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BETWEEN INDIGENOUS NATIONS AND THE STATE: SELF-DETERMINATION IN THE BALANCE

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I. INTRODUCTION

Along with territorial issues and cultural issues, the principle of self-determination is profoundly influential in the relations between states and between states and Fourth World (“indigenous”) peoples. Stated simply, the principle of self-determination asserts that it is the right of all peoples to freely choose their social, economic, political and cultural future without external interference.¹ Since the formulation by the Christian states of Europe in 1648 of basic principles defining the existence and legitimacy of a state, no idea has had as monumental an effect on international affairs as this principle. U.S. President Woodrow Wilson introduced on Jan. 8, 1918 the idea of political self-determination into international affairs when he proposed the establishment of a “general association of nations” as a part

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1. *The Historical and Current Development of the Right to Self-Determination on the Basis of the Charter of the United Nations and Other Instruments Adopted by United Nations Organs, with Particular Reference to the Promotion in Protection of Human Rights and Fundamental Freedoms*, U.N. ESCOR, 31st Sess., at 21, U.N. Doc. E/CN.4/Sub.2/404 (Vol. II) (1978) [hereinafter *Historical and Current Development*].

of his Fourteen Point Peace Program to the U.S. Senate.² Both Wilson and Britain's Prime Minister Lloyd George proposed new principles for international cooperation and collective security, thus accelerating the breakdown of empires and the making of what would become more than 150 states over the next sixty years. Despite this auspicious beginning, the United States today offers to lead world opinion in fundamental opposition to the application of the principle of self-determination to indigenous peoples, and particularly to American Indians. Under the administration of President William J. Clinton, the U.S. government has joined with China, Japan, France, Iran, Iraq, England and the likes of Guatemala and Peru to prevent the application of international standards of human rights to indigenous peoples. The external U.S. position contradicts its internal policy of self-determination by distorting international law to favor authoritarian states in their efforts to suppress the rights of indigenous peoples.

This article will examine the historical and contemporary political relations between Indian nations and the United States in the light of efforts by Indian nations to exercise self-government. Part II will begin by analyzing the recent movement by four Indian nations toward self-governance. Part III reviews some key points in the history of U.S. governmental interference in the internal political life of Indian nations. Part IV evaluates past attempts by Indian nations to govern themselves and some obstacles to self-government by Indian nations. Part V addresses attempts by the U.S. government to apply the principle of self-determination to Indian nations as a matter of internal policy, and how the U.S. government has dealt with the principle of self-determination as a matter of external policy concerning the rights of indigenous peoples. Part VI discusses the international efforts on behalf of indigenous peoples and the status of an international principle of self-determination. Parts VII and VIII observe that there is a profound contradiction between the U.S. government's internal and external applications of self-determination and that such a contradiction may reflect the practice of many state governments. The article concludes in Part IX that this contradiction may have a significant effect on how Indian nations and other indigenous peoples seek to implement self-determination.

2. See STEPHEN S. GOODSPEED, *THE NATURE AND FUNCTION OF INTERNATIONAL ORGANIZATION* 30 (1967); see also DANIEL P. MOYNIHAN, *PANDAEMONIUM: ETHNICITY IN INTERNATIONAL POLITICS* 78-79 (1993).

II. FOUR NATIONS AND THE USA

Four Indian nations have been carrying forward a quiet political revolution since 1987.³ The drive by these Indian nations to resume self-government has been underway for more than a generation, urged on by the desire to choose freely their own political and cultural futures. Their efforts are leading toward an eventual exercise of self-government. Rejecting the U.S. court system in favor of direct political negotiations with the U.S. government, these nations have begun blazing a new path to renewed political and economic development.⁴ The policies of the Quinault, Lummi, Jamestown S'Klallam and Hoopa have changed the domestic political and legal landscape of Indian affairs in the United States. The transition of these Indian nations from non-self-governing to self-governing peoples will undoubtedly have a direct impact on changing political relations between indigenous nations and states long into the future.

Changing from political dependence to a position of recognized sovereignty involves constructing a new framework for political relations. This framework necessarily reduces the governing role of the Bureau of Indian Affairs (BIA) in the internal affairs of an Indian nation. Self-government's implicit requirement is that the Indian nation takes responsibility for making and enforcing its decisions.

These four Indian nations have begun to show that self-governing indigenous peoples can coexist with a sovereign state and not threaten the dismemberment of the existing state. They have shown that there is compatibility between an indigenous people's sovereignty and a state's sovereignty, given that a framework of government-to-government relations has been established, maintained, and nurtured in order to ensure cooperative communications and systematic resolution of conflicts. Indigenous peoples and states with formal treaties, compacts and other constructive arrangements can politically coexist.

The 1993 negotiation of a long-term self-government compact between the Hoopa, Jamestown S'Klallam, Lummi, and Quinault Indian nations and the United States of America set a standard for future bilateral government-to-government relations between indigenous peoples and

3. These Indian nations are the Jamestown S'Klallam Tribe, Lummi Indian Nation, and Quinault Indian Nation, located in the northwestern part of the state of Washington, and the Hoopa Nation on the west coast of Northern California. Their decision to undertake negotiation of bilateral compacts of self-governance is a striking departure from conventional conduct of Indian affairs which has been long characterized by legal and administrative tugs-of-war between Indian governments and officials of the Bureau of Indian Affairs.

4. The use of bi-lateral and multi-lateral compacts negotiated between Indian nations and the U.S. government has increasingly become the standard for formalizing agreements to resolve disputes and particularly to establish new jurisdictional arrangements between Indian nations and the U.S. government and the states, e.g., tribal/state compacts on gambling.

states. There is, however, an obstacle to an assured constructive and positive outcome to these negotiations. The principle of self-determination, or the right of these peoples to self-government, is a serious obstacle to their success. Contradictions between domestic and external U.S. government policies on self-determination, as reflected in actions by the State Department and the Department of the Interior,⁵ cast doubts about whether these negotiations between Indian nations and the United States represent a net advance in political relations or a confirmation of the status quo. The U.S. government seems to have begun a retreat from its former advocacy of self-determination of peoples and the promotion of self-government.⁶

Although the Hoopa, Jamestown S'Klallam, Lummi, and Quinault Indian nations are not strategically important indigenous peoples in any geopolitical sense, the political initiative they have decided to undertake in the last decade of the twentieth century may turn out to have a profoundly significant impact. If they are successful in their efforts to reassume the powers of self-government, their success will point the way to peaceful resolutions around the world of conflicts between states and the indigenous peoples inside their boundaries.

The move to regain powers of self-government is also being propelled by a two decade long debate in the international community concerning evolving standards for the rights of indigenous peoples. These millions of people around the world whose nations were absorbed into newly formed states without consent included the Indian nations in the United States.⁷

5. See discussion *infra* Parts VII and VIII.

6. Global uncertainties created by the collapse of the Union of Soviet Socialist Republics [hereinafter U.S.S.R.], the breakup of Yugoslavia and Czechoslovakia and the new threats by indigenous nations to the possible breakup of the Russian Federation shook the normal self-confidence of the U.S. Department of State [hereinafter State Department]. Evidence of this uncertainty emerged during meetings in the Russian Embassy in September 1992 when the author met with German, Russian, and U.S. diplomatic representatives to discuss measures to help relieve building tensions between Russian and non-Russian peoples inside the Russian Federation after the collapse of the U.S.S.R. The U.S. representatives expressed strong reservations about participating in efforts to reduce Russian and non-Russian tensions. In subsequent meetings at the State Department and two years later in Geneva, the author engaged U.S. diplomatic representatives in extensive colloquies regarding the level of confidence the U.S. State Department had in its own ability to address issues concerning state and indigenous nation relations.

7. The United Nations (U.N.) Commission on Human Rights authorized its Sub-Commission on Prevention of Discrimination and Protection of Minorities to undertake a study of the problem of discrimination against indigenous populations beginning in 1973. See *generally Study of the Problem of Discrimination Against Indigenous Populations*, U.N. ESCOR, 36th Sess., Agenda Item 11, U.N. Doc. E/CN.4/Sub.2 (1983) [hereinafter *Study of the Problem of Discrimination*]. On a converging historical track, indigenous nations began organizing communications between themselves through new international organizations such as the International Indian Treaty Council, World Council of Indigenous Peoples ("WCIP"), and Inuit

Self-government by indigenous peoples within existing states (similar to Indian nations inside the United States) is part of a rapidly developing global debate. This debate involves representatives of indigenous peoples and states, as well as international organizations like the United Nations, International Labour Organization (ILO), and the Organization on Security and Cooperation in Europe (OSCE). The most visible result of the growing international debate is the formulation of a Draft United Nations Declaration on the Rights of Indigenous Peoples (Draft U.N. Declaration),⁸ awaiting U.N. General Assembly approval. Those participating in composing the *Draft U.N. Declaration* are state governments, indigenous nations, the United Nations, and a number of specialized international agencies, as well as non-governmental organizations (NGOs). It is a hopeful time for indigenous peoples, but as suggested already, there are obstacles on the path to self-government for Indian nations involving questions about self-determination and its applicability to indigenous nations located inside existing states.

