Minority Indigenous Populations and Their Claims for Self-Determination

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NOTES

Minority Indigenous Populations and Their Claims for Self-Determination

This paper analyzes the problems and international legal consequences of claims for self-determination by indigenous minorities. Recent assertions for self-determination by the minority populations of indigenous Melanesians on the South Pacific islands of Fiji and New Caledonia have accelerated concern over this issue, due to both the relative success of these peoples in achieving their goals and the international legal problems that these assertions present in a bipolar world.

1 As a term of art, "indigenous" is given several meanings throughout this Note. The Fijians claim that "indigenous" refers only to those persons descended from the original Fiji Islanders. See infra note 45 and accompanying text; Fijian Army Leader Stages 2d Coup, N.Y. Times, Sept. 26, 1987, at L3, col. 1. The New Caledonians claim that "indigenous" refers to persons who have resided in New Caledonia for a certain amount of time. See infra note 21. Regardless of these differences in interpretation, the notion that "indigenous" relates to persons descended from those groups which have long populated the particular area is the approach taken by this paper.


3 The Fijians made their assertion in autumn 1987. See infra Part I of this Note for a factual description of the situation in Fiji.

4 New Caledonia has been in turmoil since at least 1984, but it was only in 1987, in light of Fijian assertions, that the New Caledonians' position became apparent as one for indigenous self-determination. See infra Part I of this Note for a description of the situation in New Caledonia.


In New Caledonia, the indigenous population has received international support despite failing to win their independence from France as of yet. See, e.g., O'Loughlin, Pacific Countries Take New Caledonia Issue to United Nations, Associated Press, Aug. 8, 1986 (am cycle) (NEXIS); U.N. Calls on France to Free New Caledonia Colony, Reuter Library Report, Oct. 28, 1987 (pm cycle) (NEXIS) [hereinafter U.N. Calls on France]. However, somewhat autonomous regional self-rule within New Caledonia has been agreed on by all sides, with a referendum to be held in 1998 on the issue of self-determination. Kamm, Noumea Journal: On an Island in the Pacific, but Far from at Peace, N.Y. Times, July 26, 1988, at A4, col. 3.

6 Indigenous self-determination is a concept in conflict with sovereignty. Sovereignty, the cor-

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I. A TALE OF TWO ISLANDS: NEW CALEDONIA AND FIJI

New Caledonia, a French possession since 1853 and an overseas territory since 1946, consists of a group of islands located approximately 1,350 miles northeast of Sydney, Australia with a population of approximately 160,000. Fiji, a former British colony, is now a South Pacific nation of approximately 715,000 inhabitants. The indigenous groups in each of these archipelagos are slightly outnumbered by the combined population of the various nonindigenous groups.

A. New Caledonia

In 1984, the long-smoldering independence movement of New Caledonia’s aboriginal Melanesians, the Kanaks, erupted into bloody violence. The death toll has slowed, but the violence continues. Since 1984, France has been attempting to work out a solution to the violence generated by the Kanak independence movement.

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9 O'Loughlin, Pacific Countries, supra note 5.
12 The 1973 census put the population figure at 554,000. Gordon, supra note 11, at 76. By 1987 the population was estimated to be between 715,000 and 720,000. See Raines, Queen Elizabeth Asserts Role As True Fjian Head of State, N.Y. Times, Oct. 2, 1987, at A4, col. 1. See also KCWD/KALEIDOSCOPE: Fji, supra note 12.
13 See supra note 1. Interestingly, there are no real “indigenous” Fijians. The Islanders are a mix of Papuans, Melanesians, Polynesians and Micronesians. Gordon, supra note 11, at 75.
14 Fijian Army Leader Stages 2nd Coup, supra note 1. Fiji has a population of approximately 714,000 people with indigenous, Melanesian Fijians slightly outnumbered by ethnic Indians. Id. Indians comprise 50%, Fijians(Melanesians) 45%, Europeans 2.12%, Rotumans 1.22%, Chinese .68% and others .08% of the population. KCWD/KALEIDOSCOPE: Fui, supra note 12. See also Gordon, supra note 11, at 76.

New Caledonia has a population of approximately 150,000, 44% of which are native Melanesian Kanaks; of the remaining 56% most are whiteskinned Frenchmen. Donnet, Separatists Contest Validity of New Caledonia Independence Vote, Associated Press, Aug. 31, 1987 (am cycle) (NEXIS). The French came as colonists to exploit the mineral resources of New Caledonia, which is especially rich in nickel. Graham, Matignon Accord Brings Uneasy Peace to New Caledonia, Financial Times, Aug. 5, 1988, § I (European News), at 2.

