might had replied upon, among others, the Declaration on Friendly Relations where it states in part:
... all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

A persuasive argument by the Human Rights Committee might also pointed out the fact that Canada, had in effect, interfered in claimants rights by stripping her of protected status. However, the Committee avoided addressing the question of self-determination by relying on Art. 27 and held as follows: “The fact that Mrs. Lovelace had been denied the legal right to reside on the Tobique Reserve disclosed a breach by Canada of Article 27 of the Covenant”.65 The Committee went on to state that “[t]he complainant was entitled to be regarded as ‘belonging’ to a minority within the meaning of that Article and therefore to claim the benefits of it”.66 In short, the Committee classified Mrs. Lovelace as a member of a minority group rather than a people. Thus, as mentioned prior, self-determination is a right that flows to peoples, not minorities. This ruling may suggest that the Human Rights Committee and the Commission will attempt to avoid a ruling on the controversial right to self-determination as such if other component parts of the right may be identified.

Underscoring this point, Barsh in an article entitled: Indigenous Peoples: An Emerging Object of International Law67, suggest that:

The Human Rights Committee ... has dealt with indigenous peoples as “minorities” under Article 27 of the Covenant; their “members have only been endowed with specific rights designed to secure the existence and survival of the community concerned”, and not with any right to self-determination or autonomy.

The final outcome of the extent of self-determination will depend heavily on the balancing of interests between indigenous peoples and states, the continued filing of complaints to the appropriate human rights organs, and vigorous advocacy on behalf of the rights of indigenous peoples.

5.6. In regards to recourse through the Human Rights Committee, only individuals directly affected by an alleged human rights violation, or a duly authorized representative if proven the complainant is unable to submit the communication, may file a complaint with the Human Rights Committee under the Optional Protocol. Thus, an indigenous individual (as any other qualifying individual) residing in a territory where a state is a party to the International Covenant on Civil and Political Rights (ICCPR) and the Optional Protocol, may file a complaint. However, this view should be tempered by the following considerations:

a) A 1992 published report68 by human rights advocate Steven C. Perkins states that only two cases dealing with indigenous peoples have come before the Human Rights Committee under the ICCPR.69 The first case was Lovelace, cited above, while the second was Kitok V. Sweden.70 It is unknown whether the small number of complaints filed represent difficulty by indigenous peoples in having their complaints advance beyond the procedural review71 or a perception by indigenous peoples that the Human Rights Committee is not a viable option to gain redress.
b) Tenacious indigenous representatives may also be able to advance their cause by lobbying individual members of the Human Rights Committee. As previously mentioned, Article 40 of the ICCPR require state parties to submit periodic reports detailing steps they are taking to ensure implementation of the ICCPR provisions. These reports are then discussed by Committee members in closed session. Government representatives are invited to give a summary of their states’ report and respond to queries from Committee members. Unofficially (i.e. - in the U.N. Delegates Lounge over coffee; over lunch in the cafeteria; etc.), indigenous representatives are often able to brief sympathetic Committee members on their group’s situation in advance of the governments’ presentation to the Committee. Based on anecdotal remarks from Committee members, indigenous representatives, U.N. Secretariat staff and a number of NGOs, Committee members are better prepared to move beyond the generalities mentioned in the state reports and can raise concerns about more specific examples of alleged abuses as a result of the informal briefings.

c) Although the ICCPR requires Commission members to serve in their personal capacity, this does not shield them from various political influences. So, for example, indigenous representatives from a particular African country were able to informally brief Committee members during the July 1994 meeting as to the situation in their native community. During this same period, the African country in question had one of its nationals represented on the Committee. This may have impacted the other members from engaging in a more thorough review of the report since they had developed personal relations and possibly an affinity for the representative. Further, the government representative was able to orchestrate informal briefings of his own between Committee members and individuals claiming to be representatives of the indigenous population and government representatives. These representatives naturally presented an alternative view of the human rights situations, thus possibly further impeding the Committee from taking effective action.

d) While the Optional Protocol bars the Human Rights Committee from considering individual complaints which are simultaneously being examined by other international human rights organs, this prohibition does not extend to matters submitted under ECOSOC Resolution 1503. As a brief reminder, 1503 procedures are those which reveal “a consistent pattern of gross and reliably attested violations ...” which in practice generally entails violations of population groups. This may suggest a potential strategy for heightening pressure on a state party whereby an individual indigenous person files a complaint under the Optional Protocol on behalf of themselves, while a separate complaint is filed under 1503 alleging human rights violations perpetrated against the entire indigenous population.