III. RECOVERING THE POWER TO DECIDE

A. History of Intrusions into Self-Governance

From 1871 to 1991, Indian nations saw their ability to decide freely their own political, economic, social, and cultural affairs eroded by the U.S. Congress. The judicial branch of the U.S. government also made efforts to take governmental powers from Indian nations, followed by similar efforts by the executive branch of the U.S. government. Milner Ball noted

Circumpolar Conference. International activity concerning the affairs of indigenous peoples increasingly involved non-governmental organizations like the World Council of Churches, International Commission of Jurists, and the Anti-Slavery Society. All of these trends contributed to an expanding dialogue concerned with international standards concerning the rights of indigenous peoples. The Human Rights Monitor, published by the International Service for Human Rights in Geneva, Switzerland, contains commentaries and reports describing the dialogue.

8. Beginning in 1986 the U.N. Working Group on Indigenous Populations took under consideration the formulation of a new international Declaration. It worked under the direction of the U.N. Commission on Human Rights to draft a declaration flowing from its annual review of developments concerning the rights of indigenous peoples and its responsibility to consider international standards for the application of international rules to the conduct of relations between states and indigenous nations. In 1993, the Working Group on Indigenous Populations finished drafting the instrument and sent it to the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities subsequently adopted the Draft U.N. Declaration. *Report of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 46th Sess., Annex, at 115, U.N. Doc. E/CN.4/2 (1995), E/CN.4/Sub.2/56 (1994). The Draft U.N. Declaration was then sent on for review by the Commission on Human Rights. The final draft of the new Declaration is awaiting ratification by the UN General Assembly.

this phenomenon in his examination of the relations between Indian nations and the United States when he wrote: "[i]ndian nations have prevented recent congressional deployment of plenary power against them. But the plenary power does not lie idle. Like Ariel, it reappears, transported from Congress to the Supreme Court, where its lack of both limits and legitimacy is matched by a lack of appeal from its results."⁹

The principal means by which the powers of Indian nations were taken was through preemption and usurpation.¹⁰ Most of the erosion of Indian governmental powers, including the regulation of natural resource use, land use regulation, education, civil and criminal justice, and the making of laws, was done in the name of "protecting Indian interests."¹¹ The end result, however, was quite different.

The actual effect of the U.S. government's attempt to protect Indian interests was to undermine Indian governmental institutions.¹² No Indian nation (as a whole political entity) has a political representative in the Congress or any branch of the U.S. government. No Indian nation shares political power with the States of the Union in the federal system. Yet the United States claims and exercises its absolute dominion over Indian nations and their territories through the self-proclaimed doctrine of the "plenary power of Congress."¹³ Modern claims to absolute U.S. rule over In-

9. Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. BAR FOUND. RES. J. 1, 59 (1987).

10. *See id.* at 57.

11. The United States, it is argued by scholars, has a fiduciary duty to American Indians. *See generally* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975). U.S. President Richard M. Nixon declared in his July 1970 statement to Congress the existence of a "special relationship between the Indian tribes and the Federal government." 91 CONG. REC. 23, 132 (1970) [hereinafter Nixon 1970 Statement to Congress]. President Nixon claimed that the special relationship "continues to carry immense moral and legal force," obligating the United States to protect Indian interests. *Id.* Milner Ball expressed this view as well: "Although the trust doctrine has undeniably served as a remedy in certain instances of federal mismanagement of tribal lands and money, it appears in fact primarily to give moral color to depredation of tribes." Ball, *supra* note 9, at 62.

12. For most of the last century, the United States has presented itself as the paramount advocate of self-determination for non-self-governing peoples throughout the world. U.S. government officials pushed France, Britain and Spain to free their colonial holdings. The U.S.S.R. was under constant pressure to release its control over Lithuania, Estonia and Latvia - characterized as "captive nations." World War II losses by Germany, Italy and Japan also included lost colonies which were "liberated to determine their own political future." Statement on Indian Policy, 1 PUB. PAPERS 96 (Jan. 24, 1983) (Ronald Reagan). Yet, little if anything was ever said about the extra-Constitutional legislative dictatorship the U.S. government extended over the lives of Indian peoples.

13. U.S. Supreme Court Chief Justice John Marshall first addressed the question of the plenary power of Congress when he wrote in 1824: "This power, like all others vested in Con-

dian nations are rooted in the competition during the 1860s between the House of Representatives and the Senate over powers of budget.¹⁴ This intramural Congressional contest had to do with the making of treaties with Indian nations, the cost of those treaties, and the constitutional powers of finance.

It was in 1867 that the House considered passing legislation to repeal the authority given the President, the Secretary of the Interior, and the Commissioner of Indian Affairs to make treaties with Indian nations.¹⁵ Many Congressmen regarded treaties with Indian nations as creating a two-fold problem: rapidly increasing demands for revenues in a time of budgetary restraint following the Civil War;¹⁶ and allowing the U.S. Senate to usurp the constitutional power of the House by creating new budgetary demands through treaties.¹⁷ The debate continued when passage of the bill to restrain the Executive branch from making treaties failed and the Senate was confirmed as the constitutionally empowered body of Congress responsible for treaty ratification. A compromise bill was subsequently introduced as an attachment to the Indian Appropriation Act of 1871.¹⁸

1. The Appropriation Act of 1871

As a compromise, language used in the bill attached to the Indian Appropriation Act of 1871 stated:

[t]hat hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty; Provided . . . [t]hat nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.¹⁹

gress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the [C]onstitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-197 (1824); *see also* Ball, *supra* note 9, at 47.

14. The tension between the houses of Congress is built in the United States Constitution at Art. I, § 7, cl. 1 which provides: "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."

15. This is discussed as recently as 1975 in the U.S. Supreme Court decision of *Antoine v. Washington*, 420 U.S. 194, 202 (1975).

16. *See* D'ARCY McNICKLE, *THEY CAME HERE FIRST* 205-06 (1975).

17. *See Antoine*, 420 U.S. at 202.

18. Indian Department Appropriations Act of March 3, 1871, ch. 120, 16 Stat. 544.

19. *Id.* at 566.

The passage of the 1871 Indian Appropriation Act into law effectively stopped the making of new treaties with Indian nations and severed formal government-to-government relations between the United States and Indian nations. While satisfying the political concerns of Congressmen worried about Senate usurpation, the breaking of government-to-government connections with Indian nations posed dilemmas for the U.S. government. Questions arose as to the legal means available for the United States to legally acquire Indian lands, and how the U.S. government should deal with the growing number of civil and criminal problems involving U.S. citizens in Indian territories. A string of court cases resulting from these dilemmas appeared in the federal courts.

In one of two landmark cases, *Elk v. Wilkins*,²⁰ the Court first addressed these congressionally created dilemmas. The decision stated that the "utmost possible effect [of the 1871 Indian Appropriation Act] is to require the Indian tribes to be dealt with for the future through the legislative and not the treaty-making power."²¹ One year earlier, in *Ex Parte Crow Dog*,²² the Court ruled in favor of recognizing treaty obligations between the United States and the Brule Sioux, and recognized the power of the Brule Sioux government to administer "their own laws and customs" in connection with crimes committed by Indians against Indians.²³ Congress seized upon the court's ruling and responded to the *Crow Dog* decision by enacting the Major Crimes Act of 1885.²⁴

2. Major Crimes Act of 1885

As the first intrusion into Indian government jurisdiction by the U.S. government, the Major Crimes Act imposed U.S. authority inside Indian territory over eight subject crimes. These included: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.²⁵ New crimes were added in the years to follow: statutory rape, assault with intent to commit rape, assault with a dangerous weapon, assault resulting in serious bodily injury and robbery.

The imposition of the Major Crimes Act led to a court challenge in 1886 to the law's constitutionality.²⁶ Attorneys for two Indians who had been indicted for the murder of a member of the Hoopa tribe argued that the Act went beyond the constitutional powers of Congress. The Court agreed, noting that the Constitution did not grant Congress power to in-

20. 112 U.S. 94 (1884).

21. *Id.* at 107.

22. 109 U.S. 556 (1883).

23. *See id.* at 568.

24. 23 Stat. 385 (1885).

25. *See id.*

26. *United States v. Kagama*, 118 U.S. 375 (1886).

trude into the jurisdiction of Indian tribes.²⁷ Ignoring its own conclusion affirming the unconstitutionality of the Major Crimes Act, however, the Court turned to a political argument for its final decision: “[b]ut, after an experience of a hundred years of the treaty-making system of government, [C]ongress has determined upon a new departure,—to govern them by acts of [C]ongress. This is seen in the act of March 3, 1871. . . .”²⁸

It seemed that Congress’s own action was evidence enough that it had the power to act. The issue of the constitutionality of the law became moot. Without saying that Congress had acted in a way inconsistent with the U.S. Constitution, the Court was uncertain about whether it had the competence to enter a judgment that would limit the power of Congress to undertake what was essentially a political act outside the Constitution. However, a few years later, Congress was challenged again.