15 Markham, supra note 2.
17 See, e.g., Separatist Set Up New Government, supra note 7 (President Mitterrand of France sends special envoy to New Caledonia to diffuse situation); Lower House Narrowly Passes Autonomy Bill, Associated Press, Nov. 25, 1987 (am cycle) (NEXIS); Rosemberg, French Envoy Outlines Con-
The French solution was to hold a plebiscite\(^\text{18}\) on self-determination in New Caledonia.\(^\text{19}\) This plebiscite was proposed as a one person, one vote referendum.\(^\text{20}\) The Kanaks insisted that only native New Caledonians be allowed to vote in the referendum.\(^\text{21}\) When the French refused to accede to this demand,\(^\text{22}\) the Kanaks refused to vote on the issue and boycotted the referendum.\(^\text{23}\) The results of the referendum, which was held on September 13, 1987, overwhelmingly favored New Caledonia remaining a French Department.\(^\text{24}\) Rather than solving the problem, the referendum backfired, further polarizing the islanders and eliciting negative responses from the world community.\(^\text{25}\)

Even before the referendum, the South Pacific Forum, a thirteen-nation regional group, had raised the issue of New Caledonian independence in the United Nations.\(^\text{26}\) In 1986, the U.N. General Assembly had passed a resolution supporting the Kanaks' claim for independence from France.\(^\text{27}\) Then, in October 1987, after the referendum in New Caledo-

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\(^\text{18}\) "Plebiscite. A vote of the people expressing their choice for or against a proposed law or enactment, submitted to them, and which, if adopted, will work a change in the constitution, or which is beyond the powers of the regular legislative body." BLACK'S LAW DICTIONARY 1038 (5th ed. 1979).

\(^\text{19}\) Duverger, supra note 17.

\(^\text{20}\) Id.

\(^\text{21}\) Markham, supra note 2.

The Kanak Socialist National Liberation Front ["FLNKS"], the major independence group, had demanded that any referendum only include first-generation settlers — a stipulation that would have excluded some [twenty] percent of the population born outside the islands. \(^\text{22}\) Donnet, supra note 14. The French government ruled that "any French citizen who has lived on New Caledonia at least three years is eligible to vote." \(^\text{Id.}\)

\(^\text{23}\) Sherwell, Australia Joins Attack on New Caledonia Referendum, Financial Times, Sept. 15, 1987, at 4 (NEXIS) [hereinafter Australia Joins Attack]. The leader of the boycott movement, Jean-Marie Tjibaou, claimed that 83% of the Kanaks refused to vote. \(^\text{Id.}\)

\(^\text{24}\) France's Pacific Image, Manchester Guardian Weekly, Sept. 20, 1987, at 11 (NEXIS) (58.99% of the electorate voted, with 98.3% in favor of remaining a French territory).


\(^\text{26}\) O'Loughlin, supra note 5. The Forum, a group consisting mainly of tiny island nations, was concerned with French policy in the Pacific, especially the reduction in powers of the New Caledonian regional assemblies which had been a true source of Kanak political power. \(^\text{Id.}\)

nia, a U.N. committee voted to resubmit the issue to the General Assembly.\textsuperscript{28} Again, the General Assembly passed a resolution affirming New Caledonia's "inalienable right to self-determination and independence."\textsuperscript{29}

France stressed that almost two-thirds of the members of the United Nations had not voted against them,\textsuperscript{30} and proceeded with its longstanding plan of granting New Caledonia more autonomy.\textsuperscript{31} Notwithstanding France's refusal to accede to Kanak demands for independence and Kanak threats to boycott the presidential and regional elections in April 1988,\textsuperscript{32} relations between New Caledonia's neighbors and France began improving.\textsuperscript{33}

In the spring of 1988, with the reelection of socialist President Mitterrand in France, moves towards peace between France and the Kanaks resumed. In June of 1988, an agreement was reached between the French government and Kanak leaders for a ten year plan leading to another self-determination referendum.\textsuperscript{34} The accord provided for direct rule from France in the first year, with moves toward autonomous regional rule favoring the Kanaks in the second through ninth years, and a self-determination referendum in 1998, the tenth year.\textsuperscript{35} The election rules for the 1998 referendum would allow only those persons now qualified to vote, plus any person already on the islands who would reach

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\textsuperscript{28} U.N. Calls on France, supra note 5. "The resolution [was] passed 69-27 by the U.N.'s committee on decolonisation .... Forty-six nations abstained." \textit{Id.}

\textsuperscript{29} France Welcomes "Very Satisfying" U.N. Caledonia Vote, Reuter Library Report, Dec. 4, 1987 (am cycle) (NEXIS). "The draft was approved by 69 votes to 29, with 47 abstentions." \textit{Id.}

\textsuperscript{30} \textit{Id.} "France [however] welcomed [the] vote taken in the United Nations ... , saying 90 out of 158 member states had refused to support moves to grant independence." \textit{Id.}

\textsuperscript{31} Lower House Narrowly Passes Autonomy Bill, supra note 17.

The [autonomy] statute maintains the policy of giving more powers to the island, a practice begun in 1985 by the former Socialist government. However, it provides assurances that anti-independence forces will control at least two of New Caledonia's four regions. Three of those regions have been controlled by the Kanak Socialist National Liberation Front, which is seeking independence.

The Kanaks ... have spoken out against the autonomy statute, and President François Mitterrand, a Socialist, criticized it.

\textit{Id.}

\textsuperscript{32} Twenty Police Injured, supra note 16.


\textsuperscript{34} Fontaine, Rocard Plan Offers Real Hope for New Caledonia, Manchester Guardian Weekly, July 3, 1988, at 12 (NEXIS).