6. **Suggested areas for further inquiry**

Protecting the human rights of indigenous peoples, including their perceived right to self-determination, remain areas of increasing international concern. The following ideas are mentioned to provoke discussion of alternative solutions towards the peaceful settlement of these disputes:
a) The forerunner to the United Nations, the League of Nations, included a petition mechanism for non-state parties. The procedure stemmed from a series of “Minorities Treaties” adopted to protect the various racial and ethnic minorities in Central and Eastern Europe at the conclusion of World War I. The procedure was similar to that currently utilized by the Commission on Human Rights and the Sub-Commission. One key difference appears to be the fact that the President of the League, along with up to four additional members chosen by him from the Council membership (i.e. - General Assembly) served as a sub-committee to screen and review complaints. This sub-committee’s charge was to:

receive communications and hear complaints on behalf of minority groups in countries where such treaties are in force. The [sub-committee on behalf of the] Council also receives petitions of persons or organizations, belonging to the minorities of the country concerned.73

The sub-committee reviewed the relevant communications and decided upon an appropriate course of action. This might include unofficial negotiations with the government in question or referral to the full Council for discussion and recommendation. The Council referred a limited number of petitions concerning the plight of minorities to the then Permanent Court of International Justice (PCIJ) for decision or advisory opinions.

While the League’s approach to redress the minority issue was never fully realized, three key elements warrant future examination:

a) A series of quasi bi-lateral treaties between the allied powers and the defeated countries whereby the latter were required to guarantee specific protection for minorities within areas where they continued to exercise effective control. The model treaty in this regard was the Treaty between the Allied and Associated Powers and Poland.74

b) The requirement of national legislation to give treaties force within the given territories.75

c) An international monitoring body (the League of Nations) to supervise enforcement of agreements.76

It may prove informative to reexamine if any of the three above mechanisms or some combination thereof may be adapted to elevate attention in the current U.N. human rights apparatus. The recent establishment by the U.N. of a High Commissioner for Human Rights bodes well in this regards.

b) Concerted attention should be directed towards supporting the U.N. Draft Declaration on the Rights of Indigenous Peoples. The current draft under review by the Commission on Human Rights can go a long way in clarifying the needs and interest of indigenous peoples. The provisions outlined in the draft can open opportunities for honest dialogue between indigenous peoples and the state where they are located on the legitimate needs and aspirations of each. Key provisions include Part 1, Art. 3 establishing a right to self-determination, Part VII, Art. 36 concerning the settlement of disputes between indigenous peoples and states by
international bodies, and Part VIII, Art. 39 requiring states to take into consideration the traditions, customs, rules and legal systems of indigenous peoples in resolving disputes with same.

c) U.N. Secretary General Boutros-Ghali has commented that while the doors of the U.N. remain open, it cannot possibly handle the numbers of distinct groups and peoples who conceivably can claim independence or statehood. The U.N., other international inter-governmental organizations, along with indigenous peoples, minorities, and the various states should embark upon serious dialogues to re-examine the notion of the nation-state, self-determination, and the extent of territorial integrity and sovereignty, taking into account the legitimate aspirations of each of the effected groups.

d) As the primary actors in the international arena, states must take on greater responsibility for creating viable solutions to redress the on-going economic, political and cultural threats impacting indigenous and minority populations. One notable example involved a proposal submitted to the U.N. General Assembly by Liechtenstein. The proposal suggests initiating a study, which would lead to the adoption of a convention, specifying how to give practical effect to the right of self-determination for various groups. The proposal highlights the varying requirements for autonomy by different groups, the need to ensure a gradual transition of power to the protected groups, and considers designating “communities” rather than minorities per say as the recipients and implementors of the autonomy.

e) Finally, the process of exploration in uncovering alternative international arrangements for indigenous and minority groups will undoubtedly span many years. In the interim, many of these peoples are confronted with unparalleled threats to their survival. For these types of extreme situations, the U.N. may explore measures such as the notion of “internationalized territories”. The concept was attempted in 1919 as a consequence of the Treaty of Peace, signed at Versailles. In sum, internationalized territories may come into existence by either treaty arrangements, whereby the territory possesses a level of legal capacity and independence, or where an international organization is given exclusive authority to administer the internal affairs of the area. Notable examples include Saar, where a plebiscite was ultimately held under the auspices of the League of Nations to allow the effected population to make their desires known as regards to the “future sovereignty of the territory” and the Memel Territory between 1924-1939 which remained a part of Lithuania but enjoyed a measure of independence.