3. The Plenary Power of Congress

In 1899, the Court first used the term plenary power to describe Congress’s exercise of extra-Constitutional legislative powers in *Stephens v. Cherokee Nation*.²⁹ The Court was presented with the issue of whether Congress had the authority to establish a mechanism for determining membership rolls of several Indian tribes.³⁰ The Court said: “assuming that Congress possesses plenary power of legislation in regard[s] to [the Indians], subject only to the [C]onstitution of the United States, it follows that the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument.”³¹

Thus, the Court asserted that Congress had plenary power over Indian nations. The only evidence that Congress had such power was the Appropriations Act of 1871. The Court’s reach for evidence to support its conclusion only confirmed that Congress had unlawfully exercised absolute power over Indians. After establishing the plenary power doctrine, the Court three years later held that Congress’s power over Indian legislation was a political question and not subject to judicial review.³²

The legislative branch of the U.S. government first closed the door on government-to-government relations by enacting the Appropriations Act of 1871. It then imposed laws of the U.S. government directly over individual Indians. The U.S. courts supported Congress’s actions through the plenary power doctrine, and then closed the doors to judicial consideration of the lawfulness of the doctrine through the political question doctrine, effec-

27. *See id.* at 378-79.

28. *Id.* at 382.

29. *See* 174 U.S. 445, 478 (1899).

30. *Id.* at 476.

31. *Id.* at 478.

32. *See Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902).

tively insulating itself from criticism or challenge. Finally, the executive branch enforced both the congressional and judicial actions and assumed administrative powers of its own over Indian people.

By 1902, the U.S. government's dictatorship over Indian nations was complete: Indian nations had been stripped of the capacity to determine and decide their own political, economic and social future.

IV. PAST ATTEMPTS AT SELF-GOVERNANCE

A. Beginning Initiatives

Ninety-three years after the U.S. Congress closed the door on treaty negotiations by passing the Appropriations Act of 1871, Indian nations took their own initiatives to regain power over their lives.³³ Beginning in 1964 with the Johnson Administration's "Great Society Programs" and "Indian Self-Determination Policy," Indian nations received small amounts of community development funds and began to pursue a new political course of "strengthening tribal government." Though the "Great Society Programs" were not specifically targeted to Indian reservations, they were open to "pockets of poverty," a category under which, alas, Indians could qualify. The "Indian Self-Determination Policy" was so overshadowed by the traumatic political events choking American political leaders and the general public that little notice was given to this policy. The policy had been the Johnson Administration's late response to the 1961 "Declaration of Indian Purpose" which grew out of an intertribal conference in Chicago.

Further encouraged by the Nixon Administration's "Indian Self-Determination Policy,"³⁴ and gaining momentum with the Reagan Administration's "government-to-government policy," U.S. President Ronald Reagan offered an Indian policy that emphasized reservation economic development and the conduct of relations with each Indian government on a "government-to-government" basis. This policy implied a partnership between the U.S. government and Indian governments within a mutually defined framework that respected tribal sovereignty and U.S. sovereignty, i.e., a treaty relationship. Indian nations moved systematically to assume anew their powers of self-government. Through structured negotiations in

33. Some Tribal Councils began adopting resolutions intended to set aside some tribal lands as wilderness zones (Yakima Nation), to establish taxation on business transactions (Quileute Indian Tribe), others imposed (without Secretary of the Interior approval) restrictions on waste disposal, and still others began to draw up complete "law and order codes" and other land use regulations (Quinault Indian Nation, Red Lake Chippewa, Colville Confederated Tribes).

34. U.S. President Richard Nixon's 1970 statement to Congress called for a new federal policy of "self-determination" for American Indians, declaring that the earlier "termination policy" was ended and replaced by a policy to encourage Indian nations to decide their own future with the support of the United States government. See Nixon 1970 Statement to Congress, *supra* note 11, at 23, 132.

the U.S. courts, informal negotiations with the executive branch and work with Congress, many Indian nations moved toward clarifying their governmental powers.³⁵

B. Preliminary Discussions of 1987

The events leading up to the 1993 self-government agreements between the United States and the Hoopa, Jamestown S'Klallam, Lummi, and Quinault Indian nations, officially began in October 1987 with discussions between Lummi Chairman Larry G. Kinley, Quinault President Joe DeLaCruz, and the Chairman of the Interior and Related Agencies Appropriations Sub-Committee, Congressman Sidney Yates (Democrat Illinois). The issue under discussion was how to find a solution to the problems the Lummi and Quinault suffered while dealing with the BIA, such as mismanagement of tribal and individual trust funds and possible illegal activities in the management of natural resources. More specifically, Congressman Yates was preparing to convene hearings concerning allegations of BIA mismanagement of tribal and individual trust funds, as well as probable illegal activities associated with the management of oil, coal, and land leases appearing in reports published by an Arizona newspaper. He invited these tribal chairmen to give suggestions as to what might be done. Both tribal chairmen recited extensive complaints about BIA mismanagement of resources and finances in connection with their reservations. These exchanges naturally led to their consideration of "taking back control" from the BIA.³⁶ Previously, as President of the National Congress of American Indians ("NCAI") in 1983, DeLaCruz urged Indian leaders to "make a decisive departure from the recurring issues that divert our attention from the most important priorities and initiatives necessary to establish meaningful government-to-government relations with the United States."³⁷ While meeting with Congressman Yates, DeLaCruz reiterated his views on government-to-government relations.

In addition, Chairman Kinley appeared before Congressman Yates's Sub-Committee and delivered testimony entitled "Problems and Solutions

35. Leaders of Indian nations organized a systematic strategy within the National Congress of American Indians to carefully select and advance only those pieces of legislation (in the U.S. Congress) or litigation (in the Federal Courts) that supported a return of tribal governmental powers. In efforts to deal with the Executive Branch of the Federal Government, Indian leaders targeted their efforts to reduce Bureau of Indian Affairs control over Indian nations' internal affairs.

36. Interview with Joe DeLaCruz, President of Quinault Indian Tribe, in Taholah, Wash. (May 12, 1995).

37. See generally JAMESTOWN BAND OF KLALLAM, QUINAULT INDIAN NATION, TRIBAL SELF-GOVERNANCE: SHAPING OUR OWN FUTURE – A RED PAPER 8 (1989) (referring to an interview with Joe DeLaCruz, President of the Quinault Indian Tribe).

in the Tribal-Federal Relationship,"³⁸ which emphasized building a framework for government-to-government relations to help find solutions to persistent problems that were perceived as responsible for undermining constructive tribal development.

C. The Tribal Self-Governance Demonstration Project

As a result of these discussions and public hearings, the House Interior and Related Agencies Sub-Committee decided to include a three paragraph attachment to its annual appropriations bill that identified funds for a tribal self-governance demonstration project.³⁹ In addition to appropriating funds for conducting the demonstration project and identifying ten tribes as participants, including the Lummi and Quinault tribes, the bill provided that the United States government and the Indian governments would negotiate demonstration agreements.⁴⁰ Without fanfare or public notice, other than the three paragraphs in the Appropriations Bill, the U.S. government had reopened government-to-government relations with Indian nations through exactly the same device it had used to close them.

During the eighteen months after passage of the Appropriations Act (1988), all ten Indian nations involved in the project entered into a period of intensive research and planning to assess their political and economic interests while building a framework for formal government-to-government relations with the United States. Some of the participants did not complete the project. For example, the Mescalero Apache Indian nation⁴¹ decided not to continue to participate in the process, and the Red Lake Chippewa⁴² chose to quickly negotiate agreements with the BIA in order to rearrange administration in their territory. Only the Hoopa, Jamestown S'Klallam, Lummi, and Quinault nations continued with the project, emphasizing the formulation of government-to-government relations and standards for negotiating agreements between themselves and the U. S. government. In June 1990, each of the four tribes undertook bilateral

38. LUMMI INDIAN BUSINESS COUNCIL, PROBLEMS AND SOLUTIONS IN THE TRIBAL-FEDERAL RELATIONSHIP (1987).

39. H.R. CONF. REP. NO. 100-498, at 899 (1987).

40. *See id.*

41. Mescalero Apache Chairman Wendel Chino sent a letter in 1988 (shared with other tribal leaders) to the Secretary of the Interior advising the U.S. government that the Mescalero Apache government would not further pursue planning toward negotiation of a self-government agreement.