\textsuperscript{35} D'Antonio, French Premier to Visit South Seas Separatist Bastions, Reuter Library Report, Aug. 24, 1988 (am cycle) (NEXIS). \textit{See also supra note 5.}
voting age by 1998, to vote in the referendum.\textsuperscript{36}

\textbf{B. Fiji}

In 1874, the island chiefs of Fiji unconditionally ceded the island group to Britain.\textsuperscript{37} While under British control,\textsuperscript{38} many Indians were brought into Fiji in the late nineteenth and early twentieth centuries to work in the cane fields.\textsuperscript{39} Soon there were more Indians in Fiji than there were indigenous Melanesians.\textsuperscript{40} The British, recognizing that this imported population was altering the socio-political situation in Fiji, took steps to preserve the power of the Melanesians.\textsuperscript{41} Over eighty percent of the land was reserved exclusively for Melanesian ownership.\textsuperscript{42} Moreover, when the British granted Fiji independence in 1970, the British-sponsored constitution effectively guaranteed that at least eight of the twenty-two members of the Senate would be nominated by Melanesians.\textsuperscript{43} The constitution also provided a voting system for the lower house that favored the selection of Melanesians.\textsuperscript{44}

Melanesians controlled the government from 1970 to 1987,\textsuperscript{45} but on April 11, 1987, the first government to include the Indian-majority party came to power.\textsuperscript{46} On May 14, 1987, Colonel Sitiveni Rabuka of the Royal Fijian Armed Forces staged a coup in which he overthrew the democratically-elected coalition government.\textsuperscript{47} Rabuka’s claimed goal was to “ensure perpetual control of [government] by indigenous Fij-


\textsuperscript{38} Fiji was a British Colony from 1874 to 1970. Gordon, \textit{supra} note 11, at 76.

\textsuperscript{39} Gordon, \textit{supra} note 11, at 76. The long idle Fijians refused to work, so the British “imported” Indians to work in the cane fields for a five year stint. At the end of five years, many of the Indians chose to stay. \textit{Id. See also Fijian Army Leader Stages 2d Coup, supra note 1.}

\textsuperscript{40} \textit{The Numbers Game, supra note 37.}

\textsuperscript{41} See \textit{infra} notes 42-44 and accompanying text for a list of several means by which the British sought to protect Melanesian power.

\textsuperscript{42} Van Dyke, \textit{The Cultural Rights of Peoples}, 2 \textsc{universal hum. RTS.} 1, 15 (1980). “When Fiji was a British colony, Britain reserved about 83 percent of the land of the islands to the indigenous Fijians, prohibiting the purchase of this land by others. Independent Fiji maintains the system and safeguards it against change by special constitutional provisions.” \textit{Id.}

\textsuperscript{43} \textsc{fiji CONST.} § 45(1)(a), \textit{reprinted in v constitutions of the countries of the world (fiji) 56} (A. Blaustein & G. Flanz eds. 1986). \textit{See also \textit{The Numbers Game, supra note 37.}}

\textsuperscript{44} \textit{Id.} “[T]he House of Representatives would be filled by a partly communal system of voting that also favoured the Melanesians.” \textit{Id.}


\textsuperscript{46} \textit{Id.}

After five days, Rabuka stepped aside and allowed the Governor-General, Ratu Sir Penaia Ganilau, to exercise his executive powers as head of state. Ganilau, with an interim council of advisors, was to run the everyday affairs of Fiji and to seek a solution to its political problems. On September 25, 1987, three days before a compromise bipartisan caretaker government was to have come into power, Rabuka staged another coup, claiming that the proposed government would not ensure Fijian, ethnic self-determination.

Initial international reaction to the September coup was generally unfavorable. The United States, Australia, New Zealand, the United Kingdom and several of the smaller Pacific Islands states denounced the coup. Queen Elizabeth II of the United Kingdom, pursuant to her power as "Queen of Fiji," asserted that her Governor-General, Ganilau, was "the sole legitimate source of executive authority in Fiji." Most states, in accordance with the Queen's view, chose to recognize the Gov-

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48 Fijian Army Leader Stages 2d Coup, supra note 1. Most commentators assumed that the indigenous Fijians and Colonel (now Brigadier General) Rabuka were not confident that this coalition would protect the needs of Melanesians, although it was led by a native Fijian Melanesian, Dr. Timoci Bavadra. *The Nasty Side of Paradise*, supra note 45. However, a late 1987 report questioned this assumption:

In reality, . . . the deposed coalition government of the multiracial Fijian Labour Party and Indian-led National Federation Party had been supported by many poorer Melanesians.

The two-year old Labour Party, led by Dr. Timoci Bavadra, . . . was viewed by the traditional aristocracy of chiefs as a threat to their entrenched power. This was despite a decision by Dr. Bavadra's government to leave sensitive cabinet posts in Melanesian hands.

Even though Indians slightly outnumber other Fijians, Indian domination of the economy is more apparent than real. *Fiji Racial Tensions "Exaggerated for Coup,"* Financial Times, Nov. 11, 1987, at 6 (NEXIS) (summarizing a Nov. 11, 1987 report by the Minority Rights Group).

The Constitution of 1970 declares that only persons who have a male progenitor, himself the son of two Fijian parents, is a Fijian. *Fiji Const.* § 134(a).

49 Sherwell, *Fiji's Military Coup Ends Peacefully*, Financial Times, May 20, 1987, at 48 (NEXIS)[hereinafter *Fiji's Military Coup*]. As Fiji was a member British Commonwealth in May 1987, the Governor-General, as representative of Queen Elizabeth II, the Queen of Fiji and titular head of state of the Fiji Islands, was the constitutional source of executive authority in Fiji. See Raines, *supra* note 12; Sherwell & Mauthner, *Dilemma for Governor as Fiji Talks Fail*, Financial Times, Oct. 6, 1987, at 24 (NEXIS).