Situations such as that existing in Tibet, which is facing repression by China, or the Ogoni people, facing an equally distressed situation in Nigeria, seem to be of the magnitude which warrant this type of emergency intervention. Of course, the practical flaw to this is getting states to waive their claims to territorial integrity and sovereignty in allowing an outside administration to govern on parts of their territory. How to overcome this obstacle is no easy matter. This approach may only work in rare instances where the state in question is genuinely interested in resolving the minority or indigenous dispute in keeping with the wishes and desires of the majority of the effected population.
7. Conclusion

Conflicts between various racial, ethnic, minority and indigenous groups versus the state where they are located continue to proliferate throughout various parts of the world. In many of these instances, recourse to the various U.N. human rights apparatus remain one of the few viable options where these oppressed groups might hope to secure redress. Despite the sometime severe limitations of the 1235, 1503 and Optional Protocol procedures, they remain established procedures to bring about redress for human rights violations. Further, I would suggest that the expanse of these procedures are yet to be fully tested and reached. Effected parties should continue to vigorously press their claims through these bodies. Simultaneously, efforts should be underway in pursuance of the political organs of the U.N., and mobilizing international public awareness concerning the plight of oppressed groups.

If the U.N. prescribed method of pacific settlement of disputes is to remain a viable option in resolving disputes between states and indigenous and minority groups under their control, provisions must be made in order that the indigenous and minority groups can gain adequate standing in the international arena. This will require the realization of U.N. Secretary General Boutros Boutros-Ghali’s statement concerning the doors of the U.N. remaining open for the possible inclusion of some of these groups. However, this will also require striking a balance to ensure the continued territorial integrity of most states while simultaneously providing indigenous peoples and minorities with a sufficient measure of self-determination and autonomy.

Finally, the current struggle between protected groups and states need not be a win/lose confrontation. As mentioned above, states and various groups under their control will need to accommodate the legitimate needs and aspirations of each other in order to bring about lasting peace and security. Sustained efforts must be realized in order to change the win/lose perception and options of the parties, particularly the state in question. Otherwise, the U.N. will continue to falter in achieving the lofty goals stated in Article 1 of its Charter of “maintain[ing] international peace and security” and “develop[ing] friendly relations among nations [and I would add here - ‘and peoples’] based on respect for the principle of equal rights and self-determination of peoples”.

Joe L Washington is a Research Fellow with the International Human Rights Law Institute, DePaul University College of Law. He has worked for such diverse organizations as the Bowie State University (BSU) Center for Alternative Dispute Resolution (CADR); National Institute for Dispute Resolution (NIDR); MacArthur Foundation; Office of the Mayor, City of Chicago; and Chicago Urban League.

1 Although the primary focus of this paper is directed towards the rights of indigenous peoples, care was exercised to distinguish this group from other similarly situated groups. For example, Gurr, in his ground breaking *Minorities at*
Risk, utilizes the term ‘communal groups’ to characterize a wide assortment of ethnic groups, minorities and peoples included in his study. The two hundred and thirty-three groups Gurr reviewed were categorized and important distinctions were made between two broad categories, namely, national peoples and minorities. In sum, national peoples were described as “seeking separation or autonomy from the states that rule them” while minority peoples “seek greater access or control”. Important distinctive types were also identified within the two broad categories: national peoples include what Gurr refers to as “ethnonationalist and indigenous peoples”; while minority peoples are sub-divided under the headings of “ethnoclasses, militant sects, and three subtypes of communal contenders: dominant, advantaged and disadvantaged contenders”. While the various distinctions in these sub-categories may prove relevant in future decisions as to determining rights and protection afforded to each group, such concerns are beyond the scope of the present work. As such, the author here relies predominantly on the general definitions utilized by the United Nations in referring to indigenous and minority groups.


4 Ibid, pg. 29.


6 Ibid, pg. 1540.


8 Ibid, Art. 27.


12 Council of Europe 7th International Colloquy on the European Convention on Human Rights, report on “Equality and non-discrimination: minority rights”, Strasbourg 1990, pg. 15. Alfredsson continues to observe: “Acceptance of the distinction between minorities and indigenous peoples emerges from the standard-setting work of the United Nations (Convention on the Rights of the Child) and of the International Labour Organisation (Convention No. 169). Two United Nations working groups are preparing separate draft declarations and the United Nations has otherwise employed different procedures with regard to the two types of beneficiaries. Furthermore, the difference is reflected in the substance of the rights”.
The former British occupation in India and the Afrikaaners in South Africa are notable exceptions where a numerical minority population exercised effective control over the majority populations.

During the 4th session of the WGIP, members grappled with the question of defining indigenous populations. See A.J.I.L. at pg. 376 where it states: “The Chinese member, Gu Yijie, recalled the ‘working definition’, which she observed, bears more relation to ‘peoples’ than ‘minorities’. ‘Historically speaking’, she explained, ‘the concept of indigenous populations is associated with colonialism and aggression by foreign nations and powers’, which result in the dispossession and isolation of those populations. Minorities reflect ‘different historical backgrounds’ and must be treated separately’.