42. Well before the self-government planning process began, Red Lake Chippewa Chairman Roger Jourdain had begun negotiation of a memorandum of understanding with representatives of the Assistant Secretary for Indian Affairs in the U.S. Department of the Interior. This agreement conveyed Bureau of Indian Affairs Agency Superintendent administrative powers to the Chippewa Chairman, thus, making the Red Lake Chippewa Chairman effectively an employee of the U.S. government and the Chairman of the Red Lake Chippewa.

negotiations with the United States and concluded a Compact of Self-Governance. The central purpose of each Compact was stated in this way:

This Compact is to carry out . . . [a] Self-Governance Demonstration Project . . . intended as an experiment in the areas of planning, funding and program operations within the government-to-government relationship between Indian tribes and the United States. The Demonstration Project encourages experimentation in order to determine how to improve this government-to-government relationship⁴³

As they cautiously move toward greater internal self-government, these Indian nations are choosing to reassume most powers of internal self-government, including taxation, control of natural resources, boundary regulation, trade, environmental regulation, civil affairs, and criminal jurisdiction. The parties to each Compact mutually recognize the sovereignty of the other and pledge to conduct relations on a government-to-government basis.⁴⁴ The internal laws of each nation are to be applied in the execution of the Compact and the decisions of the nation's courts are to be recognized and respected.⁴⁵ The balance of the Compact describes procedures for funding transfers, records and property management, retrocession, dispute resolution, ratification, and a statement of obligations for each of the parties. Treaty relations between each of the nations and the United States thus began again and tentative steps toward self-government were taken.⁴⁶

43. LUMMI INDIAN BUSINESS COUNCIL, COMPACT OF SELF-GOVERNANCE BETWEEN THE LUMMI INDIAN NATION AND THE UNITED STATES OF AMERICA (1990) (stating that the language is duplicated in the bi-lateral agreements between the Quinault, Jamestown S'Klallam, and Hoopa Indian nations and the U.S. government).

44. *See id.*

45. *See id.*

46. Just as the United States and Indian nations were beginning to negotiate Self-Governance Compacts in 1989 and 1990, the United States government was participating in meetings of the International Labor Organization and the United Nations concerning new standards for the rights of indigenous peoples, including Indian nations. Despite concluding several Self-Governance Compacts, representatives of the U.S. Government in Geneva, Switzerland delivered statements opposing the raising of international standards that recognize the right of Indian nations and other indigenous peoples to the exercise of self-determination and self-government. On five key international agreements concerning the rights of indigenous peoples or U.S. obligations to advance the human rights of Indian peoples, the U.S. government delivered mixed messages which often conflicted with internally proclaimed Indian Affairs policies concerning recognition of the sovereignty of Indian nations and their right of self-determination.

V. U.S. RESPONSE TO THE DEMAND FOR SELF-GOVERNANCE

The U.S. government has made its policy on Indian self-determination abundantly clear with the election of each new president since Lyndon B. Johnson, who offered self-determination as the basis of his Indian Affairs policy in 1968.⁴⁷ Succeeding administrations affirmed the recognition of the sovereignty of tribal governments. Beyond the executive branch's frequent affirmation of Indian self-determination in policy, Congress has placed itself on the public record repeatedly endorsing the principle of self-determination since it enacted the Indian Self-Determination and Education Assistance Act of 1975 (Self-Determination Act).⁴⁸

47. In the last months of the Johnson Presidency, his administration announced its fundamental rejection of the "tribal termination policies" of earlier administrations and urged that a new policy be adopted which fosters self-determination. See Special Message to the Congress on the Problems of the American Indian: "The Forgotten American," 1 PUB. PAPERS 335, 336 (Mar. 6, 1968) (Lyndon B. Johnson). President Nixon's 1970 statement announced the first comprehensive Executive branch policy on Indian Affairs that rejected the policy of forced termination and the implication of trustee responsibility that it carried. See Nixon 1970 Statement to Congress, *supra* note 11, at 23,132. Instead, President Nixon urged the formulation of a new "Indian Self-Determination Policy." See *id.* at 23,133. Continuing this thought, Congress enacted in 1975 the Indian Self-Determination and Education Assistance Act (P.L. 93-639) with the expressed intent of increasing tribal self-government and a systematic reduction in the staff and powers of the Bureau of Indian Affairs. A joint Congressional commission (the American Indian Policy Review Commission) reaffirmed the Johnson, Nixon and Congressional affirmations of the principle of self-determination in its May 1977 final report to the Congress. While neither the Gerald R. Ford Presidency nor the James E. Carter Presidency issued Indian Affairs policy statements, both continued the policies of the previous administrations. On January 14, 1983 President Ronald Reagan issued his "Indian Policy Statement" stating "[e]xcessive regulation and self-perpetuating bureaucracy have stifled local decision-making, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency. This administration intends to reverse this trend by removing the obstacles to self-government and by creating a more favorable environment for development of healthy reservation economies. . . . Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination." Statement on Indian Policy, 1 PUB. PAPERS 96 (Jan. 24, 1983) (Ronald Reagan). By associating itself with the "government-to-government policy" the Reagan administration substantially advanced the political debate about tribal self-determination and moved the dialogue one step closer to defining a new political framework for relations between Indian nations and the United States.

48. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450(a)-(n), 458(a)-(hh) (1994).

The United States and Indian nations entered into no fewer than 400 international treaties between 1787 and 1871 concerning their direct relations.⁴⁹ Only a few multi-lateral agreements have been concluded between state governments directly relevant to United States and Indian nation relations.⁵⁰ Four international agreements (See Table 1 below) relevant to Indian Affairs were ratified by the United States between 1944 and 1992.

Table 1: State Obligations toward Nations under International Law

| INTERNATIONAL LEGAL INSTRUMENT | ADMINISTERING BODY | YEAR COMING INTO FORCE | YEAR RATIFIED BY U.S. |
|---|--|------------------------|-----------------------|
| The Inter-American Treaty on Indian Life | Organization of American States | 1941 | 1944 |
| Convention Concerning Tribal and Semi-Tribal Populations in Independent States #107 | International Labour Organization | 1957 | 1957 |
| Helsinki Final Act (Accords) | Organization on Security and Cooperation in Europe | 1975 | 1975* |
| International Covenant on Civil and Political Rights | United Nations Organization | 1963 | 1992 |

(* Initialed, but not ratified by the U.S. Senate. All parties have operated as if this instrument carries the full force of law.)

49. More than eight hundred treaties were actually negotiated, but only about half were ever ratified by both by the United States Senate and each nation.

50. Since the end of World War I and the Treaty of Paris in 1918, state governments have repeatedly affirmed and reaffirmed the principle of "non-intervention" in the internal affairs of states. Indeed, this principle is deeply rooted in European international relations. The Peace of Westphalia in 1648 ended the Thirty Years' War and defined the basic rules of relations between states. Chief among these rules were affirmation of the territorial boundaries of states, proclaiming state sovereignty and a recognized policy of non-interference in the domestic affairs of other states. Contemporary restatements of these principles effectively eliminated any perceived need for multi-lateral treaties concerning indigenous nations. This was particularly true of the U.S. because of its youthfulness as a state. Only after World War I did other states governments regard the U.S. as a significant player in international affairs. This new role as a player on the international stage gave rise to the U.S. government needing to affirm its basic identity as a state. Indian Affairs was considered an "internal matter." This view remained unexamined until BIA Commissioner John Collier began to work toward extending President Franklin Roosevelt's "New Deal" to Indian Affairs in the late 1930s and early 1940s. It was in these years that the international dimension was added to Indian Affairs.

Representatives of the U.S. government have also actively participated in the formulation of the Draft U.N. Declaration since 1986. The Draft U.N. Declaration directly bears on the conduct of U.S. relations with Indian nations inside a framework of internationally defined standards. I will discuss this evolving instrument and the U.S. government's role in its development at greater length below.

A. Obstacles to Self-Governance

Events involving nations worldwide have increasingly drawn the U.S. government into the intense international debate about the standards that should guide state governments in relations with non-self-governing peoples. As the number of multi-state agreements concerning human rights in general grows, and in particular, the number of agreements concerning nations grows, questions about the treatment by state governments of indigenous peoples will also grow.

B. Inside the U.S.

Despite this increased demand, the State Department does not have special capabilities or experience in matters concerning indigenous peoples. On rare occasions the State Department will draw a connection between the international debate on evolving standards concerning indigenous peoples and the position of Indian nations inside U.S. boundaries. On those occasions, State Department officials have requested assistance from the Department of the Interior, or have asked leading Indian officials to sit in on a U.S. delegation in order to demonstrate the government's commitment to the interests of Indian people.