50 *Fiji's Military Coup*, supra note 49.

51 The proposed government would have been an interim body which would have eased the way for a democratic change to the Fijian constitution. The government would have consisted of equal numbers from the two main political parties, but no prime minister. The Governor-General would have probably chaired the sessions of this body. Pauley, *Caretaker Coalition to Govern Fiji*, Financial Times, Sept. 24, 1987, at 24 (NEXIS).

52 *Fijian Army Leader Stages 2d Coup*, supra note 1.

53 See id. (for the reaction of the United States, Australia and the United Kingdom); see *New Zealand and Australia Resume Aid to Fiji*, Reuters Library Report, Feb. 9, 1988 (pm cycle) (NEXIS) (for New Zealand's reaction).

54 Raines, *supra* note 12. See also *supra* note 46 and accompanying text. As Queen Elizabeth
ernor-General as the source of power in Fiji. The United States urged that "reasonable leaders in Fiji" should continue to work for a broad-based government protecting the rights of all Fijians.56

In early October 1987, Rabuka proclaimed Fiji to be a republic but retained absolute control over the government. The improbability of a return to constitutional government forced the Governor-General to resign.59 Ganilau stated that, "My endeavors to preserve constitutional government in Fiji have proved [to be] in vain, . . . I can see no alternative way forward."60 Acceptance of this resignation by the Queen terminated Fiji's links to Britain,61 and contributed to the chain of events which resulted in Fiji's expulsion from the Commonwealth later in October 1987.62

In December, Rabuka stepped down as head of state, and appointed the former Governor-General, Ganilau, as President.63 Ganilau was able

is the head of state of the Commonwealth, she is considered head of state of each Commonwealth nation. The Governor-General serves as the Queen's representative.

57 Governor-General of Fiji Resigns, Xinhua General Overseas News Service, Oct. 15, 1987 (item no. 1015189) (NEXIS). A "republic" is "a government having a chief of state who is not a monarch and is usually a president . . . [or] a government in which supreme power is held by the citizens entitled to vote and is exercised by elected officers and representatives governing according to law." MERRIAM-WEBSTER DICTIONARY 594 (1978).

Since Rabuka retained absolute power in himself, see infra note 58 and accompanying text, it must be assumed he meant the first definition of "republic" — one "having a chief of state who is not a monarch." See id.

58 U.S. to Resume Aid To Fiji, Send Ambassador, Associated Press, Feb. 16, 1988 (am cycle) (NEXIS) [hereinafter U.S. to Resume Aid to Fiji].
60 Id. (quoting statement of former Fijian Governor-General, Ratu Sir Penaia Ganilau). See also supra note 56 and accompanying text.
61 Rockingham, supra note 59.

Fiji was not expelled from the Commonwealth for becoming a republic. As many as 27 Commonwealth countries have become republics, five have made their own monarchs head of state, and lots have had military coups. For nearly 20 years it has been accepted that membership can survive such events, and even that no application for continued membership is necessary after a coup.

Id. Fiji's demise was more due to bad timing and poor diplomacy.

The coup in Fiji was an affront to the Queen (still the head of state in no fewer than 16 Commonwealth countries): it culminated in the ousting of a governor-general who is her personal representative; when a republic's president is deposed, or even killed, that can be shrugged off as his country's private affair. The Commonwealth governments also dislike the idea of being asked to respect a constitutional change imposed by a soldier without due process. And some are unhappy about Colonel Rabuka's declared aim of rigging his republic to favour one racial community.

Id.

63 U.S. to Resume Aid to Fiji, supra note 58.
to reinstate Sir Kamisese Mara as prime minister, but Rabuka maintained his control over security.\textsuperscript{64}

Early in 1988, relations with the nations of the region and the world began to improve. The United States recognized Fiji, sent an ambassador,\textsuperscript{65} and began to explore ways to resume the aid cut off after the May coup.\textsuperscript{66} Both Australia and New Zealand also moved to resume aid to Fiji,\textsuperscript{67} but unlike the United States,\textsuperscript{68} refused to recognize or normalize relations with the government.\textsuperscript{69} Even France, despite its own problems with indigenous uprisings in New Caledonia, agreed to send considerable aid to Fiji.\textsuperscript{70}

Britain also took steps toward improving relations with its former Commonwealth partner by hosting the visit to London of President Ganilau and Prime Minister Mara.\textsuperscript{71} The two leaders were granted audiences with Prime Minister Thatcher and the Queen's Secretary,\textsuperscript{72} a fact which indicated tacit recognition of the new government.

\textsuperscript{64} Id. But see Fiji Premier Flies to England to Try to Restore Crown Link, Reuter Library Report, Mar. 27, 1988 (pm cycle) (NEXIS). These reports suggest that the Prime Minister was also appointed by Rabuka.

\textsuperscript{65} U.S. to Resume Aid to Fiji, supra note 58.

\textsuperscript{66} Washington News, UPI, Feb. 16, 1988 (am cycle) (NEXIS). "The aid programs that were suspended amounted to $1.325 million [in 1987]." \textit{Id.}

\textsuperscript{67} New Zealand and Australia Resume Aid to Fiji, supra note 53.