Ibid. Art. 3 and 31.
Ibid. Art. 36 and 39.
Ibid. Art. 31.
Ibid. Art. 39.
Resolution 47/135, Art. 1.
Ibid. Art. 4.
Part 1, Art. 1(1) and (2).
Ibid. Art. 2(1) and 14.
Ibid. Art. 2(2) and Art. 14(3).
Constitution of the International Labor Organization, As amended, effective April 20, 1948, 15 U.N.T.S. 35. It is important to note that this procedure has been invoked in a very limited number of situations. For useful commentary, see C.W. Jenks in International Organizations in their Legal Settings, West Publishing Co., (1977), pgs. 292-299.
Ibid. Art. 32.
Ibid. Art. 33.
Brownlie, pg. 595.
G.A. Resolution 1514 (XV) of 14th December 1960.
Brownlie, pgs. 595-596.
Among the most often cited authority is the Charter of the United Nations, Art. 2(4).
where he states: “Modern international law has deliberately attributed the right [of self-determination] to Peoples, and not to Nations and States”.

43 On this point, Espiell states emphatically: “The divergence of opinion among legal theorists which existed on this point until a few years ago has been overcome; the Declaration adopted in resolution 1514 (XV) and the International Covenants on Human Rights have provided the basis for unquestioned acceptance in international law of the fact that self-determination is a right of peoples under colonial and alien domination, cited in International Human Rights, Frank Newman and David Weissbrodt, Anderson Publishing Co., Cincinnati (1990), pg. 85. See also Current Developments, Indigenous Peoples: An emerging Object of International Law, at pg. 375 where it recounts comments by the Mexican observer to the fourth session of the WGIP as stating that “[i]t was virtually impossible ... to distinguish between indigenous populations and ‘peoples’ entitled to self-determination”. This theme was continued by the Mikmaq delegation to the meeting which stated: “... ‘indigenous’ populations should be considered ‘peoples’ in the sense of chapter XI of the Charter. Those people we call indigenous are nothing more than colonized peoples who were missed by the great wave of global decolonization following the second world war ... particularly where independence was granted, not to the original inhabitants of a territory, but to an intrusive and alien group newly arrived”. Ibid, pgs. 375-376.

44 Declaration on Principles of International Law Concerning Friendly Relations, The principle of equal rights and self-determination of peoples. See Christopher O. Quaye, Liberation Struggles in International Law, Temple University Press, Philadelphia (1991) for a more detail discussion, pgs. 217-223, and 238 where it states: “If one of the constituent peoples of a state is denied equal rights and is discriminated against, it is submitted that their full right of self-determination will revive”.


46 The Minority Rights Group, The UN Draft Declaration on the rights of persons belonging to national, ethnic, religious or linguistic minorities, London (January 1991), Pg. 22.

47 Granting some measure of autonomy to indigenous or minority populations may prove equally controversial in some states. Alfredsson suggests a continuum of ‘autonomy’ options including: “self-government, self-management, home rule, or merely the delegation of powers to a municipal authority with expanded functions ...”. Council of Europe Colloquy report at pg. 10.

48 Henkin pg. 308-309.

49 For a review of self-determination as it affects indigenous peoples, see WGIP/Martinez study at paragraphs 263-278 and 580-584. For example, paragraph 581 in exploring the full extent of internal versus external self-determination states that it: “... constitutes the exercise of free choice by indigenous peoples, who must, to a large extent, create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they live and set themselves up as sovereign entities. This right may in fact be expressed in various forms of autonomy within the State ...”.

50 Excerpt from WGIP/Martinez study at pg. 4.

51 Anderson, pg. 6.

52 See ICCPR, Art. 41 (2A-h).
See Newman and Weissbrodt, pgs. 69-70.

Chap. XIV, Art. 92.


Ibid, pg. 1590.

Quaye pgs. 82-83.

Newman and Weissbrodt, pg. 122.


See Newman and Weissbrodt, pg. 143 for a brief description.

Espiell, at para. 46.


I.L.M., at pg. 18.

Ibid, at pg. 19 (3).


While it may be reasonable to speculate that additional cases may have been filed in the ensuing years, this still would amount to a relatively small number.


According to Newman and Weissbrodt, pg. 118, although the U.N. Secretariat currently receives upwards of 300,000 complaints per year, only several dozen “may be sufficiently well prepared to be given serious consideration by [the Sub-Commission’s Working Group on Communications].”

Ogoni representatives from Nigeria during the 1994 meeting of the Sub-Commission.


Knudson, pgs. 165-167.

Ibid., pgs. 165-167.


For a useful background, see two books by John Maynard Keynes, Essays in Persuasion, W.W. Norton & Co. Inc., New York (1963); and The Economic Consequences of the Peace, Harcourt, Brace and Howe (1920). See also

79 Brownlie, pg. 58-63.
80 Knudson, pgs. 180-184.
81 Brownlie, pg. 62 and Knudson, pg. 185-186.