C. The United States in the International Realm

The U.S. government's treatment of Indian nations has regularly come under scrutiny by international agencies since 1970.⁵¹ The result has been

51. Charges of U.S. mistreatment of Indian people by the Indian Health Service (sterilization of Indian women), and the BIA created demand for information and clarifications by the Commission on Security and Cooperation in Europe and resulted in "American Indians" becoming a chapter in the 1977 report of the U.S. Commission on Security and Cooperation in Europe discussing U.S. compliance with the Helsinki Accords. The U.S. government has also been asked to respond to queries from U.N. Special Rapporteur José R. Martínez Cobo, who conducted the 1983 Commission on Human Rights Study of the Problem of Discrimination Against Indigenous Populations. See *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. ESCOR, 36th Sess., Provisional Agenda Item 11, U.N. Doc. E/CW.4/Sub.2/1983/21/Add. 1-12 (1983). The United States government has also been asked to respond to queries from the ILO on its treatment of Indian peoples, and by the United Nations Special Rapporteur Miguel Alfonso Martínez on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples. The United States and other state governments were recipients of a special questionnaire sent by the Special Rapporteur in

increased U.S. participation in international forums where issues of indigenous peoples are discussed. The U.S. government hosted the 9th Inter-American Congress on Indian Life in Santa Fe, New Mexico in 1989 and has participated in this quadrennial Congress since 1944. The United States has also participated in virtually all annual sessions of the United Nations Working Group on Indigenous Populations since 1982 and convened annual sessions of meetings between government officials responsible for "indigenous peoples" involving the United States, Australia, New Zealand and the Hawaiian State Office of Hawaiian Affairs. In addition, the United States participated actively in three years of meetings designed to revise ILO Convention 107⁵² and produce ILO Convention 169.⁵³

VI. OTHER INTERNATIONAL EFFORTS ON BEHALF OF INDIGENOUS NATIONS

Strong demands for new international policy in the highly specialized area concerning indigenous nations are being made by NGOs and indigenous peoples, as well as by state governments. The World Council of Churches (Geneva), the Anti-Slavery Society (London), International Working Group on Indigenous Affairs (Denmark), and Amnesty International (London), are among the NGOs pressing for new standards protecting the rights of indigenous nations. The Haudenosaunee (Six Nations Iroquois Confederacy), West Papuans, Yanononi, Cree, Quechua, Mapuche, Maori, and Chakma are among the indigenous nations playing an active role. Norway has been the most active state pressing for the formulation of an international declaration on "indigenous peoples' rights," but the Netherlands is perhaps the only state that is actively developing a new foreign policy based on evolving standards concerned with the rights of indigenous peoples.

A. *The International Labour Organization*

In 1959, ILO Convention 107 came into force. In addition to the 1944 Inter-American Treaty on Indian Life between the United States and sev-

1992. See *Discrimination Against Indigenous Peoples, Report of the Working Group on Indigenous Populations on its Tenth Session*, U.N. ESCOR, 45th Sess., Agenda Item 15, Annex II, at 53, U.N. Doc. E/CN.4/Sub.2/1992/33 (1992) [hereinafter *Discrimination Against Indigenous Peoples*].

52. International Labour Organization Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, 328 U.N.T.S. 247 (entered into force June 2, 1959) [hereinafter ILO Convention No. 107].

53. International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991) [hereinafter ILO Convention No. 169].

enteen South and Central American States, Convention 107 was, until the Helsinki Act of 1975, the only other major international instrument concerned with state government treatment of Fourth World nations as distinct peoples. Twenty-five state governments, including the United States, ratified the Convention 107.

The ILO is a tripartite organization controlled by state governments, but involving delegate participation of labor unions and businesses. Its Secretariat decided that Convention 107 should be changed to correspond with the new international standards of the United Nations. The central issue motivating the Secretariat to push for revisions in Convention 107 was the belief that the language advocating assimilation of indigenous peoples into state societies was antiquated and should be changed to reflect modern political realities. The land rights provisions of Convention 107 were also considered badly formulated and, thus required updating. This movement for revision arose in conjunction with the growing visibility of indigenous peoples' concerns on the international plane and the greater visibility and importance of the United Nations efforts that began in 1982 by seeking to develop the Draft U.N. Declaration.

After two years of preparations, a draft for a new ILO Convention, Convention 169, was tabled for final consideration in 1989. The three active groups permitted to engage in debate to determine the final language were representatives of labor unions, businesses and state governments. Only state governments had the power of decision to accept or not accept the proposed terms of reference. Representatives of indigenous nations and indigenous peoples' organizations participated as observers, with the right to lobby official delegates, but not to speak during the negotiations.⁵⁴ Andrew Gray reports that the representatives of Four Nations, Treaty Six Chiefs, the Federation of Saskatchewan Indians, the Four Directions Council of Canada, the Ainu of Japan, and the National Coalition of Aboriginal Organizations of Australia were joined by representatives of the World Council of Indigenous Peoples (WCIP), Nordic Sami Council, the Pacific Council of Indigenous Peoples, and the Indian Council of South America. In addition, the Coordinadora of the Amazon Basin, indigenous peoples of Brazil, Inuit Circumpolar Conference, and delegates of the Mohawk nation participated in what became known as the "Indigenous Peoples' Caucus."

Representatives of indigenous nations were not allowed to present their positions personally so their views were represented at the negotiating table by Labour Union representatives and by delegations representing the states of Portugal, Colombia and Ecuador. The business group representatives resisted all proposals for changes in the original language of Conven-

54. See Andrew Gray, *Report on International Labor Organization Revision of Convention 107*, 1989 INT'L WORKGROUP FOR INDIGENOUS AFF. [hereinafter *Report on Revision of Convention 107*].

tion 169. Other participating states, including Peru, Argentina, Brazil, Venezuela, India, Japan, Canada, and the United States, formed into three mutually supportive blocs. The South American, Asian and North American blocs were formed with the intent to ensure that international standards remained well below the domestic standards already set in the laws of each state.⁵⁵

Among the leading issues concerning delegates were whether the revised Convention should use the term "peoples" or the term "populations" to describe the subject text; whether the revised Convention should use the term "self-determination" explicitly in the text; whether the revised Convention should use the term "land" or the term "territory" in the text; and whether the revised Convention should use the term "consent" or the term "consultation" in the text.⁵⁶ The choice of these particular terms would make the difference between an international convention that enhanced the rights of indigenous peoples, or a convention that had little political meaning, except as a cover for continued state exploitation of indigenous peoples.

The representatives of Canada and the United States led diplomatic efforts to limit and narrow the terms of reference in the proposed text of Convention 169. These representatives worked to defeat the use of "peoples" as a term of reference, advocating the word "populations" instead.⁵⁷ They argued, along with delegates from India and Venezuela that the word "peoples" implied the right of secession from the state, but the term "populations" implied units of metropolitan state citizens. Further, they asserted that the right of self-determination granted to "peoples" would pose an unacceptable threat to the territorial integrity of the state, and, therefore, use of the term without qualifiers would be unacceptable. The term "peoples" constitutes a wider concept, presumably not self-governing, and each "people" is presumably distinguishable from other "peoples" by virtue of language, culture, common history or common heritage. Identification as a "people" is a requisite qualification for a nation to secure international guarantees of fair treatment in relations with state governments.⁵⁸

Use of the term "peoples" as language to identify the subject of Convention 169 was deliberately narrowed by state governments to limit the number of nations entitled to exercise a claim to self-determination. In the attempt to create a new meaning for "peoples" in international law, state governments included a disclaimer in the final text of the new Convention:

55. *See id.*

56. *See id.*

57. *See id.*

58. Aureliu Cristescu, Special Rapporteur to the U.N. Commission on Human Rights, gives a clear and incisive history of the term's usage in the UN system. *See Historical and Current Development, supra* note 1.

"[t]he use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."⁵⁹

The pattern of confusion and constant shifting of positions established by the U.S. and Canadian representatives during the debate on the term "peoples" continued during the debates over the reference terms "land," "territory", "self-determination," and "consent and consultation."⁶⁰ Representatives of indigenous peoples lobbied for use of the term "territories" to cover all lands and resources belonging to the particular people,⁶¹ while Canadian and U.S. representatives, along with other resistant states, viewed the use of "territories" as a threat to a state's integrity.⁶² After two days of debate and negotiations, Article 13 of the revised text read:

[i]n applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of the relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.⁶³

This paragraph was immediately followed by a second paragraph: "[t]he use of the term 'lands' in Article 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use."⁶⁴

By using the term "territories" in Article 13, the drafters avoided inserting the term in Article 14, which dealt with the rights of ownership and possession of land for people who traditionally occupied it.⁶⁵ Similar efforts were made to emphasize the difference between "consult" and its more active counterpart, "consent," and the term "self-determination" was completely left out of the text in favor of indirect references.

59. ILO Convention 169, *supra* note 53, at 1385.

60. *See Report on Revision of Convention 107, supra* note 54.

61. They noted that the strongest part of the 1957 Convention was Article 11: "[t]he right of ownership, collective or individual, of the members of the population concerned over the lands which these populations traditionally occupy shall be recognized." ILO Convention 107, *supra* note 52, at 256.

62. *See Report on Revision of Convention 107, supra* note 54.