The Australian Foreign Affairs Department said Fiji would receive about 10 million dollars (seven million U.S.) in assistance over the next five months.

Fiji lost about the same amount in aid when Australia suspended its assistance programme after last year's coups.

New Zealand's Foreign Minister Russell Marshall did not put a figure on its package, although government sources said it would be worth about two million dollars (1.2 million U.S.) a year — about one fifth of Wellington's previous assistance.

\textit{Id.}

\textsuperscript{68} See Washington News, supra note 66 (sending of ambassador Leonard Rochwarger to Fiji restored full relations between Fiji and the United States).

\textsuperscript{69} New Zealand and Australia Resume Aid to Fiji, supra note 53.

Australia, which has never given its official blessing to the military-nominated government of Prime Minister Ratu Sir Kamisese Mara, smoothed the way for a resumption of aid to Fiji by recognizing the country rather than the government last month.

In Wellington, Foreign Affairs Minister Marshall stressed the resumption of aid by New Zealand did not mean a return to normal relations with [Fiji].

Marshall said in a statement the package did not contain any aid for the Fijian military, which previously trained with New Zealand forces. . . .

"Our fundamental objection to the two coups remains," he said.

\textit{Id.}

\textsuperscript{70} France to Provide Aid to Fiji, BBC Summary of World Broadcasts/The Monitoring Report, Feb. 24, 1988, at FE/W0014/i (NEXIS) (aid consists of $10.5 million in grants and concessions).

\textsuperscript{71} Mara on Mission, supra note 37.

\textsuperscript{72} Fiji: The Jewel is the Crown, \textit{THE ECONOMIST}, Apr. 9, 1988, at 42 (NEXIS).
II. AMBIGUITY IN THE IDEAL OF SELF-DETERMINATION

The claims for self-determination made by the Melanesians in New Caledonia and Fiji\(^{73}\) stretch the traditional limits of the doctrine of self-determination.\(^74\) Wilsonian\(^75\) self-determination has three prongs: "a) the right of a people to be free from alien rule . . . ('external' self-determination); b) the right of a people to select [their] own form of government ('internal' self-determination); and c) [the right of] continuous consent of the governed . . . ."\(^76\)

Historically, the word "self" has meant the people of a state\(^77\) as opposed to the people of a nation.\(^78\) This notion was reinforced by the Declaration on the Granting of Independence to Colonial Countries and Peoples ("Colonial Peoples Declaration")\(^79\) which recognized the state as the basic unit for self-determination. This interpretation of "self" was prompted by concern that states emerging from colonial domination would themselves become fragmented.\(^80\)

A. The "Self" in Self-Determination: Nation or State

Nearly [seventy] years ago a Professor of Political Science who was...

\(^{73}\) See generally Part I of this Note for background on the islands.


\(^{77}\) "State" generally refers to a territory whose population is controlled by a government with the capacity to enter into foreign affairs. But "self" has been used in the context of people of colonies and possessions, which for the sake of this Note's argument may be conglomerated with the notion of "self" as pertaining to either a state or a nation. The state is the building block of the present international legal system.

"Under international law, a 'state' is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." Restatement (Third) of the Foreign Relations of the United States § 201 (1987).

\(^{78}\) A nation is a group of persons determined by a set of objective and subjective criteria such as common ethnic background, shared history, language or religion and a subjective sense of common destiny. See Dinstein, Collective Human Rights of Peoples and Minorities, 25 INT'L & COMP. L.Q. 102, 103-05 (1976).


\(^{80}\) Nanda, Self-Determination Under International Law: Validity of Claims to Secede, 13 CASE W. RES. J. INT'L L. 257, 275 (1981). "[A]ll attempts [aimed] at 'the partial or total disruption of the national unity and the integrity' of a state are prohibited." Id. at 275 n.124 (citing Colonial Peoples Declaration, supra note 79). See also Dinstein, supra note 78, at 108-10.
also President of the United States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely accepted as a sensible proposition, the doctrine of self-determination. On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people. 81

As the above quotation reveals, 82 the idea of “self” in self-determination is a slippery concept. 83 Although the term “self” is used in many ways, for the purposes of this Note the term is discussed in only two contexts—“self” meaning people of a state versus “self” meaning the people of a nation. 84

1. “Self” as People of a State

In the aftermath of World War I, the Allied leaders undertook to establish self-determination by the people of a nation, as a principle of law in Europe. 85 Unfortunately, the commingling of the numerous nationalities made the task of drawing boundaries, so as to give each of the nationalities its own state, an impossibility. 86 Many of the resulting states cut across national boundaries. 87 As a compromise, the new European states and governments set up after the war were “required to enter into treaties with the Allied and Associated Powers under which they would undertake . . . to extend a measure of protection to their racial,

82 See also supra note 77 and accompanying text.
83 Pomerance, supra note 76, at 311-12.
84 The reasons the discussion is limited to these two facets of “self” is twofold: (1) present international law inertia favors “self” to mean state, and (2) the only other asserted position, which embraces that which is asserted by the Melanesians in Fiji and New Caledonia, is “self” to mean nation.
85 Humphrey, supra note 75, at 24. It must be remembered that the spark that set off the First World War was “the murder [of Archduke Franz Ferdinand of Austria] by a member of a disaffected minority.” Id.
86 Id.
87 Id.
religion and linguistic minorities.”

This compromise sacrificed “internal” self-determination (the protection of people) for “external” self-determination (the protection of states). As a result, the need to know exactly what people or peoples comprised a state became secondary to the need for a state to be free from external interference. In addition, the compromise exposed the fact that national self-determination may be at odds with state self-determination and the concept of sovereignty. The dissolution of the League of Nations and the subsequent formation of the United Nations further undermined the importance of a nation’s right to self-determination. Moreover, the structure of the international legal system greatly favors the rights of states over the rights of nations. Given the concept of sovereignty and the primacy of external self-determination, nations have had little, if any standing in the international order.

2. “Self” as People of a Nation

Although the state unit has become the principal international actor, rights of nations appear to be an emerging trend in international

88 Id.
89 Because the Allied and Associated Powers chose to relegate the protection of peoples to the treaty process and not to base these new and emerging states upon the right of an individual people to self-determination, the rights of individual peoples became secondary to the rights of states. See Pomerance, supra note 76, at 314-15 for a further discussion of the decision made at Versailles concerning external and internal self-determination.
90 Just such a concern was in mind when the Colonial Peoples Declaration was drafted to favor the maintenance of territorial integrity over the risk of fragmentation that national self-determination would bring. See Nanda, supra note 80.
91 See Humphrey, supra note 75, at 25.

There is nothing in the United Nations Charter about what I have called the positive protection of minorities; nor indeed are minorities even mentioned in the instrument. Nor is there any mention of minorities in the Universal Declaration of Human Rights . . . . The reasons usually given for the failure of the United Nations to assume any responsibility for the positive protection of minorities, apart from the less than serious one that if the rights of everyone are respected without discrimination, there will be no need to protect minorities, are that the system as it operated under the League was discriminatory — as it indeed was — and that it was abused by the Nazis. But the real reason for the failure of the United Nations to take over any responsibilities in the matter of positive protection was that most if not all states, did not and do not want to help minorities preserve their cultural identity. They want to assimilate them.

92 See, e.g., Statute of the International Court of Justice, art. 34, para. 1.
93 Van Dyke, supra note 42, at 3.

The word right is . . . troublesome. [A] right [refers to] an entitlement, a morally justified claim, a need, or an interest justifying a presumption that it ought to be satisfied or enjoyed unless there are compelling reasons to the contrary. As the last of these three definitional phrases suggests, rights as a rule are not absolute. They may conflict with each other, forcing judgments about priorities or adjustments. It follows that the measures that

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Id.
Neither the United Nations Charter nor the Universal Declaration on Human Rights make any mention of minority or national rights, although both the subsequent Convention on the Prevention of the Crime of Genocide and the International Covenant on Civil and Political Rights do mention these rights.

The latter two documents affirmatively establish that nations have internationally protected rights. The International Covenant on Civil and Political Rights does not embrace the concept of political rights of nations, but has helped establish the recognition of positive rights of nations.

By itself, the Colonial Peoples Declaration cannot be used to affirmatively establish the right to self-determination of nations, since nowhere in the text of the Colonial Peoples Declaration is the concept of political rights of minorities specifically mentioned. However, the Colonial Peoples Declaration does state "that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory." This language, which seems to favor national self-determination, is contradicted by the traditional reading in which "peoples" means people of a state, not of a nation. This lan-
guage, coupled with the Third World’s desire to end Western colonial institutions, has led to application of the Declaration whenever “colonial and alien domination does in fact exist,” regardless of “the guise of ostensible national unity.” This use is bolstered by the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations (“Declaration Concerning Friendly Relations”) which draws the line between territorial integrity of states and national self-determination.

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

B. The Extent of Determination for Nations

As seen in part II(A)(1) of this Note, the state is still the primary international actor. Part II(A)(2) outlined the erosion of the state’s position due to the emergence of the nation as an actor, but what bases do the Melanesians in Fiji and New Caledonia have for their claims of political self-determination? Do these claims fit within the window of the Declaration Concerning Friendly Relations?

The preceding part of this Note showed that the Declaration Concerning Friendly Relations and the Colonial Peoples Declaration have been interpreted together by many states to allow some nations the international political right of self-determination. Problems in apply-

106 See supra note 104. The language of the Colonial Peoples Declaration is evidence of this desire.


108 Id.


110 See id. at 124.

111 Id.

112 See supra Part II(A)(1) of the text.

113 See supra Part II(A)(2) of the text.

114 Id.

115 See generally supra notes 113-15 and accompanying text for a description of this window.
ing this principle have arisen because the emerging states, who are proponents of Western decolonization, fear that acknowledgement of the right to national self-determination of minorities will result in their own minorities demanding self-determination, thus causing fragmentation of the state.\footnote{See generally Pomerance, supra note 76, at 321; Van Dyke, supra note 42, at 4-5. (Many of the boundaries in Africa and Asia, being the vestiges of Western colonial presence, cut across national borders.) See also Nanda, supra note 80.}

A number of limitations have been sought on the meaning of "peoples" in the Colonial Peoples Declaration. One minority view is that paragraph six of the Declaration only applies to newly emerging states. Therefore, "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country . . . [would be] incompatible with the purposes and principles of the Charter"\footnote{Colonial Peoples Declaration, supra note 79, at 7.} and would disallow national self-determination within newly emerged or emerging states while allowing it in all others.\footnote{See Pomerance, supra note 76, at 318, n.15.}

Other attempts to curb minorities' rights of self-determination have come through limitations on the scope of the Declaration, applying it only to those minorities who are under colonial or alien domination,\footnote{See id. at 320.} despite specific wording pertaining to "all peoples."\footnote{Colonial Peoples Declaration, supra note 79, at 67. But see Pomerance, supra note 76, at 320; Espiel, supra note 106, at 320.} The key determination thus becomes whether colonial or alien domination exists.