63. ILO Convention 169, *supra* note 53, at 1387.

64. *Id.*

65. *See id.*

The effect of the work of the delegations from the United States and other states was to prevent an advance in the development of international law protecting the rights of indigenous peoples. After the revision process was completed and Convention 169 was opened for ratification by ILO member states, Mr. Lee Swepston of the Secretariat addressed the United Nations Working Group on Indigenous Populations:⁶⁶

[a]n effort was made at every stage to ensure that there would be no conflict between either the procedures or the substance of the ILO Convention and the standards which the UN intends to adopt. Thus, the ILO standards are designed to be minimum standards, in the sense that they are intended to establish a floor under the rights of indigenous and tribal peoples and, in particular, to establish a basis for government conduct in relation to them.⁶⁷

B. The Draft U.N. Declaration

In 1986, the U.N. Working Group on Indigenous Populations officially requested from the Commission on Human Rights the responsibility for drafting and putting before the General Assembly the Draft U.N. Declaration. The initial impetus for developing such a declaration had come from a combination of sources. Strong encouragement came to the Working Group from the twelve-year study and final recommendations by Human Rights Commission Special Rapporteur José R. Martínez Cobo.⁶⁸ The WCIP adoption of resolutions calling for the enactment of new international laws to protect nations,⁶⁹ and an international conference of NGOs sponsored by the U.N. Economic and Social Council, Sub-Committee on Racism, Racial Discrimination, Apartheid, and Decolonization of the Special Committee on Human Rights in 1977⁷⁰ combined to reinforce Cobo's

66. The United Nations Working Group on Indigenous Populations was established in 1982 after NGOs and representatives of indigenous peoples urged the establishment of a United Nations mechanism to examine the situation of indigenous peoples. The Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed in its resolution 2 (XXXIV) of Sept. 8, 1981, the establishment of the working group. The Commission on Human Rights endorsed the Sub-Commission's proposal in its resolution 1982/19 of Mar. 10, 1982. The United Nations Economic and Social Council formally authorized in its resolution 1982/34 of May 7, 1982 the Sub-Commission to establish annually a working group to meet for the purposes of reviewing developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples, and examining the evolution of standards concerning the rights of indigenous peoples.

67. Lee Swepston, Paper Presented to the Working Group on Indigenous Peoples (July 31, 1989) (International Labour Organization, on file with author).

68. See generally *Study of the Problem of Discrimination Against Indigenous Populations*, *supra* note 51.

69. See World Council of Indigenous Peoples, Resolution of 1975; see also World Council of Indigenous Peoples, Resolution of 1977 (on file with author).

70. International NGO Conference on Discrimination Against Indigenous Populations,

recommendations and the U.N. Working Group on Indigenous Populations' favorable embrace of the job of formulating a declaration.

As work continues on the development of this document of international consensus concerning accepted standards for the rights of indigenous peoples, key terms of reference in its text have become central to the growing debate. Convention 169 has played a role in the evolution of the Draft U.N. Declaration. As of July 1993, five of the 144 member ILO states had ratified Convention 169. Despite the low level of interest by state governments, Convention 169 is nevertheless being used as authoritative evidence to support arguments for narrowing the interpretations for the terms "peoples," "territories," "self-determination," and "self-government" in the Draft U.N. Declaration.⁷¹ The more limited meanings, states like the United States and Sweden argue, should be included in the Draft U.N. Declaration. While many state governments have participated in the formulation of the Draft U.N. Declaration, along with hundreds of representatives of nations, the work of the representatives of the United States, Sweden, Canada, Australia, New Zealand, Japan and the Peoples Republic of China should be noted. Since 1986, these representatives have been working to prevent the Draft U.N. Declaration from including key terms of reference such as "peoples" and "self-determination" in ways that are consistent with customary international law.

In an effort to narrow the meaning of terms such as "self-determination," the representative of the U.S. government before the U.N. Working Group on Indigenous Populations urged Working Group members to characterize "the concepts of "self-determination," "peoples," and "land rights," as "desired objectives rather than rights" in August 1992.⁷¹ Kathryn Skipper, a member of the U.S. delegation, expressed serious questions about the definition of "indigenous peoples" as a term of reference in July of 1993.⁷² Discussing provisions of the Draft U.N. Declaration, she said:

[t]he draft declaration does not define 'indigenous peoples.' Hence, there are no criteria for determining what groups of persons can assert the proposed new collective rights . . . [W]e are concerned that in some circumstances, the articulation of group rights can lead to the submergence of the rights of individuals.⁷³ The position of the U.S. government set the tone of state delegation interventions with the intent of narrowing and limiting the meaning of terms of reference in the same way as

Paper Read at the Geneva Conference (Oct. 1977) (on file with author).

71. *Discrimination against Indigenous Peoples*, *supra* note 51, at 14.

72. Kathryn Skipper, Statement Before the United Nations Working Group on Indigenous Populations, 11th Sess. (July 12, 1993) (on file with author).

73. *Id.*

Convention 169.⁷⁴

Dr. Rolf H. Lindholm, on behalf of the Swedish government, amplified the U.S. government's serious questions by specifically urging the narrow application of the term "peoples." Stating that the Swedish government "favors a constructive dialogue between governments and indigenous peoples," Lindholm nevertheless called for "consensus language" that would make the Draft U.N. Declaration acceptable to various bodies within the United Nations system, including the General Assembly.⁷⁵ Indicating that a consensus should be achieved as to the reference term "self-determination," Lindholm averred:

[i]t is important that we recognize in this context, as we have in others, that the concept, as used in international law, must not be blurred. It is therefore necessary to find another term in the declaration, or to introduce an explanatory definition such as that included in ILO Convention No. 169, which provides that "[t]he use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."⁷⁶

Delegates of indigenous peoples participating in the proceedings argued that it was necessary to maintain the term "peoples" in order to remain consistent with existing international laws. In particular, the language originally proposed in 1987 was stressed: "[i]ndigenous nations and peoples have, in common with all humanity, the right to life, and to freedom from oppression, discrimination, and aggression."⁷⁷

As to the efforts of state governments aimed at narrowing the meaning of the word "peoples," the Chairman of the U.N. Working Group on Indigenous Populations, Erica-Irene Daes, responded:

74. Rudolph Rýser, *Indian Nations & United States Debate Self-Determination and Self-Governance at the United Nations* (July 18-31, 1993) (unpublished paper, on file with the Center for World Indigenous Peoples).

75. Rolf H. Lindholm, *Statement Before the United Nations Working Group on Indigenous Populations*, 11th Sess. (July 12, 1993) (on file with author).

76. *Id.*

77. *Declaration of Principles on Indigenous Peoples*, (as amended). Adopted by a Consensus of Indigenous Peoples' Organizations Meeting at Geneva, 27-31 July 1987. U.N. Doc. E/CN.4/Sub.2/1987/22/Annex V.

[i]ndigenous groups are unquestionably "peoples" in every political, social, cultural and ethnological meaning of this term. . . . It is neither logical nor scientific to treat them as the same "peoples" as their neighbours, who obviously have different languages, histories and cultures. The United Nations should not pretend, for the sake of a convenient legal fiction, that those differences do not exist.⁷⁸

She offered, "[t]he right of indigenous peoples to self-determination . . . should comprise a new contemporary category of the right to self-determination."⁷⁹

Delegates of indigenous nations additionally argued the need to introduce their own paragraph on self-determination:

[a]ll indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine their political status, freely pursue their own economic, social, religious and cultural development, and determine their own membership and/or citizenship, without external interference.⁸⁰

The Canadian, Japanese, Brazilian, and U.S. objections to the use of "self-determination" as a term of reference in the Draft U.N. Declaration flew in the face of eighty years of expanding usage in the international arena. In the case of the United States, objections to the term contradicted the long-standing Indian affairs policy that affirmed the sovereignty of Indian nations as well as their right to self-determination. As a response to general state objections to the use of this term in association with indigenous nations, delegates of indigenous nations at the 12th Session of the U.N. Working Group on Indigenous Populations authorized the preparation and distribution of the Covenant on the Rights of Indigenous Nations⁸¹

78. Erica-Irene A. Daes, *Discrimination Against Indigenous Peoples, Explanatory Notes Concerning the Draft Declaration on the Rights of Indigenous Peoples*, U.N. ESCOR, 45th Sess., Agenda Item 14, at 2, U.N. Doc. E/CN.4/Sub.2/1993/26/Add.1 (1993).

79. *Id.* at 3.

80. *Declaration of Principles on Indigenous Peoples, supra* note 77.

81. Covenant on the Rights of Indigenous Nations. Drafted in 1994 this new international instrument is a culmination of nearly twenty years of meetings between indigenous delegations striving to formulate new language to instruct international law concerning the conduct of relations between indigenous nations and between indigenous nations and states. The Covenant draws on evolving language offered in meetings concerned with social, economic and political relations as well as strategic and cultural issues. Materials generated by meetings organized by the World Council of Indigenous Peoples, International Indian Treaty Council, South American Indigenous Regional Council, Central American Indigenous People's Organization, North American Indigenous Peoples' Regional Council (comprised of representatives from the National Indian Brotherhood, the First Nations Assembly and the National Congress

for direct ratification by nations all over the world. The paragraph on self-determination in this document now pending before the councils of indigenous nations states: "Indigenous Nations have the right of self-determination, in accordance with international law, and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development without external interference."⁸²

The United States and other states will clearly have to contend with the consequences of their own obstruction to the application of international principles to indigenous nations. Of perhaps greater importance is the growing movement by indigenous nations to take international law into their own hands by actively formulating new laws such as the Covenant on the Rights of Indigenous Nations and thus establishing the probability that they will seek to enforce such laws.