The first step of the delineation was simple: a "salt-water test" was applied.\footnote{Pomerance, supra note 76, at 321.} Any territory not contiguous with a state but controlled by that state was deemed colonial.\footnote{Id.} As a naked doctrine, the salt-water test would label Hawaii and Alaska as colonial. However, the test must be read in conjunction with the Declaration Concerning Friendly Relations, which says one cannot disturb the integrity of states within which the "nations" are represented fully in government.\footnote{See Declaration Concerning Friendly Relations, supra note 109. Also see the text in supra note 109.}

The second step of the determination was also simple: a pigmentational or racial test was applied.\footnote{Pomerance, supra note 76, at 321.} "[A]ny white or Western presence outside Europe, North America or Australasia was deemed 'nonindigenous' — 'alien' or 'colonial.' "\footnote{Id.}

While the salt-water test and the pigmentation test do further the process of decolonization, they are not a complete solution to the prob-
lem. Peoples dominated by Indo-European colonialists are able to exercise their self-determination while peoples dominated by their neighbors are unable to do so. This disparity is the result of the inclusion of the contradictory principles of “territorial integrity” and “self-determination” in the Colonial Peoples Declaration and the Declaration Concerning Friendly Relations.

A modern and widely accepted interpretation of the Colonial Peoples Declaration is that the reversion of territory to a previous sovereignty pursuant to historic claims is “a valid form of decolonization, legally and morally.” Under this interpretation, the “territorial integrity” guarantees of paragraph six of the Colonial Peoples Declaration do not apply where there are valid claims of historic title. This approach is more egalitarian than the other suggested approaches in that it makes distinctions solely upon the basis of peoples’ claims, and not upon the politically maneuvered states’ ideologic preferences. In contrast, the salt-water and pigmentation tests have been used by emerging nations to their own advantage so as to affect Indo-European actions and not their own.

C. Conflicts and Resolutions

Fiji and New Caledonia differ in terms of external self-determination: Fiji is an independent state, while New Caledonia is a department and an integral part of France. Furthermore, the United Nations has called New Caledonia a territory of France. With respect to internal self-determination, the right of the people who live in Fiji to self-determination has been recognized, and although New Caledonia remains a French department, even France has recognized the New Caledonians’ right to self-determination. Therefore, neither the right to external self-determination nor the right to internal self-determination is at issue with respect to Fiji and New Caledonia. What is at issue is the determination of who bears the right of internal self-determination.

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126 Id. at 318-19.
127 Id. at 319 n.15. But see supra notes 106-07 and accompanying text for the principal contrary position.
128 Pomerance, supra note 76, at 319 n.15.
129 The other suggested methods, such as the one which protected new states (see supra notes 106-07 and accompanying text) and the salt-water and racial tests which targeted Western states (see supra notes 108-13 and accompanying text) protected Third World interests in suppressing nationalism while allowing the same group to erode the similar interests of the Western states.
130 See supra note 129 and accompanying text.
131 See generally U.N. Calls on France, supra note 5.
132 Id. The French held a referendum on the independence issue in September 1987.

French U.N. Ambassador Pierre-Louis Blanc said, “There is no question of a refusal by France to grant independence . . . . [T]he independence would have been granted immediately [if the people of New Caledonia had voted for it in September].” Id.
Paragraph seven of the Declaration Concerning Friendly Relations, in its limitation of protection of state integrity to states whose governments "represent[ ] the whole people belonging to the territory without distinction as to race, creed or colour," should be a key determinant. Under the Declaration, nations have the right to self-determination where the government of the state does not qualify as exempt. If not for paragraph seven, the nationalities placed in power in decolonizing areas, could obtain sole control, at the expense of other national groups and thus circumvent the purpose of the Colonial Peoples Declaration. Of course, even entrenched or imported persons could have power as long as it was fairly shared.

It is due to the Declaration Concerning Friendly Relations that international response to the situations in Fiji and New Caledonia has been markedly different. As seen in Part I of this Note, Fiji's assertions were met with near universal condemnation by world powers, but those of New Caledonia were supported by a great number of states. While this divergence might indicate a division along the lines of external versus internal self-determination, it is more likely that the divergence is due to the perceived existence of unbiased representative government, coupled with the application of the salt-water test. In any event, both developing and developed states favor this internal/external division because it keeps their own indigenous minorities under control.

The world community sees the Kanaks in New Caledonia as political outsiders in a territory controlled from Paris. This perception may be due to application of the salt-water test, but the problem is real, as evidenced by the coercive practices used by the French settlers in New Caledonia against the natives. Also, the Kanaks' claims are tempered with reasonableness. Although they claim that only native New Caledonians may vote in any decision of independence, their definition of native embraces all others with the exception of first generation settlers. This characterization would allow approximately eighty percent

133 Declaration Concerning Friendly Relations, supra note 109, at 124. In order to qualify as exempt from scrutiny under the provision, a nation needs a non-biased, representative government.
134 These nationalities might be either pre-existing nations or imported nations, such as the French in New Caledonia.
135 See Pomerance, supra note 76, at 318 n.15, for a discussion of reversion of title.
136 For New Caledonia, see supra notes 27-31. For Fiji, see supra notes 50-58.
137 For New Caledonia, see supra notes 25-33 and accompanying text. For Fiji, see supra notes 53-56 and accompanying text.
138 This political motivation is the fear that acknowledgment of such a principle would give their own minorities a colorable claim of independence, and result in the break-up of their own states.
139 See generally Part I(A) for a description of the relationship between the settlers and the natives in New Caledonia.
140 Markham, supra note 21 and accompanying text.
of the islanders of French descent to vote,\textsuperscript{141} and thus moderates the harshness of the natives’ claims. In the agreement between France and the Kanaks for the 1998 referendum, the Kanaks have agreed to allow all those persons in New Caledonia who are eligible to vote in 1988, plus all those persons residing in New Caledonia in 1988 who will attain majority in time for the 1998 referendum, to vote in the referendum.\textsuperscript{142}

The claims of the native Fijians, however, have racial overtones. If successful in their claims, the native Fijians would institute a class-based society with native Fijian landowners\textsuperscript{143} who may vote and tenants who may not vote. This system, based upon nonrepresentative government biased on grounds of race, religion and pigmentation,\textsuperscript{144} would be apartheid in reverse.\textsuperscript{145}

\section*{D. Continuous Self-Determination}

Despite the fact that Western and Northern powers are those who generally lose out when self-determination is used to oust an entrenched group, the East/West power struggle also pushes states to recognize the natives’ claims. For example, the United States claims to be the supporter of democracy anywhere in the world. So in late 1987 and early 1988 when Fiji started to implement democratic reforms, there was great pressure on the United States to recognize and assist the new regime, although the government position with respect to the political rights of non-Melanesians had not changed.\textsuperscript{146} Perhaps, had the Soviet Union not been active in cultivating “friends” in the area, the United States would not have so quickly normalized relations with the new Fijian government.

But where does that leave the system? Both the Kanaks and the Fijians have made claims which concern the control of the whole territory of their states.\textsuperscript{147} What happens if they succeed?

In the short term, the native Fijians seem to have won. They have control of a racial state and have effectively thwarted the internal self-determination of a majority of the population. This in turn thwarts that

\textsuperscript{141} Markham, \textit{supra} note 2.
\textsuperscript{142} Carton, \textit{supra} note 36.
\textsuperscript{143} Van Dyke, \textit{supra} note 42, at 15.
\textsuperscript{144} The proposed constitution in Fiji would permanently deprive “all non-native racial groups . . . of their equal rights to participate in governing their country.” Islam, \textit{The Proposed Constitutional Guarantee of Indigenous Governmental Power in Fiji: An International Legal Appraisal}, 19 CAL. W. INT’L L.J. 107, 108 (1988). As native Fijians are Melanesian Christians and most of the non-natives are Indian Hindus, the government would be biased as to race, religion and pigmentation.
\textsuperscript{145} It would be reverse in the sense that the group on top of the socio-political spectrum would not be the Anglo-Saxon or English-speaking group, but rather the tribal minority.
\textsuperscript{146} See \textit{supra} notes 59-62 and accompanying text for the background.
\textsuperscript{147} See generally Part II of this Note.
majority's ability to change their system of government through continuous self-determination. This situation is pure apartheid and will likely produce conflict both within and without Fiji, as it has concerning similar practices in South Africa. The Fijians may not be so successful in the long run.

The Kanaks have not been successful as yet, but should they be, they will have a problem similar, though of lesser magnitude, to that of the Fijians. If New Caledonia attains its independence after 1998 and there is no significant flight of French settlers from New Caledonia, the Kanaks will be unable to control New Caledonia without some sort of restriction on non-Kanak power, due to the majority presence of the French settlers.

These situations exemplify the problem of national self-determination where there is only one territory. The nation may not simply splinter off, as did Pakistan and India. This problem is also evident in the struggle between Israel and the Palestinians, neither of whom seem to be willing to share the territory. The situations in both New Caledonia and Fiji create such problems, but while the Fijians are closing the door on solutions with repression, the New Caledonians, if successful, may find a better way.

III. CONCLUSION

At present, there appears to be little possibility that indigenous, minority political self-determination will be accepted as an international legal norm in the near future, unless a state qualifies under paragraph seven of the Declaration Concerning Friendly Relations. Cultural self-determination may already be accepted, but the grave threat which political self-determination of native minorities presents to the integrity of representative states and to the international legal system will deter states from acquiescing to the natives' claims without more. However, just as the once seemingly impregnable Western colonialism dissolved with the entrance of Third World powers into the United Nations, so may the longstanding suppression of natives by stronger groups within their territories fade away in the face of increasing levels of education, increasing availability of world news and the outcome of the New Caledonia situation.

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148 See supra note 76 and accompanying text.
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