VII. INTERNATIONAL OBLIGATION DENIED

The principle of self-determination is deeply rooted in the customary and formal rules of conduct between nations and between states. The broad outline of the concept of self-determination was first delivered into international discourse by U.S. President Woodrow Wilson as the fifth point in his Fourteen Points Speech:

[f]ree, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the population concerned must have equal weight with the equitable claims of the Government whose title is to be determined.⁸³

It is not merely coincidental that the subject of self-determination looms large in the developing domestic and international debate over self-determination of indigenous nations in their relations to states. Wilson's concern was the establishment of a process for non-self-governing peoples inside existing states. He sought to establish a peaceful manner in which to rearrange the political landscape without war; a way in which to encourage negotiations between state governments and indigenous nations. He felt

of American Indians) the Inuit Circumpolar Council, meetings of the United Nations Working Group on Indigenous Populations, special seminars of the United Nations on indigenous peoples, and many other regional and sub-regional indigenous peoples organizations. The Covenant on the Rights of Indigenous Nations was initiated by representatives of indigenous nations in West Papua, Central Africa, Canada and the Eurasia.

82. *Id.*

83. Woodrow Wilson, *On Self-Determination* (1918), in *THE HUMAN RIGHTS READER*, 151 (Walter Laqueur & Barry Rubin eds.) (1979).

that a nation or part of a nation inside or under the control of an existing state needed recognition in order to determine its political future without prejudice. The method for ensuring equal weight being given to such nations became identified as self-determination.

A. Right of Self-Determination in the United States

The U.S. government's policy initiatives in connection with the ILO's revision of its Convention 107, the Helsinki Final Act, and the Draft U.N. Declaration, illustrate the difficulty of maintaining consistency between internal Indian affairs policy and external policies concerning the rights of indigenous peoples under international laws. Most of the 44 million refugees in the world are non-state populations,⁸⁴ and the concerns of indigenous nations are at the heart of regional instabilities around the world. In Africa, the countries of Nigeria, Somalia, Sudan, Kenya, and South Africa, are implicated. In Europe, particularly the former Yugoslavia, Spain, Georgia, and Italy, and in Eurasia generally, there are instabilities. In addition, there are instabilities in the Middle East, Central Asia, and Melanesia. To all of these, the U.S. foreign policy establishment remains oblivious. This weakness in U.S. foreign policy accounts for the inconsistent and often incoherent U.S. positions on issues of indigenous peoples, and on Indian affairs in particular.

With the greater convergence between Indian affairs, self-determination, and self-government policies in U.S. domestic policy, and the intensification of activities by the United Nations and other international organizations undertaking standard-setting activities concerning indigenous peoples at the international level, the gap between internal and external self-determination discussions is rapidly disappearing. Despite this convergence of internal and external policy realms, the State Department continues to regard Indian affairs and concerns about indigenous peoples generally as a very low priority, i.e., a matter of little strategic or diplomatic importance.

B. International Right to Self-Determination

Framers of the U.N. Charter attached paramount importance to the principle of self-determination.⁸⁵ In its broadest formulation, the principle of self-determination encompasses the political, legal, economic, social and cultural subjects of the life of peoples. In international law, the principle of self-determination is unique in that it is a recognized collective right

84. Paul Lewis, *Stoked by Ethnic Conflicts, Refugee Problem Consumes Resources*, N.Y. TIMES, Nov. 9, 1993, at A6.

85. See U.N. CHARTER art. 1, para. 2. (The U.N. member states there affirm the purpose of the organization to be "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . .").

which may be exercised by peoples. "The right to self-determination is a collective right, a fundamental human right forming part of the legal system established by the Charter of the United Nations, the beneficiaries of which are peoples—whether or not constituted as independent States—nations and states."⁸⁶

While relatively amiable dialogue characterizes the continuing evolution of the social, economic and cultural aspects of self-determination, discussions concerning the full development of the right of political self-determination have become increasingly contentious. The original, Wilsonian conception of self-determination was political. State governments have historically wanted to emphasize the less controversial subjects of economic, social and cultural self-determination. Political self-determination is regarded as a direct threat to the stability or permanence of many states where the claimed internal population includes many distinct peoples. Article 76 is the only provision of the U.N. Charter which addresses the right of peoples to political self-determination.⁸⁷

The U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples ("Declaration on Granting of Independence")⁸⁸ elaborated on Article 76 with the affirmation that peoples "freely determine their political status:"

[t]he "political status" which each people has the right freely to determine by virtue of the equal rights and self-determination of peoples comprises both international status and domestic political status. Consequently the application of the principle of equal rights and self-determination of peoples in the political field has two aspects, which are of equal importance.⁸⁹

The U.N. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations ("Declaration on Principles of International Law")⁹⁰ specifically defines various modes by which peoples may determine their international political status: "[t]he establishment of a sovereign and independent State, the free association or integration with an inde-

86. *Historical and Current Development*, *supra* note 1.

87. U.N. CHARTER art. 76 (stating the purpose to be "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned. . .").

88. See G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960).

89. *Id.*

90. See G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

pendent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."⁹¹

Where state governments have assumed responsibilities for administering territories where indigenous peoples do not exercise the full measure of self-government, they automatically acquire an obligation to advance the social, economic and political well-being of the inhabitants of those territories.⁹² It is by virtue of this provision that non-self-governing peoples obtain an internal political status of their own choosing. If non-self-governing peoples are administered under the international trusteeship system, the process similar to Article 73 defined in the Declaration on Granting of Independence⁹³ applies.

The International Covenant on Civil and Political Rights (ICCPR) (ratified by the United States in 1992) contains the strongest and most succinct statement of the principle of self-determination: "[a]ll 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."⁹⁴ This statement is repeated in the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁹⁵ and in the Helsinki Accords⁹⁶ as Principle VIII.

Even if the U.S. government's position in the U.N. Working Group on Indigenous Populations accurately reflects one policy on "sovereignty," "self-determination," and "self-government," there is no ambiguity in the U.S. government's affirmation of Indian self-determination within the framework of the Helsinki Final Act. The U.S. government negotiated the Helsinki Accords with thirty-seven European states, including the U.S.S.R. and Canada, and in 1979 issued a National Security Council approved progress report on the U.S. government's final act compliance concerning American Indians.⁹⁷ The report emphatically affirms that "[i]ndian rights

91. *Id.*

92. See U.N. CHARTER art. 73 (affirming that member states accept "as a sacred trust" the obligation, *inter alia*, to "develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement").

93. G.A. Res. 1514, *supra* note 88.

94. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 1, para. 1, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

95. See International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 1, para. 1, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

96. See Conference on Security and Co-operation in Europe, Final Act, Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975), 14 I.L.M. 1292 (1975) [hereinafter Helsinki Final Act].

97. See COMMISSION ON SECURITY AND COOPERATION IN EUROPE, FULFILLING OUR PROMISES: THE UNITED STATES AND THE HELSINKI FINAL ACT (Nov. 1979) (on file with

issues fall under both Principle VII of the Helsinki Final Act, where the rights of national minorities are addressed, and under Principle VIII, which addresses equal rights and the self-determination of peoples."⁹⁸

The NCAI, in its statement at the 1983 session of the U.N. Working Group on Indigenous Peoples in Geneva, Switzerland, expressed its confidence that the

United States of America took a revolutionary step toward clarification of international standards concerning Principle VII and Principle VIII in relation to Indian Nations, the United States has committed itself to conduct its relations in accord with the law of nations and new international law evolved since the founding of the League of Nations.⁹⁹

The NCAI statement went even further to say:

[t]he recognition of Indian nations as 'peoples' and the commitment to promote effective exercise of equal rights and self-determination of peoples for the development of friendly relations among all states by the United States creates a commitment to apply provisions of . . . international agreements to Indian/U.S. relations.¹⁰⁰

The National Security Council report asserts that the U.S. government's policy of Indian self-determination "is designed to put Indians, in the exercise of self-government, into a decision-making position with respect to their own lives."¹⁰¹ The U.S. government report further clarified the state's relationship to Indian nations by stating that "the U.S. Government entered into a trust relationship with the separate tribes in acknowledgment, not of their racial distinctness, but of their political status as sovereign nations."¹⁰²

Principle VIII of the Helsinki Final Act affirms:

[b]y virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference,

author) [hereinafter FULFILLING OUR PROMISES].

98. *Id.*

99. National Congress of American Indians, On the Evolution of Standards Concerning the Rights of Indigenous Populations, Statement Before the United Nations Working Group on Indigenous Populations (Aug. 10, 1983).

100. *Id.*

101. FULFILLING OUR PROMISES, *supra* note 97.

102. *Id.*

and to pursue as they wish their political, economic, social and cultural development.¹⁰³

This language is virtually the same as is contained in the U.N. Charter and Article 1 of both the ICESCR and the ICCPR.¹⁰⁴ Despite recent U.S. government requests for the ILO and the United Nations to specifically narrow definitions for self-determination in connection with indigenous peoples, there is no ambiguity about U.S. commitments under international agreements to apply the full, normative meaning of these terms to its relations with Indian nations.

VIII. THE FUTURE STRUGGLE WITH THE OPPOSITION OF STATES TO SELF-DETERMINATION

While it is perfectly within the right of any government to change its policy, the U.S. government's failure to advise Indian nations entering into good-faith negotiation of self-governance compacts that it no longer maintains a commitment to self-government or the principle of self-determination, seems a gross deception. Just as negotiations over the final text of Convention 169 were being debated to narrow the meaning of critical terms of reference, the U.S. government's representative negotiated compacts to affirm the political sovereignty and self-determination of Indian nations.

As recently as November 30, 1998 before the U.N. Commission on Human Rights, the U.S. government reiterated its opposition to applying international standards for self-determination to "Indian tribes and other indigenous peoples." U.S. government opposition was carried before one of the most important United Nations organs addressing the language to be included in the Draft U.N. Declaration. Deputy Assistant Secretary of State Leslie A. Gerson made five points concerning language in the Draft U.N. Declaration for the United States delegation.¹⁰⁵

The first point that Gerson discussed was the process. The Draft U.N. Declaration should build on principles established in basic human rights instruments such as the Universal Declaration on Human Rights, the Human Rights Covenants and the 1992 Declaration on the Rights of Persons Belonging to Linguistic Minorities.¹⁰⁶ The process "should not . . . convert aspiration or objectives into "rights."¹⁰⁷ "Rights" should be reserved for

103. Helsinki Final Act, *supra* note 96, at 325-26, 14 I.L.M. at 1295.

104. *See* ICESCR, *supra* note 95, at 5; *see also* ICCPR, *supra* note 94.

105. Leslie A. Gerson, General Statement on the Draft Declaration on the Rights of Indigenous Peoples, Address Before the Commission on Human Rights Working Group (Nov. 30, 1998).

106. *See id.*

107. *See id.*

those duties that governments owe their people.¹⁰⁸

In her second point, Gershon referred to universality. The term "indigenous peoples" should be defined, but not narrowly such that certain countries would exclude indigenous groups inside their territories.¹⁰⁹ She emphasized that the U.S. government does "not believe that the focus of the declaration should be the privileging of historically prior inhabitants."¹¹⁰ In other words, peoples who claim original occupation of the land should not be identified as "indigenous peoples" and their long occupation of the land must not give them "privileges" or "rights."¹¹¹

Gershon next dealt with the issue of local realities. State governments and indigenous populations "may take local realities into account when applying the draft declaration" and not be concerned about the universal application of various principles (i.e., land rights, treaty rights, etc.).¹¹²

Next, Gershon addressed the question of autonomy by saying "the U.S. has made clear in several of its statements, we do not believe that international law accords indigenous groups everywhere the right of self-determination."¹¹³

Lastly, Gershon addressed individual rights. "Since international law, with few exceptions, promotes and protects the rights of individuals, as opposed to groups, it is confusing to state that international law accords certain rights to 'indigenous peoples' as such. International instruments generally speak of individual, not collective, rights."¹¹⁴

By attempting to block international recognition of the rights of indigenous nations to self-government and therefore certain international guarantees under existing international laws, U.S. actions in the United Nations and elsewhere threaten to exacerbate growing tensions between nations, and between nations and states. This is particularly evident in the failure of U.S. government foreign policies to effectively deal with the conflicts in Africa,¹¹⁵ in South America, Melanesia, Southeast Asia and Central Europe and Eurasia—particularly involving the peoples of

108. *See id.*

109. *See id.*

110. Gershon, *supra* note 105.

111. *Id.*

112. *See id.*

113. *See id.*

114. *Id.*

115. The U.S. government failed miserably to recognize the role of indigenous peoples in the collapse of Somalia and consequently contributed to massive violence instead of stabilization. In the Sudan, a neighbor of Somalia, and in Kenya, Uganda, Rwanda, Burundi, and the former Zaire (now the Congo), U.S. foreign policy has continued to reflect a fundamental obstinacy as relates to the application of self-determination to indigenous peoples in those countries. The result has been nearly universal disaster in policy and in the lives of the many peoples in Africa.

Chechyna, Dagastan, Serbia, Kosovo, Bosnia, Croatia and Macedonia. Indeed, the U.S. government's failure to squarely reconcile its contradictions over self-determination for peoples seeking to change their political status undermines U.S. interests by forcing the U.S. to act more undemocratically and more supportively of authoritarian and even dictatorial regimes.

The gap between domestic U.S. government Indian self-determination policy and U.S. government international self-determination policy threatens to expose the United States to international criticism, undermine confidence in accepted international principles, and it risks the stability of relations with Indian nations and the stability of other countries in the world where indigenous nations are present. U.S. government and the efforts of other States to modify the meaning of accepted international principles to deny nations the opportunity to express their international identity threatens to further erode international compliance with widely accepted human rights standards as well. Finally, the inconsistency of policy also threatens to undermine the U.S. government's ability to formulate a new, coherent and effective post Cold War foreign policy.

The negotiation of self-governance compacts has, for all practical purposes, re-opened treaty-making between Indian nations and the United States. Whether both parties to the self-governance compacts fully comprehend the significance of this process is still open to question. It is clear, however, that Indian nations are seeking a new political level of development, and they seem intent on achieving this new level with at least the appearance of U.S. government participation and support. It is also clear that the U.S. government is eager to have the appearance of a tolerant and benevolent political power, but policy makers are equally eager to put the "genie" of self-determination back into its bottle by seeking back-door measures to prevent international recognition of Indian rights to self-government.

IX. CONCLUSION

By the beginning of 1995, the nations of Hoopa, Lummi, Quinault, and Jamestown S'Klallam had been joined by twenty-nine other Indian nations that had negotiated bi-lateral compacts with the U.S. government. Within a period of ten more years, Indian government officials suggest, there will be as many as 150 or more Indian nations negotiating self-government compacts with the U.S. government.¹¹⁶ The members of the Tribal Self-Governance Demonstration Project believe that the idea of self-governance is very exciting, particularly the advancement of the government-to-government relationship between national governments and tribal

116. See SELF-GOVERNANCE: A NEW PARTNERSHIP (The Government of Lummi, 1995) (on file with author).

governments. Five years after negotiating the first compacts, Indian government hopes and aspirations remained high, as a growing number of Indian nations cautiously worked to structure a new relationship with a reluctant U.S. government. A study of the self-governance initiative by the U.S. Department of the Interior¹¹⁷ strongly suggests that the high hopes of the Indian nations may be too optimistic and greater caution is warranted. The Department of the Interior study suggests that the desired government-to-government framework Indian nations seek as a pillar supporting the self-government process has begun to appear much more like a "government-to-agency" relationship similar to the one existing before the Self-Government Compacts.¹¹⁸ Indeed, a study commissioned by the Indian nations themselves found that Indian communities have been enjoying "vigorous and creative developments . . . as a direct result of the Self-Governance Demonstration Project,"¹¹⁹ but that "[t]he United States government generally is not seriously participating in the development and conduct of the self-government initiative."¹²⁰ The findings of both studies tended to agree that the failure of the U.S. government to enter into a genuine effort aimed at the elevation of Indian nations to a full level of self-government foreshadows growing tensions between Indian governments and the United States.

As if to give credence to these warnings, the U.S. Senate voted to cut by nearly one-half the total funds allocated to permit the U.S. government to comply with self-government compacts.¹²¹ Remarkably, it was the action of one Senator (serving as chairman of the Senate Appropriations Subcommittee on the Department of the Interior and one who has been characterized as a militant advocate of "white rights on Indian reservations") that precipitated in 1995 a growing political confrontation between Indian governments and the U.S. government. Indian nations may now take this growing controversy and the related failure to negotiate a formal government-to-government relationship into the international arena where the swirling debate over self-determination is rapidly taking center stage in the discussions over the role of human rights in international relations.

117. See KEN REINFELD, U.S. DEP'T OF THE INTERIOR, DRAFT STUDY OF THE TRIBAL SELF-GOVERNANCE DEMONSTRATION PROJECT (1995).

118. See *id.* at 14.

119. SELF-GOVERNMENT PROCESS EVALUATION PROJECT (The Government of Lummi, 1995) (on file with author).

120. See *id.*

121. See Ulrich, Roberta, *Clinton Threats Help Tribes in Budget Fight*, THE OREGONIAN, Sept. 17, 1995, at D5.

